

# AGRICULTURE DECISIONS

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SECRETARY OF AGRICULTURE AND THE COURTS  
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UNITED STATES DEPARTMENT OF AGRICULTURE

## AGRICULTURE DECISIONS

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**AGRICULTURAL MARKETING AGREEMENT ACT**

**COURT DECISIONS**

**HEIN HETTINGA v. UNITED STATES.**

**No. 07-5403.**

**Decided April 3, 2009.**

**[Cite as: 560 F.3d 498.]**

**AMA – Milk – Producer-handler – Pricing and pooling requirements – Failure to state a claim upon which relief may be granted – Bill of Attainder, when not – Equal protection - Failure to exhaust administrative remedies.**

**United States Court of Appeals  
District of Columbia Circuit**

Before: ROGERS, TATEL, and KAVANAUGH, Circuit Judges.

**Opinion**

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

Hein and Ellen Hettinga, owners of Sarah Farms, and co-owners with their son Gerben of GH Dairy, appeal the dismissal of their complaint challenging the constitutionality of two amendments to the Agricultural Marketing Agreement Act (“AMAA”). The Hettingas alleged that the amendments, which subjected certain large producer-handlers of milk to contribution requirements applicable to milk handlers, were invalid as a bill of attainder and a violation of equal protection and due process. The question on appeal is whether the Hettingas were required to exhaust administrative remedies before filing suit against the United States. We hold that exhaustion was neither jurisdictionally nor prudentially required. The plain text of the exhaustion requirement in the AMAA does not apply to constitutional challenges to the AMAA itself,

## 2 AGRICULTURAL MARKETING AGREEMENT ACT

as distinct from challenges to regulatory orders and attendant obligations. Because the Hettingas' objections do not involve an alleged defect in a marketing order and the Secretary lacks the power to provide a remedy, requiring exhaustion as a prudential matter would not protect administrative agency authority or advance judicial efficiency. Accordingly, we reverse.

### I.

The milk business is highly regulated by the Secretary of Agriculture pursuant to the AMAA, 7 U.S.C. §§ 601-674. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 779 (D.C.Cir.2006). The Secretary issues milk marketing orders that regulate payments made from milk handlers (processors and distributors) to milk producers (farmers). *Id.* In order to protect producers from variations in prices, handlers are required to pay into a pool for milk bought from producers; the funds in the pool are distributed on a pro rata basis to the producers. *Id.*; *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 341-43, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984).

Until 2005, the Secretary had exempted “producer-handlers”—i.e., dairy farms that produce, process, and distribute milk within a single vertically-integrated operation—from the pooling requirements and pricing restrictions of milk marketing orders. *See Edaleen Dairy*, 467 F.3d at 780. This gave market power to the producer-handlers who could afford to undercut the prices charged by participants in the pooling system, but most producer-handlers were small family operations that had little effect on the market. *Id.* Some producer-handlers grew quite large, however, and the Secretary initiated a formal rulemaking to determine whether to change the status of producer-handlers in two regions, including the Arizona-Las Vegas marketing area in which Sarah Farms is located. *Id.* As a result, in 2006 the Secretary promulgated a rule requiring producer-handlers that produced over 3 million pounds of fluid milk per month within a marketing area to pay into the producer settlement fund if they sold milk at a price higher than that paid by handlers to producers. *Id.*; *Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas: Order Amending the Orders*, 71

Fed.Reg. 9430 (Feb. 24, 2006) (codified at 7 C.F.R. §§ 1124.10, 1124.71, 1131.10, 1131.71).

Sarah Farms is a producer-handler. Its owners, the Hettingas, are also partners with their son, Gerben, in GH Dairy, a handler dairy in Arizona that sells milk exclusively in California. On March 15, 2006, the Hettingas sought an injunction from the district court in the Northern District of Texas against enforcement of the new rule, alleging that it was arbitrary and capricious and that the Secretary lacked authority over producer-handlers that sell only milk produced from their own cows. Another large producer-handler sought an injunction from the district court of the District of Columbia, alleging the Secretary lacked authority to promulgate the rule, and on appeal this court held the producer-handler must first exhaust administrative remedies. *Edaleen Dairy*, 467 F.3d at 783. Before the Texas district court heard arguments in the Hettingas' case, Congress amended the AMAA.

The Milk Regulatory Equity Act of 2005, Pub.L. No. 109-215, 120 Stat. 328 (2006) (codified at 7 U.S.C. § 608c) (“MREA”), codified the Secretary's revocation of the exemption for large producer-handlers in the Arizona-Las Vegas marketing area, but not the Pacific Northwest area, and also made subject to regulation producers like GH Dairy that are located in the marketing area and sell milk to areas that are unregulated by marketing orders, such as California. 7 U.S.C. § 608c(5)(M), (N), note (2006) (“the Amendments”).<sup>1</sup> On September 22, 2006, the Hettingas filed a complaint in the district court here alleging

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<sup>1</sup>The MREA amended section 608c(5) of the AMAA to add, as relevant here, subparagraphs M and N. Subparagraph M, “Minimum Milk Prices for Handlers,” provides:

(i) Application of minimum price requirements.-Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

that the Amendments are unconstitutional as a bill of attainder and a denial of due process and equal protection because only the Hettingas are subject to them. The district court dismissed the complaint for lack of subject matter jurisdiction upon ruling that “any challenge to the validity of the [Amendments] is essentially a challenge to [an] order by the Secretary,” and the Hettingas were therefore required to exhaust administrative remedies. *Hettinga v. United States*, 518 F.Supp.2d 58, 61 (D.D.C.2007). The Hettingas appeal, and our review is *de novo*. *Munsell v. Dep't of Agric.*, 509 F.3d 572, 578 (D.C.Cir.2007).

## II.

1 2 3 Parties have long been required to exhaust administrative remedies before seeking relief from federal courts, *McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), either as a matter of congressional command or to protect the authority of the agency and to promote judicial efficiency, *id.* at 145, 112 S.Ct. 1081. “Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.” *McCarthy*, 503 U.S. at 144, 112 S.Ct. 1081 (1992) (citations omitted). “Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (citation omitted).

4 5 6 Where exhaustion is required, there still is a separate question whether the requirement is jurisdictional, and thus nonwaivable, or non-jurisdictional. In *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C.Cir.2004), this court, in observing that the distinction between jurisdictional and non-jurisdictional exhaustion “is purely a question of statutory interpretation,” *id.* at 1247, set a high bar for determining that a statute requiring exhaustion is jurisdictional: “In order to mandate exhaustion, a statute must contain ‘ “[s]weeping and direct” statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim.’ ” *Id.* at 1248 (quoting *Weinberger v. Salfi*, 422 U.S.

749, 757, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)). This court will “presume exhaustion is non-jurisdictional unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.’ ” *Id.* (quoting *I.A.M. Nat’l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1208 (D.C.Cir.1984)).

7 Prudential exhaustion, in turn, “serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *McCarthy*, 503 U.S. at 145, 112 S.Ct. 1081. Prudential exhaustion is not required where: (1) it would occasion undue prejudice to subsequent assertion of a court action, for example through excessive delay; (2) an agency may not be empowered to grant relief, for example “because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute” or because “an agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested”; or (3) the agency is biased. *Id.* at 146-49, 112 S.Ct. 1081.

A.

8 9 10 Section 608c(15)(A)<sup>2</sup> of the AMAA imposes a mandatory administrative exhaustion requirement on milk handlers “seeking to challenge the provisions of a milk marketing order.” *Edaleen Dairy*, 467 F.3d at 782; *see Block*, 467 U.S. at 343, 104 S.Ct. 2450; *United States v. Ruzicka*, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). There is no similar requirement for producers because the AMAA affords them no administrative remedy. *See Stark v. Wickard*, 321 U.S. 288, 309, 64

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<sup>2</sup>The AMAA provides in relevant part:

(A) Any handler subject to a[ ] [milk marketing] order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A).

S.Ct. 559, 88 L.Ed. 733 (1944); *see also Ruzicka*, 329 U.S. at 295, 67 S.Ct. 207. Where a producer-handler sues in its capacity as a handler, as it does in challenging the Secretary's order subjecting it to price-pooling obligations, it must exhaust. *Edaleen Dairy*, 467 F.3d at 783. Thus, were the Hettingas challenging the Secretary's milk marketing order for the Arizona-Las Vegas area, they would be required to exhaust administrative remedies before filing a lawsuit challenging those orders. *Block*, 467 U.S. at 346, 104 S.Ct. 2450; *Ruzicka*, 329 U.S. at 290, 67 S.Ct. 207; *Edaleen Dairy*, 467 F.3d at 782. The Hettingas' complaint, however, is directed at the Amendments to the AMAA, not a milk marketing order. The complaint alleges that “[t]he MREA, as adopted, contained provisions that singled out and punished the Hettingas,” citing subparagraphs M and N. Compl. ¶ 27.

The government advances two arguments that the Hettingas are nonetheless challenging a milk marketing order rather than the MREA, but neither is persuasive. First, the government maintains that only such orders, and not the MREA, impose affirmative obligations to pay fees. The MREA, in fact, provides that large producer-handlers located in states regulated by milk marketing orders that sell milk in unregulated states “shall be subject” to the price and pooling obligations of the marketing orders. 7 U.S.C. § 608c(5)(M). It further provides that “no” large producer-handler in Arizona “shall be exempt” from the relevant milk marketing order. *Id.* § 608(5)(N). The price and pooling obligations for large handlers in the Arizona-Las Vegas milk marketing area preexisted enactment of the MREA, and the MREA imposed those obligations on large producer-handlers. To suggest, as the government offers, that the MREA does not subject formerly exempt producer-handlers to such obligations ignores the inexorable consequences of the Amendments. The district court suggested that those consequences are not inexorable because the Secretary could relieve such obligations for the entire milk marketing area by terminating the relevant order. Putting aside the unrealistic nature of the premise, the Secretary could only repeal the marketing order upon determining it no longer tends to effectuate the policy of the AMAA. *See* 7 U.S.C. § 608c(4). There is nothing to indicate that the Secretary considers the marketing order to have outlived its purpose. Instead the

Secretary's promulgation of a rule abolishing prior exemptions is consistent with imposing the marketing order obligations on more producers, not fewer. In any event, the Hettingas are not asserting that the marketing order is not effective in most instances, only that they should be exempted from it. Under the MREA, the Secretary no longer has authority to provide such an exemption. It follows that the Hettingas are challenging provisions of the MREA amending the AMAA and not the underlying marketing order.

Second, the government maintains the MREA requires implementation by the Secretary in order to become effective, and therefore the Hettingas are challenging the Secretary's administrative action in effecting this implementation, rather than provisions of the MREA. Section 2(d) of the MREA provides:

EFFECTIVE DATE AND IMPLEMENTATION.-The amendments made by this section take effect on the first day of the first month beginning more than 15 days after the date of the enactment of this Act. To accomplish the expedited implementation of these amendments, effective on the date of the enactment of this Act, the Secretary of Agriculture shall include in the pool distributing plant provisions of each Federal milk marketing order ... a provision that a handler described in subparagraph (M) of such section ... will be fully regulated by the order in which the handler's distributing plant is located.

7 U.S.C. § 608c note. As an initial matter, the MREA only requires addition of “a provision” in marketing orders with regard to subparagraph (M), not subparagraph (N), which the Hettingas also challenge. More importantly, section 2(d) does not demonstrate that to become effective the MREA requires the Secretary first to issue an order. Instead, its text provides that the MREA took effect on a precise date shortly after its enactment. *Id.* Congress included the requirement that the Secretary add “a provision” to marketing orders making clear that large producer-handlers are subject to the orders in order to “accomplish the expedited implementation of the [ ] amendments,” and not to make those amendments take effect. *Id.* Hence, the statutory text

does not suggest the MREA has no force and effect on its own. Rather, section 2(d) reflects that large producer-handlers were automatically subject to the marketing order on a date certain, and that the Secretary was to ensure the rapid and smooth implementation of the MREA by making clear to affected parties the obligations created by operation of law upon enactment of the MREA.

Although the AMAA exhaustion requirement is mandatory, *see Block*, 467 U.S. at 344, 104 S.Ct. 2450; *Ruzicka*, 329 U.S. at 290, 67 S.Ct. 207, and the court has refused to excuse it, *see Edaleen Dairy*, 467 F.3d at 782, the court has never decided whether exhaustion is a jurisdictional requirement inexcusable under any circumstances or merely a mandatory requirement inexcusable under most. *See generally Munsell*, 509 F.3d at 579. The court's opinion in *Avocados Plus*, 370 F.3d at 1248-50, holding that similar text in a different statute failed to create a jurisdictional requirement, perhaps suggests that AMAA exhaustion is best described only as mandatory and not as something more. We need not reach that question, however, because it is clear that the AMAA does not create a jurisdictional exhaustion requirement for challenges to the AMAA itself.

11 The AMAA's exhaustion requirement, *supra* n. 2, plainly is aimed only at marketing orders and attendant obligations, not at challenges to the statute. The government's suggestion that the MREA is an "obligation imposed in connection" with an order is resourceful but unpersuasive. The context of the reference to "any obligation imposed in connection" with marketing orders indicates Congress was referring to obligations imposed by the Secretary in the marketing orders, not a more general statutory obligation to be subject to such administrative orders. In *Ruzicka*, 329 U.S. at 289, 67 S.Ct. 207, for example, a handler challenged the amount set by an order of the Secretary directing payment into the producer settlement fund, according to terms in a marketing order, as distinct from a challenge to the marketing order itself. That is the situation captured by the phrase "obligation imposed in connection" with a milk marketing order. By contrast, the Hettinas challenge neither a marketing order nor an attendant obligation but rather Congress's determination of which entities shall be subject to the

preexisting administratively determined obligations. Because the AMAA's exhaustion requirement does not apply to such statutory challenges "in clear, unequivocal terms," *Avocado Plus*, 370 F.3d at 1248, the Hettingas' constitutional challenges to the Amendments were not subject to exhaustion as a jurisdictional matter.

**B.**

12 13 Whether exhaustion should be required as a prudential matter depends on "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345, 104 S.Ct. 2450. Moreover, "[n]otwithstanding [the institutional interests in exhaustion], federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy*, 503 U.S. at 146, 112 S.Ct. 1081 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

14 15 Requiring exhaustion of the Hettingas' statutory challenges would neither "protect[ ] administrative agency authority" nor "promot[e] judicial efficiency." *Id.* at 145, 112 S.Ct. 1081. As the Supreme Court has observed, it would make little sense to require exhaustion where an agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute" or where "an agency may be competent to adjudicate the issue presented, but still lack[s] authority to grant the type of relief requested." *Id.* at 147-48, 112 S.Ct. 1081. Both conditions apply here. The Secretary lacks the power either to declare provisions of the MREA unconstitutional, or to exempt the Hettingas from the requirements of the milk marketing order as imposed by the MREA. A constitutional challenge to a statute "has generally been thought beyond the jurisdiction of administrative agencies," even if courts have sometimes made exceptions to that rule. *Thunder Basin*, 510 U.S. at 215, 114 S.Ct. 771. Although the government suggests administrative proceedings would provide the court with the benefit of the Secretary's expertise in the technical arena of milk pricing and develop an appropriate

administrative record, it is unclear what benefit the Secretary could provide. The Hettingas' complaint relies on the structure of the MREA and its legislative history. The discrete factual question of whether other parties are subject to the Arizona-Las Vegas marketing order could as easily be addressed in the district court. And whatever insight the Secretary could provide regarding how the MREA furthers the AMAA's purposes does not directly address Congress's goals in enacting the MREA.

16 A remand for the district court to conduct the “intensely practical” balancing inquiry outlined in *McCarthy* is unnecessary, for unlike in *Avocados Plus* and the cases it cited, 370 F.3d at 1251 (citing *Montgomery v. Rumsfeld*, 572 F.2d 250, 254 (9th Cir.1978); *Ogden v. Zuckert*, 298 F.2d 312, 317 (D.C.Cir.1961)), the issue of exhaustion has been briefed by the parties and the suggestions favoring exhaustion are unpersuasive. Accordingly, we reverse and remand the case to the district court for further proceedings on the Hettingas’ complaint.

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**AGRICULTURAL MARKETING AGREEMENT ACT**

**DEPARTMENTAL DECISIONS**

**In re: HEIN HETTINGA AND ELLEN HETTINGA, d/b/a SARAH FARMS, AND GH DAIRY, d/b/a GH PROCESSING.**

**Docket No. AMA M-08-0069.**

**Decision and Order.**

**Filed October 30, 2008.**

*[Editor's Note: We regret that this case was not published in Vol. 67 Jul. - Dec. (2008)]*

**AMA – Milk – Producer-handler – Pricing and pooling requirements – Failure to state a claim upon which relief may be granted.**

Sharlene Deskins for the Administrator, AMS.

Alfred W. Ricciardi, Phoenix, AZ, for Petitioners.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**BACKGROUND**

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], empowers the Secretary of Agriculture to regulate persons who handle agricultural commodities, including milk, in order to establish and maintain orderly marketing conditions for those agricultural commodities, to protect consumers of agricultural commodities, and to avoid unreasonable fluctuations in supplies and prices by maintaining an orderly supply of agricultural products.<sup>1</sup> The AMAA authorizes the Secretary of Agriculture to issue milk marketing orders to regulate geographic regions of the country. Generally, pricing and pooling requirements established by federal milk marketing orders do not apply to entities that process their own milk because these entities, which are referred to as “producer-handlers,” are

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<sup>1</sup>7 U.S.C. § 602(1)-(2), (4).

## 12 AGRICULTURAL MARKETING AGREEMENT ACT

typically small and have little impact on the milk market.<sup>2</sup>

On February 24, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], issued a final rule amending the federal orders regulating the handling of “Milk in the Pacific Northwest Marketing Area” (7 C.F.R. pt. 1124 (2006)) and “Milk in the Arizona-Las Vegas Marketing Area” (7 C.F.R. pt. 1131 (2006)) to subject large producer-handlers in the two milk marketing areas to pricing and pooling obligations.<sup>3</sup> As a result of that final rule, Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms, who operate a large dairy business in Arizona, were required to comply with the pricing and pooling obligations that applied to other dairy businesses in the Arizona-Las Vegas marketing area.

On April 11, 2006, Congress enacted the Milk Regulatory Equity Act of 2005 [hereinafter the MREA], which amended and supplemented the AMAA.<sup>4</sup> The MREA places volume limits on the applicability of the producer-handler exemption and requires the Secretary of Agriculture to issue a final rule regulating the sale of fluid milk into geographic regions with state-law minimum prices for milk by handlers located in federally-regulated milk marketing areas. Under this provision, milk handlers which import milk into a region governed by state minimum milk prices shall be subject to all the minimum and uniform price requirements of a federal milk marketing order applicable to the county

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<sup>2</sup>*Edaleen Dairy, LLC v. Johanss*, 467 F.3d 778, 780 (D.C. Cir. 2006). *See also Stew Leonard’s v. Glickman*, 199 F.R.D. 48, 50 (D. Conn. 2001) (stating, typically, a producer-handler conducts a small family-type operation, processing, bottling, and distributing only his own farm production and the rationale for exempting the producer-handler from the pricing pool is that producer-handlers are so small that they have little or no effect on the pool), *aff’d*, 32 F. App’x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002).

<sup>3</sup>71 Fed. Reg. 9430 (Feb. 24, 2006).

<sup>4</sup>Section 2(a) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 328-29, is codified at 7 U.S.C. § 608c(5)(M)-(O); section 2(b) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 329, amends 7 U.S.C. § 608c(11)(C) and adds a new provision, 7 U.S.C. § 608c(11)(D); and section 2(c)-(d) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 330 is set forth in 7 U.S.C. § 608c note.

in which the plant of the handler is located. On May 1, 2006, the Secretary of Agriculture issued a final rule amending the 10 federal milk marketing orders to implement the MREA.<sup>5</sup> As a result of that final rule, GH Dairy, d/b/a GH Processing, a partnership whose partners are Hein Hettinga, Ellen Hettinga, and Gerben Hettinga, were required to comply with the pricing requirements of the Arizona marketing area.<sup>6</sup>

Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms, and GH Dairy, d/b/a GH Processing [hereinafter the Hettingas], brought an action against the United States in the United States District Court for the District of Columbia: (1) asserting that the MREA violates the Bill of Attainder Clause, the Due Process Clause, and the Equal Protection Clause; (2) seeking a declaration that two provisions of the MREA are unconstitutional; and (3) requesting the issuance of a permanent injunction against the application of the MREA to them.

The United States moved to dismiss for lack of subject matter jurisdiction arguing that the Hettingas' claims are barred because the Hettingas did not exhaust administrative remedies available through petition to the Secretary of Agriculture. The AMAA specifically provides that handlers may petition the Secretary of Agriculture for modification of, or exemption from, an order, as follows:

**§ 608c. Orders**

.....

**(15) Petition by handler and review**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or

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<sup>5</sup>71 Fed. Reg. 25,495 (May 1, 2006).

<sup>6</sup>Pursuant to the MREA, the Administrator removed Clark County, Nevada, from the Arizona-Las Vegas milk marketing area (71 Fed. Reg. 25,495, 25,502 (May 1, 2006)). Subsequently, the Administrator published a final rule changing the name of the federal milk marketing order from "Milk in the Arizona-Las Vegas Marketing Area" to "Milk in the Arizona Marketing Area" and changing the name of the milk marketing area from the "Arizona-Las Vegas marketing area" to the "Arizona marketing area" (71 Fed. Reg. 28,248, 28,249 (May 16, 2006)).

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any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A).

On July 31, 2007, the United States District Court for the District of Columbia issued a Memorandum Opinion: (1) finding the MREA requires an order by the Secretary of Agriculture to be effective; (2) concluding, because the MREA cannot be implemented as to the Hettingas without an order by the Secretary of Agriculture, any challenge to the validity of the MREA is essentially a challenge to the order issued by the Secretary of Agriculture; therefore, the mandatory exhaustion requirement of 7 U.S.C. § 608c(15)(A) applies; (3) granting the motion to dismiss filed by the United States; and (4) dismissing the case. *Hettinga v. United States*, 518 F. Supp.2d 58 (D.D.C. 2007). The Hettingas appealed to the United States Court of Appeals for the District of Columbia Circuit and that appeal is currently pending.

#### PROCEDURAL HISTORY

On March 7, 2008, the Hettingas instituted this administrative proceeding by filing a Petition<sup>7</sup> pursuant to 7 U.S.C. § 608c(15)(A) and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-71) [hereinafter the Rules of Practice]. The Hettingas allege the MREA violates the Bill of Attainder Clause, the Due Process Clause, and the Equal Protection Clause (Pet. ¶¶ 71-90) and seek a declaration that section 2(a) of the MREA is unconstitutional (Pet. at 19-20).

On April 7, 2008, the Administrator filed “Answer of Respondent” in which the Administrator: (1) denies the material allegations of the Petition; (2) states the Petition fails to state a claim upon which relief can be granted; (3) states the AMAA and the federal order regulating

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<sup>7</sup>The Hettingas entitle their Petition “Petition For Declaratory Relief From Application Of The Milk Regulatory Equity Act And For Restitution” [hereinafter Petition].

“Milk in the Arizona Marketing Area” (7 C.F.R. pt. 1131), as interpreted by the Administrator, are fully in accordance with law and binding on the Hettingas; and (4) requests denial of the relief requested by the Hettingas and dismissal of the Petition.

On July 15, 2008, the Hettingas filed a Motion for Judgment on the Pleadings: (1) stating the Petition is a facial constitutional challenge to the MREA and the Secretary of Agriculture has no authority to relieve the Hettingas from the operation of the MREA and (2) requesting dismissal of the Petition and certification of the Hettingas’ right to have their claims reviewed by a court pursuant to 7 U.S.C. § 608c(15)(B). On August 11, 2008, the Administrator filed a response to Petitioners’ Motion for Judgment on the Pleadings in which the Administrator requested dismissal of the Hettingas’ Petition with prejudice because the Hettingas failed to state a claim upon which relief can be granted.

On August 26, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order dismissing the Petition for failure to state a claim upon which relief can be granted. On September 26, 2008, the Hettingas filed an “Appeal to the Judicial Officer and Request for Oral Argument” [hereinafter Appeal Petition]. On October 15, 2008, the Administrator filed “Respondent’s Response to Appeal to the Judicial Officer and Request for Oral Argument.” On October 20, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 27, 2008, the Hettingas filed “Petitioners’ Response To Department Request To Decide This Petition Without Oral Argument.”

## **CONCLUSIONS BY THE JUDICIAL OFFICER**

### **The Hettingas’ Appeal Petition**

The Hettingas state their Petition presents only a facial constitutional challenge to the MREA, and the statutory provision under which the Hettingas instituted the instant administrative proceeding, 7 U.S.C. § 608c(15)(A), is not applicable to this facial constitutional challenge (Appeal Pet. at 2). Moreover, the Hettingas agree with the ALJ’s legal conclusion that the Secretary of Agriculture cannot provide the relief

requested by the Hettingas (Appeal Pet. at 1). The Administrator states that the Hettingas' facial constitutional challenge to the MREA is a claim that cannot be raised administratively and urges, in his response to the Hettingas' Appeal Petition, that I affirm the ALJ's Memorandum Opinion and Order dismissing the Hettingas' Petition.

I agree with the Hettingas, the Administrator, and the ALJ. The Hettingas' March 7, 2008, Petition fails to state a claim upon which relief may be granted in this forum. Therefore, I affirm the ALJ's August 26, 2008, Memorandum Opinion and Order and dismiss the Hettingas' March 7, 2008, Petition with prejudice.

#### **The Hettingas' Request for Oral Argument**

The Hettingas' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,<sup>8</sup> is refused because the parties have thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

#### **The Hettingas' Reply to the Administrator's Response to the Hettingas' Appeal Petition and Request for Oral Argument**

On October 27, 2008, the Hettingas filed a reply to the Administrator's response to the Hettingas' Appeal Petition and the Hettingas' request for oral argument. The Rules of Practice do not provide for a reply to a response to an appeal petition or for a reply to a response to a request for oral argument, and the Hettingas did not request the opportunity to file such a reply. Therefore, I strike the Hettingas' October 27, 2008, supernumerary filing.

For the forgoing reasons, the following Order is issued.

#### **ORDER**

The Hettingas' March 7, 2008, Petition is dismissed with prejudice for failure to state a claim upon which relief may be granted.

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<sup>8</sup>7 C.F.R. § 900.65(b)(1).

**In re: HEIN HETTINGA AND ELLEN HETTINGA, d/b/a SARAH FARMS.**

**AMA Docket No. M-08-0071.**

**Decision and Order.**

**Filed January 15, 2009.**

**AMA – Marketing orders – Pricing and pooling provisions – Producer-handler – Class I milk – Cancellation provision.**

Sharlene A. Deskins, for the Administrator, AMS.

Alfred W. Ricciardi, Phoenix, AZ, for Petitioners.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

On March 7, 2008, Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms [hereinafter the Hettingas], instituted this administrative proceeding by filing a Petition<sup>1</sup> pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. The Hettingas seek a determination that the Market Administrator misinterpreted and misapplied the federal order regulating the handling of “Milk in the Arizona-Las Vegas Marketing Area” (7 C.F.R. pt. 1131 (Apr. 1, 2006)) [hereinafter the Arizona-Las Vegas Milk Marketing Order] by imposing minimum price regulations upon the Hettingas for the month of April 2006; a determination that the imposition of the minimum price regulations on the Hettingas was not in accordance with

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<sup>1</sup>The Hettingas entitle their Petition “Petition for Declaratory Relief and for Restitution of April 2006 Assessment” [hereinafter Petition].

the Arizona-Las Vegas Milk Marketing Order; a refund of the \$324,211.60 assessment which the Hettingas paid under protest; interest, attorney fees, and costs; and all other relief to which the Hettingas might be entitled.

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], responded to the Petition by filing “Answer of Respondent” on April 7, 2008. On May 6, 2008, United Dairymen of Arizona, Shamrock Foods, Shamrock Farms, Parker Farms, and the Dairy Institute of California [hereinafter the Intervenors] filed a motion for leave to intervene in the proceeding pursuant to 7 C.F.R. § 900.57. On August 27, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] granted the motion to intervene.

On September 10, 2008, the ALJ conducted a hearing in Washington, DC. Alfred W. Ricciardi, of Aiken, Schenk, Hawkins & Ricciardi, P.C., Phoenix, Arizona, represented the Hettingas. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Two witnesses testified at the hearing: James R. Daugherty, the market administrator for the federal order regulating the handling of “Milk in the Pacific Northwest Marketing Area” (7 C.F.R. pt. 1124) and the federal order regulating the handling of “Milk in the Arizona Marketing Area” (7 C.F.R. pt. 1131),<sup>2</sup> and William Alan Wise, the assistant market administrator for the federal order regulating the handling of “Milk in the Pacific Northwest Marketing Area” (7 C.F.R. pt. 1124) and the federal order regulating the handling of “Milk in the Arizona Marketing Area” (7 C.F.R. pt. 1131).<sup>3</sup> Ten exhibits were introduced and received into evidence. The Hettingas, the Administrator, and the Intervenors

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<sup>2</sup>The Administrator removed Clark County, Nevada, from the Arizona-Las Vegas milk marketing area (71 Fed. Reg. 25,495, 25,502 (May 1, 2006)). Subsequently, the Administrator published a final rule changing the name of the federal milk marketing order from “Milk in the Arizona-Las Vegas Marketing Area” to “Milk in the Arizona Marketing Area” and changing the name of the milk marketing area from the “Arizona-Las Vegas marketing area” to the “Arizona marketing area” (71 Fed. Reg. 28,248, 28,249 (May 16, 2006)).

<sup>3</sup>See note 2.

each filed a post-hearing brief. Following the filing of the post-hearing briefs, the Hettingas sought leave to file a reply brief to address issues raised in the Intervenor's post-hearing brief. The ALJ granted the Hettingas' motion, and on November 13, 2008, the Hettingas filed Petitioners' Reply Brief.

On November 17, 2008, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded that the market administrator's imposition of minimum price regulations upon the Hettingas for the month of April 2006 was in accordance with law, denied the relief sought by the Hettingas, and dismissed the Hettingas' March 7, 2008, Petition with prejudice (Initial Decision at 7-8). On December 12, 2008, the Hettingas appealed to, and requested oral argument before, the Judicial Officer. On December 30, 2008, the Intervenor filed a response in opposition to the Hettingas' appeal petition, and on January 5, 2009, the Administrator filed a response in opposition to the Hettingas' appeal petition.

On January 9, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision denying the relief sought by the Hettingas and dismissing the Hettingas' March 7, 2008, Petition with prejudice.

## **DECISION**

### **Background**

The Hettingas, since 1994, have owned and operated Sarah Farms, a large dairy business in Arizona. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers. The Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas milk marketing area (now known as the Arizona milk marketing area).

On February 24, 2006, the Administrator issued a final rule, which became effective April 1, 2006, that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest milk marketing areas to the pricing and pooling provisions of their respective marketing orders if that person had in-area route distributions of class I milk in excess of 3,000,000 pounds per month (71 Fed. Reg. 9430 (Feb. 24, 2006)). As a producer-handler of milk since 1994 and continuing until April 1, 2006, the Hettingas had been exempt from the minimum pricing and pooling provisions of federal milk marketing orders adopted by the Secretary of Agriculture under the AMAA. Acting under the newly adopted final rule, the market administrator assessed a pool payment of \$324,211.60 on the Hettingas for milk processed in April 2006, based upon the Hettingas in-area route distributions of class I milk in excess of 3,000,000 pounds.

On April 11, 2006, Congress enacted the Milk Regulatory Equity Act of 2005 [hereinafter the MREA] which amended and supplemented the AMAA. The MREA statutorily affirmed the Secretary of Agriculture's determination to place volume limits on the applicability of the producer-handler exemption. On May 1, 2006, the Administrator issued a final rule amending the 10 federal milk marketing orders to implement the MREA.<sup>4</sup>

In asserting that the market administrator wrongfully assessed a pool payment of \$324,211.60 against them for the month of April 2006, the Hettingas argue that May 2006 was the first month in which an assessment could properly be made and the assessment for April 2006 was not in accordance with law as their status as a producer-handler was not formally cancelled. The Hettingas cite as support for their argument 7 C.F.R. § 1131.10(c) which provides:

**§ 1131.10 Producer-handler.**

. . . .

(c) *Cancellation.* The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraphs (a)(1) through (5) of this

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<sup>4</sup>71 Fed. Reg. 25,495 (May 1, 2006).

section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2) or (3) of this section. Cancellation of a producer handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

Further, the Hettingas argue, as they continuously held the status of a producer-handler for 12 years, notice of loss of that status was required, and the market administrator failed to provide that notice.

While it is clear that the Hettingas had indeed qualified as a producer-handler prior to April 1, 2006, the definition of "producer-handler" was changed by the final rule which became effective on April 1, 2006 (71 Fed. Reg. 9430 (Feb. 24, 2006)). Included in the changes in the new definition is a requirement that, in order to become a producer-handler, a two-step process is required: (a) the operator has to apply to be a producer-handler, and (b) the market administrator has to designate a qualified dairy operation as a producer-handler.<sup>5</sup> The cancellation provision relied upon by the Hettingas was another change that also became effective on April 1, 2006. The Administrator argues that, as the cancellation provision did not exist prior to April 1, 2006, the now-existent cancellation provision logically applies only to producer-handlers that have been designated as such by the market administrator after April 1, 2006. Moreover, as there is no evidence that the Hettingas ever applied for the producer-handler

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<sup>5</sup>Prior to the April 1, 2006, changes to the Arizona-Las Vegas Milk Marketing Order, a producer-handler self-determined the scope of his or her operation and the market administrator audited the information to verify its accuracy (Tr. 23-24). The pre-April 1, 2006, definition of the term "producer-handler" did not have any provision for designation of producer-handlers by the market administrator and contained no provision for the cancellation of the producer-handler designation by the market administrator (Tr. 64). See 7 C.F.R. § 1131.10 (2006); 64 Fed. Reg. 48,010 (Sept. 1, 1999).

designation<sup>6</sup> (even if they had been otherwise eligible, which they were not, as their class I route distribution exceeded the 3,000,000 pound threshold), *a priori*, the Hettingas could not have been a producer-handler within the post-April 1, 2006, definition.

Although the parties differ as to whether the amendments to the Arizona-Las Vegas Milk Marketing Order merely amend the old order, or create a new order, determination of that question is unnecessary, as the inescapable effect of the amendments in this case, regardless of which terminology is used, changed the definition of “producer-handler” in such a way as to make the Hettingas no longer eligible for the regulatory exemption afforded producer-handlers. Similarly, the Hettingas’ argument regarding the imprecision in the use of terminology by the market administrator and his staff in describing the “designation” or “status” of a producer-handler fails to provide any support for the Hettingas’ position as, in absence of a published definition of the terms, recourse falls upon the regulatory language contained in the Arizona-Las Vegas Milk Marketing Order. Last, the boot strap argument that a producer-handler who not only exceeds the volume threshold of 3,000,000 pounds of route distribution, but also has never applied to be designated as, or been designated as, a producer-handler after April 1, 2006, somehow still requires cancellation under the new cancellation provision effective April 1, 2006, is without merit.

### **Findings of Fact**

1. The Hettingas, since 1994, have owned and operated Sarah Farms, a large dairy business in Arizona.
2. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers.
3. The Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas milk marketing area (now known as the Arizona milk marketing area).

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<sup>6</sup>Tr. 71-72.

4. On February 24, 2006, the Administrator issued a final rule, which became effective April 1, 2006, that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest milk marketing areas to the pricing and pooling provisions of their respective milk marketing orders if they had in-area route distributions of class I milk in excess of 3,000,000 pounds per month (71 Fed. Reg. 9430 (Feb. 24, 2006)).

5. From 1994 and continuing until April 1, 2006, the Hettingas, as a producer-handler of milk, had been exempt from the minimum pricing and pooling provisions of federal milk marketing orders adopted by the Secretary of Agriculture under the AMAA.

6. Following adoption of the final rule, the market administrator assessed a pool payment of \$324,211.60 on the Hettingas for milk processed in April 2006.

7. The Hettingas paid the pool assessment of \$324,211.60 under protest.

8. On April 11, 2006, Congress enacted the MREA which amended and supplemented the AMAA. The MREA statutorily affirmed the Secretary of Agriculture's determination to place volume limits on the applicability of the producer-handler exemption. On May 1, 2006, the Administrator issued a final rule amending the 10 federal milk marketing orders to implement the MREA.<sup>7</sup>

9. Commencing April 1, 2006, the Hettingas ceased to be eligible for the producer-handler exemption under the Arizona-Las Vegas Milk Marketing Order because the Hettingas' in-area route distributions of class I milk exceeded 3,000,000 pounds per month, because the Hettingas failed to apply for a producer-handler designation, and because the market administrator did not designate the Hettingas as a producer-handler.

#### **Conclusions of Law**

1. The Secretary has jurisdiction over this action.
2. The market administrator's assessment of \$324,211.60 against the

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<sup>7</sup>See note 4.

Hettingas for the month of April 2006 was appropriate and in accordance with law based upon the April 1, 2006, revisions to the Arizona-Las Vegas Milk Marketing Order (71 Fed. Reg. 9430 (Feb. 24, 2006)).

3. Effective April 1, 2006, the definition of “producer-handler” was changed by final rule. Included in the changes to the new definition was a requirement that in order to become a producer-handler a two-step process is required: (a) the operator has to apply to be a producer-handler, and (b) the market administrator has to designate a qualified dairy operation as a producer-handler. (71 Fed. Reg. 9430 (Feb. 24, 2006).)

4. Cancellation of the designation as a producer-handler was not required for an entity which had not applied for designation as, and had not been designated as, a producer-handler after April 1, 2006.

5. The Hettingas’ in-area route distributions of class I milk exceeded 3,000,000 pounds in April 2006 and precluded them from being eligible for designation as a producer-handler even had they applied.

#### **The Hettingas’ Request for Oral Argument**

The Hettingas’ request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,<sup>8</sup> is refused because the parties have thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

#### **The Hettingas’ Appeal Petition**

The Hettingas raise four issues in their “Appeal to the Judicial Officer and Request for Oral Argument” [hereinafter Appeal Petition]. First, the Hettingas contend “the ALJ erred in concluding that the Market Administrator was not required to cancel the status of the Hettingas as a producer-handler in accordance with the provisions of 7 C.F.R. § 1131.10(c).” (Appeal Pet. at 1.)

The Administrator amended the definition of the term “producer-handler” in the Arizona-Las Vegas Milk Marketing Order

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<sup>8</sup>7 C.F.R. § 900.65(b)(1).

effective April 1, 2006, to include provisions for the market administrator's designation of persons as producer-handlers and cancellation of the producer-handler designation. The market administrator never designated the Hettingas as a producer-handler under the April 1, 2006, definition of "producer-handler." The Arizona-Las Vegas Milk Marketing Order provides that the designation of producer-handler shall be cancelled by the market administrator under certain circumstances (7 C.F.R. § 1131.10(c) (2007)). Logically, the market administrator cannot cancel a designation that does not exist. Therefore, as the Hettingas were never designated as a producer-handler under the April 1, 2006, definition of "producer-handler," the ALJ correctly concluded that the market administrator could not cancel the producer-handler designation of the Hettingas.

Second, the Hettingas contend the ALJ's failure to decide whether the February 24, 2006, final rule (71 Fed. Reg. 9430 (Feb. 24, 2006)) amended the Arizona-Las Vegas Milk Marketing Order or created a new Arizona-Las Vegas Milk Marketing Order, is error. The Hettingas take the position that the Arizona-Las Vegas Milk Marketing Order was merely amended; hence, the Hettingas continued as a producer-handler until the market administrator cancelled their producer-handler status in accordance with 7 C.F.R. § 1131.10(c). (Appeal Pet. at 2.)

The ALJ found unnecessary the resolution of the issue of whether the April 1, 2006, final rule amended the Arizona-Las Vegas Milk Marketing Order or created a new Arizona-Las Vegas Milk Marketing Order, as follows:

Although the parties differ as to whether the amendments to a milk marketing order merely amend the old order, or create a new order, as amended, determination of that question is unnecessary, as the inescapable effect of the amendments in this case, regardless of which terminology is used, changed the definition of producer-handler in such a way as to make the [Hettingas] no longer eligible for the regulatory exemption afforded producer-handlers.

Initial Decision at 5. I agree with the ALJ. The characterization of the

final rule (71 Fed. Reg. 9430 (Feb. 24, 2006)) does not affect the disposition of the instant proceeding. Whether the final rule is characterized as amendment to the Arizona-Las Vegas Milk Marketing Order or a new Arizona-Las Vegas Milk Marketing Order, the effect is the same: namely, prior to the effective date of the final rule, the Hettingas were a producer-handler under the Arizona-Las Vegas Milk Marketing Order; on and after the effective date of the final rule, the Hettingas, as a matter of law, were not a producer-handler. As the Hettingas had never been designated by the market administrator as a producer-handler, the market administrator had no designation to cancel.

Third, the Hettingas contend the ALJ erroneously “downplayed” the imprecision of the market administrator, his staff, and other United States Department of Agriculture employees in using the terms “status” and “designation” to simultaneously define a producer-handler (Appeal Pet. at 2).

The ALJ referenced the United States Department of Agriculture employees’ interchangeable use of the terms “status” and “designation,” as follows:

Similarly, imprecation concerning imprecision in the use of terminology by the Market Administrator and his staff in describing the “designation” or “status” of a producer-handler fails to provide any support for the [Hettingas’] position as in absence of a published definition of the terms, recourse falls upon the language of the regulatory language contained in the milk marketing order.

Initial Decision at 5. The purported imprecision of United States Department of Agriculture employees when using the terms “designation” and “status” is not relevant to the disposition of the instant proceeding. The final rule, which amended the definition of the term “producer-handler,” requires that, in order for a person to be a “producer-handler,” the market administrator must designate that person as a producer-handler after determining that all of the requirements of 7 C.F.R. § 1131.10 have been met. The Hettingas were never designated by the market administrator as a producer-handler. The purported imprecise language used by United States Department of

Agriculture employees does not change the fact that, as a matter of law, on and after April 1, 2006, the Hettingas were not a producer-handler under the Arizona-Las Vegas Milk Marketing Order.

Fourth, the Hettingas contend the ALJ's conclusion that an application for designation of as a producer-handler is required under the Arizona-Las Vegas Milk Marketing Order, is error (Appeal Pet. at 2).

The Arizona-Las Vegas Milk Marketing Order does not explicitly refer to an "application" for designation as a producer-handler. However, producer-handler status is an exception to the general regulatory scheme of the AMAA and must be established by the person seeking the exception.<sup>9</sup> The Arizona-Las Vegas Milk Marketing Order places the burden of establishing and maintaining producer-handler status on the handler. I find that, although 7 C.F.R. § 1131.10 does not explicitly use the word "application," the process by which a person must obtain producer-handler designation under 7 C.F.R. § 1131.10 constitutes an application to the market administrator for such designation.

For the forgoing reasons, the following Order is issued.

### ORDER

1. The relief sought by the Hettingas is denied.
2. The Hettingas' March 7, 2008, Petition is dismissed with prejudice.

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<sup>9</sup>*In re Stew Leonard's*, 59 Agric. Dec. 53, 71 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805, 826-27 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 67 (1995); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 138 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 983 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 405 (1974); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763, 800 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd*, *United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973).

This Order is effective upon service on the Hettingas.

**RIGHT TO JUDICIAL REVIEW**

The Hettingas have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which the Hettingas have their principal place of business. The Hettingas must file a bill in equity for the purpose of review of the Order in this Decision and Order within 20 days from the date of entry of the Order in this Decision and Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.<sup>10</sup> The date of entry of the Order in this Decision and Order is January 15, 2009.

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<sup>10</sup>7 U.S.C. § 608c(15)(B).

Ronald Walker, Alidra Walker  
and Top Rail Ranch, Inc.  
68 Agric. Dec. 29

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## **ANIMAL QUARANTINE ACT**

### **DEPARTMENTAL DECISIONS**

**In re: RONALD WALKER, ALIDRA WALKER AND TOP RAIL RANCH, INC.**

**A.Q. Docket No. 07-0131.**

**Decision and Order.**

**March 18, 2009.**

**AQ – Chronic wasting Disease – Destruction of herd – Compensation.**

Darlene Bolinger for APHIS.

Brenda L. Jackson for Respondent.

*Decision and order by Chief Administrative Law Judge Marc R. Hillson.*

### **Decision**

In this decision I find that Respondents did violate a “final premises” agreement with Complainant concerning restocking of their elk breeding facility. I find that Respondents did not violate the agreement by purchasing and breeding reindeer, as the reindeer were not penned in the area that was the subject of the agreement. I impose a civil penalty of \$20,000 for the violations, but this penalty should be offset against the funds that Complainant has withheld pending completion of the depopulation of Respondent’s elk hunting facility.

### **Procedural Background**

This proceeding was initiated by the filing of a complaint on June 14, 2007, by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that Respondents Ronald Walker, Alidra Walker, and Top Rail Ranch violated the Animal Health Protection Act and the Chronic Wasting Disease Indemnification Program Regulations by restocking their

premises in violation of a herd plan agreed to by Complainant and Respondents. Respondents filed a timely answer on August 8, 2007. I conducted a hearing in this matter in Denver, Colorado on May 14-15, 2008. Complainant was represented by Lauren Axley, Esq. and Darlene Bollinger, Esq. of USDA's Office of General Counsel. Respondents were represented by Brenda Jackson, Esq. Complainant called four witnesses and Respondents called two, including Mr. Walker. The parties filed a "Joint Stipulations of Fact" which was admitted as Joint Exhibit 1. I admitted 36 exhibits at the behest of Complainant and 6 at the behest of Respondents.

Following the hearing, Complainant submitted its opening brief, including proposed findings of fact and conclusions of law, on July 11, 2008; Respondents filed their brief on August 18, 2008; and Complainant's reply brief was filed on September 11, 2008.

#### **Statutory and Regulatory Background**

In enacting The Animal Health Protection Act, 7 U.S.C. § 8301 et seq., Congress provided the Secretary of Agriculture the authority to take actions for "the prevention, detection, control and eradication of diseases and pests of animals." The Act is designed to protect, among other things, animal health, the health and welfare of the people of the United States, and the economic interests of the livestock industry. The powers of the Secretary include the seizure, quarantine, destruction, or disposal of disease carrying animals or animals exposed to animals carrying certain diseases. The Secretary also is generally required to compensate owners of animals required to be destroyed under the Act. 7 U.S.C. § 8306(d). The Secretary is also empowered with the authority to seek civil and criminal penalties for violations of the Act, 7 U.S.C. § 8313, and to promulgate regulations "as the Secretary determines necessary to carry out this chapter." 7 U.S.C. § 8315.

In accordance with these Congressional directives, the Secretary promulgated the regulations at 9 C.F.R. Part 55—Control of Chronic Wasting Disease. These regulations included setting up a Chronic Wasting Disease Indemnification Program, which provided for paying owners of herds to be destroyed as part of a CWD program up to 95% of each animal's value, with an upper limit of \$3,000 per animal. The

regulations also provide for cleaning and disinfection of premises after cervid removal has been accomplished and for the creation of a herd plan and/or a premises management agreement whereby the USDA, the owner and the state representative agree on a plan for eradicating CWD from a herd, and preventing its future recurrence.

The regulations, at 9 CFR § 55.7, specify that claims that arise out of the destruction of cervids are only payable if the cervids have been appraised and the owners have signed the appraisal form indicating that they agree with the appraisal, and that the owners will agree to comply with a herd plan and will not introduce cervids onto the premises until after the date specified in the herd plan. “Persons who violate this written agreement may be subject to civil and criminal penalties.”

#### **Facts**

Respondents Ronald Walker and Alidra Walker own Respondent Top Rail Ranch, which in 2004 consisted of an elk breeding herd on premises located at 2055 Highway 50, Penrose, CO and a hunting herd located on premises at 1000 Walker Way, Canon City, Colorado. JX 1, Stip. 1 and 2. The breeding herd premises is generally referred to as E71 and the hunting herd premises is generally referred to as E85. Id. Stip. 2. Mr. Walker was born and raised on a ranch and has hunted all his life. Tr. 529. He has been an elk rancher since 1996, and has served as president of both the Colorado Elk Breeders Association and the North American Elk Breeders Association. Tr. 557-559.

CWD is a disease of livestock that belongs to the family of diseases known as transmissible spongiform encephalopathy. Tr. 274-275. It is a fatal, progressive, degenerative neurological disease. It is transmissible from one animal to another through direct contact as well as through environmental contamination. Tr. 288-289. One of the difficulties in dealing with this disease is that there is currently no means of detecting the presence of the disease through testing a living creature—it can only be detected by testing the brain tissue of a deceased animal. Tr. 285. The State of Colorado requires that any elk

that dies must be tested for CWD. USDA works in cooperation with the state of Colorado to implement this program. JX 1, Stip. 4. Once CWD is discovered in a herd, the common practice is to quarantine the herd, and then to depopulate it, with each of the euthanized animals being tested for CWD. Tr. 303-310.

After a USDA representative collected samples from a hunter-killed elk at the E85 facility, test results released in January 2005 indicated that the 52-month old elk bull tested positive for CWD. JX 1, Stip. 5. As a result, and pursuant to their normal practices, the State of Colorado quarantined all elk on both the E71 and E85 premises. JX 1, Stip. 6, CX 2, Tr. 27-28, 584-586. Mr. Walker accepted the quarantine on February 2, 2005. At that point, no elk could enter or leave either the breeding herd or the hunting herd.

Several months later, the parties began discussions on how and when to depopulate the two herds. JX 1, Stip. 7-9, Tr. 31-36, 482-484, 588-591. Over a period of time, a plan was agreed to whereby the two herds would be euthanized and Respondents would be paid for a percentage of the appraised value of the herds, as per the regulations at 9 C.F.R. § 55.7(b). This Depopulation Agreement and Preliminary Premises Plan became effective after it was signed by Mr. Walker on August 22, 2005. CX 5. The herd at E71, consisting of 234 elk, was appraised at \$429,637.50. JX 1, Stip. 11. The Plan provided for the appraised value to be paid after the E71 herd was depopulated, except that the parties agreed that 25% of the payment would be withheld until such time as the E85 herd was depopulated. CX 5, pp. 1-2. The parties agreed that 4 animals in the E71 herd, which were referred to as “bottle babies<sup>1</sup>” would be spared. CX 5, JX 1, Stip. 13. This was an exception to the usual rule where the entire herd would normally be depopulated, but the Walkers were adamant about the four elk. Tr. 37, 41-43, 185-186, 483-485, 588-589. The agreement to depopulate E71, CX 5, specifically mentioned the four animals as exempt from the program, with provisions that after they died they would each be tested for CWD. The Plan made it clear that only four animals from the herd would be

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<sup>1</sup> Although they were referred to as “bottle babies” these four elk were not juveniles. Essentially, the term means that these were hand-raised and were regarded as family pets.

retained, and that restocking of E71 with any cervids would not be allowed until after the death of the four retained elk. The Plan referred to a future "final premises plan" with strong implications that such a plan would be developed after all elk were gone from the premises and certain cleaning measures were undertaken. However, the plan did not define the boundaries of E71, so it is unclear, particularly in terms of future uses of the property, as to the boundaries the document is intended to cover. This included whether the conditions imposed in the plan were confined to the corrals where the elk were kept, and the extent to which other areas of the property, such as corrals never used by the elk, were covered by future use restrictions. Both the withholding of 25% of the indemnity money and the allowance of the four bottle babies were exceptions to the normal depopulation agreement. Tr. 43-44, 83-84, 326-327, 407-410. APHIS viewed the withholding of the 24% as a form of leverage, as they had never allowed a split depopulation before. Tr. 83-84.

By the time the depopulation of E71 took place in September 2005, many of the females had calved. Although no compensation was paid for the 65 calves, they too were euthanized as part of the depopulation. Tr. 183-184. Two of the E71 elk tested positive for CWD. JX 1, Stip. 15, Tr. 66.

When this gruesome task was accomplished, APHIS personnel assumed that only the four bottle babies remained on E71. Tr. 56-58, 189. The bottle babies consisted of one bull and three cows. Tr. 185. APHIS was not aware that two of the bottle babies had calved and that there were actually six elk on E71 that had not been depopulated. Tr. 77, 110. Mr. Walker testified that the state personnel, particularly Dr. Cunningham, who had since retired and did not testify, knew of the two additional elk. Tr. 602-603. While not notifying federal officials of the existence of the two elk, Mr. Walker did follow state procedures, registering the newborn calves with the state brand board, and tattooing them as required. Tr. 612, 628-629. In the next few years six additional calves were born as a result of the bottle baby bull mating with the bottle baby cows. The bottle baby bull, Howard, died a few months before the

hearing. Tr. 610. At the time of the hearing, there were eleven elk on E71. Tr. 628-629.

The parties had negotiated to have the E71 depopulation occur before the E85 depopulation to allow, at Respondents' request, two hunting seasons to transpire before the final depopulation would be undertaken. Tr. 40-41. Since every elk in E85 was stated to have come from E71 and since there was no way for a living elk to depart from E85, the parties apparently agreed that it would do no harm, in terms of the spread of CWD, if Respondents were allowed to conduct hunts, as long as no new animals were introduced to E85. Tr. 40. That way, Respondents would have two more seasons to conduct profitable hunts, and the depopulation of the remaining elk would be less costly for APHIS, as there would be fewer elk to kill and thus much less indemnity to pay. All hunted elk would still be required to be tested as per the regulations. The agreement the parties entered into assumed that the withheld indemnity for 25% of the E71 herd would be paid by the end of 2006, by which time it was apparently presumed that the depopulation of E85 would have occurred.

On September 20, Mr. Walker signed the Final Premises Plan (FPP) for E71 on behalf of Respondents, and Dr. Roger Perkins, on behalf of APHIS, signed the plan the next day. CX 9, J. Ex. 1. Although it was normal practice for such a plan to also be signed by the state, and there was a signature line reserved for this purpose, the Colorado State Veterinarian did not sign this plan. The plan refers to an attached diagram of the premises, but no such diagram is attached to CX 9. However, Dr. Perkins indicated that the document admitted as CX 19 was the diagram referred to in CX 9. Tr. 164-165. This diagram is reasonably consistent with the aerial photographs admitted as RX 3.

The FPP specifically referred to the fact that the entire E71 herd had been euthanized "with the exception of 4 elk," CX 9, p. 1, so it is indisputable that by signing the document, Mr. Walker was unambiguously making a representation that he knew to be untrue. He admitted as much on his direct testimony, stating that the only way to get his money was to sign the FPP, even though he knew there were 6,

rather than 4, elk on the E71 premises. Tr. 636-637.<sup>2</sup>

Events did not transpire as planned. For a variety of reasons, the parties had considerable difficulty in agreeing on various aspects of the plan to depopulate E85. Mr. Walker insisted on a variety of conditions which APHIS thought made carrying out the plan exceedingly difficult, if not impossible, including such conditions as not allowing any motor vehicles to operate off the trails, thus requiring all killed elk to be manually carried off the premises, and severely limiting the duration of the operation. Tr. 87-120. Unlike E71, which was a series of corrals, E85 consisted of approximately 1500 acres of rough terrain. Tr. 542-544.

Eventually, APHIS agreed to Mr. Walker's insistence that hunters familiar with E85 be employed, and bids were solicited for this purpose. Tr. 112-121. However, the three bids that were submitted were deemed too costly by APHIS. Tr. 120. Finally, late in the winter of 2007, APHIS hired, with Mr. Walker's approval, Roger McQueen, an independent hunter known to Mr. Walker. Tr. 132-133. Interestingly, McQueen would be allowed to use motorized vehicles, including snowmobiles, rubber-tired all terrain vehicles, a 4 X 4 winch truck, a tractor and a backhoe in order to carry out the operation. Id. However, the fact that Mr. Walker went out of his way to make the E85 depopulation more difficult to accomplish is not material to any of my findings here, as an agreement was finally reached and was only not accomplished by the unilateral action of APHIS.

The E85 depopulation was scheduled to begin in mid-March 2007. Because conditions were good for hunting, Mr. McQueen began his work one day early and killed seven elk in that one day. Tr. 137-138. The following day, APHIS directed that the depopulation be suspended. Tr. 133-134, 410-411, 632-633. The apparent reason for the suspension of the operation was that APHIS had discovered that there was a

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<sup>2</sup> Although it is speculation, and not material to my findings, it is likely that Dr. Cunningham did not sign the Plan because he knew it was untrue with regards to the number of elk.

violation regarding E71, resulting from the procreative activities of the bottle babies, and because Respondents had purchased reindeer which were allegedly being housed in E71 in violation of the quarantine and the agreements that had been signed. Tr. 133-134, 410-411. APHIS reimbursed Respondents for the seven elk that McQueen killed. CX 37. No further depopulation efforts had been undertaken as of the date of the hearing.

Respondents admit purchasing reindeer, with the purpose of breeding them, subsequent to the date of signing the depopulation agreement. Tr. 642-645, JX 1, Stip. 24-25. Respondents even exhibited the reindeer as part of a Christmas pageant in Florence, Colorado. Tr. 250. Reindeers, like elk, are cervids, but there has never been a reported case of CWD in a reindeer. Tr. 324-325, 399. The depopulation plan included a ban on keeping cervids in E71, but there is disputed evidence as to what constitutes E71, and where the reindeer were kept. Mr. Walker did not dispute that he owned the reindeers, but rather contended that they were kept out of the area that he defined as E71. Tr. 643-645. There is a lack of specificity in the various documents signed by the parties, as well as the state representatives involved, in terms of defining exactly what was meant by E71. Mr. Walker contends that, with respect to the depopulation agreement, E71 consisted of the fenced elk enclosure, and that the portions of his property that were not previously inhabited by elk were not covered by the conditions of the agreement; while he knew cervids could not be brought on to a quarantined property, he testified that the reindeer were never situated in any portion of the property that was quarantined. Tr. 643-645. One witness, Tad Puckett, who had sold the reindeer cows to Respondents after the depopulation took place, testified that while he never saw the reindeer and the elk together, he saw them to the east or the north of Respondents' working barn, including in pen 1 or 2, both of which were part of the E71 property used by the depopulated elk. Tr. 453-454. However, Dr. Richard Brewster, who had been specializing in CWD in Colorado for the three or four years prior to his retirement in July 2007, testified that he did not see any reindeer when visiting E71 on December 27, 2006, Tr. 499.; Steve Rossi, a retired state employee who owned one of the four bottle babies testified that he visited many times and the reindeer were always kept in an area clearly separate from the 12 elk pens, Tr. 576-577; and

Elizabeth Kelpis, the area manager for APHIS's Investigations and Enforcement Branch, testified that even though she saw eight elk and 6 reindeer on the property, they were never penned together, and the reindeer may well have been in the same pen indicated by Mr. Walker and Mr. Rossi—that is, a pen that was not one that had previously been used to corral the E71 herd. Tr. 259-262.

### **Discussion**

I find that Alidra Walker and Top Rail Ranch were properly named parties to this action, along with Ronald Walker. I find that both the Depopulation and Preliminary Premises Plan, and the FPP were legitimate exercises of regulatory authority by APHIS. In particular, I find that it was proper to include in the Plans withholding of 25% of the indemnification for the E71 depopulation to successful completion of the E85 depopulation. I also find that the failure of Respondents to notify APHIS representatives of the calves born to the bottle babies, and Mr. Walker's signing of the FPP when he knew that more than 4 elk were excluded from the depopulation was a violation warranting a civil penalty. I also find that there was absolutely no legitimate basis for APHIS to discontinue the depopulation of E85. Finally, I find that because neither of the Plans clearly defined the parameters of E71 to the extent that it was unclear whether cervids were banned from areas not specifically described as areas which the elk herd had occupied, that the starting of a reindeer herd did not constitute a violation of the Act, the underlying regulations, or the FPP.

1. Respondents contend that neither Alidra Walker nor Top Rail Ranch are proper parties to this matter. They contend that since only Ron Walker signed the various agreements at issue and that since there is no indication that he was acting on behalf of either his wife or Top Rail, that he should be the only respondent in this proceeding. They also contend that Top Rail had no ownership interest in the E71 herd. They state in their brief that Complainant only named all three as parties in order to increase the maximum penalty that could be assessed.

These contentions are belied by the Joint Stipulations of Fact, J. Ex.

1. The parties stipulated that “Ronald and Alidra Walker own and operate the Top Rail Ranch, Inc.” and that “The ranch consists of an elk breeding herd . . . (E71) . . . as well as a hunting herd . . . (E85). (Stipulations 1 and 2). Stipulation 12 indicates that Mr. Walker’s signature on the Depopulation Agreement was on behalf of both himself and his wife, which would likewise indicate that he was signing as the owner or authorized representative of both his wife and Top Rail, while the Plan itself purported to be “an agreement between Top Rail Elk Ranch owners Ron and Alidra Walker,” APHIS and the State of Colorado. CX 5, paragraph 1. Thus, the evidence clearly supports a finding that Alidra Walker and Top Rail Ranch, Inc. are proper parties in this action, along with Ron Walker.<sup>3</sup>

2. Withholding 25% of the indemnity for the depopulation of E71, as an extra assurance that the depopulation of E85 would be accomplished, was not inconsistent with the regulations. Because of the unusual factors present in this case, principally the sparing of the four bottle babies (which eventually grew to a group of eleven), and the fact that Respondents negotiated for a two hunting season extension of time before the depopulation of E85 would occur, in order to allow Respondents to arrange the more-profitable elk hunts during that time, APHIS was certainly allowed to negotiate a quid pro quo in terms of withholding a portion of the proceeds. While there was no specific language in the regulations allowing such a withholding, the regulations also appear to contain no language that would allow excepting four elk from the depopulation, nor is there any language that would appear to allow a two-hunting season postponement of depopulation.

3. While the withheld 25% of the agreed upon indemnity was supposed to be paid on the completion of the E85 depopulation, and no later than December 2006, it is apparent that Mr. Walker was engaging in various obstructive actions to delay the depopulation, presumably to allow Top Rail to continue hunting operations. However, after the parties finally

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<sup>3</sup> Interestingly, the regulations only allow indemnity if “the owners” sign the appraisal agreement and the herd plan (emphasis added). Both these documents were only signed by Ron Walker, but neither Complainant nor Respondents are contending that the payment of the indemnity was unlawful.

reached agreement in February 2007, it was APHIS who unilaterally abrogated the agreement by electing to discontinue the depopulation of E85 just after it began because of its investigation into whether Respondents violated provisions of the depopulation agreement by restocking the elk (by allowing the bottle babies to breed and not reporting the information to APHIS) and by starting a herd of reindeer.

APHIS witnesses repeatedly testified to the importance of the CWD program and the need for prompt depopulation of herds where a positive test for CWD has occurred. Herd depopulation is certainly one of the more drastic remedies to animal disease that is permissible under USDA regulations. The imposition of quarantines, the creating of herd plans and final premises plans, the cleaning up and disinfection of the premises where the diseased animal had lived, all attest to the seriousness of the disease and the need to take prompt action. Complainant's decision to stop the depopulation of E85, due to what is effectively an unrelated series of events on E71, does not make sense. On the one hand, Complainant complains of the admittedly obstructionist role Mr. Walker played in terms of agreeing to conditions for depopulation of E85, and how APHIS was being extraordinarily lenient in allowing Respondents two extra hunting seasons before undertaking the final depopulation of E85. Yet after agreement was reached, APHIS unilaterally decided that because there was a pending investigation as to whether the agreements on E71 were violated that the depopulation should be entirely stopped, leaving possibly contaminated elk alive and putting the Respondents in a costly state of limbo. Even if there were violations of the provisions of the plans dealing with E71—and I find that there were—that is not a basis to stop the depopulation of E85. The record does not indicate if APHIS was concerned over the payment of the 25% of the indemnification that was withheld was a major motivating factor, but that could have been worked out after the fact. Not completing the depopulation or at least allowing Respondents to conduct hunts until the elk were entirely removed from E85 is simply unfathomable in light of the purposes of the

CWD eradication program.

4. Only the four specifically identified bottle babies were permitted to survive the E71 depopulation. The depopulation plan clearly contemplates only the four would be allowed to survive, and Respondents' failure to notify APHIS that two of the elk had calved by the time of the depopulation, and their subsequent signing of the FPP which represented that the four bottle babies were the only remaining elk in E71, constituted a deliberate misrepresentation of fact and was a violation of the depopulation plan.

Mr. Walker testified that the State veterinarian, Dr. Cunningham, saw the two calves that were kept with the bottle babies during the depopulation of E71, and told him to lock them in pen 7, where he stated the bottle babies were kept in clear view during the depopulation effort. Other witnesses testified that they did not see either the bottle babies or their two calves during the depopulation. It can reasonably be assumed that Dr. Cunningham's failure to sign the FPP was related to his knowledge that the representation that only the four bottle babies survived the euthanization that took place a few weeks earlier. It is certainly clear that neither Mr. Walker nor Dr. Cunningham informed APHIS officials about the two calves born to the bottle babies, and that the APHIS officials did not know about the two calves at the time of the signing of the FPP. While Mr. Walker apparently did inform the state brand board of the birth of the two calves, as well as the three calves that were born in the spring of 2006 (and presumably three more that were born in 2007, since there were eleven elk at the time of the hearing (Tr. 628-629), factoring in the fact that the bull had died), he never notified APHIS, presumably because he knew that he had specifically represented to them that only the four bottle babies were alive at the time of signing the FPP.

The addition of any elk, other than the four bottle babies, to the E71 property constitutes restocking in violation of the FPP. The motivation of the parties throughout the process was to reduce the elk population of E71 to zero, with the exception being made that the four bottle babies would be allowed to live out their lives but remaining quarantined. The FPP contemplated a reassessment of CWD risks on the property before allowing restocking with cervids, depending on the test results on the bottle babies after their deaths. The Plan clearly did not contemplate

additional elk living on E71, whether through intentional or inadvertent breeding, or through any other means, unless and until the four bottle babies died and were tested.

Respondents contend that the failure of the FPP to address the issue of breeding indicates that no violation occurred. They also contend that APHIS was at fault for not developing “cooperative lines of communication” with Colorado so that they would have known about the birth of calves which had been registered with the brand board. This does not change the fact that the plain language of the FPP limited the exceptions to the four bottle babies and that there were to be no additions to the elk herd until after they died and were tested. It is difficult to believe Mr. Walker’s argument that he did not know that additions to the herd through breeding did not present a problem for APHIS, given his blatant misrepresentation when signing the FPP that he had just the four remaining elk on E71. He knew that having more than the four was inconsistent with his commitment in the depopulation plan and that being truthful would put his indemnity payments in jeopardy. While he maintained at hearing that they were visible in a pen during the depopulation, APHIS witnesses testified they did not see them; if they did see them and recognize them as bottle babies with two calves it is hard for me to believe that Dr. Perkins would have signed the FPP.

Mr. Walker also testified that the subsequent births were a surprise to him on two counts. First, the bull elk had a prolapsed sheath which should have made breeding difficult if not impossible. After three more calves were born, he then separated the bull from the cows during the next normal breeding season, but the cows became pregnant once again outside the normal elk birthing cycle. He continued to report the births to the state brand board, but never reported any information on the births to APHIS.

Even taking Respondents’ word that the births were a surprise, and that they took reasonable precautions to prevent the births, it is difficult to escape a finding that the births were restocking as that term is generally understood. Neither agreement talks about whether breeding

or restocking would have to be intentional or unintentional, and the only possible interpretation of the agreements is that only the four bottle babies were to be on the premises of E71, and that upon and until their deaths, no additional cervids would be allowed on E71.

Respondents also contend that the FPP was not a “herd plan” as required by the regulation. However, Complainant has amply demonstrated that the difference between the FPP and a typical herd plan was a result of Respondents’ insistence on keeping the bottle babies, and that provisions associated with a complete depopulation were not appropriate at the time of the signing of the FPP. The fact that Respondents were able to negotiate these more lenient conditions does not render the FPP unenforceable.

5. Respondents stocking and breeding of reindeer was not a violation of the FPP. While the FPP did ban all cervids from the premises of E71 until after the deaths of the four bottle babies, the premises of E71 were not clearly enough defined to warrant a finding that all the property owned by the Respondents located at 2055 Highway 50 in Penrose was covered by the ban of cervids. The FPP refers to an “attached diagram” which was not in fact attached to the copy of the FPP received in evidence. CX 9, p. 1. However, Respondents submitted a diagram that appears to be representative of the layout of the Penrose property, RX 3, as did Complainant, CX 19. These diagrams both indicate that the Penrose property covers substantially more area than the areas where the elk were kept, including the barn and feed storage areas. In CX 9, the parties agree that “[t]he facility is divided into 12 pens surrounding a central alleyway.” If APHIS wanted to be sure that the entire Penrose property was subject to the agreement, rather than just the area inhabited by the elk, they could have so specified. In the face of what is at best characterized as an ambiguous definition of the property outside the 12 elk pens and the alleyway area, the stocking of reindeer for breeding purposes in other areas of the Penrose property cannot be deemed a violation of the FPP.

APHIS appears to contend that Respondents are in violation because the reindeer were in fact kept in the areas clearly specified in the FPP as being banned to cervids, other than the 4 bottle babies. The only testimony in support of this contention comes from Tad Puckett, who traded Ron Walker some reindeer cows in exchange for fencing

material. Mr. Puckett testified that he knew of the CWD problem and the subsequent depopulation of E71, and that he questioned Ron Walker as to whether it was legal for him to have reindeer on his property. He stated that Ron Walker replied that he thought it was legal and that he would keep them in the back of his property. Mr. Puckett also stated that he observed the reindeer on several later visits to the Penrose property, and that he thought he once saw them in pen 1 or 2, and that they were always to his left as he drove to the barn. Both Mr. Walker and Mr. Puckett testified that they bore each other considerable ill will due to some business transactions that turned sour.

Mr. Walker testified that he always kept the reindeer on a portion of the property that was never utilized by the elk. Dr. Brewster apparently did not see the reindeer on any of his visits to the Penrose property; when Ms. Kelpis was on the property shortly before the hearing she saw both elk and reindeer on the property, but they were not in the same pen. Ms. Kelpis indicated that the reindeer could have been in the area marked in blue in RX 3; i.e., outside the areas designated as pens for the elk.

While neither Mr. Puckett nor Mr. Walker are fully credible as to the location of the reindeer, the burden of proof is on APHIS to demonstrate, by a preponderance of the evidence, that a violation exists with respect to whether the reindeer were housed in an area completely separate from the elk pens. The FPP does not define the E71 premises, even with reference to the diagram that was presumably attached and separately received into evidence, with sufficient clarity for me to hold that it was intended to ban the introduction of cervids on every inch of the Penrose property. Indeed, if that was the intent of the FPP than there would have been no need to refer to the diagram at all. While some aspects of the FPP could be interpreted to apply to the entire property, the FPP is simply too ambiguous on this issue to hold Respondents liable for stocking reindeer, as long as the reindeer were not and are not utilizing any of the property that was utilized by the elk herd. Given the ambiguity of the FPP as to this subject, and the lack of convincing testimony concerning whether the reindeer ever utilized the E71

property as described in the FPP, I find that the stocking of reindeer did not violate the terms of the FPP.

6. The appropriate remedy is a civil penalty of \$20,000. The breeding/restocking of elk via the unplanned pregnancies of the bottle babies is a serious violation of the FPP. However, because I find that the stocking of reindeer did not violate the terms of the FPP, and because I find that the subsequent actions of APHIS in cancelling the depopulation of E85 are inconsistent with the imposition of more significant civil penalties, the \$110,000 civil penalty suggested by Complainant would be excessive for these violations. I am also directing that the civil penalty does not have to be paid directly by Respondents, but rather should be deducted from the indemnity funds that Complainants have been withholding from Respondents.

While my jurisdiction over this matter presumably does not include the authority to order APHIS to resume and finish the depopulation of E85, which undisputedly arose out of the unilateral actions of APHIS, it is clear that E85's depopulation is utterly unrelated to the violations alleged in the complaint, and that no valid reason exists for not completing that task. I am aware that completion of that task will generate an obligation on behalf of APHIS to indemnify Respondents for the remaining elk on E85 as well as generate the release of the withheld 25% of the indemnity (less the civil penalty of \$20,000) for the E71 herd. I specifically do not speak to the fate of the elk born to the bottle babies, and leave that to the parties to sort out.

### **Findings of Fact**

1. Respondents Ronald and Alidra Walker own and operate Respondent Top Rail Ranch. At the time of the occurrence of the violations alleged in the complaint, Respondents operated an elk breeding herd on premises located in Penrose, CO ("E71" or "Penrose") and an elk hunting herd on premises located in Canon City, CO ("E85").
2. The Penrose property consists of approximately 365 generally flat acres and includes 12 designated elk corrals as well as other property, including the residence of the Walkers.
3. The E85 facility is approximately 1500 acres with significant ranges in elevation, with thick woods, rocky outcroppings and a few roads for

access. Tr. 542-544. It is enclosed by fencing. All elk in E85 are transported from E71, and do not leave until they are hunted or otherwise killed.

4. After a hunt on during the 2004 hunting season, the required testing was performed on the killed elk on E85. The elk tested positive of chronic wasting disease (CWD). As a consequence of this test, the State of Colorado initiated discussions with Respondents, resulting in both the E85 and E71 herds being quarantined. Tr. 27-28. An order to this effect was issued on January 31, 2005. CX 2.

5. Respondent Ron Walker has been a hunter and rancher throughout his life. He is very knowledgeable about all aspects of raising and hunting elk. He is a past president of the Colorado Elk Breeders Association and the North American Elk Breeders Association.

6. Respondent Ron Walker, acting on behalf of his wife and Top Rail, signed a Depopulation Agreement and Preliminary Premises Plan for E71 and E85 on August 22, 2005. CX 5. The document had been signed on August 1 by Dr. Cunningham on behalf of the State of Colorado and Dr. Perkins on behalf of APHIS. This Preliminary Plan indicates that the E71 herd would be depopulated first with indemnity to be paid based on a percentage of the herd's appraised value, with 25% of that indemnity to be withheld pending the depopulation and signing of a Final Premises Plan for E85. The Preliminary Plan makes it absolutely clear that only the four specifically identified bottle babies would be exempt from the depopulation and that they would be kept "under permanent isolation and quarantine." Restocking of the E71 herd would not occur until have the four bottle babies had died and tested negative for CWD. The E85 herd would be hunted out through the end of the 2006 hunting season, at which point the remaining elk would be appraised and depopulated, with depopulation of E85 to be completed no later than December 31, 2006.

7. The depopulation of E71 was carried out on September 6-7, 2005. Two of the elk tested positive for CWD.

8. At the time of the E71 depopulation, two of the bottle babies had calves. Respondents did not make Complainant aware of this fact at that

time, although it appears that the State veterinarian, Dr. Cunningham, was aware of the calves.

9. In September 20-21, 2005, the parties signed a Final Premises Plan (FPP) for E 71. No one signed on behalf of the State of Colorado. In this plan, Respondents specified that only the four bottle babies remained on the premises of E71, and that they would be quarantined until their death. The FPP did not contain all the provisions normally associated with such plans, because this plan was exceptional due to the four elk being spared (normally a plan would describe measures to be taken before the empty premises could be used again). Respondent Ron Walker signed the FPP even though it categorically stated that only the four bottle babies remained on E71, when he in fact knew that there were two calves on the premises in addition to the bottle babies.

10. Although Respondents did not report the existence of the two elk calves to APHIS, they were reported to the Colorado State Brand Board.

11. In subsequent years, the bottle baby cows calved again after being impregnated by the baby bottle buck. Respondent Ron Walker indicated that he did not believe that the buck was capable of mating due to a prolapsed sheath. After the second series of births, Mr. Walker separated the bull from the cows during the normal mating season. The cows became pregnant out-of-season and calved anyway. All the calving activity was duly registered with the State, but no one informed APHIS.

12. Subsequent to the signing of the FPP, APHIS had difficulty in getting Respondent Ron Walker to agree to a reasonable plan for the depopulation of E85. However, an agreement was eventually reached in February, 2007 (over a month after the December, 2006 deadline imposed by the FPP) and a hunter was hired to conduct the depopulation, with indemnities to be paid for the killed elk.

13. The day after the hunter commenced the depopulation, which was one day earlier than he had told APHIS he would begin due to favorable weather conditions, APHIS unilaterally directed him to stop killing the elk. He had already killed seven elk, for which he was compensated and for which Respondents were paid indemnity. APHIS indicated to Respondents and reiterated at the hearing that the E85 depopulation was being suspended because of possible violations of the E71 FPP. Tr. 133-134.

14. No evidence was ever introduced which would explain how the discovery of a possible violation of the E71 FPP would justify suspending the depopulation of E85.

15. APHIS first became aware there were more than 4 elk on E71 in December 2006 but continued with plans to proceed with the E85 depopulation until March 2007.

16. Respondents began purchasing reindeer, with the idea of establishing a reindeer breeding herd in 2006 when he purchased five reindeer cows from Tad Puckett. The reindeer were kept on the Penrose property, but were never kept in the elk pens, or in any of the property that was designated as part of E71 in agreements between the parties, or in the diagrams attached thereto. Reindeer are cervids, but there is no recorded instance of a reindeer with CWD.

17. CWD is a transmissible spongiform encephalopathy which has a fatal effect on elk, deer and moose. Generally, it takes two to five years from exposure to the disease before death. The disease is transmissible from animal to animal, either through direct contact or through environmental contamination. Currently, the only way to test for CWD is through testing the brain stem tissue and tonsils of deceased animals. There is no treatment or preventative vaccine for CWD. Depopulation of the contaminated herd is the current best method to control the disease.

### **Conclusions of Law**

1. Ron Walker, Alidra Walker and Top Rail Ranch are all proper parties to this action.
2. The Final Premises Plan (FPP) signed by Ron Walker on behalf of Respondents and Dr. Perkins on behalf of Complainant is a legitimate agreement under the regulations, and is binding on both parties.
3. By hiding from APHIS the existence of two calves at the time the FPP was signed, and by allowing the bottle babies to breed without notifying APHIS, Respondents violated the provisions of the FPP banning the restocking of cervids until after certain requirements were

met.

4. Respondents' establishment of a reindeer breeding herd at the Penrose property was not a violation of the FPP restocking ban, because the FPP's definition of the E71 premises did not clearly include property outside the vicinity of the elk pens and surrounding alleys, and because Complainant did not establish by a preponderance of the evidence that the reindeer were housed within the E71 premises.

5. Factoring in the severity of the violations, as well as the other statutory factors, I assess a civil penalty of \$20,000 for the violation of the FPP's provisions. However, I direct that the civil penalty be collected by deducting it from the indemnity funds that are being held by Complainant for the E71 depopulation.

#### **Order**

Respondents have committed violations of the Animal Health Protection Act. Respondents are assessed a civil penalty of \$20,000 which is to be offset from the indemnity funds owed to Respondents by APHIS.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

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**In re: HOWARD OVERHOLT.**  
**A.Q. Docket 08-0120.**  
**Decision and Order.**  
**Filed June 5, 2009.**

**AQ – Slaughter horse transportation – Unnecessary harm, stress, protection from.**

Thomas Neil Bolick for APHIS.  
Respondent, Pro se.  
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

I find that Respondent, Howard Overholt, committed four very serious violations of the Commercial Transportation of Equine for Slaughter Act along with two moderate violations of the Act. I also find that Respondent committed paperwork violations regarding many loads of horses and I am imposing civil penalties in the amount of \$19,500 for these violations.

This administrative proceeding was instituted by the Complaint filed on May 16th, 2008, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, hereinafter APHIS, for Complainant.

The Complainant alleged that the Respondent violated the Commercial Transportation of Equine for Slaughter Act, 7 USC, Section 1901 Note (the Act) which is how I will refer to it generally and the regulations promulgated thereunder 9 CFR Section 88.

It's important to point out that 9 CFR 88.6(a) authorizes the Secretary of Agriculture to assess civil penalties up to \$5,000 per violation or any violations of the regulation in this part.

9 CFR 88.6(b) states that each equine transported in violation of the regulation of this part will be considered a separate violation.

In the Complaint civil penalties authorized by Section 903(c)(3) of the Act, 7 USC 1901 Note and 9 CFR 88.6 and 88.6.

I conducted an Oral Hearing beginning June 4th, 2009, via audio/visual telephone links and teleconference links between the U.S. Attorney's Office in Lansing, Michigan, the U.S. Attorney's Office in Central Islip, New York, and USDA Headquarters in Washington, D.C.,

and on June 4th as I already stated.

Complainant was represented by Thomas Neil Bolick, Esq., Office of the General Counsel, USDA, Washington, D.C. 20250, and Respondent did not appear at the hearing. Complainant presented six witnesses and introduced approximately 88 exhibits.

The Complaint alleged that between early October 2004 to mid-July 2005, Respondent commercially transported 18 shipments of horses to slaughter in the course of which he committed approximately 23 violations of the Act and its accompanying regulations.

Specifically, the Complaint alleged that on three occasions the Respondent failed to handle horses as carefully and expeditiously as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma during commercial transportation to slaughter in violation of 9 CFR Section 88.4(c).

On another occasion, Respondent also either failed to obtain immediate veterinary assistance from an equine veterinarian for a horse that was in obvious physical distress during commercial transportation to slaughter or failed to notify the nearest APHIS office about a horse that died in route in violation of 9 CFR Section 88.4(b)(2).

The Complaint also alleged that on two occasions Respondent or his drivers delivered horses to a horse slaughter plant outside of the plant's normal working hours and failure to remain at the plant until a USDA representative had inspected the horses or to return to the slaughter plant to meet the USDA representative upon his arrival in violation of 9 CFR Section 88.5(b).

Finally, the Complaint alleged that Respondent failed to prepare complete and accurate owner/shipper of certificates, Veterinary Services Form 10-13 for 17 shipments of horses being commercially transported for slaughter in violation of 9 CFR Section 88.4(a)(3).

Respondent filed an answer on June 19th, 2008. In his answer, Respondent stated that "he did not know he was not doing right" and asked why he had not been "informed the first time?"

He also stated that he has "stopped hauling horses" and "has not hauled horses for a long time."

The witness testimony and documentary photographic and videographic evidence presented at the hearing clearly establishes that the Respondent was the owner/shipper of all of the commercial

shipments of horses to slaughter that are listed in the Complaint.

The evidence clearly establishes that on three different occasions, Respondent or his driver failed to commercially transport dying, injured or blind horses to slaughter as carefully and expeditiously as possible in a manner that did not cause these horses unnecessary discomfort, stress, physical harm or trauma. It also clearly establishes that on another occasion Respondent or his driver was aware that a horse was in obvious physical distress during commercial transportation to slaughter and that this horse died during said transportation but Respondent or his driver failed to obtain veterinary assistance as soon as possible from an equine veterinarian or to notify the nearest APHIS office about the dead horse.

The evidence presented at the hearing further establishes that on two occasions Respondent or the driver delivered shipments of horses to a horse slaughter plant outside of normal business hours but did not remain at the plant until a USDA representative examined the horses or returned to the plant to meet with a USDA representative upon his arrival.

Finally, the evidence clearly establishes that Respondent routinely failed to prepare a complete and accurate owner/shipper certificate for each shipment of horses. Therefore, pursuant to Section 1.142(c) of the Rules of Practice applicable to this proceeding [7 CFR Section 1.142(c)] I make the following finds of fact and conclusions of law and issue the following order.

### **Findings of Fact**

1. Respondent, Howard Overholt, is a commercial slaughter horse buyer with a mailing address of 547 St. Joseph Road, Burr Oak, Michigan 49030.

2. On or about October 8, 2004, Respondent shipped 39 horses from Shipshewana, Indiana, to Beltex Corporation in Ft. Worth, Texas, hereinafter referred to as Beltex, for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13. The filling of the form was deficient in that the time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section

88.4(a)(3)(ix).

3. On or about October 27, 2004, Respondent shipped 38 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed in violation of 9 CFR 88.4(a)(3)(iv), and

(2) At the time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR 88.4(a)(3)(ix).

4. On or about October 30th, 2004, Respondent shipped 37 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiency.

The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

5. On or about November 2nd, 2004, Respondent shipped 36 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) The prefix for each horse's USDA back tag number was not recorded properly in violation of 9 CFR Section 88.4(a)(3)(vi), and

(2) The date on which the horses were loaded onto the conveyance was not listed properly in violation of 9 CFR Section 88.4(a)(3)(ix).

6. On or about November 3rd, 2004, Respondent shipped 88 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv), and

(2) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

7. On or about November 7, 2004, Respondent shipped 42 horse from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiency.

The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

8. On or about November 14th, 2004, Respondent shipped 43 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) The time when the horses were loaded onto the conveyance, it was listed in violation of 9 CFR Section 88.4(a)(3)(ix), and

(2) There was no statement that the horses had been rested, watered and fed for at least six consecutive hours prior to being loaded for the commercial transportation in violation of 9 CFR Section 88.4(a)(3)(x).

9 (a) On or about November 14th, 2004, Respondent shipped a second load of 38 horses from Shipshewana, Indiana, to Beltex for slaughter. One of the horses in the shipment with USDA back tag number USDA 0848 went down during transportation and it became apparent that it was in obvious physical distress and died on route to the slaughter plant. The Respondent and/or his driver did not obtain veterinary assistance as soon as possible from an equine veterinarian nor did they contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse in violation of 9 CFR Section 88.4(b)(2).

(b) On or about November 14th, 2004, Respondent shipped a second load of 38 horses from Shipshewana, Indiana, to Beltex for slaughter. One of the horses in shipment with USDA back tag number 0848 went down in transportation indicating it was in obvious distress and died in route to the slaughter plant. Respondent and/or his driver thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma in violation of 9 CFR Section 88.4(c).

10. On or about November 20th, 2004, Respondent shipped 37 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport

the horses and the license plate number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv).

(2) At the time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

11. On or about November 20th, 2004, Respondent shipped a second load of 39 horses from Shipshewana, Indiana to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv).

(2) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

12. On or about November 27th, 2004, Respondent shipped a load of 42 horses from Shipshewana, Indiana to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv).

(2) The time that the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

13. On or about November 27th, 2004, Respondent shipped a second load of 45 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill ut the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv).

(2) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR 88.4(a)(3)(ix).

14. On or about December 11th, 2004, Respondent shipped a load of 29 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-

13.

The form had the following deficiencies.

(1) There was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv).

(2) The boxes indicating the fitness of the horses that traveled at the time of loading were not checked off in violation of 9 CFR Section 88.4(a)(3)(vii).

(3) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

15(a) On or about June the 4th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipped certificate, VS Form 10-13.

The form had the following deficiencies.

(1) The form did not indicate the breed, type and/or sex of the horses, physical characteristics that could be used to identify those horses in violation of 9 CFR Section 88.4(a)(3)(v), and

(2) There was no statement that the horses had been rested, watered and fed for at least six consecutive hours prior to being loaded on the conveyance for removal in violation of 9 CFR Section 88.4(a)(3)(x).

(b) On or about June 4th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter. One of the horses in the shipment, a quarter horse mare with bag tag number USDA 3287 had a severe gash on top of its left hip that appeared to have occurred during loading, transit or unloading.

Respondent and/or his driver thus failed to handle this horse as expeditiously and careful as possible in a manner that they're not causing unnecessary discomfort, stress, physical harm or trauma in violation of 9 CFR Section 88.4

(c) On or about June 4th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter. Respondent and/or his driver did not remain at Beltex until the horses had been examined by a USDA representative or in the alternative had delivered the horses out of Beltex' normal business hours and left the slaughter facility but they did not return to Beltex to meet the USDA

representative upon his arrival in violation of 9 CFR Section 88.5(b).

16(a) On or about June 18th, 2005, Respondent shipped a load of 39 horses From Shipshewana, Indiana, to Beltex for slaughter. One of the horses in the shipment, USDA Bag Tag USDA 3287 was blind in both eyes. The Respondent shipped it with the other horses. Respondent and/or his driver -- best way to handle a blind horse is expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma in violation of 9 CFR Section 88.4(c).

(b) On or about June 18th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter. Respondent, and/or his driver did not remain at Beltex until the horses had been examined by a USDA representative or in the alternative they delivered the horses outside of Beltex' normal business hours and left the slaughter facility, but they did not return to Beltex to meet the USDA representative upon his arrival in violation of 9 CFR Section 88.5(b).

17. On or about July 15th, 2005, Respondent shipped a load of 45 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipper certificate, VS Form 10-13.

The form had the following deficiencies.

The form did not indicate the breed type and/or sex of a horse bearing USDA Bag Tag No. 3766. Physical characteristics that could be used to identify that horse in violation of 9 CFR Section 88.4(a)(3)(v).

### **Discussion**

1(a) The most serious violations.

Complainant seeks the imposition of two \$5,000 penalties with respect to the November 14th, 2004, loading and shipment of the clearly distressed mare who laid down at the time of loading, was urged to stand and was loaded onto the conveyance and who laid down again in route and who eventually died before arriving at Beltex.

Dr. Timothy Cordes, DVM, the national coordinator of equine programs at USDA convincingly testified that an adult horse that lays down is a sick horse and that the horse never should have been loaded under the Act and the regulations.

Dr. Cordes also stated that the failure of the driver to contact the

equine veterinarian or the nearest APHIS office as soon as possible after the distressed horse died, was also in violation.

While I have previously found in the William Richardson case that only one civil penalty can be imposed for violations committed in regard to a single horse. The Judicial Officer rules that multiple violations can be assessed.

Accordingly, I find that by loading a horse in obvious physical distress and transporting that horse, the Respondent violated the provisions of 9 CFR Section 88.4(c) by failing to transport this horse to slaughter as carefully and expeditiously as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma. This is one of the most significant violations that can occur under the Act and I impose the maximum penalty of \$5,000.

The failure to take proper action upon the death of the mare is also significant but clearly involves less harm since the damage has already been done. I impose a penalty of \$2,500 for the failure to contact a veterinarian or the nearest APHIS office after the mare died.

(b) A serious violation also occurred on June 4th, 2005, with respect to commercial transportation of a horse which arrived at Beltex with a severe gash on its left hip.

Joseph Astling who was an animal health technician at the time of the incident photographed the wound and testified as to its severity. He believed the wound must have been caused by contact with a sharp overhanging object in transit such as would be likely found in a trailer such as the one used to transport this horse.

Dr. Cordes fully concurred with Mr. Astling's conclusions based on his examination of the photographs. Because this is a clear and serious violation of the requirement that a horse be transported to slaughter as carefully and expeditiously as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, but does not involve the degree of knowledge present in the previously discussed violation, I impose a \$3,000 civil penalty.

(c) A serious violation also occurred on June 18th, 2005, where Respondent transported a horse blind in both eyes. Video evidence was introduced, CX 82, Complaint's Exhibit 82, that establishes the fact that the horse in question with the Bag Tag No. USDA 3357 was, in fact,

blind.

The horse when not led bumped into the stall or another horse, had facial scars indicating a history of bumping into objects due to blindness.

Dr. Cordes was able to demonstrate through examination of the video evidence that this horse had impairments to the extent that it could not see. While there was no evidence that this horse was harmed in transit, the regulations require that a horse in order to be fit for transport must not be blind in both eyes. 9 CFR 88.4(a)(3)(vii). And by definition shipping it with other horses violated the prohibitions of 9 CFR 88.4(c).

In addition, a horseman with Respondent's 30 years experience could not help but notice that this horse was blind.

I impose a civil penalty of \$4,000 for this violation.

2. The moderately serious violations.

Complainant also seeks to impose a \$500 penalty for each of the two instances where Respondent or his driver dropped off horse outside normal working hours and the driver did not either remain at the facility or return to meet with AHT Astling as per 9 CFR 88.5(b).

I note that the two dates cited for these violations, June 4th, 2005, and June 18th, 2005, are the same days that the injured and blind horses were delivered to Beltex. This indicates to me in the absence of any evidence to the contrary, that respondent knew the status of these two horses and directed the driver to leave the premises to avoid contact with AHT Astling.

I find Respondent more culpable to these violations than Complainant's suggested penalty would warrant and I impose a \$1,500 penalty for each of these two violations.

3. The paperwork violations.

Finally, I impose a \$2,000 penalty for the combined paperwork violations.

While I did not believe it a violation to omit the full address or phone number of Beltex when that facility was clearly identified, properly filling out the other information required in the VS 10-13 is pivotal to the successful operation of this program.

### **Conclusions of Law**

1. Respondent, Howard Overholt, was the owner/shipped of each shipment of horses that are the subject of the Complaint in this matter.
2. Respondent has violated the Commercial Transportation of Equine to Slaughter Act by committing the violations described above.
3. A civil penalty totaling \$19,500 is appropriate for these violations.

### **ORDER**

Respondent, Howard Overholt, is assessed a civil penalty of \$19,500.

Respondent shall send a certified check or money order for \$19,500 payable to the Treasurer of the United States to the United States Department of Agriculture, APHIS, Accounts Receivable, P.O. Box 3334, Minneapolis, Minnesota 55403, within 30 days of the effective date of this order. Certified check or money order should include the Docket Number of this proceeding.

This Order shall be final and effective 30 days after the date of service of this Order on Respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice, 7 CFR Section 1.145.

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## ANIMAL WELFARE ACT

## COURT DECISIONS

**LANCELOT KOLLMAN RAMOS v. USDA.**

**No. 08-10236.**

**Filed April 7, 2009.**

**[Cite as: 322 Fed.Appx. 814 (C.A.11)].**

**AWA- Default – Failure to answer – Admission to complaint – Fairness.**

**United States Court of Appeals  
Eleventh Circuit**

Court affirmed the Judicial Officer's (JO) Decision and Order, finding that he did not err in concluding that Petitioner failed to admit or deny any material allegations in the complaint and was thus deemed to have admitted all allegations and that the JO did not abuse his discretion by revoking Petitioner's AWA license on a finding of willfulness. By failing to answer all material allegations on the complaint, Petitioner admitted to all allegations, including that Petitioner's conduct was willful. The Court also found that the Judicial Officer's Decision and Order did not violate fundamental principles of fairness as embodied in the Fifth Amendment of the United States Constitution, the Administrative Procedures Act, the Animal Welfare Act, and the USDA's rules.

**Judge COHILL, District Judge** delivered the opinion of the court.

**Opinion of the Court**

Pending before this Court is a "Petition for Review" filed by former pro se Petitioner Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman ("Kollman"). Kollman seeks to have this court review and set aside a Decision and Order of a U.S. Department of Agriculture ("USDA") Judicial Officer rendered on October 2, 2007. He seeks remand of the matter for a full hearing on a Complaint filed against him and others for violations of the Animal Welfare Act (the "AWA"), as amended, 7 U.S.C. §§ 2131-2159, and the regulations and standards

issued under the AWA, 9 C.F.R. § § 1.1 et seq. (the “Regulations” and “Standards”). Congress enacted the AWA to ensure that animals intended for use in research facilities, for exhibition or for use as pets “are provided humane care and treatment.” 7 U.S.C. § 2131. This Court has jurisdiction over the Petition pursuant to 28 U.S.C. §§ 2341-2350. For the reasons set forth below, we affirm the Judicial Officer's October 2, 2007 Decision and Order.

## I. BACKGROUND

This case was initiated on April 26, 2005, when an Administrator with the Animal and Plant Health Inspection Service of the United States Department of Agriculture (the “Administrator”) instituted a disciplinary administrative proceeding against Kollman, his father, Manuel Ramos, another individual named Peter Octave Caron (“Caron”), and a corporation, Octagon Sequence of Eight, Inc. (“Octagon”) by filing a Complaint with the Secretary of Agriculture. Only Kollman remains in this case. Caron died; Manuel Ramos never responded, and a default decision was entered against him; Octagon timely answered and the proceedings against it eventually settled in April 2008.

In the Complaint, the Administrator alleged that Kollman willfully violated the AWA, the Regulations, and the Standards. More specifically, the Complaint alleged that Kollman had a small business; the gravity of his violations of the AWA, the Regulations, and the Standards was great; he knowingly operated as a dealer without a valid license; he caused injuries to two lions that resulted in the death of one of them, and he lied to investigators about his actions. Complaint, ¶ 6. The Complaint further alleged that between May 10, 2001 and the date of the filing of the proceeding against him, April 29, 2005, Kollman knowingly failed to obey a cease and desist order issued by the Secretary of Agriculture pursuant to section 2149(b) of the AWA, in *In re Lancelot Kollman, aka Lance Ramos, respondent*, 60 Agric. Dec. 190, AWA Docket No. 01-0012, which specifically provided that: “[r]espondent, his agents and employees, successors and assigns, directly or through any corporate device, shall cease and desist from violating the Act and the Regulations and Standards.” *Id.* at ¶ 8. The

Complaint also alleged that on or about September 13, 2000, Kollman operated as a dealer, as that term is defined in the AWA and the Regulations, “by delivering for transportation, or transporting, two lions for exhibition, without having a valid license to do so, in willful violation of sections 2.1, 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1, 2.10(c), 2.100(a).” Id. at ¶ 9. The Complaint next alleged that on or about September 13, 2000, Kollman engaged in specified conduct which constituted willful violation of section 2.40 of the Regulations, which governs the provision of veterinary care to animals. Id. at ¶ 10. The Complaint then charged that on or about December 13, 2000, Kollman engaged in specified conduct which constituted willful violation of section 2.131(a)(1) and (a)(2)(I) of the Regulations. Id. at ¶¶ 12-16. Finally, the Complaint sought to have Kollman ordered to cease and desist from violating the Act and the Regulations and Standards issued thereunder, be assessed civil penalties, and have his license revoked or suspended. Id.

On May 2, 2005, a hearing clerk from the Office of Administrative Law Judges sent to Kollman by certified mail, return receipt requested, a copy of the Complaint, the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (the “Rules of Practice”), 7 C.F.R. §§ 1.130.151, and a letter which stated in pertinent part:

[a]lso enclosed is a copy of the Rules of Practice, which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments, which follow, are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance on your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint.

Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the

material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

(emphasis in original).

Kollman received the Complaint, the Rules of Practice, and the service letter on July 5, 2005. Within the twenty days, he filed a response, dated July 15, 2005, which the USDA received on July 22, 2005. The response stated in pertinent part:

I Lancelot Ramos Kollman am responding to a complaint In re: OCTAGON SEQUENCE OF EIGHT, INC., a Florida corporation doing bussiness [sic] as OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; PETER OCTAVE CARON an individual; LANCELOT KOLLMAN an individual and MANUEL RAMOS an individual: AWA DOCKET # 05-0016.

I Lancelot Kollman as a individual am to [sic] requesting an oral hearing of this complaint. Please send any and all responses to this address....

Thus, he requested a hearing but did not offer any denial or defense. On July 25, 2005, Kollman received a letter from a hearing clerk at the Office of Administrative Law Judges. The letter stated:

Respondents Answer has been received and filed on July 22, 2005, in the above-captioned proceeding.

You will be informed of any future action taken in this matter.

Thereafter, the case lay dormant for almost two years. On April 12, 2007, the Administrator filed a “Motion for Adoption of Proposed Decision and Order as to Lancelot Ramos by Reason of Admission of Facts” (the “Motion for Default Decision”) along with a “Proposed Decision and Order as to Lancelot Kollman Ramos by Reason of Admission of Facts” (the “Proposed Default Decision”). A hearing clerk from the Office of Administrative Law Judges then sent Kollman a letter, dated April 12, 2007, stating that she had enclosed copies of the Motion for Default Decision and the Proposed Default Decision and that “[i]n accordance with the applicable Rules of Practice, you will have 20

days from the receipt of this letter in which to file with this office an original and three copies of objections to the Motion for Decision.” Kollman received this correspondence on April 18, 2007.

On May 9, 2007, twenty-one days after April 18, 2007, a hearing clerk from the Office of Administrative Law Judges sent Kollman a letter. The letter stated:

[a]n objection to Complainant's Motion has not been received within the allotted time.

In accordance with the applicable Rules of Practice, the file is being referred to the Administrative Law Judge for consideration and decision.

On that same day, May 9, 2007, the Administrative Law Judge (the “ALJ”) issued his “Default Decision and Order as to Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman” (the “Default Decision”). In the Default Decision, the ALJ concluded, inter alia, that Kollman had violated various provisions of the Regulations as alleged in the Complaint and that these violations had been willful. The ALJ then ordered Kollman to cease and desist from violating the AWA and the Regulations and Standards, revoked Kollman's AWA license, and assessed a “civil penalty” of \$43,500 against him. The ALJ did not explain how he arrived at the \$43,500 penalty.

The Default Decision was mailed to Kollman on May 9, 2007, along with a letter that stated in part that Kollman had “30 days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.” Kollman received the Default Decision on May 16, 2007.

On May 11, 2007, three days late and after the Default Decision had been mailed to Kollman, the Office of Administrative Law Judges received a letter from Kollman dated April 27, 2007, which stated: “I Lancelot Kollman hereby deny all charges and request a hearing on the allegations mentioned in the motion for adoption of proposed decision.”

On June 6, 2007, the Office of Administrative Law Judges received another letter from Kollman, this time concerning the Default Decision. In the letter Kollman stated:

I am in receipt of your response to my denial of charges/ Judges Orders.

I continue to deny all the charges and have documentation that proves I am not guilty of the charges stated.

I hereby request to appeal the decision and request an oral hearing with a judge where I can present evidence.

The letter instructs me to refer to 7C.F.R.1.145. Where can I find this information?

If this letter is not sufficient to request an oral hearing and file an appeal, Please send information as how to do so.

On July 2, 2007, the Office of Administrative Law Judges received another letter from Kollman, dated June 26, 2007. The Office of Administrative Law Judges treated this letter as a Request for a Hearing and forwarded it to the Judicial Officer assigned to the case. On July 9, 2007, the Judicial Officer entered an Informal Order wherein he determined that: (1) Kollman's June 6, 2007 "request to appeal" letter constituted a request for an extension of time within which to file an appeal petition, (2) Kollman's request was granted up to and including July 2, 2007; and (3) Kollman's June 26, 2007 letter, filed on July 2, 2007, constituted a timely filed appeal petition.

On July 30, 2007, Kollman, now represented by counsel, filed a "Motion to Set Aside Default Decision and Order as to Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman" ("Motion to Set Aside Default Decision and Order").

On October 2, 2007, the Judicial Officer filed a "Decision and Order as to Lancelot Kollman Ramos" ("the Decision and Order"). Relevant to the instant appeal, the Judicial Officer found as follows. First, he found that in Kollman's July 22, 2005 response, Kollman requested an oral hearing, but failed to deny or otherwise respond to any of the allegations in the Complaint filed against him. Therefore, the Judicial Officer concluded, pursuant to section 1.136(c) of the Rules of Practice, 7 C.F.R. § 1.136(c), Kollman was deemed to have admitted the allegations in the Complaint.

The Judicial Officer further found that Kollman failed to file objections to the Administrator's Motion for Default Decision and Proposed Default Decision by May 8, 2007, as required under section 1.139 of the Rules of Practice.

He also concluded that the July 30, 2007 “Motion to Set Aside Default Decision and Order” filing was an appeal petition, that pursuant to section 1.145(a) of the Rules of Practice a party may only file a single appeal petition, that Kollman did not request the opportunity to supplement or amend his July 2, 2007 appeal petition, and that the second appeal petition was filed 28 days after the expiration of the time for filing his appeal petition. On the basis of these conclusions, the Judicial Officer struck the July 30, 2007 “Motion to Set Aside Default Decision and Order” from the record and did not address any issues raised in the Motion.

The Judicial Officer also determined that Kollman's AWA license was to be revoked and assessed Kollman a civil penalty of \$13,750 (as opposed to the \$43,500 penalty previously imposed by the ALJ). For purposes of determining this penalty, the Judicial Officer considered, as required by 7 U.S.C. § 2149(b): (1) the size of Kollman's business; (2) the gravity of Kollman's violations; (3) Kollman's good faith; and (4) Kollman's history of previous violations. The Judicial Officer concluded: (1) Kollman operated a small business; (2) the gravity of Kollman's violations, operating as a dealer without an Animal Welfare license and causing injuries to two lions with one of the lions dying, was great; and (3) based upon Kollman having been a respondent in one previous Animal Welfare enforcement case, that Kollman lacked good faith and had a history of previous violations. Based upon his finding that Kollman was deemed to have admitted five violations of the Regulations and Standards and that Kollman could be assessed a maximum civil penalty of \$2,750 for each of his five violations of the Regulations and Standards, the Judicial Officer determined Kollman's civil penalty to be \$13,750.

On November 15, 2007, Kollman filed a Motion for Rehearing on the Default Decision, which the Judicial Officer treated as a Petition for Rehearing. On December 17, 2007, after consideration of the merits of the Petition for Rehearing, the Judicial Officer denied the Petition.

## II. STANDARD OF REVIEW

Under the Administrative Procedures Act, we must set aside any agency action that is found to be arbitrary, capricious, an abuse of

discretion, in excess of statutory authority, or without observance of procedure as required by law, or is contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2). “Under this standard, we give deference to a final agency decision by reviewing for clear error, and we cannot substitute our own judgment for that of the agency.” *Sierra Club v. Johnson*, 436 F.3d 1269, 1273 (11th Cir.2006), citing, *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir.2002) (internal citation omitted). Furthermore:

[a]lthough the standard of review applied to final agency decisions is deferential, the matter is a little more complicated than that. Under the arbitrary and capricious standard, we must consider whether an agency's decision “was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir.1996) (quotation marks omitted). “This inquiry must be searching and careful, but the ultimate standard of review is a narrow one.” *Id.* (quotation marks omitted).  
*Sierra Club*, 436 F.3d at 1273-74.

### III. DISCUSSION

Preliminarily, Kollman raised two arguments on appeal that we find were not properly raised before the Judicial Officer, and were therefore waived. See *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (“[s]imple fairness ... requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”); *McConnell v. U.S. Dept. of Agriculture*, 198 Fed.Appx. 417, 424-25 (6th Cir.2006), citing, 7 C.F.R. § 1.145(a) (appellate court refused to consider due process arguments raised by appellants because they had failed to exhaust these arguments by presenting them to the Judicial Officer on administrative appeal); *Excel Corp. v. U.S. Dept. of Agriculture*, 397 F.3d 1285, 1296-97 (10th Cir.2005) (holding arguments waived on appeal from Judicial Officer's opinion where there was no indication in the record on appeal that the arguments had been presented to the

Judicial Officer). The first of the waived arguments is that the Judicial Officer abused his discretion, committed reversible error, and violated Kollman's due process rights when he failed to accept Kollman's April 27, 2007 letter either as an objection to the proposed default decision or as a timely filed amended answer. Second, Kollman argues that the Judicial Officer abused his discretion, committed reversible error, and violated Kollman's due process rights when he assessed a civil penalty against Kollman based in part on his determination that a May 2001 consent order entered into by Kollman established that Kollman lacked good faith and had a history of previous violations. Kollman argues that since the consent order was not in existence in September and December 2000, the time the events relevant to the Complaint took place, he could not be found to have violated it.

With respect to Kollman's argument concerning the monetary penalty issued against him, we specifically find, contrary to Kollman's contention, that Kollman did not properly raise this issue before the Judicial Officer when he stated in his June 26, 2007 letter “[s]o I ask please consider this I never willfully acted on what I am accused of.” Moreover, with respect to Kollman's arguments about the April 27, 2007 letter, had we reviewed the issue on the merits, we would have found no error on the part of the Judicial Officer in his treatment of the letter; the letter was filed after the ALJ's Default Decision and Order had been issued and nothing in the letter established good cause for allowing an amendment of the answer as required by section 1.137(a) of the Rules of Practice, 7 C.F.R. § 1.137(a).

We now address three issues raised by Kollman on appeal: (1) whether the USDA reversibly erred in finding that Kollman defaulted and thereby admitted the allegations against him when in July 2005 he timely responded to the Administrator's Complaint and requested a hearing; (2) whether the Judicial Officer abused his discretion in striking and refusing to consider Kollman's motion to set aside default; and (3) whether the Judicial Officer abused his discretion in revoking Kollman's AWA license.<sup>1</sup> Underscoring all of these arguments is Kollman's contention that these actions by the agency violated principles of

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<sup>1</sup>We find any remaining arguments by Kollman lack significant merit and therefore, further discussion of the arguments is not needed.

fundamental fairness embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the AWA, and the USDA's own rules.

We turn first to the argument that since Kollman was acting pro se at the time he filed his July 22, 2005 letter, the ALJ should have construed the letter liberally and read it as Kollman denying the material allegations of the Complaint filed against him. It is well established that pro se pleadings are to be liberally construed. See *Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir.2006).

Section 1.136 of the Rules of Practice, a copy of which was provided to Kollman, states in pertinent part:

§ 1.136 Answer.

(a) Filing and service. Within 20 days after the service of the complaint (within 10 days in a proceeding under section 4(d) of the Perishable Agricultural Commodities Act, 1930), or such other time as may be specified therein, the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding....

(b) Contents. The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) Default. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

7 C.F.R. § 1.136. At the time Kollman was served with the Complaint,

a letter accompanied it explicitly explaining to Kollman that while “[y]our answer may include a request for an oral hearing,” the “[f]ailure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.”

Even construing Kollman's letter liberally, the contents of his July 22, 2005 letter simply do not equate to a denial or other response to any of the allegations against him in the Complaint. Therefore, the USDA did not err when it concluded, pursuant to Rule of Practice 1.136(c), 7 C.F.R. § 1.136(c), that Kollman failed to deny or otherwise respond to any of the material allegations of the Complaint and thus was deemed to have admitted all those allegations.

We turn next to the argument that the Judicial Officer abused his discretion when he struck and refused to consider the “Motion to Set Aside Default Decision and Order” filed by Kollman's attorney on July 30, 2007. More specifically, Kollman's argument is that the Judicial Officer erred with respect to his treatment of Kollman's Motion to Set Aside Default Decision and Order since the USDA did not suffer any prejudice as a result of Kollman's procedural errors, the stakes involved (revocation of Kollman's license and a substantial monetary fine) were high, and Kollman's defenses were meritorious. What the Judicial Officer should have done, Kollman contends, is to have treated the Motion either: (1) as a supplement or amendment to his July 2, 2007 appeal petition, or (2) as a separate petition to reopen the proceedings pursuant to Rule 1.146(a)(2) of the Rules of Practice. In support of his position that the Judicial Officer should have treated the Motion to Set Aside Default Decision and Order as a motion to reopen the proceedings pursuant to Rule of Practice 1.146(a)(2), Kollman relies on the court's decision in *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C.Cir.1987).

We conclude that the Judicial Officer did not abuse his discretion when he failed to treat the Motion to Set Aside Default Decision and Order either as a supplement or amendment to his July 2, 2007 appeal petition. First, the Judicial Officer had already ruled that Kollman's June 26, 2007 letter was his appeal petition and section 1.145(a) of the Rules of Practice, 7 C.F.R. § 1.145(a), only allows for the filing of “an appeal petition,” i.e. one appeal petition. Second, the Motion to Set Aside

Default Decision and Order was filed twenty-eight days after the expiration of the already extended date for filing an appeal petition. Finally, and perhaps most importantly, counsel never requested that the motion be treated as either a supplement or amendment to Kollman's appeal petition. Indeed, counsel basically ignored the fact that the Judicial Officer had already ruled that the June 26, 2007 letter was an appeal petition, attaching the June 26, 2007 letter to the Motion to Set Aside Default Decision and Order as Kollman's proposed Answer to the Complaint.

We also conclude that the Judicial Officer did not abuse his discretion when he failed to treat the Motion to Set Aside Default Decision and Order as a separate petition to reopen the proceedings pursuant to Rule 1.146(a)(2). Rule of Practice 1.146(a)(2) is entitled “[p]etition to reopen hearing” and states:

[a] petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Neither the title of Kollman's document nor, more importantly, its contents would have put the Judicial Officer on notice that the Motion to Set Aside Default Decision and Order was, in fact, a request that the proceedings be reopened pursuant to Rule of Practice 1.146(a)(2).

Moreover, even if the Judicial Officer had erred in failing to consider that motion as a motion to reopen the proceedings pursuant to Rule of Practice 1.146(a)(2), we conclude the error was harmless and did not violate Kollman's due process rights. A request to reopen proceedings pursuant to Rule of Practice 1.146(a)(2) “shall set forth a good reason why such evidence was not adduced at the hearing.” 7 C.F.R. § 1.146(a)(2). Here, none of the evidence attached to the Motion to Set

Aside Default Decision and Order was new evidence<sup>2</sup> and Kollman's Motion did not set forth a “good reason why such evidence was not adduced” earlier in the proceedings. Instead, Kollman simply stated “[t]hat this motion is brought upon the basis of excusable neglect and several meritorious defenses to the Complaint herein.” Motion to Set Aside Default Decision and Order, ¶ 5.

Presumably the basis of excusable neglect was that Kollman had originally been pro se, a fact which we find does not constitute a “good reason” for a late filing. See *Veg-Mix, Inc.*, 832 F.2d at 609 (holding that one of the requirements for allowing a proceeding to be reopened under Rule of Practice 1.146(a)(2) is that the party give a good reason for the late filing).

Next we address Kollman's argument that the Judicial Officer abused his discretion when he revoked Kollman's AWA license. Kollman argues that even if deemed admitted, the allegations in the Complaint did not support a finding of “willfulness” as required under 5 U.S.C. § 558(c) and therefore, he was entitled to notice and an opportunity to achieve compliance before his license could be revoked. Notably, the USDA argued that Kollman waived this argument by failing to present it to the Judicial Officer. Liberally construing Kollman's June 26, 2007 letter, which was filed while Kollman was pro se and which was treated by the Judicial Officer as an appeal of the ALJ's Decision, we find that the letter can be read to have raised the argument before the Judicial Officer that Kollman's conduct with respect to the lions and his acting as a dealer without a license was not willful and so he should not have had his license revoked. See June 26, 2007 letter (“[s]o I ask please consider this I never willfully acted on what I am accused of.”).

5 U.S.C. § 558(c) provides in relevant part:

[e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension,

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<sup>2</sup>The exhibits attached to the Motion to Set Aside Default Decision were as follows: (1) Exhibit A-the paperwork transferring the two lions dated September 19, 2000; (2) Exhibit B -Kollman's Application to USDA for license dated January 6, 2006; (3) Exhibit C-January 18, 2006 letter from USDA to Kollman approving him for a license under the AWA; and (4) Exhibit D-Kollman's June 26, 2007 letter to ALJ Davenport which was treated by the Judicial Officer as Kollman's Appeal Petition.

revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given-

- (1) notice by the Agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

*Id.* A violation is willful under this subsection “ ‘if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.’” *Coosemans Specialties, Inc. v. U.S. Dept. of Agriculture*, 482 F.3d 560, 567(D.C.Cir.), cert. denied, 128 S.Ct. 628, 169 L.Ed.2d 394 (2007), quoting, *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 778 (D.C.Cir.1983); *Potato Sales Co., Inc. v. U.S. Dept. of Agriculture*, 92 F.3d 800, 805 (9th Cir.1996) (same). For a revocation of license to be authorized, only one of the violations need be willful; the government need not show that all of the violations were willful. *Cox v. U.S. Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991).

The Judicial Officer found, by virtue of Kollman's failure to answer or otherwise respond to the Complaint as required under the Rules of Practice, that Kollman had admitted all of the material allegations in the Complaint, including that his relevant conduct was willful. We have already concluded that this finding by the Judicial Officer was correct. Accordingly, the Judicial Officer did not err when he found Kollman's various violations of the Standards and Regulations were willful and revoked Kollman's license without giving him an opportunity to cure.

Finally, we acknowledge Kollman's citations to cases wherein default decisions issued by the USDA and other administrative agencies were vacated on appeal based upon judicial determination that under the facts of those cases the default decisions were fundamentally unfair.

In support of his fundamental unfairness argument, Kollman cites primarily to *Oberstar v. FDIC*, 987 F.2d 494, 504 (8th Cir.1993) and *Lion Raisins, Inc. v. U.S. Dept. Agric.*, Case No. CV-F-04-5844 (E.D.Ca. May 12, 2005). These decisions, however, are distinguishable. First, the cases were in completely different procedural postures than the instant case. The default decision at issue in *Oberstar* came after the

parties had already litigated substantive issues in a related case, and were awaiting an appellate ruling. The default decision in Lion Raisins came after a substantive motion to dismiss had been filed and the case involved parties with whom a second action was already pending and was being vigorously defended by Lion Raisins. Indeed, in both cases the courts emphasized their displeasure with the agencies' attempt to "end run" around the merits of the case with procedural maneuvers. This simply was not the posture of the instant case, where the case sat idle with respect to Kollman for almost two years until the ALJ jump-started it with a sua sponte motion to show cause why the complaint should not be dismissed and stricken from the docket for failure to take further action in the case.

Second, in both Oberstar and Lion Raisins, the courts emphasized that good cause had been shown for the late filing of the respondents' answers such that the rendering of the default decision was unfair. In contrast, Kollman did not establish good cause for the insufficiency of his response to the Complaint which included neither denials nor defenses even after he had been given explicit directions as to how to respond to the complaint and the consequences of a failure to follow said directions. Nor did Kollman provide good cause for his failure to timely proffer evidence in an attempt to demonstrate his innocence of the charges.

The bottom line is that inquiry in these types of cases is fact intensive. Upon review of the overall fairness of the proceedings in this case, the Judicial Officer's Decision and Order did not violate the principles of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the AWA, and the USDA's own rules.

Although we affirm the decision of the Judicial Officer, we must say that the actions of the agency were not above reproach. In fact, they were virtually glacial and hardly represent "best practice" by a government agency. The Complaint was not filed until April 29, 2005, approximately five years after the alleged violations pertaining to the two lions. Kollman filed his response to the Complaint on July 22, 2005. Thereafter, no action was taken by the agency with respect to Kollman until March 1, 2007 when it was presented with a February 1, 2007 sua sponte order from the ALJ. The order commanded the Agency to show

cause why the action should not be dismissed and stricken from the docket for failure to take further action in the case. Only then did this case begin to move along the judicial path, with the Decision and Order finally filed by the Judicial Officer on October 2, 2007, more than seven years after the conduct related to the two lions occurred.

#### IV. CONCLUSION

For the foregoing reasons, we affirm the Judicial Officer's October 2, 2007 Decision and Order.

AFFIRMED.

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**BROCK v. USDA.**  
**No. 08-60247.**  
**Filed June 24, 2009.**

[Cite as: 335 Fed.Appx. 436.]

AWA – Transfer/movement of animals – Dealers.

**United States Court of Appeals,  
Fifth Circuit.**

Before JOLLY, SMITH, and BENAVIDES, Circuit Judges.

#### **Opinion**

PER CURIAM:\*

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\*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

A judicial officer of the United States Department of Agriculture determined that the petitioners, Robert and Michelle Brock, had violated the Animal Welfare Act by acting as dealers of animals without being licensed to do so. The Brocks petition for review.

We have examined all of the submissions, including post-submission letter briefs that the attorneys were permitted to file.<sup>1</sup> We also have consulted pertinent parts of the record and the applicable law.

The decision of the judicial officer is sound. There is substantial evidence on all the elements needed for a finding of violation, including, *inter alia*, that the Brocks took part in the transfer of the subject animals; that the transfer was for compensation or profit; and that the Brocks were “dealers.” The claim that the transactions had no effect on interstate commerce is without merit even if it was not waived.

Because there is no error of fact or law, the petition for review is DENIED.

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<sup>1</sup>Despite his diligent efforts to make alternate travel arrangements after experiencing airline and weather delays that were well beyond his control, petitioners' counsel was unable to appear for oral argument. We permitted both sides to submit letter briefs after the scheduled argument date, particularly to allow the absent attorney to supplement his other submissions. Especially given the steep standard of review, this is not a close case, and the petitioners were not prejudiced by the inability of their counsel to present oral argument.

**ANIMAL WELFARE ACT**  
**DEPARTMENTAL DECISIONS**

**In re: AMARILLO WILDLIFE REFUGE, INC., A TEXAS NON-PROFIT CORPORATION.**

**AWA Docket No. 07-0077.**

**Decision and Order.**

**Filed January 6, 2009.**

**AWA – License termination – License disqualification – Endangered Species Act – Sanction policy.**

Bernadette Juarez for the Administrator, APHIS.

Respondent, Pro se.

Initial decision issued by Victor W. Palmer, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

Kevin Shea, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding on March 6, 2007, by filing an “Order to Show Cause as to Why Animal Welfare License 74-C-0486 Should Not Be Terminated” [hereinafter Order to Show Cause]. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges: (1) at all times material to the instant proceeding, Amarillo Wildlife Refuge, Inc. [hereinafter Amarillo Wildlife], operated as an “exhibitor” and a “dealer” as those terms are defined in the Animal Welfare Act and the Regulations; (2) at all times

material to the instant proceeding, Amarillo Wildlife held Animal Welfare Act license 74-C-0486; (3) at all times material to the instant proceeding, Carmel Azzopardi (also known as Charles Azzopardi) was the president, director, and agent of Amarillo Wildlife and managed, controlled, and directed Amarillo Wildlife's business activities; (4) on July 21, 2006, a United States Magistrate Judge convicted Carmel Azzopardi of selling and transporting in interstate commerce an endangered species of wildlife, on or about July 19, 2005, in violation of the Endangered Species Act (Order to Show Cause ¶¶ 1-2, 9). The Administrator seeks an order terminating Amarillo Wildlife's Animal Welfare Act license and disqualifying Amarillo Wildlife from obtaining an Animal Welfare Act license for 2 years (Order to Show Cause at 5).

On March 30, 2007, Carmel Azzopardi, on behalf of Amarillo Wildlife, requested an oral hearing. On April 2, 2007, Mr. Azzopardi, on behalf of Amarillo Wildlife, responded to the allegations in the Order to Show Cause: (1) admitting that Amarillo Wildlife holds Animal Welfare Act license 74-C-0486; (2) admitting that from 1995 through 2005 he was president, director, and agent of Amarillo Wildlife; (3) admitting that on July 21, 2006, he pled guilty to, and was convicted by a United States Magistrate Judge of, selling and transporting in interstate commerce an endangered species of wildlife, in violation of the Endangered Species Act; and (4) asserting mitigating circumstances that warrant denial of the Administrator's request for an order terminating Amarillo Wildlife's Animal Welfare Act license and disqualification of Amarillo Wildlife from obtaining an Animal Welfare Act license for 2 years.

On April 24, 2007, the Administrator filed "Complainant's Response to Respondent's Letter and Request for a Hearing," in which the Administrator argued that Amarillo Wildlife's request for a hearing should be denied because the license termination sought by the Administrator is based on Mr. Azzopardi's criminal conviction and there is no issue of material fact upon which to hold a hearing. Attached to Complainant's Response to Respondent's Letter and Request for a Hearing are: (1) a copy of the plea agreement executed by Mr. Azzopardi and the United States in which Mr. Azzopardi pled guilty to the Endangered Species Act, (2) a factual resume signed by Mr. Azzopardi and his attorney setting forth the facts relevant to

Mr. Azzopardi's violations of the Endangered Species Act, and (3) a judgment by United States Magistrate Judge Clinton E. Averitte finding Mr. Azzopardi guilty of violating the Endangered Species Act. The Deputy Clerk of the United States District Court for the Northern District of Texas certified that each of these documents is a "true copy of an instrument on file." In addition, the Administrator attached certified copies of Amarillo Wildlife's corporate documents obtained from the Texas Office of the Secretary of State, as well as Animal and Plant Health Inspection Service violation warnings and inspection reports.

On May 8, 2007, Administrative Law Judge Peter M. Davenport issued an order in which he denied Amarillo Wildlife's request for hearing and "granted leave to amend or supplement the pleadings to conform to the rules for the institution of proceedings, to provide documentation of compliance with 5 U.S.C. § 558 or in lieu thereof, authority for dispensing with the same, and any appropriate dispositive motion in this matter." (May 8, 2007, Order at 2.) On May 30, 2007, the Administrator responded explaining that a notice to show cause complies with the requirements of the Rules of Practice for initiating a proceeding (7 C.F.R. § 1.133(b)(1)) and arguing that the notice and opportunity to cure requirement of 5 U.S.C. § 558 is inapplicable because Mr. Azzopardi's violations of the Endangered Species Act were willful. Finally, the Administrator requested issuance of an order "allowing the case to proceed as filed."

On July 31, 2007, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an Order in which he found that the Administrator's May 30, 2007, response lacked clarity. The ALJ suggested that the Administrator file a dispositive motion clarifying his position.

It is uncertain whether APHIS desires that part of Judge Davenport's order denying [Mr. Azzopardi's] request for a hearing to be set aside in abandonment of the position it took in its response to Mr. Azzopardi's letter that a hearing is not needed. If APHIS is seeking instead to rely upon its position that an order

should be entered to terminate the license without a hearing, it has still not filed an appropriate dispositive motion.

Order at 3.

The ALJ then noted that “[s]uch a motion would be akin to a motion for summary judgment.” (Order at 3.) In response to the ALJ’s July 31, 2007, Order, the Administrator filed, on January 15, 2008, a motion for summary judgment with a Declaration by Robert M. Gibbens, DVM, Animal and Plant Health Inspection Service, Animal Care, Regional Director – Western Region, explaining why Mr. Azzopardi’s criminal conviction for violating the Endangered Species Act constitutes an appropriate cause for terminating the Animal Welfare Act license held by Amarillo Wildlife and disqualifying Amarillo Wildlife from obtaining a new Animal Welfare Act license for 2 years. Amarillo Wildlife requested and was granted an extension of time until March 18, 2008, to respond to the Administrator’s motion for summary judgment, and on March 21, 2008, Amarillo Wildlife filed its response.

On March 24, 2008, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which, based on Mr. Azzopardi’s criminal conviction, the ALJ terminated Amarillo Wildlife’s Animal Welfare Act license and disqualified Amarillo Wildlife and its directors, officers, agents, and any legal entity in which they have a substantial interest from obtaining an Animal Welfare Act license for a 2-year period.

On April 24, 2008, Amarillo Wildlife appealed the ALJ’s Initial Decision to the Judicial Officer, and on May 14, 2008, the Administrator filed a response to Amarillo Wildlife’s appeal petition. On May 16, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ’s Initial Decision granting the Administrator’s motion for summary judgment, terminating Amarillo Wildlife’s Animal Welfare Act license, and disqualifying Amarillo Wildlife and its directors, officers, and agents from obtaining an Animal Welfare Act license for 2 years.

## **DECISION**

### Discussion

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application for a license in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133). The power to require and issue licenses under the Animal Welfare Act includes the power to deny a license, to suspend or revoke a license, to disqualify a person from becoming licensed, and to withdraw a license.<sup>1</sup> The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide that an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines that the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

#### § 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

.....

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

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<sup>1</sup>In re Loreon Vigne, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

**§ 2131. Congressional statement of policy**

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

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

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

7 U.S.C. § 2131.

The Administrator has determined that allowing Amarillo Wildlife to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act (Order to Show Cause ¶ 12; Complainant's Mot. for Summary Judgment, Memorandum of Points and Authorities at 8-10). The record supports the conclusions that: (1) Amarillo

Wildlife is unfit to retain its Animal Welfare Act license, and (2) the Administrator's determination that allowing Amarillo Wildlife to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.

### **Findings of Fact**

1. Amarillo Wildlife is a Texas non-profit corporation (Answer at 1 ¶ 1).
2. Amarillo Wildlife is located at 4401 Reding Road, Amarillo, Texas 79108 (Answer at 1 ¶ 1).
3. Carmel Azzopardi, also known as Charles Azzopardi, resides at 4401 Reding Road, Amarillo, Texas 79108 (Answer at 1).
4. During the period 1995 through 2005, Carmel Azzopardi was the president, director, and agent of Amarillo Wildlife (Answer at 1 ¶ 3).
5. During the period 1995 through 2005, Carmel Azzopardi managed, controlled, and directed Amarillo Wildlife's business activities (Answer at 1 ¶ 3).
6. During the period 1995 through 2005, Carmel Azzopardi submitted annual renewal applications for Animal Welfare Act license 74-C-0486 on behalf of Amarillo Wildlife, and, at all times material to the instant proceeding, Amarillo Wildlife held Animal Welfare Act license 74-C-0486 (Answer at 1 ¶¶ 2, 4).
7. On or about January 18, 2006, Carmel Azzopardi was indicted in the United States District Court for the Northern District of Texas for knowingly and willfully offering for sale, selling, and transporting in interstate commerce an endangered species, in violation of the Endangered Species Act (Answer at 2 ¶ 6; Plea Agreement at 1 and Factual Resume filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006)).
8. In addition to the violations described in Finding of Fact number 6, on or about January 18, 2006, Carmel Azzopardi was indicted in the United States District Court for the Northern District of Texas for three felonies associated with improper paperwork (Answer at 2 ¶ 6).
9. On or about March 28, 2006, Carmel Azzopardi entered into a

plea agreement with the Assistant United States Attorney with respect to *United States v. Azzopardi*. In the plea agreement, Mr. Azzopardi pled guilty to violating the Endangered Species Act. The plea agreement was filed with the United States District Court for the Northern District of Texas on or about March 29, 2006. (Answer at 2 ¶ 7; Plea Agreement at 1 and Factual Resume filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006).)

10. On or about March 28, 2006, Carmel Azzopardi executed a factual resume in which he admitted that he knowingly and willfully offered for sale, sold, and transported in interstate commerce in the course of commercial activity an endangered species of wildlife, in violation of the Endangered Species Act. Carmel Azzopardi set forth the specific facts of his violations as follows and stated that the facts are true and correct:

On or about July 19, 2005, in the Amarillo Division of the Northern District of Texas, and elsewhere, Carmel Azzopardi, also known as Charlie Azzopardi, defendant, did knowingly and willfully offer for sale and sell in interstate commerce, and transport in interstate commerce from Amarillo, Texas, to Clinton, Oklahoma, in the course of commercial activity, two clouded leopards, an endangered species of wildlife. In violation of 16 U.S.C. §§ 1538(E)(F) and 1540(b)(1) and 50 C.F.R. 17.21(e)(f)(1).

On March 29, 2006, Mr. Azzopardi filed the factual resume with the United States District Court for the Northern District of Texas. (Answer at 2 ¶ 7; Factual Resume filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006).)

11. On or about July 16, 2006, United States Magistrate Judge Clinton E. Averitte adjudicated Carmel Azzopardi guilty of the sale and transport in interstate commerce of an endangered species of wildlife, in violation of the Endangered Species Act (Answer at 2 ¶ 9; Judgment in a Criminal Case filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006)).

12. At all times material to this proceeding, Carmel Azzopardi was the president, director, and agent of Amarillo Wildlife (Complainant's

Response to Respondent's Letter and Request for a Hearing Attach. B; Complainant's Motion for Summary Judgment Decl. of Robert M. Gibbens ¶¶ 11-14; Amarillo Wildlife's Appeal Pet. at 2 ¶ (2); Complainant's Response to Respondent's Appeal Pet. Attachs. F, G, I, J).

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Based on the Findings of Fact, I conclude the Administrator's determination that Amarillo Wildlife's retention of an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.
3. Based on the Findings of Fact, I conclude Amarillo Wildlife is unfit to be licensed under the Animal Welfare Act, within the meaning of 9 C.F.R. § 2.11(a)(6).

### **Amarillo Wildlife's Appeal Petition**

Amarillo Wildlife raises seven issues in its appeal petition. First, Amarillo Wildlife argues the ALJ erroneously failed to consider Amarillo Wildlife's response to the Administrator's motion for summary judgment (Appeal Pet. at 2).

The Hearing Clerk served Amarillo Wildlife with the Administrator's motion for summary judgment on January 23, 2008;<sup>2</sup> therefore, Amarillo Wildlife's response was due no later than February 12, 2008.<sup>3</sup> Amarillo Wildlife requested an extension of time within which to file a response to the Administrator's motion for summary judgment, and the ALJ granted Amarillo Wildlife's request by extending the time for filing a

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<sup>2</sup>Domestic Return Receipt for article number 7004 2510 0003 7023 2200.

<sup>3</sup>See 7 C.F.R. § 1.143(d) (providing that a party may file a response to a motion within 20 days after service).

response to March 18, 2008.<sup>4</sup> Amarillo Wildlife filed its response to the Administrator's motion for summary judgment with the Hearing Clerk on March 21, 2008, but argues that its response is timely because Amarillo Wildlife mailed its response on March 17, 2008.

Amarillo Wildlife's argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer.<sup>5</sup> The Rules of Practice provide that a document is deemed to be filed when it reaches the Hearing Clerk, as follows:

**§ 1.147 Filing; service; extensions of time; and computations of time.**

....

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk[.]

7 C.F.R. § 1.147(g). The Hearing Clerk's time and date stamp establishes that the Hearing Clerk received Amarillo Wildlife's response to the Administrator's motion for summary judgment on March 21, 2008. Therefore, I find Amarillo Wildlife filed its response to the Administrator's motion for summary judgment 3 days late and the ALJ's failure to consider Amarillo Wildlife's response to the Administrator's motion for summary judgment, is not error.

Second, Amarillo Wildlife asserts Carmel Azzopardi resigned from Amarillo Wildlife prior to April 23, 2007 (Appeal Pet. at 2).

The Administrator instituted the instant proceeding based upon Mr. Azzopardi's relationship with Amarillo Wildlife on the date

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<sup>4</sup>ALJ's February 19, 2008, Extension of Time to Respond.

<sup>5</sup>*In re Bodie S. Knapp*, 64 Agric. Dec. 253, 302 (2005) (indicating the mailbox rule does not apply in proceedings under the Rules of Practice); *In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

Mr. Azzopardi was convicted of violating the Endangered Species Act, July 21, 2006 (Compl. ¶¶ 11-12). Moreover, the basis for the ALJ's termination of Amarillo Wildlife's Animal Welfare Act license and disqualification of Amarillo Wildlife from obtaining an Animal Welfare Act license is Mr. Azzopardi's relationship with Amarillo Wildlife when Mr. Azzopardi "was convicted, on July 21, 2006, by a U.S. Magistrate Judge of the misdemeanor of Selling and Transporting in Interstate Commerce an Endangered Species of Wildlife." (ALJ's Initial Decision at 3.) Therefore, I find Amarillo Wildlife's assertion regarding Mr. Azzopardi's resignation on or about April 23, 2007, is not relevant to the instant proceeding.

Third, Amarillo Wildlife asserts that it is "closed" and a new corporation, Texas Wildlife Center, Inc., has been formed. Amarillo Wildlife asserts it no longer holds an Animal Welfare Act license and Animal Welfare Act license 74-C-0486 is held by Texas Wildlife Center, Inc. (Appeal Pet. at 2.)

The Administrator's response to Amarillo Wildlife's appeal petition contains a number of attachments which belie Amarillo Wildlife's assertion that it is closed and Texas Wildlife Center, Inc., is a new corporation (Complainant's Response to Respondent's Appeal Pet. at 4-6, Attachs. B-F). Instead, I find, as Amarillo Wildlife states in its April 16, 2007, letter to the United States Department of Agriculture: Amarillo Wildlife "simply changed the name[]" to Texas Wildlife Center, Inc. (Complainant's Response to Respondent's Appeal Pet. at 4-6, Attach. D.)

Fourth, Amarillo Wildlife concedes that the Secretary of Agriculture has the right to terminate Amarillo Wildlife's Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6), .12, based on Mr. Azzopardi's July 21, 2006, conviction of violating the Endangered Species Act; however, Amarillo Wildlife argues the ALJ's disqualification of Amarillo Wildlife's directors, officers, and agents, other than Mr. Azzopardi, is unfair and not in accordance with the Animal Welfare Act (Appeal Pet. at 2-3.)

I agree with Amarillo Wildlife that, under 9 C.F.R. §§ 2.11(a)(6), .12, I may terminate Amarillo Wildlife's Animal Welfare Act license, based

upon Mr. Azzopardi's having been found to have violated the Endangered Species Act, and that I may disqualify Mr. Azzopardi from obtaining an Animal Welfare Act license; however, I disagree with Amarillo Wildlife's contention that no sanction may be imposed on its directors, officers, and agents, other than Mr. Azzopardi. The Regulations provide that no license shall be issued under circumstances that circumvent an order terminating an Animal Welfare Act license.<sup>6</sup> Granting Amarillo Wildlife's request to limit the disqualification order to Amarillo Wildlife and Mr. Azzopardi would enable Amarillo Wildlife to circumvent the disqualification order through its other directors, officers, and agents. Therefore, I decline to modify the ALJ's disqualification order as requested by Amarillo Wildlife.

Fifth, Amarillo Wildlife asserts Dr. Robert M. Gibbens' declaration attached to the Administrator's motion for summary judgement is "completely out of context." Amarillo Wildlife suggests Dr. Gibbens' declaration overstated the effect of Mr. Azzopardi's violations of the Endangered Species Act and states there was no evidence either presented at Mr. Azzopardi's trial or presented by Dr. Gibbens in his declaration that the animals which Mr. Azzopardi sold and transported, in violation of the Endangered Species Act, were in fact endangered species. (Appeal Pet. at 3-4.)

Mr. Azzopardi did not litigate the charges against him under the Endangered Species Act. Instead, Mr. Azzopardi pled guilty to the charges, admitted to the underlying facts, and was convicted of violating the Endangered Species Act by a United States Magistrate Judge (Plea Agreement, Factual Resume, and Judgment in a Criminal Case filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006)). I reject Amarillo Wildlife's attempt to relitigate Mr. Azzopardi's criminal conviction in this forum.

Sixth, Amarillo Wildlife argues the ALJ erroneously relied on Dr. Gibbens' sanction recommendation (Appeal Pet. at 4).

The ALJ described his reliance on Dr. Gibbens' sanction recommendation, as follows:

In keeping with the policy often expressed by the Judicial

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<sup>6</sup>9 C.F.R. § 2.11(d).

Officer that when adjudicating sanction cases, we should ascertain policies relevant to their disposition from the Department's administrative officials and defer to them when appropriate, the following order is being entered in accordance with Dr. Gibbens' declaration.

Initial Decision at 4. The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.<sup>7</sup> The ALJ made clear that he was not bound by Dr. Gibbens' sanction recommendation, but that he

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<sup>7</sup>*In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

found Dr. Gibbens' sanction recommendation to be appropriate. Therefore, I reject Amarillo Wildlife's argument that the ALJ erroneously relied on Dr. Gibbens' sanction recommendation. Moreover, I have examined the purported mitigating circumstances raised by Amarillo Wildlife (Answer ¶¶ (A)-(D)) and find no basis to modify the sanction imposed by the ALJ.

Seventh, Amarillo Wildlife contends Mr. Azzopardi's 6 months of house arrest, 3 years of probation, and payment of over \$50,000 in fines and attorney's fees in connection with his violations of the Endangered Species Act should be taken into account when determining the sanction imposed on Amarillo Wildlife (Appeal Pet. at 3).

I reject Amarillo Wildlife's contention that the penalty imposed on Mr. Azzopardi for his violations of the Endangered Species Act and the attorney's fees that Mr. Azzopardi paid in connection with *United States v. Azzopardi* are relevant to the sanction to be imposed on Amarillo Wildlife under the Animal Welfare Act. The penalty imposed on, and the payments made by, Mr. Azzopardi in connection with *United States v. Azzopardi* do not address the remedial purposes of the Animal Welfare Act.

#### **Amarillo Wildlife's Motions Regarding Sanction**

Amarillo Wildlife moves that: (1) Carmel Azzopardi be disqualified from obtaining an Animal Welfare Act license for 2 years; (2) no sanction be imposed on Amarillo Wildlife because it is no longer in existence; and (3) Texas Wildlife Center, Inc., continue to hold Animal Welfare Act license 74-C-0486 (Appeal Pet. at 4).

For the reasons articulated in this Decision and Order, *supra*, Amarillo Wildlife's motions that no sanction be imposed on Amarillo Wildlife and that Texas Wildlife Center, Inc., continue to hold Animal Welfare Act license 74-C-0486 are denied.

For the foregoing reasons, the following Order is issued.

#### **ORDER**

1. Amarillo Wildlife's Animal Welfare Act license 74-C-0486 is terminated.

2. Amarillo Wildlife is disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

3. Amarillo Wildlife's directors, officers, and agents and any legal entity in which they may have a substantial interest are disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license.

This Order shall become effective on the 60th day after service of this Order on Amarillo Wildlife.

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**In re: ANIMALS OF MONTANA INC., A MONTANA CORPORATION.**

**AWA Docket No. D-05-0005.**

**Decision and Order.**

**Filed March 10, 2009.**

**AWA – License termination – Disqualification – Lacey Act – Endangered Species Act – Motion for summary judgement – Providing false records to government agency.**

Bernadette Juarez, for the Administrator, APHIS.

Michael L. Humiston, Herber City, UT, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

On June 6, 2005, the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], informed Troy Hyde, owner and operator of Animals of Montana, Inc. [hereinafter Animals of Montana], that APHIS intended to terminate Animals of Montana's Animal Welfare Act license (Animal Welfare Act license number 81-C-0023) based upon Troy Hyde's violations of the Lacey Act and the Endangered Species Act. On June 16, 2005, Animals of Montana instituted this proceeding by requesting a hearing regarding APHIS' proposed termination of its Animal Welfare Act license. Animals of Montana instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On July 8, 2005, the Administrator of APHIS [hereinafter the Administrator], responded to Animals of Montana's request for a hearing stating he agreed with Animals of Montana that a hearing should be scheduled.

Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] scheduled a hearing to commence March 9, 2006, in Washington, DC. On March 6, 2006, the Administrator reversed his position regarding the need for a hearing and requested a continuance of the hearing, without date, pending the Administrator's filing a motion for summary judgment and the ALJ's ruling on that motion for summary judgment. On March 6, 2006, the ALJ cancelled the hearing.

On March 8, 2006, the Administrator filed "Respondent's Motion for Summary Judgment." On May 24, 2006, Animals of Montana filed "Petitioner's Response to Respondent's Motion for Summary Judgment" in which it sought denial of the Administrator's motion for summary judgment. On October 29, 2007, the ALJ issued a "Ruling Upon Consideration of Respondent's Motion for Summary Judgment" in which the ALJ: (1) found no material issues of fact with respect to four conclusions; (2) found a number of issues appropriate for consideration only after a hearing and inappropriate for summary judgment; and (3) ordered supplemental briefs to address the issue of whether Mr. Hyde's May 1999 and May 2000 Lacey Act and Endangered Species Act violations could constitute a basis for termination of Animal of Montana's Animal Welfare Act license based upon a regulation (9 C.F.R. § 2.12) that became effective August 13, 2004, more than 4 years after Mr. Hyde's violations of the Lacey Act and the Endangered Species Act.

On April 4, 2008, the Administrator filed "Supplemental Briefing and Motion for Reconsideration of Ruling on Consideration of Respondent's Motion for Summary Judgment," and on April 7, 2008, Animals of Montana filed "Petitioner's Memorandum Re: Retroactive Application of 9 C.F.R. § 2.12."

On July 17, 2008, the ALJ held a conference call to discuss the parties' April 2008 filings. The ALJ stated she had "reversed course" and, instead of holding a hearing to receive testimony and exhibits, concluded she would decide the case based upon written submissions. (Hearing Cancellation filed July 17, 2008.) On August 13, 2008, the Administrator filed "Supplemental Declaration of Robert M. Gibbens, D.V.M." Animals of Montana did not file any supplemental written submission in response to the ALJ's July 17, 2008, conference call.

On August 29, 2008, the ALJ issued a Decision and Order [hereinafter the Initial Decision] in which the ALJ: (1) granted the Administrator's March 8, 2006, motion for summary judgment; (2) terminated Animals of Montana's Animal Welfare Act license; and (3) disqualified Animals of Montana from obtaining an Animal Welfare Act license for 2 years.

On September 29, 2008, Animals of Montana appealed the ALJ's Initial Decision to the Judicial Officer, and on January 16, 2009, the Administrator filed "Respondent's Response to Petitioner's Appeal Petition." On January 23, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's August 29, 2008, Initial Decision terminating Animals of Montana's Animal Welfare Act license and disqualifying Animals of Montana from obtaining an Animal Welfare Act license for 2 years.

## DECISION

### Discussion

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application for a license in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133). The power to require and issue licenses under the Animal Welfare Act includes the power to terminate a license and to disqualify a person from becoming licensed.<sup>1</sup> The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). Section 2.11(a)(6) of the Regulations provides that an initial application for an Animal Welfare Act license will be denied if the applicant has provided false records to a government agency or has been

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<sup>1</sup>*In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. \_\_\_\_, slip op. at 6 (Jan. 6, 2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

found to have violated any federal law pertaining to the transportation, ownership, neglect, or welfare of animals, as follows:

**§ 2.11 Denial of initial license application.**

(a) A license will not be issued to any applicant who:

....

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled nolo contendere (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6). Section 9 of the Animal Welfare Act (7 U.S.C. § 2139) provides that the act, omission, or failure of any person acting for or employed by an Animal Welfare Act licensee shall be deemed the act, omission, or failure of that licensee. The record supports the conclusions that: (1) Troy Hyde, owner, operator, and president of and the responsible corporate officer for Animals of Montana, has been found to have violated the Lacey Act and the Endangered Species Act; (2) Troy Hyde provided false records to a government agency; (3) Troy Hyde was acting for or employed by Animals of Montana when he was found to have violated the Lacey Act and the Endangered Species Act and when he provided false records to a government agency; and (4) APHIS' termination of Animals of Montana's Animal Welfare Act license and disqualification from obtaining an Animal Welfare Act license for a period of 2 years is warranted in law and justified by the facts.

**Findings of Fact**

1. Animals of Montana is a Montana corporation (Respondent's Motion for Summary Judgment Attach. A at 2-3).

2. Animals of Montana's mailing address is 14752 Brackett Creek Road, Bozeman, Montana 59715 (Respondent's Motion for Summary Judgment Attach. A at 3).

3. At all times material to the instant proceeding, Animals of Montana held Animal Welfare Act license number 81-C-0023 (Respondent's Motion for Summary Judgment Attach. G at 6-9, 13, 15, 17-22, 24-28, 33-35; Attach. N ¶ 3).

4. Troy Hyde was the incorporator of Animals of Montana (Respondent's Motion for Summary Judgment Attach. A at 3).

5. At all times material to the instant proceeding, Troy Hyde was the registered agent of Animals of Montana (Respondent's Motion for Summary Judgment Attach. A at 3, 6, 8, 10; Attach. N ¶ 6).

6. At all times material to the instant proceeding, Troy Hyde owned and operated Animals of Montana (Respondent's Motion for Summary Judgment Attach. B ¶ 2b; Attach. N ¶ 3; Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 13).

7. At all times material to the instant proceeding, Troy Hyde was the president of and the responsible corporate officer for Animals of Montana (Respondent's Motion for Summary Judgment Attach. A at 4, 6-11; Attach. B ¶ 2b; Attach. N ¶ 3; Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 13).

8. On March 8, 2005, in an Information filed with the United States District Court for the District of Minnesota, the United States Attorney for the District of Minnesota charged Troy Hyde with violations of the Lacey Act and the Endangered Species Act, as follows:

#### COUNT 1

On or about May 22, 1999, in the State of Minnesota and elsewhere, the defendant,

TROY ALLEN HYDE,

did knowingly transport or cause to be transported wildlife, to wit: a tiger, that had been sold in violation of a law or regulation of the United States, when, in the exercise of due care, he should have known that the wildlife was sold in violation of the

Endangered Species Act, 16 U.S.C. § 1538(a)(1)(E), (F), and (G); all in violation of Title 16, United States Code, Sections 3372(a) and 3373(d)(1)(B)(2).

**COUNT 2**

On or about May 14, 2000, in the State of Minnesota and elsewhere, the defendant,

TROY ALLEN HYDE,

did knowingly and unlawfully receive, carry or transport, or cause to be delivered, received, or transported, in interstate commerce, and in the course of commercial activity an endangered species, to wit: a tiger; all in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(E) and (G).

Respondent's Motion for Summary Judgment Attach. C.

9. On March 8, 2005, Troy Hyde appeared before United States District Court Judge Ann D. Montgomery and admitted the allegations in the Information referenced in Findings of Fact number 8 (Respondent's Motion for Summary Judgment Attach. L).

10. On March 8, 2005, Troy Hyde entered into a Plea Agreement and Sentencing Stipulations in which he pled guilty to a misdemeanor trafficking violation of the Lacey Act and to a violation of the Endangered Species Act (Respondent's Motion for Summary Judgment Attach. B). The Plea Agreement and Sentencing Stipulations sets forth the factual basis relevant to Troy Hyde's violations of the Lacey Act and the Endangered Species Act, as follows:

1. Charges. The defendant agrees to plead guilty to Count[] One charging the defendant with a misdemeanor trafficking violation of the Lacey Act and Count Two charging a violation of the Endangered Species Act.

## 2. Factual Basis.

- a. Regulatory Background. Both the United States Fish and Wildlife Service (USFWS) and the United States Department of Agriculture (USDA) have authority over animals kept in captivity. Among other things, the USFWS regulates the interstate commerce of endangered and threatened species (collectively, referred to hereafter as “protected”) through the Endangered Species Act (ESA) (16 U.S.C. §§ 1531 *et seq.*) and Endangered Species Regulations (50 C.F.R. 17). The USFWS also regulates the interstate commerce of wildlife through the Lacey Act (16 U.S.C. §§ 3371 *et seq.*). The Lacey Act, among other things, prohibits a person from knowingly engaging in certain conduct with wildlife when, in the exercise of due care, he should have known that the wildlife was possessed, transported or sold in violation of any wildlife-related federal law or regulation. 16 U.S.C. §§ 3372(a), 3373(d)(1)(B)(2). The USDA regulates the transportation, purchase, sale, housing, care, handling, and treatment of animals through the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*). Among other things, the Animal Welfare Act requires dealers and exhibitors to make and retain certain records with respect to the purchase, sale, transportation, identification, and previous ownership of animals. The Animal and Plant Health Inspection Service (APHIS) is a component of USDA. The APHIS Form 7020 can be used to record the required information.

Under the ESA, the Secretary of the Interior has, through the USFWS, the authority to issue permits authorizing otherwise prohibited activity, for scientific purposes, to enhance the survival of the species, or for the incidental taking of endangered wildlife. These are known as Endangered Species permits, or ES permits (or registration). Such permits/registrations are difficult to

obtain.

- b. General Factual Background. The defendant owns and operates a business known as Animals of Montana, Inc. He is the responsible corporate officer for Animals of Montana. Defendant and Animals of Montana acquired an APHIS Class "C" exhibitor license in 1993. Defendant and his business acquired a "Permit for Roadside Menagerie" from the Montana Department of Fish, Wildlife and Parks in approximately 1993. The defendant and his business have acquired leopards, snow leopards, a spotted leopard, tigers, lions, cougars, bobcats, bears, Canada lynx, wolves, and other wildlife over the years. Several of these transactions involved interstate purchases and sales the defendant made with Kenneth and Nancy Kraft of Racine, Minnesota. Defendant displayed the wildlife at his facility in Bozeman, Montana, and he earned income from displaying the wildlife for photographers and by training certain of the wildlife for use in movies, commercials, and similar film work.

In 1999, the defendant received a USFWS Captive-Bred Wildlife (CBW) permit for Siberian tigers. In June 2000, the defendant renewed this CBW registration and also obtained a CBW for snow leopards. At the time he applied for and received the CBWs, the defendant received copies of the applicable wildlife regulations and related rules regarding his CBW permit. He signed various paperwork related to his CBW certifying he had read the legislation and other materials applicable to CBW registration. The CBW registration allows for commercial activity with species covered by the CBW, but only with other persons who also have a CBW registration.

- c. Offense Conduct. On or about May 22, 1999, the defendant arranged for the sale and purchase of a tiger. The

defendant negotiated the sale of the tiger by telephone with Nancy Kraft. He paid the Krafts \$750 for the tiger. The tiger had been identified as both a Bengal and, subsequently, a Siberian. On the APHIS Form 7020, the tiger was identified as a “generic Siberian tiger.” The defendant asked a third party to pick up the tiger cub for him from the Krafts in Minnesota, and the tiger was transported to the defendant in Montana. Tigers are endangered. While the defendant had a CBW for Siberian tigers, the Krafts did not have any permit or license to engage in the interstate commercial activity with these, or any other, endangered species. The sale of these animals in interstate commerce violated the Endangered Species Act, and at the time of the offense, the defendant, in the exercise of due care, should have known that the sale was illegal. Thus, the subsequent knowing transport of this tiger to Montana at the defendant’s direction violated the Lacey Act. APHIS Forms 7020 record information about the acquisition, disposition or transport of animals (other than cats and dogs). The APHIS Form 7020 the defendant received from the Krafts stated the transaction was a “permanent breeding loan” rather than the sale that it was. The defendant had not entered into any agreement to breed the tiger with the Krafts, nor was it his intention to breed the tiger.

In or about May 2000, the defendant negotiated with Nancy Kraft the purchase of a tiger (“Keeno”) for \$1,000. The defendant arranged for the transport of the tiger from Minnesota to Montana. While the defendant had a CBW for Siberian tigers, the Krafts did not have any permit or license to engage in the interstate commercial activity with these, or any other, endangered species. The knowing and unlawful transport of these animals in interstate commerce violated the Endangered Species Act. APHIS Forms 7020 record information about the acquisition, disposition or transport of animals (other than cats and dogs). The

APHIS Form 7020 for this transaction reflected that it was a “donation” rather than the sale that it was.

Respondent’s Motion for Summary Judgment Attach. B at 1-3.

11. On March 8, 2005, William H. Koch, Assistant United States Attorney, and Catherine C. Pisaturo, Trial Attorney, United States Department of Justice, on behalf of Thomas B. Heffelfinger, United States Attorney; Troy Hyde; and Bret B. Hicken, Attorney for Troy Hyde, signed the Plea Agreement and Sentencing Stipulations referenced in Findings of Fact number 10 (Respondent’s Motion for Summary Judgment Attach. B at 9).

12. On September 8, 2005, based on the Plea Agreement and Sentencing Stipulations referenced in Findings of Fact numbers 10 and 11, United States District Court Judge Ann D. Montgomery convicted Troy Hyde of a trafficking violation of the Lacey Act and a violation of the Endangered Species Act, sentenced Troy Hyde to 2 years of probation and 180 days of home detention, and ordered Troy Hyde to pay \$10,000 in restitution (Respondent’s Motion for Summary Judgment Attachs. E-F).

13. Troy Hyde falsified United States Department of Agriculture records (APHIS Form 7020) in furtherance of and to conceal his violations of the Lacey Act and the Endangered Species Act (Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 15).

14. Based upon Troy Hyde’s falsification of United States Department of Agriculture records and violations of the Lacey Act and the Endangered Species Act Dr. Robert M. Gibbens, D.V.M., Western Regional Director, Animal Care, APHIS, found Animals of Montana unfit to hold an Animal Welfare Act license (Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 16).

15. Based upon Troy Hyde’s falsification of United States Department of Agriculture records and violations of the Lacey Act and the Endangered Species Act, Dr. Robert M. Gibbens, D.V.M., Western Regional Director, Animal Care, APHIS, found the issuance of an Animal Welfare Act license to Animals of Montana contrary to the purposes of the Animal Welfare Act (Supplemental Decl. of Robert M.

Gibbens, D.V.M. ¶ 19).

16. Dr. Robert M. Gibbens, based upon his 8 years of experience as Western Regional Director, Animal Care, APHIS, and based upon Troy Hyde's falsification of United States Department of Agriculture records and violations of the Lacey Act and the Endangered Species Act, recommended termination of Animals of Montana's Animal Welfare Act license and disqualification of Animals of Montana from becoming licensed under the Animal Welfare Act for a period of 2 years (Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶¶ 1, 20-24).

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Based on the Findings of Fact, I conclude the Administrator's determination that Animals of Montana's retention of an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.
3. Based on the Findings of Fact, I conclude Animals of Montana is unfit to be licensed under the Animal Welfare Act within the meaning of 9 C.F.R. § 2.11(a)(6).

### **Animals of Montana's Appeal Petition**

Animals of Montana raises eight issues in "Petitioner's Appeal of Hearing Officer's Decision and Order" [hereinafter Appeal Petition]. First, Animals of Montana argues the Administrator's motion for summary judgment was time-barred by section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) (Appeal Pet. at 3).

The Rules of Practice provide "[a]ll motions and request[s] concerning the complaint must be made within the time allowed for filing an answer." (7 C.F.R. § 1.143(b)(2).) On June 16, 2005, Animals of Montana instituted this proceeding by requesting a hearing regarding APHIS' proposed termination of its Animal Welfare Act license.<sup>2</sup> The

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<sup>2</sup>The Rules of Practice define the word "complaint" as including a "document by virtue of which a proceeding is instituted." (7 C.F.R. § 1.132.) Therefore, I find  
(continued...)

Hearing Clerk served the Administrator with Animals of Montana's request for a hearing on June 23, 2005; therefore, the Administrator was required to file with the Hearing Clerk any motion concerning the request for hearing no later than July 13, 2005.<sup>3</sup> The Administrator filed the motion for summary judgment with the Hearing Clerk on March 8, 2006, more than 7 months after a motion concerning the request for hearing was required to be filed. However, after review of the Administrator's motion for summary judgment, I conclude the Administrator's March 8, 2006, motion for summary judgment is not a motion "concerning" the request for hearing. The Administrator does not seek correction or clarification of the request for hearing and does not seek an extension of time to file a response to the request for hearing. Instead, the Administrator's motion for summary judgment seeks a judgment based on the filings in the record. Therefore, I find the time limit in 7 C.F.R. § 1.143(b)(2) is not applicable to the Administrator's March 8, 2006, motion for summary judgment.

Second, Animals of Montana argues the Administrator's motion for summary judgment is inappropriate because suspension or revocation of Animal of Montana's Animal Welfare Act license is discretionary (Appeal Pet. at 4).

The Administrator seeks termination of Animals of Montana's Animal Welfare Act license and a 2-year disqualification from obtaining an Animal Welfare Act license based upon 9 C.F.R. §§ 2.11, .12. The Administrator does not seek suspension or revocation of Animals of Montana's license pursuant to 7 U.S.C. § 2149(a) for violations of the Animal Welfare Act or the Regulations, as Animals of Montana asserts. Therefore, I find Animals of Montana's argument that summary judgment is inappropriate because suspension or revocation of Animals of Montana's license is discretionary, misplaced. Moreover, I have

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<sup>2</sup>(...continued)

Animals of Montana's request for a hearing constitutes a "complaint" for the purposes of 7 C.F.R. § 1.143(b)(2).

<sup>3</sup>The Rules of Practice require that an answer must be filed with the Hearing Clerk within 20 days after service of the document instituting the proceeding (7 C.F.R. § 1.136(a)).

repeatedly found summary judgment appropriate in cases involving the termination and denial of Animal Welfare Act licenses based upon prior criminal convictions.<sup>4</sup> Hearings are futile where, as in the instant proceeding, there is no factual dispute of substance.<sup>5</sup>

Third, Animals of Montana argues the Administrator's motion for summary judgment is inappropriate because Animals of Montana was not given an opportunity to demonstrate or achieve compliance with all lawful requirements (Appeal Pet. at 4).

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

**§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**

....

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the

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<sup>4</sup>See *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. \_\_\_, slip op. at 6 (Jan. 6, 2009) (affirming the administrative law judge's initial decision granting the administrator's motion for summary judgment to terminate an Animal Welfare Act license based on the conviction of Amarillo Wildlife Refuge, Inc.'s president, director, and agent for violations of the Endangered Species Act notwithstanding Amarillo Wildlife Refuge, Inc.'s request for an oral hearing); *In re Loreon Vigne*, 67 Agric. Dec.1060, 1060-61 (2008) (affirming the administrative law judge's initial decision granting the administrator's motion for summary judgment to terminate an Animal Welfare Act license based on the Endangered Species Act conviction of a corporation that Loreon Vigne managed, directed, and controlled); *In re Mark Levinson*, 65 Agric. Dec. 1026, 1028 (2006) (upholding the administrative law judge's initial decision affirming the administrator's denial of Mark Levinson's Animal Welfare Act license application after the administrator demonstrated there was no material fact upon which to hold a hearing).

<sup>5</sup>See *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c). License termination in the instant proceeding is predicated upon Mr. Hyde's having been found to have knowingly violated the Endangered Species Act and the Lacey Act. Therefore, termination of Animals of Montana's Animal Welfare Act license falls within the Administrative Procedure Act's "willfulness" exception to the notice and opportunity to demonstrate or achieve compliance requirement.

Fourth, Animals of Montana contends 9 C.F.R. §§ 2.11, .12 are inconsistent with 7 U.S.C. § 2149 because 9 C.F.R. § 2.11 identifies the circumstances under which an Animal Welfare Act license "will not be issued," while 7 U.S.C. § 2149 specifies when the Secretary of Agriculture "may" suspend or revoke an Animal Welfare Act license for violations of the Animal Welfare Act and the Regulations (Appeal Pet. at 4-6).

As an initial matter, the Administrator does not seek to suspend or revoke Animals of Montana's Animal Welfare Act license for violations of the Animal Welfare Act or the Regulations, pursuant to 7 U.S.C. § 2149(a). Instead, the Administrator seeks to terminate Animals of Montana's Animal Welfare Act license because Mr. Hyde violated the Endangered Species Act and the Lacey Act and provided false records to a government agency thereby demonstrating that Animals of Montana is unfit to hold an Animal Welfare Act license (Supplemental Decl. of

Robert M. Gibbens, D.V.M. ¶ 20).

Moreover, in a recent proceeding, I addressed the contention that 9 C.F.R. § 2.11(a)(6) is “faulty,” as follows:

. . . I note the Secretary of Agriculture is authorized to promulgate regulations that the Secretary deems necessary to effectuate the purposes of the Animal Welfare Act (7 U.S.C. § 2151) and 9 C.F.R. § 2.11(a)(6) is clearly a regulation which the Secretary of Agriculture is authorized by 7 U.S.C. § 2151 to promulgate. Moreover, I find there is a rational connection between 9 C.F.R. § 2.11(a)(6) and its purpose. The purpose of 9 C.F.R. § 2.11(a)(6) is to deny Animal Welfare Act licenses to persons who are not fit to have Animal Welfare Act licenses, and I find 9 C.F.R. § 2.11(a)(6) accomplishes its purpose. Finally, I find 9 C.F.R. § 2.11(a)(6) was promulgated in accordance with the Administrative Procedure Act. Therefore, I reject Ms. Vigne’s contention that 9 C.F.R. § 2.11(a)(6) is “faulty.”

*In re Loreon Vigne*, 67 Agric. Dec. 1060, 1067 (2008) (footnote omitted).

Further still, the proposed rule relevant to the promulgation of 9 C.F.R. §§ 2.11, .12 explains that the proposed regulations promote the Animal Welfare Act’s remedial purpose of ensuring the humane care and treatment of animals and that persons who have violated any Federal, State, or local laws or regulations pertaining to animal cruelty, transportation, ownership, neglect, or welfare would be unfit for an Animal Welfare Act license (65 Fed. Reg. 47,908, 47,911 (Aug. 4, 2000)).

Thus, contrary to Animals of Montana’s contention, 9 C.F.R. §§ 2.11, .12 were lawfully adopted pursuant to 7 U.S.C. § 2151, promote the remedial purpose of the Animal Welfare Act, and are rationally related to the purpose of denying Animal Welfare Act license applications to applicants unfit to hold Animal Welfare Act licenses and terminating Animal Welfare Act licenses held by those unfit to hold them.

Fifth, Animals of Montana asserts Mr. Hyde’s violations of the

Lacey Act and the Endangered Species Act merely disrupted the administrative mechanism designed to carry out the purposes of the Lacey Act and the Endangered Species Act. Animals of Montana further asserts Mr. Hyde's violations did not result in harm to endangered wildlife or a reduction of the endangered species population. (Appeal Pet. at 6-8.)

Even if I were to find that Mr. Hyde's violations of the Lacey Act and the Endangered Species Act only disrupted the administrative mechanism designed to carry out the purposes of the Lacey Act and the Endangered Species Act and that Mr. Hyde did not harm endangered wildlife and did not reduce the population of endangered species, I would not dismiss the instant proceeding. An Animal Welfare Act license may be terminated if a person acting for or employed by a licensee has been found to have violated any federal laws pertaining to the transportation, ownership, neglect, or welfare of animals.<sup>6</sup> Animals of Montana does not dispute the fact that Mr. Hyde has been found to have violated two statutes pertaining to the transportation, ownership, neglect, or welfare of animals; namely, the Lacey Act and the Endangered Species Act. The Administrator is not also required to establish that Mr. Hyde's violations resulted in harm to animals or the reduction of the population of animals in order to support the termination of Animals of Montana's Animal Welfare Act license.

Sixth, Animals of Montana asserts Mr. Hyde "has already been criminally sanctioned"; thus, "[d]eterrence has already been fully accomplished in his case." (Appeal Pet. at 8-9.)

I reject Animal of Montana's contention that the criminal penalty imposed on Mr. Hyde in *United States v. Hyde*, Case No. 03-315(6) (D. Minn. Sept. 8, 2005), is relevant to the remedy to be imposed on Animals of Montana in the instant civil administrative proceeding. The criminal penalty imposed on Mr. Hyde in *United States v. Hyde* does not

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<sup>6</sup>7 U.S.C. § 2139; 9 C.F.R. §§ 2.11, .12.

address the remedial purposes of the Animal Welfare Act.<sup>7</sup>

Seventh, Animals of Montana asserts that any suspension of its Animal Welfare Act license for more than a month or two will end Mr. Hyde's "otherwise" law-abiding career of 22 years (Appeal Pet. at 9-10).

The impact on Mr. Hyde's career, which may result from the termination of Animals of Montana's Animal Welfare Act license and disqualification of Animals of Montana from holding an Animal Welfare Act license, is not relevant to determining whether Animals of Montana is unfit to hold an Animal Welfare Act license. Moreover, collateral effects of the termination of an Animal Welfare Act license and disqualification from holding an Animal Welfare Act license are not relevant to the determination of whether Animals of Montana is unfit to be licensed.<sup>8</sup>

Eighth, Animals of Montana argues the Secretary of Agriculture cannot retroactively apply a regulation (9 C.F.R. § 2.12) effective after Mr. Hyde violated the Lacey Act and the Endangered Species Act (Appeal Pet. at 10-11).

On September 8, 2005, United States District Court Judge Ann D. Montgomery adjudicated Mr. Hyde guilty of violating the Lacey Act in May 1999 and violating the Endangered Species Act in May 2000 (Respondent's Motion for Summary Judgment Attachs. E-F). The instant proceeding regarding the termination of Animal of Montana's Animal Welfare Act license is based upon 9 C.F.R. § 2.12, a regulation which became effective August 13, 2004,<sup>9</sup> more than 4 years after Mr. Hyde's violations of the Lacey Act and the Endangered Species Act and more than 1 year before Mr. Hyde was convicted of violating the

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<sup>7</sup>See *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. \_\_\_, slip op. at 17 (Jan. 6, 2009) (rejecting Amarillo Wildlife Refuge, Inc.'s argument that its principal's 6 months of house arrest, 3 years of probation, and payment of over \$50,000 in fines and attorneys fees in connection with his violations of the Endangered Species Act should be considered when determining the remedy in an Animal Welfare Act license termination proceeding).

<sup>8</sup>*In re Loreon Vigne*, 67 Agric. Dec. 1060, 1061 (2008).

<sup>9</sup>69 Fed. Reg. 42,089 (July 13, 2004).

Lacey Act and the Endangered Species Act.

The Regulations provide that the Secretary of Agriculture may terminate an Animal Welfare Act license when a licensee (or any person acting for or employed by the licensee<sup>10</sup>) “has been found to have violated” any federal laws pertaining to the transportation, ownership, neglect, or welfare of animals.<sup>11</sup> Based upon the language of the Regulations, I find Mr. Hyde’s September 8, 2005, conviction of having violated the Lacey Act and the Endangered Species Act triggered the Secretary of Agriculture’s ability to terminate Animals of Montana’s Animal Welfare Act license; not the date of the underlying criminal activities, as Animals of Montana suggests.<sup>12</sup> Thus, the ALJ’s application of 9 C.F.R. § 2.12, to terminate Animals of Montana’s license based on Mr. Hyde’s September 8, 2005, conviction has no retroactive effect.

For the foregoing reasons, the following Order is issued.

#### **ORDER**

1. Animal Welfare Act license 81-C-0023 is terminated.
2. Animals of Montana is disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

This Order shall become effective on the 60th day after service of this Order on Animals of Montana.

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<sup>10</sup>7 U.S.C. § 2139.

<sup>11</sup>9 C.F.R. §§ 2.11(a)(6), .12.

<sup>12</sup>See *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. \_\_\_, slip op. at 13 (Jan. 6, 2009) (stating termination of Amarillo Wildlife Refuge, Inc.’s Animal Welfare Act license, pursuant to 9 C.F.R. § 2.12, is based upon Mr. Azzopardi’s relationship with Amarillo Wildlife Refuge, Inc., when Mr. Azzopardi was “convicted” of violating the Endangered Species Act).

**In re: BRET B. HICKEN, AN INDIVIDUAL; AND ANIMAL INDUSTRIES, LLC.**

**AWA Docket No. D-08-0164.**

**Decision and Order.**

**May 1, 2009.**

**AWA – Lacey Act – Circumvention of license termination – Successor corporate licensee.**

Colleen Carroll for APHIS.

Respondent, Pro se.

*Decision and order by Administrative Law Judge Victor W. Palmer.*

#### **Decision and Order**

Bret B. Hicken initiated this proceeding, on August 11, 2008, by filing a petition in which he alleged that the Animal and Plant Health Inspection Service (APHIS), an agency of the United States Department of Agriculture (USDA), had improperly denied a license he needs to exhibit animals pursuant to the terms of the Animal Welfare Act (7 U.S.C. §§ 2131-2159). The petition states that Mr. Hicken's applications for a license were denied because APHIS erroneously assumed that he was attempting to circumvent the termination of the exhibitor's license held by Animals of Montana, a corporation that Mr. Hicken, an attorney, had represented. On August 18, 2008, APHIS filed a response with a motion for summary judgment seeking the dismissal of the petition.

On January, 28, 2009, I held a transcribed hearing with Mr. Hicken participating by telephone. Both parties filed briefs subsequent to the hearing. Based on the facts developed at the hearing, I conclude that the present denial of an exhibitor's license to Mr. Hicken and the company he owns is proper, and the actions so far taken by APHIS should be upheld. However, Mr. Hicken has testified that if he or his company should be granted a license, he would observe conditions assuring his activities as a licensed exhibitor would be independent of and not a continuation of Animals of Montana, a company owned by his former client Troy Hyde. Based on that testimony and the stated concerns of APHIS, the order that follows includes the requirement that an

exhibitor's license shall be issued to Mr. Hicken or his company, upon the filing of a future application that complies with all governing regulations, subject to the provision that the licensee shall meet and observe conditions specified in the order to assure the separation of its activities from those of Mr. Hyde and Animals of Montana.

### **Findings**

1. Bret B. Hicken, who seeks an exhibitor's license from APHIS, has acted as the attorney for Troy Hyde, owner of Animals of Montana, Inc., who pled guilty (*U.S. vs. Hyde*, No. 03-315(6), D.C. Minn., March 8, 2005), to a misdemeanor trafficking violation of the Lacey Act and a violation of the Endangered Species Act. (RX 1).
2. On August 29, 2008, based on the guilty plea in the criminal case, an order was entered on behalf of USDA that terminated the license held by Animals of Montana that is required under the Animal Welfare Act for exhibiting animals, and disqualified it for two years from obtaining a new license. (RX 7). The order was affirmed by USDA's Judicial Officer on March 10, 2009. (*In re Animals of Montana, Inc.*, AWA Docket No. D-05-0005 (March 10, 2009)).
3. On April 27, 2008, Ms. Tracy Krueger, the companion of Troy Hyde and an officer of Animals of Montana, Inc., applied for an exhibitor's license to operate the Animals of Montana facility. APHIS denied her license application as an attempt to circumvent the impending termination of Animals of Montana's license. (Transcript, pp. 69-75; RX 6, pp. 6-9).
4. Shortly after the denial of Ms. Krueger's application, Bret B. Hicken, on June 6, 2008, formed a limited liability company, Animal Industries, LLC, and began submitting applications to APHIS for an exhibitor's license. The first application was denied for being incomplete. The second application was denied for failing to send the licensing fee. The third application was submitted on July 11, 2008 and was denied by APHIS, on July 17, 2008, because: (1) Mr. Hyde and Animals of Montana continued to own the property, equipment and animals that the application stated Mr. Hicken had purchased; (2) Animal Industries, LLC did not appear to be authorized to transact business in Montana

where the facility and animals were located; and (3) APHIS officials believed that the application by Mr. Hicken was an attempt to circumvent the termination of the license held by Animals of Montana. (Transcript, pp. 76-84; RX 6, pp. 10-16).

4. Mr. Hicken denies that he is seeking a license to circumvent the termination of the license formerly held by Animals of Montana, Inc. He testified that:

(a) Mr. Hicken has previous experience as an animal trainer from approximately 1979 to 1985, when he raised and trained wild animals to work his way through college and law school.

(b) Though Mr. Hicken has represented Mr. Hyde, he had been involved in the animal business before becoming acquainted with Mr. Hyde. Mr. Hicken is licensed to practice law and has represented not only Mr. Hyde, but a number of other clients in his practice. He is now at the point that he wishes to retire and return to the animal training business. He regards the termination of Mr. Hyde's license by APHIS as presenting him with an opportunity to purchase his client's business.

(c) Mr. Hicken has filed Articles of Incorporation in the State of Utah for a new corporation named Animal Industries, Inc. that he proposes should be granted an exhibitor's license under which it will operate the business in replacement of Animals of Montana. Mr. Hicken as the corporation's owner would operate the business under a new name, with new personnel, new telephone and contact number, and probably a new location. Mr. Hicken has entered into a contact with Mr. Hyde to purchase his animals and equipment, but not the real property where the animals were exhibited. If Mr. Hicken is unable to reach a rental agreement with the current owner of the real estate, Mr. Hicken would move the animals to a new location, and create an entirely new business.

### **Conclusions**

1. APHIS properly denied an exhibitor's license to Petitioners in that the property, equipment and animals that were the subject of the application were still owned by Mr. Hyde and Animals of Montana, Inc.
2. At such time in the future as Mr. Hicken, or a company that he owns, files a new application that complies with 9 C.F.R. §§ 2.1, 2.2, 2.3 and 2.6, for a license under the Animal Welfare Act to exhibit animals, the

license should be issued subject to the following conditions which if not observed shall be grounds for license termination under 9 C.F.R. § 2.12 for violating 9 C.F.R. § 2.11(d), in that the license shall be presumed to have been obtained to circumvent the order that terminated the license held by Animals of Montana:

The licensee shall not employ the name, logo, advertisements, employees, or principals of Animals of Montana, Inc.; and neither Troy Hyde nor Tracey Krueger (or any of their agents or assigns) shall be a full or part-time employee of petitioner(s).

Troy Hyde shall not participate in any way in promotional or marketing activities or in the exhibition of animals other than as a part-time consultant on an independent contractor basis who is not present at any animal exhibition.

The licensee shall not hold, use or house any animals personally owned, held or otherwise used by, or in the custody of, Troy Hyde, Tracey Krueger or Animals of Montana, Inc.

Troy Hyde, Tracey Krueger and/or Animals of Montana, Inc., or their agents or assigns, shall have no interest, financial or otherwise, in petitioner(s) Animal Welfare Act activities, or in any business operated by the licensee that is subject to regulation under the Animal Welfare Act.

#### **Discussion**

Mr. Hicken would like to purchase his client's animal exhibition business and retire from the practice of law in the State of Utah. The need of his client, Troy Hyde, to sell his animal exhibition business, is perceived by Mr. Hicken as a unique opportunity to return to a business he knows. However, he cannot exhibit wild animals without first obtaining a license from APHIS as required by the Animal Welfare Act (7 U.S.C. §§ 2131-2159). Under applicable USDA regulations, a person seeking such a license must file an application that among other conditions sets forth "...a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance..." (9 C.F.R. § 2.1). Mr. Hicken cannot comply with this requirement until

he actually purchases the animals and equipment, and acquires a facility where they will be kept. He is therefore presently ineligible for a license, but is afraid to purchase Mr. Hyde's animals and equipment without assurance that the needed license will be granted. APHIS has made it clear that it is fearful that Mr. Hicken, contrary to 9 C.F.R. § 2.11 (c) and (d), is attempting to obtain the license to enable his client, Mr. Hyde, to continue his operations as an animal exhibitor in circumvention of the license termination and the two-year proscription that USDA has imposed. Mr. Hicken states that APHIS is mistaken in that his company is a completely different entity from Mr. Hyde's. He argues that because the two companies are not intertwined, a license may not be denied for circumventing the prior order. *Suncoast Primate Sanctuary Foundation, Inc.*, 65 Agric. Dec.113, 65 Agric. Dec. 1197 (vacated by the Judicial Officer but reaching this conclusion, January 8, 2008, AWA Docket No. D-05-0002, 67 Agric. Dec (2008)). Additionally, Mr. Hicken testified at the hearing that he would be agreeable to conditions being placed upon the grant of a license to assure that the activities of his company would not involve Mr. Hyde. He specifically stated that those conditions could include prohibiting Mr. Hyde's presence when the animals are exhibited. (Transcript, p. 124).

The parties face an impasse that may only be overcome by an advance specification of the conditions under which a license shall be granted that adequately assures that the license is not actually obtained for Mr. Hyde.

Subsequent to the hearing, APHIS undertook to delineate such conditions. Though Mr. Hicken has not addressed the APHIS proposal in his brief, APHIS advises that he presently objects to a proposed requirement that Mr. Hyde may not attend future animal exhibitions by the new licensee. Even though he testified at the hearing that he would agree to this condition (Transcript, p. 124), APHIS advises in its brief, that Mr. Hicken now contends that Mr. Hyde's presence at the exhibitions is needed for his expertise on the animals' training and upbringing to better assure the safety of clients. That may be, but the fact that Mr. Hyde would be present at exhibitions is grounds for a reasonable inference that Mr. Hicken seeks an exhibitor's license as a subterfuge to circumvent Mr. Hyde's two-year disqualification. Animals are regularly sold by one trainer to another with the new owner

assuming all training duties before the animals are again exhibited. To the extent Mr. Hicken needs advice from Mr. Hyde, it should be obtained prior to exhibiting the animals. If Mr. Hicken cannot in that way obtain the expertise and confidence he needs when he exhibits these wild animals, he has the choice of hiring some expert other than Mr. Hyde to assist him at the exhibitions, or not entering into a dangerous business that he is not properly trained and experienced to conduct. In sum, I find the conditions elaborated by APHIS for the issuance of an exhibitor's license to Mr. Hicken to be prudent and reasonable, and with some modifications I have included them as part of the order being entered in this proceeding.

#### **ORDER**

1. The denial of an exhibitor's license to petitioners by APHIS was in accordance with law and is hereby upheld.
2. At such time in the future as Mr. Hicken, or a company that he owns, files a new application that complies with 9 C.F.R. §§ 2.1, 2.2, 2.3 and 2.6, for a license under the Animal Welfare Act to exhibit animals, the license should be issued subject to the following conditions which if not observed shall be grounds for license termination under 9 C.F.R. § 2.12 for violating 9 C.F.R. § 2.11(d), in that the license shall be presumed to have been obtained to circumvent the order that terminated the license held by Animals of Montana:
  - (a) Mr. Hicken and/or his company, shall not employ the name, logo, advertisements, employees, or principals of Animals of Montana, Inc.; and neither Troy Hyde nor Tracey Krueger (or any of their agents or assigns) shall be a full or part-time employee of the licensee.
  - (b) Troy Hyde shall not participate in any way in promotional or marketing activities or in the exhibition of animals other than being hired by Mr. HHicken and/or his company, as a part-time consultant on an independent contractor basis who is not present at any animal exhibition.
  - (c) Mr. Hicken and/or his company, shall not hold, use or house any animals personally owned, held or otherwise used by, or in the custody of, Troy Hyde, Tracey Krueger, or Animals of Montana, Inc.

(d) Troy Hyde, Tracey Krueger and/or Animals of Montana, Inc., or their agents or assigns, shall have no interest, financial or otherwise, in the Animal Welfare Act activities of Mr. Hicken and/or his company, or in any business operated by Mr. Hicken and/or his company, that is subject to regulation under the Animal Welfare Act.

This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service as provided in 7 C.F.R. §1.145.

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

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**In re: KATHLEEN BAIRD.**  
**AWA Docket No. D-08-0184.**  
**Decision and Order.**  
**May 30, 2009.**

**AWA – Falsified application – Period of denial, expiration of.**

Colleen Carroll for APHIS.

Respondent, Pro se.

*Decision and Order by Administrative Law Judge Jill S. Clifton.*

#### **Decision and Order**

1. The Petitioner, Kathleen Baird (Petitioner Baird), represents herself (appears *pro se*). The Respondent, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), is represented by Colleen A. Carroll, Esq.

2. This case was previously assigned to Chief Administrative Law Judge Marc R. Hillson, who had scheduled a one-day hearing. The Chief Judge reassigned this case to me, Administrative Law Judge Jill S. Clifton, on March 23, 2009.

3. APHIS's Motion for Summary Judgment was filed on March 31, 2009. Petitioner Baird's Response(s) were timely filed on May 13, 2009 and May 15, 2009. Petitioner Baird included in her Responses, her "Motion for Dismissal." Ordinarily a Petitioner would not request

dismissal of her own petition, so I have taken care to determine what Petitioner Baird was really asking for: Petitioner Baird asked me to undo APHIS's denial of her request for a USDA Animal Welfare Act license.

#### **Findings of Fact and Conclusions**

4. The following mixed findings of fact and conclusions, lettered (a) through (h), are not in controversy, are established as a matter of Summary Judgment, and do not require a hearing in order to be proved.

(a) Petitioner Baird applied to APHIS in March 2008 for an Animal Welfare Act license.

(b) By letter dated August 20, 2008, APHIS denied Petitioner Baird's application, based in part on the requirements of 9 C.F.R. § 2.11(a)(6), which, among other things, prohibits the issuance of a license to any applicant who has provided any false records to USDA or other government agencies.

(c) APHIS advised Petitioner Baird that she may reapply for an Animal Welfare Act license one year from the date the denial of her application becomes final.

(d) Petitioner Baird's one year of waiting to reapply has not yet begun to run, because the denial of Petitioner Baird's application cannot become final while it is being appealed.

(e) Petitioner Baird's appeal began on September 9, 2008, when she filed this case. Petitioner Baird's appeal is ongoing.

(f) The Tennessee Wildlife Resources Agency (TWRA), a government agency, had in its possession a record which had been falsified, a USDA AWA exhibitor's license naming Susan Aronoff as the licensee (the purported license bore the false expiration date of February 16, 2008; the true license showed instead an expiration date of February 16, 2006).

(g) Petitioner Baird acknowledges that she sent to TWRA the Susan Aronoff USDA AWA exhibitor license and maintains that she did not falsify it.

(h) TWRA, through Walter T. Cook, its Captive Wildlife Coordinator, maintains that Petitioner Baird provided the false record to it in about February 2007 as part of Petitioner Baird's application for a TWRA

Class I Wildlife permit. [Class I felids includes lions and tigers.] TWRA, again through Walter T. Cook, maintains that Petitioner Baird again provided the false record to it in about October 2007, in follow-up to her application to TWRA.

5. Based on the foregoing mixed findings of fact and conclusions, lettered (a) through (h), which are not in dispute, summary judgment in favor of APHIS is GRANTED, for the reason that APHIS has proved that Petitioner Baird provided the false record to the Tennessee Wildlife Resources Agency, a government agency. It is not necessary that APHIS prove who falsified the Susan Aronoff USDA AWA exhibitor license that bore the false expiration date of February 16, 2008.

#### **Order**

6. This Decision affirms APHIS's denial of Petitioner Kathleen Baird's application for a USDA Animal Welfare Act license, contained in APHIS's letter dated August 20, 2008, based on the requirements of 9 C.F.R. § 2.11(a)(6), which prohibits the issuance of a license to an applicant who provided a false record to a government agency, to-wit, the Tennessee Wildlife Resources Agency.

7. Consequently, the hearing, scheduled for July 21 through 23, 2009, in Tampa, Florida, is not necessary and will be canceled by separate Order.

8. Petitioner Kathleen Baird is disqualified from being granted a USDA Animal Welfare Act license for a period of 1 year from the effective date of this Order. This Order is effective on the day after this Decision becomes final (*see* the following section regarding finality).

9. Petitioner Kathleen Baird may apply for an Animal Welfare Act license 60 days prior to the end of the 1 year period of disqualification, with the understanding that no license will issue until disqualification has ended.

#### **Finality**

10. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145

Kathleen Baird  
68 Agric. Dec. 116

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of the Rules of Practice (7 C.F.R. § 1.145, see enclosed Appendix A).  
Copies of this Decision and Order shall be served by the Hearing Clerk  
upon each of the parties.

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**ADMINISTRATIVE WAGE GARNISHMENT**

**DEPARTMENTAL DECISIONS**

**In re: ANNIE PALDO.  
AWG Docket No. 09-0032.  
Decision and Order.  
January 6, 2009.**

**AWG.**

Petitioner Pro se.  
Mary Kimball for RD.

*Decision and Order by Administrative Law Judge Peter M. Davenport.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner, Annie Paldo, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 20, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. Ms. Paldo failed to file anything further with the Hearing Clerk and efforts to reach her by telephone were unsuccessful. At the time she requested a hearing, the Petitioner disputed only the amount of the garnishment, stating "I don't make [a] enough money for yall to take my income is low". In an effort to facilitate the Petitioner the hearing that she requested, the above Prehearing Order provided forms upon which to list her financial information so that an informed decision might be made concerning her ability to pay the amount alleged to be due.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact,

Conclusions of Law and Order will be entered.

### **Findings of Fact**

On July 29, 2005, the Petitioner, Annie Paldo, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on September 28, 2005 obtained a home mortgage loan for property located at 611 Roosevelt Street, Navasota, Texas from J.P. Morgan Chase Bank, N.A. (Chase) for \$82,000.00 (Loan Number 1082576112). RX-1. In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on May 1, 2007 for \$76,500.00. Chase was not able to sell the residence by the marketing expiration date and submitted a loss claim in the amount of \$26,103.83 based upon a Liquidation Appraisal of \$75,000.00. The residence was subsequently sold for \$74,000.00 on February 22, 2008. No further recovery has been made. RX-2, 3 &4.

The Summary of Loss Claim Paid on the Loan Guarantee reflects that USDA paid Chase \$26,103.83 under the Loan Guarantee, including principal, accrued interest, the costs of foreclosure, maintenance, and subsequent sale, less the final sales proceeds. RX-2.

The Petitioner did file a Petitioner for Relief under Chapter 13 of the Bankruptcy Act on December 5, 2006 in the United States Bankruptcy Court for the Southern District of Texas (Petition No. 06-37005); however, on February 1, 2007, the Chapter 13 Trustee moved to dismiss the case. On March 13, 2007, the Motion to Dismiss was granted. As the Petitioner was not discharged in bankruptcy, the debt remains collectible.

### **Conclusions of Law**

The Petitioner, Annie Paldo, is indebted to USDA RD in the amount of \$26,103.83 as of February 12, 2008 for the mortgage loan guarantee extended to her, further identified as Loan account number 1082576112. All procedural requirements for administrative wage offset set forth in

31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

**Order**

For the foregoing reasons, the wages of the Petitioner, Annie Paldo, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.  
Done at Washington, D.C.

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**In re: THERESA CRUEA.**  
**AWG Docket No. 08-0170.**  
**Decision and Order.**  
**January 12, 2009.**

**AWG .**

Petitioner Pro se.  
Mary Kimball for RD.  
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner, Theresa Cruea, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On October 7, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved and to direct the exchange of information and documentation concerning the existence of the debt and the Petitioner's ability to pay any debt established.

Both parties complied with that Order. The Respondent filed a Narrative together with supporting documentation. The Petitioner filed schedules reflecting her assets and liabilities as well as her current income and monthly expenses. A teleconference was held with the parties on January 8, 2009. The Petitioner participated *pro se*, unassisted by counsel. The Respondent was represented by Mary Kimball and Gene Elkin, both from the Rural Development Office, United States Department of Agriculture, Saint Louis, Missouri. During the teleconference, Ms. Cruea indicated that she did not dispute the amount of the debt, that she did not have any additional exhibits to submit that were not already in the record and would not be calling any witnesses. Ms. Cruea indicated that as a result of the general economic condition, the number of hours that she was allowed to work had been cut to 20 hours per week and that further cuts or lay-offs were possible. She also indicated that the child support that her ex-husband has been ordered to pay will be terminated as her daughter will soon be 18 years of age. The record reflects that her receipt of child support has been problematic as there is an arrearage noted and that she is unable to depend upon regular receipt of the sums owed.

Based upon Ms. Cruea's testimony concerning her current income, her current gross weekly income amounts to \$196.00 per week (20 hours @ \$9.80/hour) or a monthly average of \$842.00 (\$196.00 x 4.3 weeks/month). Even were she to receive the child support which her husband has been ordered to pay (\$483.41/month + \$96.68 arrearage), the Petitioner's necessary monthly expenses of rent, utilities, groceries, transportation and insurance expenses considerably exceed her monthly income.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

#### **Findings of Fact**

On February 22, 1999, the Petitioner, Theresa Cruea applied for and received a home mortgage loan from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at

825 Hemlock, Celina, Ohio in the amount of \$64,225.00 (Loan Number 0019282967). RX-1.

In 2005, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. Respondent's Narrative.

The secured property was sold at foreclosure sale on January 3, 2007 for \$34,633.83. RX-4.

Subsequent collection activity by the Department of Treasury has reduced the amount due by \$8,921.00 leaving the amount remaining due after application of all recovery to date is \$25,594.19. RX-4.

The Petitioner's current income from all sources is exceeded by necessary monthly expenses.

#### **Conclusions of Law**

The Petitioner, Theresa Cruea is indebted to USDA RD in the amount of \$25,594.19.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

Based upon the Petitioner's current income and necessary living expenses, administrative wage garnishment of the wages of the Petitioner would cause financial hardship to her.

Due to the finding of financial hardship, administrative wage garnishment is not authorized at this time.

The Respondent may review the Petitioner's hardship at least annually and may reinstitute proceedings if it receives information that the Petitioner's financial condition has materially changed.

#### **Order**

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Theresa Cruea, is **not** authorized at this time, without prejudice to reinstating proceedings should there be a material change in the Petitioner's financial condition.

This matter is stricken from the active docket.  
Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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**In re: GALEN STACY.**  
**AWG Docket No. 08-0183.**  
**Decision and Order.**  
**February 4, 2009.**

**AWG.**

Petitioner Pro se.  
Mary Kimball for RD.  
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

#### **Decision and Order**

This matter is before me upon the request of the Petitioner, Galen Stacy, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against Petitioner. On September 17, 2008, I issued a Prehearing Order requiring the parties to exchange information concerning the nature of the debt and the ability of Petitioner to repay all or part of the debt, if established.

I conducted a telephone conference with the parties on November 14, 2008. During this conference, it became evident that Petitioner did not dispute the existence or the amount of the debt, but contended only that he was unable to pay the debt due to limited income and assets. Since Petitioner's written submission in response to my September 17 Order did not contain much in the way of current information, I directed him to submit by December 19, 2008, to the Hearing Clerk and Respondent, several forms<sup>1</sup> concerning his financial status. I scheduled the case for a telephone hearing to be conducted on January 27, 2009.

At the hearing, Petitioner appeared on his own behalf, while Respondent was represented by Gene Elkin, Esq. While the Hearing Clerk had received a copy of the submission prepared by Petitioner on his financial status, Petitioner stated that the copy he sent to Respondent

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<sup>1</sup> Assets and liabilities statement; Income and expenses statement.

had been returned to him as undeliverable. I offered to continue the hearing to allow Respondent's counsel to review the submission, but my offer was declined.

After being sworn in, Petitioner testified that, although he graduated from college in the mid-1990's, he had never found a job in line with his university degree. He has been working as a security guard for \$9 an hour, and is not optimistic about finding a job in another field. Currently, with overtime, he grosses about \$1700 a month, and after taxes and health insurance deductions, he nets approximately \$1162 a month. He characterizes his monthly expenses at \$1193 per month, owns no real property, and lists his cash and household goods as being worth a total of \$620. He undisputedly owes approximately \$35,000 on the USDA RD loan, and also lists education, credit card, hospital and IRS debts totaling over \$100,000.

Mr. Elkin did not testify.

#### **Findings of Fact**

1. On November 30, 2001, Petitioner Galen C. Stacy obtained a USDA Rural Development home mortgage loan for property located at 502 Ohio, Oswego, KS 67536. Petitioner signed a promissory note for \$68,000. RX 1.
2. On June 25, 2004 Petitioner was sent a Notice of Default on the promissory note.  
RX 3. On August 9, 2004, the account was reinstated and foreclosure efforts were ceased. On September 9, 2004, USDA received Petitioner's request for a moratorium on the loan; however, the property was eventually sold at foreclosure on February 2, 2007 for \$49,277.56.
3. After the foreclosure proceeds were applied to the debt owed at the time of the sale, the amount due USDA from Petitioner was \$34,955.14. RX 9.
4. Petitioner's current monthly net income is slightly exceeded by his current monthly expenses. In addition, Petitioner is substantially in arrears for student loans, hospital bills, credit card bills, and an IRS lien. His total indebtedness is well over \$100,000.

### **Conclusions of Law**

1. Petitioner Galen C. Stacy is indebted to USDA's Rural Development program in the amount of \$34,955.14.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. Based upon Petitioner's current income and necessary living expenses, and the large amount of debt owed by Petitioner, administrative wage garnishment of the wages of the Petitioner would cause him financial hardship.
4. Due to the finding of financial hardship, administrative wage garnishment is not authorized at this time.
5. Respondent may review the Petitioner's hardship at least annually and may reinstitute administrative wage garnishment proceedings if it receives information that the Petitioner's financial condition has materially changed.

### **Order**

For the foregoing reasons, administrative wage garnishment of the wages of Petitioner Galen C. Stacy is not authorized at this time, without prejudice to reinstating proceedings should there be a material change in Petitioner's financial condition.

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

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**In re: BARBARA GREER.**  
**AWG Docket No. 09-0005.**  
**Decision and Order.**  
**February 11, 2009.**

**AWG .**

Petitioner Pro se.  
Mary Kimball for RD.  
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

### **Decision and Order**

This matter is before me upon the request of the Petitioner, Barbara Greer, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 18, 2008, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

Respondent filed a Narrative, Witness and Exhibit List even before I issued my November 18 Order. Ms. Greer failed to file anything further with the Hearing Clerk even though she was contacted by telephone. At the time she requested the hearing, Petitioner indicated that her “soon to be [e]x-husband should be responsible for this debt.” In response to my Order, Respondent filed a Supplemental Narrative stating that because Petitioner and her then husband jointly signed the loan guarantee, the debt was owed by both borrowers jointly and severally.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

### **Findings of Fact**

1. On February 20, 2005, Aubrey and Barbara Greer, husband and wife, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture’s Rural Development Agency for property located at 705 E. Tate, Brownfield, Texas 79316. The loan, for \$43,000, was from JP Morgan Chase Bank. RX 1.
2. In September 2005 the Greer’s defaulted on the loan. Chase purchased the home at a foreclosure sale for \$45,067.47 in April 2006, but was unable to sell the home within six months. Chase submitted a loss claim based on a liquidation appraisal of \$30,000. USDA Rural Development paid Chase \$19,121.19 under the Loan Guarantee. The home was subsequently sold for \$20,000. RX 2, 3.

3. USDA has collected \$11,458 of the debt, leaving a current balance of \$7,663.19.
4. Petitioner has submitted no evidence in response to my Order that would indicate that her current income from all sources is exceeded by necessary monthly expenses.

#### **Conclusions of Law**

1. Petitioner Barbara Greer is indebted to USDA Rural Development in the amount of \$7,663.19. Both Petitioner and Aubrey Greer, who was her husband at the time the guarantee was applied for, are jointly and severally liable for this amount, as each borrower signed the loan guarantee.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.
3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

#### **Order**

For the foregoing reasons, the wages of the Petitioner, Barbara Greer, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

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

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**In re: MARCUS SEGUNDO.**  
**AWG Docket No. 09-0010.**  
**Decision and Order.**  
**March 25, 2009.**

**AWG .**

Respondent Pro se.  
Mary Kimball for RD.

*Decision and Order by Administrative Law Judge Peter M. Davenport.*

### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner, Marcus Segundo, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On October 20, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. The petitioner failed to file anything further with the Hearing Clerk and efforts to reach him by telephone were unsuccessful. At the time he requested a hearing, the Petitioner indicated that he did not owe the amount alleged to be due as "The house was paid off." Attached to the request for hearing was a closing statement indicating that \$28,786.26 was paid to the "Clrk of the Dist Court for" on item 504 (Pay off of First Mortgage).

The Narrative filed by the Respondent reflects that Petitioner did redeem the property prior to the expiration of the redemption period and resold the property as reflected by the closing statement provided by the Petitioner, but that USDA Rural Development was nonetheless obligated to pay the lender the sum of \$7,345.51 for accrued interest, protective advances, liquidation costs and property sale costs.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

### **Findings of Fact**

On September 3, 2003, the Petitioner, Marcus Segundo, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on October 10, 2003 obtained a home mortgage loan for property located

at 206 Eldridge, Coffeyville, Kansas from J.P. Morgan Chase Bank, N.A. (Chase) for \$32,280.00 (Loan Number 1082058435). RX-1. In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on June 7, 2007 for \$28,050.00. The Petitioner sold the residence on September 4, 2007 for \$35,000.00 three days prior to the expiration of the redemption period and redeemed the property for \$28,765.20, representing the foreclosure sale price of \$28,050.00, interest in the amount of \$700.20 for the period from June 7, 2007 through September 5, 2007, and a property inspection fee of \$15.00. Chase received the funds from the Court on October 5, 2007 and submitted a loss claim in the amount of \$7,345.51 to USDA Rural Development for accrued interest, protective advances, liquidation costs and property sale costs. RX-3.

USDA paid Chase \$7,345.51 under the Loan Guarantee. RX-3.

### **Conclusions of Law**

The Petitioner, Marcus Segundo, is indebted to USDA Rural Development in the amount of \$7,345.51 as of December 19, 2007 for the mortgage loan guarantee extended to him, further identified as Loan account number 1082058435.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

### **Order**

For the foregoing reasons, the wages of the Petitioner, Marcus Segundo, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

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

Done at Washington, D.C.

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**In re: DARRELL DALY.**  
**AWG Docket No. 09-0082.**  
**Decision and Order.**  
**June 16, 2009.**

**AWG .**

Petitioner Pro se.  
Mary Kimball for RD.  
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

#### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner, Darrell Daly, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 1, 2009, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. The Petitioner failed to file anything further with the Hearing Clerk and efforts to reach him by telephone were unsuccessful. At the time he requested a hearing, the Petitioner indicated that he did not owe the amount alleged to be due as "When the Judge ruled at the end he stated I owe nothing else and then he closed the case." On June 2, 2009, an Order was entered directing the Petitioner to provide a working telephone number so that a hearing could be scheduled; however, the time set forth in the Order expired without the Petitioner's compliance. Nothing further having been received from the Petitioner, the request for hearing will be considered waived and the matter will be decided upon the record.

The Narrative filed by the Respondent reflects that foreclosure proceedings were brought by the lender against the Petitioner and the property was sold in a foreclosure sale. USDA however was not a party to that action and the debt that is being sought to be collected arises under the Request for Single Family Housing Loan Guarantee signed by the Petitioner by which he agreed to reimburse the agency in the event a loss claim was paid on the loan. As a result of the foreclosure action, USDA Rural Development was obligated to pay the lender the sum of \$51,607.51 for accrued interest, protective advances, liquidation costs and property sale costs. The amount due has been reduced by Treasury Offsets amounting to \$5,230.50 leaving \$46,377.01 due at this time. On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

#### **Findings of Fact**

On October 6, 2003, the Petitioner, Darrell Daly, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on February 4, 2004 obtained a home mortgage loan for property located at 407 E. Pine Street, Cadillac, Michigan from J.P. Morgan Chase Bank, N.A. (Chase) for \$72,500.00 (Loan Number 1082071546). RX-1.

In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on December 15, 2006 for \$62,050.00. Chase submitted a loss claim and USDA paid Chase the sum of \$51,607.51 for accrued interest, protective advances, liquidation costs and property sale costs. RX-3, 4. Treasury offsets totaling \$5,230.50 have been received. Narrative, p 2. The remaining unpaid debt is in the amount of \$46,377.01.

#### **Conclusions of Law**

The Petitioner, Darrell Daly, is indebted to USDA Rural Development in the amount of \$46,377.01 as of February 22, 2008 for

the mortgage loan guarantee extended to him, further identified as Loan account number 1082071546. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met. The Respondent is entitled to administratively garnish the wages of the Petitioner.

**Order**

For the foregoing reasons, the wages of the Petitioner, Darrell Daly, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.  
Done at Washington, D.C.

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**In re: ERIC WALTERS.**  
**AWG Docket No. 09-0083.**  
**Decision and Order.**  
**June 16, 2009.**

**AWG .**

Petitioner Pro se.  
Mary Kimball for RD.

*Decision and Order by Administrative Law Judge Peter M. Davenport.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner, Eric Walters, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 1, 2009, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation

concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. The Petitioner failed to file anything further with the Hearing Clerk and efforts to reach him by telephone were unsuccessful. At the time he requested a hearing, the Petitioner indicated that he did not owe the amount alleged to be due as "House has been resold for the amount that I owed." On June 2, 2009, an Order was entered directing the Petitioner to provide a working telephone number so that a hearing could be scheduled; however, the time set forth in the Order expired without the Petitioner's compliance. Nothing further having been received from the Petitioner, the request for a hearing will be considered waived and the matter will be decided upon the record.

The Narrative filed by the Respondent reflects that foreclosure proceedings were brought by the lender against the Petitioner and the property was sold in a foreclosure sale. USDA however was not a party to that action and the debt that is being sought to be collected arises under the Request for Single Family Housing Loan Guarantee signed by the Petitioner by which he agreed to reimburse the agency in the event a loss claim was paid on the loan. As a result of the foreclosure action, USDA Rural Development was obligated to pay the lender the sum of \$16,276.18 for accrued interest, protective advances, liquidation costs and property sale costs. The amount due has been reduced by Treasury Offsets amounting to \$6,151.00, leaving \$10,125.18 due at this time. On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

#### **Findings of Fact**

On April 8, 2004, the Petitioner, Eric Walters, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on May 12, 2004 obtained a home mortgage loan for property located at 29 Sears Street, Clarksville, Arkansas from J.P. Morgan Chase Bank, N.A. (Chase) for \$65,800.00 (Loan Number 1082197453). RX-1.

In 2005, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on November 20, 2006 for \$55,250.00. Chase submitted a loss claim and USDA paid Chase the sum of \$16,276.18 for accrued interest, protective advances, liquidation costs and property sale costs. RX-2, 3. Treasury offsets totaling \$6,151.00 have been received. Narrative, p 2. The remaining unpaid debt is in the amount of \$10,125.18.

#### **Conclusions of Law**

The Petitioner, Eric Walters, is indebted to USDA Rural Development in the amount of \$10,125.18 for the mortgage loan guarantee extended to him, further identified as Loan account number 1082197453. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

#### **Order**

For the foregoing reasons, the wages of the Petitioner, Eric Walters, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

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

Done at Washington, D.C.

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**In re: NICOLA THOMAS.  
AWG Docket No.09-0053.  
Decision and Order.  
June 23, 2009.**

**AWG .**

Petitioner Pro se.  
Mary Kimball for RD.  
*Decision and Order by Administrative Law Judge Victor W. Palmer.*

#### **DECISION AND ORDER**

This matter is before me upon the request of the Petitioner, Nicola Thomas, for a hearing to contest the efforts of the Respondent, USDA/Rural Development, to garnish her wages in order to collect rental assistance it provided her. Initial efforts to conduct a preliminary telephone conference on April 28, 2009 were unsuccessful in that Ms. Thomas was not at her telephone at the time scheduled. A hearing was thereupon scheduled and held on May 20, 2009. Respondent introduced records that were duly identified and authenticated showing Ms. Thomas' wages when she applied for and received rental assistance from USDA, Rural Development, were higher than the amounts she listed on the application forms she had filed. The amount of her present debt for the rental assistance she received that she was not entitled to receive was proven by the evidence to amount to \$15,802. Though Petitioner stated she is unable to pay any amount at this time, she did not produce any evidence in support of this statement elucidating her present ability to pay, or showing at what point a repayment schedule would cause her financial hardship. Inasmuch as Ms. Thomas may not have understood prior to the hearing that she has the burden of proof under 31 C.F.R. § 285.11 (f)(8) to produce evidence of alleged financial hardship, I instructed Respondent to send her forms giving her the opportunity to provide financial information and show her ability to meet a monthly repayment schedule. Respondent advised that such forms were sent and in accordance with my instructions, Ms. Thomas was given until June

15, 2009 to complete the forms and return them to Respondent. Ms. Thomas did not do so.

Accordingly, the petition is hereby DISMISSED, and Respondent is entitled to administratively garnish the wages of the Petitioner subject to the limitations set forth in 31 C.F.R. § 285.11 (i).

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

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**In re: GEORGE W. TANNER, JR.**  
**AWG Docket No. 09-0103.**  
**Decision and Order.**  
**June 24, 2009.**

**AWG .**

Petitioner Pro se.

Mary Kimball for RD.

*Decision and Order by Administrative Law Judge Peter M. Davenport.*

#### **DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On May 4, 2009, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. The Petitioner filed the schedules that had been forwarded to him with the Hearing Clerk, but requested an extension of time for the hearing. At the time he requested a hearing, the Petitioner indicated that he had "explained my situation to 2 USDA-RD Representatives. No[t] one told me that interest would

be accrued. The house payments forced me to short sale. I discussed repayment and tried to get a settlement agreement based on my low or [illegible] income from April 08 to Jan 09.”

A telephonic hearing was held on June 24, 2009. The Petitioner was unrepresented spoke on his own behalf. The Respondent was represented by Gene Elkin, Legal Liaison for the Centralized Servicing Center and Mary Kimball, Accountant for the New Program Initiatives Branch, United States Department of Agriculture, Rural Development, St. Louis, Missouri. Diane Green, Secretary to the Administrative Law Judge was also present. Mary Kimball testified for the Respondent, identifying the exhibits attached to the Narrative and explaining the computation of the debt. The Petitioner cross examined Ms. Kimball on certain aspects of her testimony to clarify the computations and then testified how he had completed the schedules and provided some updated information which did not materially alter the picture presented as reflected on his schedules. On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

#### **Findings of Fact**

On November 27, 2002, the Petitioner, George W. Tanner, Jr., applied for and received a home mortgage loan in the amount of \$111,476.00 from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at 1667 Cherry Street, Lake City, Pennsylvania. RX-1.

The debt was established in the Mort Serv system as account number 0080851100. RX-2.

In 2007, the Petitioner defaulted on the mortgage loan and was sent a Notice of Default on September 18, 2007. RX-3.

A foreclosure sale was held on May 7, 2008 at which time the amount due prior to the sale was \$116,224.13, including principal, accrued interest, and fees. Funds received from the sale were \$100,277.52, leaving a balance due prior to referral to Treasury of \$15,946.61. RX-5.

USDA has received one payment of \$74.90 and Treasury has

collected two more payments totaling \$205.78 after fees, leaving a balance of \$15,665.93, exclusive of Treasury fees due and payable. Narrative, p. 2.

**Conclusions of Law**

The Petitioner, George W. Tanner, Jr., is indebted to USDA RD in the amount of \$15,665.93 for the mortgage loan extended to him.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

**Order**

For the foregoing reasons, the wages of the Petitioner, George W. Tanner, Jr., shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

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

Done at Washington, D.C.

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**EQUAL OPPORTUNITY CREDIT ACT**

**COURT DECISIONS**

**SHERRY ROBINSON v. USDA.**

**No. 08-13255.**

**Non-Argument Calendar.**

**December 30, 2008.**

**[Cite as: 305 Fed.Appx. 629].**

**United States Court of Appeals,  
Eleventh Circuit.**

**ECO A – Tolling of Limitations, equitable.**

The assertion of an applicant for USDA Loan and disaster relief that she was pursuing her remedy through the United States Department of Agriculture's ( USDA) administrative processes was insufficient to satisfy her burden of showing that equitable tolling of her Equal Credit Opportunity Act (ECO A) was warranted.

Before ANDERSON, MARCUS, and CARNES, Circuit Judges.

PER CURIAM:

Sherry Robinson, proceeding *pro se*, appeals the Fed.R.Civ.P. 12(b)(6) dismissal of her civil complaint based upon the district court's finding that her Equal Credit Opportunity Act (“ECO A”), 15 U.S.C. § 1691 *et seq.*, claim was time-barred. Robinson argues that the court should have applied equitable tolling to her claim because she has not sat “idly by” but rather has pursued a remedy through the United States Department of Agriculture (“ USDA”)’s administrative processes for many years.

We review *de novo* a district court's ruling on a Rule 12(b)(6) motion. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir.2003). “When considering a motion to dismiss, all facts set forth in the plaintiff's

complaint ‘are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.’ ” *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir.2000) (citation omitted); *see also* Fed.R.Civ.P. 10(c). Because a statute-of-limitations bar is an affirmative defense, a plaintiff is not required to negate it in her complaint. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir.2004). Therefore, “a Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is ‘apparent from the face of the complaint’ that the claim is time-barred.” *Id.* (citations omitted).

That is apparent from the face of the complaint in this case. The relevant section of the ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age.” 15 U.S.C. § 1691(a)(1). A later ECOA section notes that no action “shall be brought later than two years from the date of the occurrence of the [§ 1691(a)(1) ] violation” unless at least one of two exceptions apply. *Id.* § 1691e(f). Neither applies here. Robinson’s complaint did not allege any discriminatory acts by the USDA within the two-year statute of limitations period. Although she filed her complaint in October 2007, the most recent violation that she alleged occurred in 2001. Robinson acknowledges in her brief that she failed to comply with the statute-of-limitations requirements.

Under the doctrine of equitable tolling, “plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances.” *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir.1998). The Supreme Court has stated that “[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.” *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 1100, 166 L.Ed.2d 973 (2007). It is “appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999). “Because the time limits imposed by

Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.” *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990).

Robinson has the burden of establishing that she is entitled to equitable tolling. *See Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir.2002). *Pro se* status, ignorance of the law, and administrative processes that “are too slow or involve too much delay” do not warrant equitable tolling. *Wakefield v. R.R. Ret. Bd.*, 131 F.3d 967, 970 (11th Cir.1997). Furthermore, the liberal construction given to *pro se* pleadings “does not mean liberal deadlines.” *Wayne v. Jarvis*, 197 F.3d 1098, 1104 (11th Cir.1999), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir.2003).

While we have not yet considered whether the doctrine of equitable tolling applies to ECOA claims, the well-established rule is that, absent congressional intent to the contrary, equitable tolling principles should be read into every federal statute of limitations. *United States v. Johnson*, 541 F.3d 1064, 1067 (11th Cir.2008); *see also Irwin*, 498 U.S. at 95, 111 S.Ct. at 457 (applying equitable tolling to Title VII claims); *Ellis*, 160 F.3d at 708 (applying equitable tolling to Truth in Lending Act claims). Applying that rule to ECOA claims would not, however, help Robinson. *See, e.g., Ramsdell v. Bowles*, 64 F.3d 5, 9 (1st Cir.1995) (denying equitable tolling as unwarranted but noting that it “may be available in a proper case”). She has not carried her burden of showing that this is one of those unusual cases where the “rare remedy” of equitable tolling is warranted. *See Wallace*, 127 S.Ct. at 1100.

Robinson has not carried her burden, either through the allegations in her complaint or even through arguments in her briefs, of asserting any circumstances that would justify equitable tolling. *See Drew*, 297 F.3d at 1286. Her complaint recounts a series of loan and disaster-relief applications, refusals, and delays stretching from 1992 to 2001, and it even admits that the USDA appellate division suggested in 2000 that she

sue in federal district court. Yet, she waited a full seven years before doing so. She offers no reason for this delay beyond an assertion that she was pursuing her remedy through the USDA's administrative processes. As we have recognized before, however, slow or delayed administrative processes do not justify the rare remedy of equitable tolling. *Wakefield*, 131 F.3d at 970.

Because it is apparent from the face of the complaint that Robinson's claim was time-barred and she has failed to meet her burden of establishing any extraordinary circumstances justifying the application of equitable tolling, the district court did not err when it dismissed her complaint.

**AFFIRMED.**

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**GUADALUPE L. GARCIA AND G.A. GARCIA AND SONS  
FARM, ET AL, v. USDA.**

**Nos. 08-5110, 08-5135.**

**Filed April 24, 2009.**

**Rehearing En Banc Denied June 18, 2009.**

**[Cite as: 563 F.3d 519].**

**ECOA – APA – Hispanic minority – Female minority.**

Female and Hispanic farmers brought action against USDA under the Equal Credit Opportunity Act (ECOA), the Declaratory Judgment Act, and the Administrative Procedure Act (APA) alleging that the USDA had unlawfully discriminated against them in the administration of its farm benefit programs and failed to act on their administrative complaints in accordance with USDA regulations. On remand, 444 F.3d 625, 525 F.Supp.2d 155, the United States District Court for the District of Columbia reaffirmed its dismissal of the APA failure-to-investigate claims. after the USDA publicly acknowledged it had previously “effectively dismantled” its civil rights enforcement apparatus, had an “adequate remedy” in court within the meaning of the Administrative Procedure Act (APA), and farmers were therefore barred from relying on the APA to obtain relief. Under the Equal Credit Opportunity Act (ECOA), to the

Guadalupe L. Garcia and  
G.A. Garcia and Sons Farms v. USDA  
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extent they could offer proof that the USDA discriminated against them in the administration of its credit programs, the farmers would be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief. Relief will be deemed "adequate," where a statute affords an opportunity for de novo district-court review of the agency action, and, also, where there is a private cause of action against a third party otherwise subject to agency regulation. Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.

**United States Court of Appeals,  
District of Columbia Circuit.**

Before: ROGERS and GRIFFITH, Circuit Judges, and EDWARDS,  
Senior Circuit Judge.

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

These appeals relate to the continuing efforts by farmers to obtain relief from the discriminatory distribution of federal farm benefits by the United States Department of Agriculture ("USDA"). *See, e.g., Pigford v. Glickman*, 206 F.3d 1212 (D.C.Cir.2000). This time the complaints were filed by female and Hispanic farmers who alleged that since 1981 the USDA has unlawfully discriminated against them in the administration of its farm benefit programs and failed to act on their administrative complaints in accordance with USDA regulations. This court affirmed the denial of class action certification and the dismissal of the failure-to-investigate claims brought under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f. *Love v. Johanns*, 439 F.3d 723 (D.C.Cir.2006); *Garcia v. Johanns*, 444 F.3d 625 (D.C.Cir.2006). The question in this second interlocutory appeal is whether appellants' failure-to-investigate claims are reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Because appellants fail to show they lack an adequate remedy in a court, we affirm the dismissals of their APA failure-to-investigate claims and remand the cases to the district court.

**I.**

The ECOA provides that it is “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age.” 15 U.S.C. § 1691(a). The statute authorizes the recovery of actual damages from creditors, including the federal government, *see id.* §§ 1691a(e)-(f), 1691e(a), and a court “may grant such equitable and declaratory relief as is necessary to enforce [the ECOA],” as well as “reasonable attorney's fees” to applicants bringing a “successful action.” *Id.* § 1691e(c)-(d). Claims under the ECOA must be filed within two years of the “date of the occurrence of the violation.” *Id.* § 1691e(f).

USDA regulations have long provided that applicants alleging discrimination by the USDA in its direct benefit programs may file administrative complaints with the USDA. *See* 7 C.F.R. § 15d.4; *see also Love v. Connor*, 525 F.Supp.2d 155, 157-58 (D.D.C.2007).<sup>1</sup> Appellants allege, however, that for years the USDA ignored discrimination complaints like theirs. Indeed, in 1997 the USDA publicly acknowledged that in the early 1980s it “effectively dismantled” its civil rights enforcement apparatus.<sup>2</sup>

In response, Congress enacted a special remedial statute in 1998 for applicants who had filed a “nonemployment related complaint” with the USDA before July 1, 1997 that alleged discrimination occurring between January 1, 1981 and December 31, 1996. Omnibus

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<sup>1</sup>The USDA regulations treat the filing of administrative complaints alleging discrimination as permissive, rather than mandatory. *See* Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed.Reg. 62,962, 62,963 (proposed Nov. 10, 1998).

<sup>2</sup> CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 46-47 (1997); *see also Pigford v. Veneman*, 292 F.3d 918, 920 (D.C.Cir.2002); *Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearings Before the H. Subcomm. on Dep't Operations, Nutrition and Foreign Agric. and the H. Comm. on Agric.*, 105th Cong. 97 (1997) (statement of the Secretary of the USDA).

Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub.L. No. 105-277, § 741(e), 112 Stat. 2681-31 (codified at 7 U.S.C. § 2279 Note) (hereinafter “Section 741”). The statute extended the ECOA statute of limitations until October 21, 2000, and provided that such eligible complainants could either file an ECOA action in federal court, pursuant to Section 741(a), or renew their administrative complaints and obtain a determination on the merits of their claim from the USDA, pursuant to Section 741(b). Subsection (b) of the statute required the USDA to timely process renewed administrative complaints, to investigate the claims, and to issue merits determinations after a hearing on the record. Subsections (d) and (g) provided that complainants denied administrative relief could seek *de novo* review in federal court.

Appellants, nearly all of whom appear to have filed complaints with the USDA before July 1, 1997,<sup>3</sup> chose the first option: On the eve of the October 21, 2000 deadline, they filed complaints in the federal district court here under the ECOA and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Their complaints also included claims under the APA.<sup>4</sup> They alleged that the USDA had discriminated against them with respect to credit transactions and disaster benefits in violation of the

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<sup>3</sup> Two Garcia appellants filed administrative complaints with the USDA regarding discrimination occurring after 1996. Those complaints would not be covered by Section 741. This is a circumstance of no significance because we hold that all of the appellants have an adequate remedy at law in the ECOA for their failure-to-investigate claims. During oral argument government counsel acknowledged, however, that were agency action on the post-1996-occurrence complaints unreasonably delayed, these Garcia appellants could seek judicial relief in the district court under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C.Cir.1984). Government counsel expressed no opinion on whether such delay had occurred as to these two administrative complaints. We leave for another day whether *TRAC* relief would be available given our holding that the ECOA provides an adequate remedy at law for failure-to-investigate claims.

<sup>4</sup> See *Love v. Veneman*, Civ. No. 00-2502 2001 WL 34840898, \*1 (D.D.C. Dec. 13, 2001); *Garcia v. Veneman*, Civ. No. 00-2445, 2002 WL 33004124, at \*1 (D.D.C. Mar. 20, 2002).

ECOA, and also had systemically failed to investigate complaints of such discrimination in violation of USDA regulations. In the district court only appellants' ECOA credit transaction claims and the Garcia appellants' APA disaster benefit claims have survived the USDA's motion to dismiss. The district court also denied appellants' motions for class certification on their remaining ECOA discrimination claims, and this court affirmed upon interlocutory review in 2006. *See Love*, 439 F.3d 723; *Garcia*, 444 F.3d 625. Following a remand of the APA failure-to-investigate claims, the district court reaffirmed its dismissal of those claims on the ground that Section 741 provided appellants an adequate remedy at law. *See Love v. Connor*, 525 F.Supp.2d 155; Order, *Garcia v. Veneman*, Civ. No. 00-2445. The district court certified its interlocutory ruling, and this court granted appellants' petition for leave to appeal pursuant to 28 U.S.C. § 1292(b).

## II.

The APA provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704. In *Bowen v. Massachusetts*, 487 U.S. 879, 904, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), the Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a “special and adequate review procedure.” *Id.* at 904, 108 S.Ct. 2722 (internal quotations omitted). An alternative remedy will not be adequate under § 704 if the remedy offers only “doubtful and limited relief.” *Id.* at 901, 108 S.Ct. 2722. So understood, this court has held that the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the “same genre.” *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1272 (D.C.Cir.2005). Thus, for example, relief will be deemed adequate “where a statute affords an opportunity for *de novo* district-court review” of the agency action. *Id.* at 1270. In such cases, the court has reasoned that “Congress did not intend to permit a litigant challenging an administrative denial ... to utilize simultaneously both [the review provision] and the APA.” *Id.* at 1270 (quoting *Env'tl. Defense Fund v.*

*Reilly*, 909 F.2d 1497, 1501 (D.C.Cir.1990)) (omission and alteration in original). Relief also will be deemed adequate “where there is a private cause of action against a third party otherwise subject to agency regulation.” *Id.* at 1271. In evaluating the availability and adequacy of alternative remedies, however, the court must give the APA “ ‘a hospitable interpretation’ such that ‘only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.’ ” *Id.* at 1270 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)); see also *Bowen v. Massachusetts*, 487 U.S. at 904, 108 S.Ct. 2722.

Appellants contend that the district court erred in two respects in holding that they could not bring a claim under the APA challenging the USDA's failure to investigate their civil rights complaints: First, the district court misapplied *Bowen* by disregarding record evidence that under Section 741 there was no real adequate alternative remedy in a court for their failure-to-investigate claims; second, the district court mistakenly relied on this court's precedents involving claims against an agency for failing to regulate third-party wrongdoers, and therefore failed to follow circuit precedent that permits a plaintiff to bring an APA claim for the agency's failure to follow its regulations in addition to a non-APA discrimination claim. Appellants emphasize that their survival as farmers depends in significant part on their ability to obtain federal benefits authorized by Congress to be administered by the USDA, and that when the USDA fails to comply with its regulations for handling and processing administrative complaints, the benefits systems envisioned by Congress are thwarted and their efforts to survive as farmers are stymied. Although this court has no occasion to doubt appellants' claims of harm, their legal challenges to the dismissal of their APA failure-to-investigate claims are unpersuasive.

First, there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit.

In responding to the dilemma presented by the USDA's failure to investigate discrimination claims, Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative complaint with the USDA with subsequent judicial review if the USDA denied relief. Although appellants had the option first to renew their administrative complaints with the USDA pursuant to Section 741(b), they chose not to do so. Had appellants done so, the USDA would have been obligated to process, investigate, and adjudicate appellants' complaints of discrimination in a timely fashion and absent relief *de novo* judicial review would be available. Having chosen instead to proceed directly to the district court pursuant to Section 741(a), appellants' complaints sought declaratory and injunctive relief that the USDA should have investigated their old, unrenewed administrative complaints about discrimination and requiring USDA to develop a better processing system for such claims-in other words to grant appellants the relief that they chose to forego when they filed their lawsuits pursuant to Section 741(a). By extending the statute of limitations for administrative complaints and by providing for judicial review of USDA's determinations, Congress provided appellants an adequate remedy in court within the meaning of the APA. Appellants are therefore barred from relying on the APA to obtain relief they chose to forego.

Appellants contend, however, that they were entitled to seek a court order pursuant to the APA to remedy the USDA's failure to investigate their old administrative complaints because the alternative administrative option under Section 741(b) was illusory. To that end, appellants offered un rebutted evidence that the USDA never successfully implemented the required administrative process; they also suggested that no plaintiff has yet obtained *de novo* district court review pursuant to Section 741(b).<sup>5</sup> Because of the flaws in the Section 741(b) option, appellants conclude that they may obtain through their Section 741(a) complaint relief under the APA promised by Section 741(b).

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<sup>5</sup> See, e.g., Decl. of Rosalind Gray, Former Director, USDA Office of Civil Rights, Apr. 6, 2002; Gray Supp. Decl., Oct. 18, 2006; Gray Second Supp. Decl., Sept. 12, 2007; *Benoit v. U.S. Dep't of Agric.*, 577 F.Supp.2d 12 (D.D.C.2008).

There are two problems with appellants' approach. The first is simply a matter of statutory interpretation. Adoption of appellants' interpretation would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints. The plain text of Section 741 required complainants to make a choice between going to court immediately or first renewing their administrative complaints. Congress required the USDA to process, investigate, and adjudicate the renewed administrative complaints and afforded complainants who obtained no relief the opportunity to seek *de novo* review in the district court. Each option afforded an in-court remedy. Moreover, had appellants renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative process, and been unable to obtain a final determination due to the USDA's unreasonable delay, they could have sought, as government counsel acknowledged during oral argument, relief in the district court under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C.Cir.1984). *Cf. In re Core Commc'ns, Inc.*, 531 F.3d 849, 855, 860 (D.C.Cir.2008); *In re Tennant*, 359 F.3d 523, 531 (D.C.Cir.2004). Appellants' futility contention, then, fails to show that in enacting Section 741 Congress did not intend to require eligible complainants to make a choice between two remedial regimes. *Cf. Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088-89 (D.C.Cir.1996).

The second problem arises because, even giving credence to appellants' futility suggestion, they still would be unable to show that they lack an adequate remedy at law. Under the ECOA, to the extent appellants can offer proof that the USDA discriminated against them in the administration of its credit programs, appellants will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief. 15 U.S.C. § 1691e. This court's precedent in *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (1983) (en banc), and its progeny-*Coker v. Sullivan*, 902 F.2d 84 (1990), and *Women's Equity Action League v. Cavazos* ("WEAL"), 906 F.2d 742 (1990)-make clear that an ECOA

discrimination claim filed directly against the USDA would be adequate to preclude a cause of action under the APA. In those cases the court held that the plaintiff could not maintain an action under the APA directly against a federal agency for failure to investigate and rectify the wrongdoing of a third party where Congress had provided the plaintiff with a private right of action against the third party. *See Council*, 709 F.2d at 1531-33; *Coker*, 902 F.2d at 89-90; *WEAL*, 906 F.2d at 750-51. For example, in *Council*, the plaintiffs had alleged that the Office of Revenue Sharing had failed to process and resolve administrative complaints in a timely manner. On appeal, they contended that a national suit against the federal agency would be more effective. This court held that even so the remedy in the form of a private suit against state and local governments provided by Congress was adequate to address the alleged discrimination. *Council*, 709 F.2d at 1532-33.

The relevant question under the APA, then, is not whether private lawsuits against the third-party wrongdoer are as effective as an APA lawsuit against the regulating agency, but whether the private suit remedy provided by Congress is adequate. *See Council*, 709 F.2d at 1532; *WEAL*, 906 F.2d at 751. As a result, the availability of actions against individuals may be adequate even if such actions “cannot redress the systemic lags and lapses by federal monitors” and even if such “[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement.” *WEAL*, 906 F.2d at 751. This is because the court concluded in *Council*, *Coker*, and *WEAL*, “situation-specific litigation affords an adequate, even if imperfect, remedy.” *Id.* As explained in *El Rio Santa Cruz*, third-party suits are an adequate remedy for the alleged victims of statutory violations, like unlawful discrimination, because they provide relief of “the same genre” as that offered by an APA claim. 396 F.3d at 1272 (quoting *WEAL*, 906 F.2d at 751).

Appellants' attempts to avoid this precedent are unpersuasive. The court has confirmed that its approach is consistent with the Supreme Court's construction of the APA in *Bowen*. In *El Rio Santa Cruz*, the

court explained that, consistent with *Bowen*, *Council*, *Coker*, and *WEAL* held that an alternative adequate remedy at law exists where Congress chooses to grant those allegedly aggrieved by agency failure to remedy the wrongs of a regulated third parties a private cause of action against those third parties. 396 F.3d at 1270-71. The fact that appellants fault the USDA's regulation of itself and not its regulation of a third party does not mean that *Council* and its progeny are inapposite, because there is no material difference between the adequacy of the ECOA remedy and the third-party actions in *Council*, *Coker* and *WEAL*. The suggestion that ECOA relief would not vindicate appellants' interest in ensuring that the USDA adheres to its duty-to-investigate regulations, was rejected in *Council*, *Coker*, and *WEAL* when the court concluded that a direct action against a regulated private party was an adequate remedy at law for whatever additional injury a plaintiff suffered as a result of a federal agency's failure to remedy that violation administratively. *See Council*, 709 F.2d at 1531-33; *Coker*, 902 F.2d at 89-90; *WEAL*, 906 F.2d at 750-51. If anything, an ECOA discrimination claim filed directly against the USDA affords a better remedy than those available in *Council*, *Coker*, and *WEAL*. If successful, a plaintiff can obtain declaratory and injunctive relief against the agency itself, in addition to money damages, and such remedies would presumably deter the USDA to the same extent as a successful APA claim from discriminating against plaintiff-credit applicants and failing to adhere to its duty-to-investigate regulations. On appellants' view of *Council*, *Coker*, and *WEAL*, the availability of a direct ECOA claim against a private creditor would constitute an adequate remedy barring APA challenges to the FTC's oversight of a private creditor, *see* 15 U.S.C. §§ 1691c, 1691c(a)-(c); *see also* 22 Op. Off. Legal Counsel 11, 1998 WL 1180049, at \*1, but the availability of a nearly identical claim against the USDA would not constitute an adequate remedy. Appellants cannot show that Congress intended such disparate results.

*McKenna v. Weinberger*, 729 F.2d 783 (D.C.Cir.1984), is of no assistance to appellants. In *McKenna*, the court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, did not provide the

exclusive judicial remedy for a probationary employee's claim that the agency failed to follow its regulations in effecting an allegedly discriminatory discharge. *Id.* at 791. The court observed that “Ms. McKenna's claim under the APA is *not* one of discrimination. Rather, she charges that the agency, whether its motive was legal or illegal, failed to conform to its own regulations. She does not claim that these procedural violations constitute employment discrimination.” *Id.* (emphasis in original). In other words, her claim related to a personnel matter that was completely distinct from her gender discrimination. Here, by contrast, appellants' APA failure-to-investigate and lending discrimination claims are inextricably linked.

As appellants read *McKenna*, it stands for the proposition that a plaintiff may always bring an APA claim alleging that an agency failed to follow its own regulations in processing or investigating discrimination allegations, notwithstanding the existence of other adequate remedies at law. But *McKenna* cannot bear the weight that appellants place upon it. In *McKenna*, the court did not address whether the judicial and administrative procedures under Title VII constituted an adequate remedy at law so as to preclude APA review and so cannot be read, as appellants urge, as inconsistent with *Council* and its progeny. Appellants cite to no case that reads *McKenna* that way, and such precedent as we have found does not support their position.<sup>6</sup> In *McKenna* the court simply assumed without deciding that Title VII procedures did not constitute an adequate remedy at law. *Cf. Trudeau v. FTC*, 456 F.3d 178 (D.C.Cir.2006). Appellants' other authorities also provide no support. For instance, their reliance on *Esch v. Yeutter*, 876 F.2d 976, 984-85 (D.C.Cir.1989), is misplaced; the court held only that the potential availability of a cause of action in the Claims Court was not an adequate remedy because that court lacked equitable jurisdiction and it was doubtful that court had jurisdiction over the plaintiffs claims.

Remaining are appellants' APA claims that the USDA discriminated in dispersing non-credit disaster benefits, which are not covered by

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<sup>6</sup> See *Nichols v. Agency for Int'l Dev.*, 18 F.Supp.2d 1, 3 & n. 2 (D.D.C.1998); *Lynch v. Bennett*, 665 F.Supp. 62, 64-65 (D.D.C.1987).

Section 741. We remand these claims. As to the Garcia appellants, the district court's dismissal did not address their non-credit claims. *See Order, Garcia v. Veneman*, Civ. No. 00-2445 (Nov. 30, 2007). As to the Love appellants, the district court's conclusion that there was no reason to allow them to proceed with their non-credit claims “at this time,” *Love*, 525 F.Supp.2d at 161, was not a dismissal with prejudice, *see Foremost Sales Promotions, Inc. v. Dir., Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1045-46 (7th Cir.1987); 12 MOORE'S FEDERAL PRACTICE § 58.02. Finally, the court will not address the government's jurisdictional and other contentions for dismissal of these claims because the district court has yet to rule on them and they were not adequately briefed in this interlocutory appeal.

Accordingly, we affirm the dismissals of appellants' APA failure-to-investigate claims and otherwise remand the cases to the district court.

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**ROBERT WILLIAMS, ET AL, v. USDA.**  
**Civil Action No. 03-2245 (CKK).**  
**June 1, 2009.**

[Cite as: 620 F.Supp.2d 40].

**EOCA – Race minority – Non discriminatory reasons for denial .**

Farmers brought action against USDA, alleging that they were discriminated against on the basis of race by the USDA when their application for a farm loan was denied. Credit applicant complained of inquiry into their credit history. FSA's determination that their undisclosed existing debts made their operation financially not feasible was not discriminatory. Court granted USDA's motion for summary judgment.

**United States District Court,  
District of Columbia**

**MEMORANDUM OPINION**

COLLEEN KOLLAR-KOTELLY, District Judge.

Plaintiffs Robert and LaVerne Williams allege that they were discriminated against on the basis of race by the United States Department of Agriculture (“USDA”) when their application for a farm loan was denied in 2003. Defendant Ed Schafer, Secretary of the United States Department of Agriculture (together with the United States and other government officials sued in their official capacities, “Defendants”), deny Plaintiffs’ allegations and have filed the pending Motion for Summary Judgment.<sup>1</sup> After a searching review of the parties’ submissions, relevant case law, statutory authority, and the entire record of the case as a whole, the Court finds that there is no evidence in the record from which to find that Plaintiffs were subject to discrimination based on their race. Accordingly, the Court shall GRANT Defendants’ Motion for Summary Judgment, for the reasons that follow.

## I. BACKGROUND

### *A. Statutory and Regulatory Background*

This case involves the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*, pursuant to which the Farm Service Agency (“FSA”) is authorized to make loans to (1) eligible farmers who (2) propose plans of operation that are feasible. *See* 7 C.F.R. §§ 1910.5, 1941.12, 1941.33. With respect to this first requirement (eligibility), the FSA considers various enumerated criteria, including an inquiry into an applicant’s credit history. 7 C.F.R. § 1910.5(b), (c). Pursuant to an instruction issued by the USDA, this inquiry includes an assessment of whether the applicant is “creditworthy” in the sense that he or she must not have provided false information in connection with the loan application:

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<sup>1</sup> The Court has substituted Secretary Vilsack for the name of his originally-named predecessor, Secretary Ann Veneman, pursuant to Federal Rule of Civil Procedure 25(d) (“[a]n action does not abate when a public officer who is a party in an official capacity ... ceases to hold office while the action is pending. The officer’s successor is automatically substituted as a party”).

Applicants ... will be determined not creditworthy if they have ever deliberately provided false information, intentionally omitted information relative to the loan decision, or have not made every reasonable effort to meet the terms and conditions of any previous loan.

Defs.' Reply, Ex. A at 2 (Instruction 1910-A(c)). With respect to the second requirement (a feasible plan), the FSA reviews the applicant's plan to assess whether the applicant will be able to:

- (1) Pay all operating expenses and all taxes which are due during the projected farm budget period;
  - (2) Meet necessary payments on all debts; and
  - (3) Provide living expenses for the [applicant's] family members.
- 7 C.F.R. § 1941.33(b), 1941.4.

Only loans that comply with all established policies and regulations, including the requirement that “[t]he proposed loan is based on a feasible plan,” are subject to approval. *Id.* § 1941.33(b).

#### *B. Factual Background*

The following material facts are based on undisputed evidence in the record.<sup>2</sup> Plaintiffs own a small cotton farm in Roscoe, Texas. Defs.'

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<sup>2</sup> The Court notes that it strictly adheres to the text of Local Civil Rule 7(h)(1) (formerly 56.1) when resolving motions for summary judgment. The Court instructed the parties that the Court would strike pleadings that violated Local Civil Rule 7(h), and that it would “assume [ ] facts identified by the moving party in its statement of facts are admitted, unless ... controverted.” *See* [225] Order at 2 (Dec. 12, 2008). Pursuant to this Order, the Court struck Plaintiffs' initial Opposition to Defendants' Motion for Summary Judgment because Plaintiffs' objections to Defendants' proffered facts were unsupported by citations to record evidence. *See* Min. Order dated Feb. 19, 2009. Plaintiffs re-filed their Opposition on February 23, 2009, admitting many of Defendants' proffered facts but continuing to object to certain of the them without record support. These “disputed” facts shall be deemed conceded in accordance with the Court's prior Orders. Accordingly, the Court shall cite directly to Defendants' Statement of Material Facts (“Defs.' Stmt.”) and, where an objection has been made that includes record support, the Court shall cite to Plaintiffs' Response to Defendants' Statement of Material Facts (“Pls.' Resp. Stmt.”). The Court shall also cite directly to evidence in the record, where appropriate. Finally, the Court notes that Plaintiffs submitted a Statement of Genuine  
(continued...)

Stmt. ¶ 1. In early 2003, Plaintiffs applied for a farm loan from the FSA. *Id.* ¶ 4. In connection with their loan application, Plaintiffs met with Robert Kalina, a Farm Loan Manager. *Id.* ¶¶ 4, 5. With Mr. Kalina's assistance, Plaintiffs submitted a complete loan application in March 2003. *Id.* ¶¶ 8, 12.

On April 4, 2003, Mr. Kalina and Plaintiffs developed a Farm and Home Plan (the "Plan") that would "cash flow," a term of art used to describe a feasible plan whereby an applicant is able to (1) pay all of his or her farm operating expenses and taxes, (2) meet necessary payments on debts, and (3) provide living expenses for family members. *Id.* ¶ 13. The Plan met these requirements by \$152. *Id.*

As part of the loan application process, Mr. Kalina conducted an equipment inspection and appraisal of Plaintiffs' farm operation. *Id.* ¶ 15. Mr. Kalina observed several pieces of equipment on Plaintiffs' property that were not included in the Plan, including a "4650" tractor. *Id.* ¶ 15. Plaintiffs informed Mr. Kalina that this equipment, including the 4650 tractor, belonged to his neighbors. *Id.* Based on the Plan that Mr. Kalina and Plaintiffs created (and Plaintiffs' representations that the equipment visually observed by Mr. Kalina was not owned by them), the FSA initially approved two loans for Plaintiffs—a refinance loan of \$23,500 for tractor repairs on a "4640" tractor, and an operating loan of \$55,800. *Id.* ¶ 14. Problems arose almost immediately.

On April 15, 2003, Mr. Kalina spoke with Plaintiffs about obtaining the financing statement for their 4640 tractor. *Id.* ¶ 17. For the first time, Plaintiffs informed Mr. Kalina that the requested financing actually related to a 4650 tractor that they had recently purchased, which the Key Brothers Equipment store ("Key Brothers") could verify. *Id.* ¶ 17. When Mr. Kalina spoke with Key Brothers, he discovered that Plaintiffs owed \$23,268 for repairs associated with the 4640 tractor, \$24,000 associated

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<sup>2</sup>(...continued)

Disputed Issues along with their Opposition. Because this statement is unsupported by evidence in the record, the Court shall disregard it pursuant to Local Civil Rule 7(h)(1) and the Court's Orders relating to the same.

with the 4650 tractor (including an outstanding payment of \$5,610), and \$22,275 for various other parts and repairs. *Id.* ¶¶ 19, 24. Key Brothers informed Mr. Kalina that approximately \$38,280 was needed to bring Plaintiffs' account current. *Id.* ¶ 19. When Mr. Kalina asked Plaintiffs about the 4650 tractor, Plaintiffs explained that the 4650 tractor that Mr. Kalina previously observed, was an identical model owned by his neighbor, and that his 4650 tractor was located in a friend's barn at the time. *Id.* ¶ 20. Although the 4640 tractor had been contemplated by the Plan, the 4650 tractor and the additional debt for parts and repairs had not been disclosed by Plaintiffs and had not been known to the FSA when it initially approved Plaintiffs' loans. *Id.* ¶¶ 22-27.

Mr. Kalina successfully sought to set up a payment plan with Key Brothers to lower Plaintiffs' monthly payments and potentially allow a feasible Plan to be created. *Id.* ¶¶ 24-25, 28, 30. Despite these efforts, the 4650 tractor added \$5,610 to Plaintiffs' debt, and the payment plan with Key Brothers added another \$500 per month. *Id.* ¶ 31. These additional debts prevented the Plan from achieving cash flow by approximately \$11,500. *Id.* ¶ 32. On April 22, 2003, Mr. Kalina met with Plaintiffs to discuss the Plan, and although they discussed ways in which Plaintiffs could increase their cash flow or reduce their operating expenses, none of their ideas resulted in the creation of a cash flow plan. *Id.* ¶¶ 33-35, 38.

On April 30, 2003, Larry Owens, the FSA's Texas Farm Loan Chief, rescinded the initial approval of Plaintiffs' loans. *Id.* ¶ 39. In a May 1, 2003 letter to Plaintiffs, Mr. Owens explained that the FSA had decided to deny Plaintiffs' loan application for two reasons. *Id.* ¶ 40. First, the FSA concluded that Plaintiffs were not "creditworthy" based on their failure to disclose debts in connection with the creation of their Plan:

As you know, a lien search revealed a previously undisclosed debt of \$24,078.00 to John Deere Credit Corporation for a 4650 John Deere tractor. While verifying that debt, FSA discovered an additional \$22,000 dollar debt owed to Key Brothers Equipment for farm equipment parts and repairs. Based upon this information, FSA has concluded that you

are not eligible for loan assistance because you are not creditworthy as required by 7 C.F.R.1910.5, FmHA Instructions 1910-A, section 1910.5(c), [which] states in part that: 'Applicants ... will be determined not creditworthy if they have ever deliberately provided false information, [or] intentionally omitted information relative to the loan decision.'

Defs.' Mot., Ex. 28 at 1 (5/1/08 Letter from L. Owens to Plaintiffs). Second, the FSA determined that Plaintiffs' additional debts prevented the Plan from remaining feasible:

Inclusion of the additional debt that was discovered during the pre-closing activity results in your plan of operation (cash flow projection) not being feasible ... The inclusion of the additional debts discovered by the agency in your Farm & Home Plan results in balance available in your plan lacking \$11,458.00 to project a feasible plan.

*Id.* at 1-2.<sup>3</sup>

Dissatisfied with the FSA's handling of their loan application, Plaintiffs filed a complaint of discrimination through their attorney, Mr. James W. Myart. *Id.*, Ex. 42 (10/27/03 Letter from C. Pearson to Plaintiffs). The Office of Civil Rights for the Department of Agriculture investigated Plaintiffs' complaint and found no discrimination. *Id.* Plaintiffs initiated this lawsuit on November 3, 2003.

### *C. Procedural Background*

To suggest that this case has a tortured history is to dramatically understate the difficulties encountered during its prosecution (or lack thereof) by Plaintiffs. The Court shall not again recount these difficulties, as they have been exhaustively described by Magistrate Judge John M. Facciola and the undersigned Judge in previous Orders

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<sup>3</sup> Mr. Owens noted that Plaintiffs had suggested that they were going to begin a catering business to increase their planned income, but that Plaintiffs had not submitted a business plan or market analysis that supported their income projections, or submitted proof that they had obtained the health department permits necessary to operate such a business. *See* Defs.' Mot., Ex. 28 at 2 (5/1/08 Letter from L. Owens to Plaintiffs).

and Opinions. *See, e.g.*, 498 F.Supp.2d 113 (D.D.C.2007) (describing the history of discovery abuses by Plaintiffs' counsel, including his failure to follow court orders, file required pleadings, cooperate with opposing counsel, and respond to or pursue appropriate discovery); 518 F.Supp.2d 205 (D.D.C.2007) (describing a misrepresentation made by Plaintiffs' counsel to the Court and the baseless reasons that he proffered for the numerous extensions of time that delayed resolution of this case). The Court shall incorporate these opinions by reference herein. For present purposes, the Court shall simply note three relevant points about the procedural history of this case.

First, the parties were afforded the opportunity to pursue discovery in this case from July 2005 through June 2007. Plaintiffs' efforts to take their own discovery were minimal:

Discovery began in July of 2005. From that date to at least March of 2007, Plaintiffs engaged in no discovery whatsoever. More specifically, they did not give notice of their intention to take any depositions until those they noticed in the week before discovery is to end. The persons to now be deposed include: the President of the United States, the Deputy Secretary of the United States Department of Agriculture, the Chief of Staff of the United States Department of Agriculture, and the Director of the Office of Civil Rights. Plaintiffs contend that during their depositions they recounted a meeting with the President and then with other persons to be deposed and that these meetings provided evidence of persons with direct and relevant knowledge regarding matters before the Court.

But, Plaintiffs have been aware of the meetings to which they refer since they occurred and cannot possibly say to have recently discovered their existence and significance ... Even with the multiple stays granted in this case, Plaintiffs' waiting so late in the process to begin depositions hardly justifies the extension they seek.

Order at 1-2, 2007 WL 1723661 (Jun. 11, 2007) (internal punctuation omitted). Plaintiffs' lack of initiative toward discovery was also reflected

in their deficient responses to Defendants' discovery, for which Plaintiffs were sanctioned:

Plaintiffs failed to adequately respond to Defendants' interrogatory regarding potential lay and expert witnesses-and at least twice the failure was in direct violation of court orders. On April 27, 2006, when discovery responses were already two months overdue, the Court ordered Plaintiffs to supplement their response of 'will supplement' to the interrogatory on witnesses within ten days. They did not do so. Instead, Plaintiffs provided Defendants with the precise response the Court held insufficient in its previous order. Despite this violation, the Court provided another opportunity for Plaintiffs to 'provide a list of all potential lay and expert witnesses known at this point in the case within ten days of this memorandum opinion or forego the introduction of witnesses at trial.' Plaintiffs again failed to do so. The result, as clearly stated in the Court's order, is the foregoing of the introduction of witnesses at trial.

498 F.Supp.2d at 116-17 (D.D.C.2007) (emphasis and internal citations omitted). *See also* [92] Mem. Op. at 16 (“[a]s a result of plaintiffs' violation of this Court's Order relating to [discovery], plaintiffs will only be allowed to introduce the two names provided as the only two similarly situated white farmers whose application[s] for [ ] farm operating loan[s] [were] treated more favorably than plaintiffs' application”).

Second, the Court sought to ensure that Plaintiffs were apprised of the developments in their case by sending its Orders and Opinions directly to Plaintiffs themselves. *See, e.g., id.* at 118 (“The Court ... orders the Clerk to issue a copy of this Memorandum Opinion with the accompanying Order directly to Plaintiffs Mr. and Mrs. Williams”); 518 F.Supp.2d at 212 (D.D.C.2007) (“[the] Clerk shall issue a copy of this Order and accompanying Memorandum Opinion directly to Plaintiffs Mr. and Mrs. Williams”). Despite receiving the orders and opinions describing their counsel's conduct, Plaintiffs affirmatively decided to continue with Mr. Myart as their counsel. *See Mot. to Amend, Ex. 11 at 11* (Nov. 28, 2007) (Affidavit of L. Williams) (“we want Mr. Myart to

continue to be our lawyer”).

Third, Mr. Myart's application to renew his membership in the bar of this Court was rejected in December 2007. *See* 529 F.Supp.2d 22, 22-23 (D.D.C.). The Court notified Plaintiffs by Order dated January 2, 2008, that their counsel could no longer file pleadings in this case, and thereafter allowed Plaintiffs an extensive period of time to either proceed *pro se* or to retain new counsel prior to moving forward with dispositive motions. Ultimately, Plaintiffs retained new counsel in December 2008—after Defendants had filed their Motion for Summary Judgment but prior to the deadline for Plaintiffs' Response. *See* Order at 1 (Dec. 12, 2008). At the request of Plaintiffs' new counsel, the Court granted yet another extension of more than two months to allow counsel to prepare an appropriate response to Defendants' Motion for Summary Judgment. Plaintiffs filed an Opposition to Defendants' Motion for Summary Judgment on February 23, 2009, and Defendants filed a Reply on March 18, 2009. This case is now ripe for resolution.

## II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56, a party is entitled to summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C.Cir.1994). Under the summary judgment standard, the moving party bears the “initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The non-moving party, in response to the motion, must “go beyond the pleadings and by [his] own affidavits, or depositions, answers to interrogatories, and admissions on file, ‘designate’ specific facts showing that there is a genuine issue for trial.” *Id.* at 324, 106 S.Ct. 2548 (internal citations

omitted).

Although a court should draw all inferences from the supporting records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by sufficient admissible evidence that a reasonable trier-of-fact could find for the nonmoving party. *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242-43 (D.C.Cir.1987); *Liberty Lobby*, 477 U.S. at 251, 106 S.Ct. 2505 (the court must determine “whether the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law”). “If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted.” *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. 2505 (internal citations omitted). “Mere allegations or denials in the adverse party’s pleadings are insufficient to defeat an otherwise proper motion for summary judgment.” *Williams v. Callaghan*, 938 F.Supp. 46, 49 (D.D.C.1996). The adverse party must do more than simply “show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, while the movant bears the initial responsibility of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-movant to “come forward with ‘specific facts showing that there is a *genuine issue for trial.*’ ” *Id.* at 587, 106 S.Ct. 1348 (citing Fed.R.Civ.P. 56(e)) (emphasis in original).

### III. DISCUSSION

Plaintiff’s sole remaining claim in this case is brought under the Equal Credit Opportunity Act (“ECOA”), which prohibits a creditor from discriminating against any applicant on the basis of race, color, religion, national origin, sex, marital status, or age. 15 U.S.C. §

1691(a)(1).<sup>4</sup> As an initial matter, the parties dispute the appropriate legal framework for examining an ECOA discrimination claim.

Most courts have examined ECOA claims using the Title VII burden-shifting paradigm articulated in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir.2000) (“[i]n interpreting the ECOA, this court looks to Title VII case law”); *Matthiesen v. Banc One Mortgage Corp.*, 173 F.3d 1242, 1246 (10th Cir.1999) (affirming lower court's decision to analyze ECOA claim “in the same manner as discrimination claims brought under Title VII”); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir.1998) (applying Title VII framework to ECOA claim). Although the D.C. Circuit has not expressly adopted the *McDonnell Douglas* framework for ECOA claims, it has affirmed the decision of at least one district court that has applied it. *See Mavity v. Veneman*, 2004 U.S.App. LEXIS 28796 at \*4-\*5 (D.C.Cir. Mar. 31, 2004) (rejecting the argument that “the [lower] court improperly used [a] direct evidence standard ... rather than the burden-shifting framework of *McDonnell Douglas* ” in the context of an ECOA claim because the lower court considered the evidence “under the framework of *McDonnell Douglas* and its progeny”).

Acknowledging the weight of the foregoing authority, Defendants analyze Plaintiffs' ECOA claim under the *McDonnell Douglas* framework. *See* Defs.' Mot. at 13-21. In contrast, Plaintiffs argue that *McDonnell Douglas* does not supply the appropriate legal standard, citing *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712 (7th Cir.1998). *See* Pls.' Opp'n at 12. In *Latimore*, the Seventh Circuit held that the *McDonnell Douglas* framework was unsuitable for ECOA claims “when there is no basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other, similarly situated persons.” 151 F.3d at 714. Instead, the court held that a plaintiff could

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<sup>4</sup> The Court dismissed Plaintiffs' other claims on July 5, 2005. *See* Mem. Op. at 1-16 (Jul. 5, 2005) (granting Defendants' Motion to Dismiss as to all claims except the pending ECOA claim of discrimination).

“show in a conventional way, without relying on any special doctrines of burden-shifting, that there is enough evidence, direct or circumstantial, of discrimination to create a triable issue.” *Id.* at 715. Although Plaintiffs do not advocate the adoption of a particular standard (beyond arguing that the standard should not be based on the *McDonnell Douglas* framework), any distinction drawn between *Latimore* and the cases applying the *McDonnell Douglas* framework is more illusory than real.

The D.C. Circuit has explained that the burden-shifting framework of *McDonnell Douglas* is “almost always irrelevant.” *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 492-93 (D.C.Cir.2008). Where an employer asserts a legitimate, non-discriminatory reason for its challenged conduct, thereby doing “everything that would be required of [it] if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.” *Id.* (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)). Where a defendant asserts a legitimate, non-discriminatory reason, a district court's inquiry collapses into a single question: “[h]as the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?” *Id.* at 494. In other words, the district court's inquiry in such cases is functionally identical to the one contemplated by the Seventh Circuit in *Latimore-i.e.*, whether the plaintiff has produced evidence of discrimination sufficient to create a genuine issue of material fact.

In this case, Defendants have asserted two legitimate, non-discriminatory reasons for the denial of Plaintiffs' loan application-(1) that Plaintiffs were not “creditworthy” based on their failure to disclose debts in connection with the creation of the Plan, and (2) that Plaintiffs' additional debts prevented the Plan from remaining feasible. Accordingly, the Court's inquiry in this case is the same regardless of whether it applies the *McDonnell Douglas* framework or the standard

articulated in *Latimore*-whether Plaintiffs have proffered evidence that their loan application was denied based on their race rather than the two reasons advanced by Defendants.

Plaintiffs present three arguments in their Opposition in connection with this inquiry. First, Plaintiffs argue that “creditworthy” is not a criteria for loan eligibility, and that without such a requirement, Plaintiffs “were eligible for financial assistance from FSA.” Pls.’ Opp’n at 14. Second, and in the alternative, Plaintiffs argue that even if “creditworthy” is an element of eligibility, that “Defendants fail to provide sufficient evidence ... to support their claim that Plaintiffs deliberately and intentionally did not add the loan for the ... 4650 tractor.” *Id.* at 15. Third, Plaintiffs argue that they should be granted additional discovery under Federal Rule of Civil Procedure 56(f) in the hopes that they would discover evidence of discrimination and successfully oppose Defendants’ Motion for Summary Judgment. *Id.* at 16-18. The Court shall address each of these arguments in turn.

Plaintiffs’ first argument is both legally erroneous and factually irrelevant. Legally, the Court agrees with Defendants that “[i]t is hard to see how an inquiry into a loan applicant’s ‘credit history’ ... could prevent USDA from determining that a particular loan applicant is not ‘creditworthy.’ ” Defs.’ Reply at 8. As described above, the USDA Instruction concerning the evaluation of loan applications specifically contemplates such an inquiry. Defs.’ Reply, Ex. A at 2 (Instruction 1910-A(c)) (“[a]pplicants ... will be determined not creditworthy if they have ever deliberately provided false information, intentionally omitted information relative to the loan decision, or have not made every reasonable effort to meet the terms and conditions of any previous loan”). Plaintiffs do not argue that this Instruction exceeds the scope of the USDA’s statutory authority, *see* Pls.’ Opp’n at 15, and such instructions are entitled to deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (holding that courts “must give substantial deference to an agency’s interpretation of its own regulations”). Plaintiffs also authorized an inquiry into their creditworthiness as a part of their loan application,

certifying that their representations were “complete and correct” and “authoriz[ing] the FSA to make all inquiries deemed necessary to verify the accuracy of the information contained [therein] to determine [Plaintiffs'] credit-worthiness and to answer questions about their credit experience with [Plaintiffs].” Defs.' Mot., Ex. 6 at 3 (10/29/08 Facsimile Copy of the Plan).<sup>5</sup>

Factually, Plaintiffs' argument fails for several reasons, not the least of which is that, even assuming Plaintiffs were able to show that Defendants mistakenly applied the eligibility criteria, Plaintiffs would still have to proffer evidence that Defendants applied the criteria incorrectly *based on* Plaintiffs' race, which they have not done. *See, e.g., Brady*, 520 F.3d at 493, 496 n. 4 (“[e]ven if [the plaintiff] showed that the sexual harassment incident was not the actual reason for his demotion, he still would have to demonstrate that the actual reason was a racially discriminatory reason”) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). Plaintiffs have not presented the Court with *any* evidence from which racial discrimination could reasonably be inferred.

Additionally, and no less significantly, Defendants rejected Plaintiffs' loan application based on their ineligibility *and* on the basis that the Plan was not feasible. *See* Defs.' Mot., Ex. 28 (5/1/08 Letter from L. Owens to Plaintiffs). Plaintiffs do not dispute that Defendants could only approve a plan that was feasible. *See* 7 C.F.R. § 1941.33(b) (allowing approval of loan applications only when they comply with all established policies and regulations, including the requirement that “[t]he proposed loan is based on a feasible plan”). Thus, regardless of whether or not Plaintiffs were creditworthy, it remains undisputed that

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<sup>5</sup> The Court notes that a *different* regulation concerning loan approvals, 7 C.F.R. § 1941.33, was amended in 2003, and the word “creditworthy,” which had appeared in the pre-amendment text, was eliminated in the post-amendment text. It does not follow, however, that an inquiry into an applicant's credit history under 7 C.F.R. § 1910.5 cannot consider whether an applicant has provided false information in connection with his or her loan application. In fact, the D.C. Circuit has since noted that the USDA criteria concerning eligibility decisions “emphasizes credit history and reliability.” *Love v. Johanns*, 439 F.3d 723, 725 (D.C.Cir.2006).

Defendants denied Plaintiffs' loan application for a legitimate, non-discriminatory reason.

Plaintiffs' second argument fares no better. Acknowledging that an inquiry into whether Plaintiffs intentionally omitted items from their Plan could be relevant to the approval or denial of their loan application, Plaintiffs argue that “Defendants fail to provide sufficient evidence ... to support their claim that Plaintiffs deliberately and intentionally did not add the loan for the ... 4650 tractor.” *Id.* at 15. This argument suffers from several deficiencies. First, as support for this argument, Plaintiffs rely on an unsworn one-paragraph letter signed by Mr. Williams. *See, e.g.,* Pls.' Resp. Stmt. ¶¶ 29, 37. This letter states that Mr. Williams did not intentionally omit the 4650 tractor from the Plan, but rather, that he “paid no attention to [the] tractor because it did not belong to [him], [he] was merely leasing it, and that is why it wasn't included in the plan.” Pls.' Opp'n, Ex. 1 at 1 (2/20/09 Letter from R. Williams to Whom It May Concern). This explanation conflicts with the evidence in the record indicating that the tractor was purchased, not leased. *See, e.g.,* Pls.' Opp'n at 15-16 (“when Mr. Williams was questioned as to why he did not report the loan on the John Deere 4650 tractor, he stated that ‘he *purchased* the tractor outside of the FSA and he did not think it should be shown on the balance sheet’ ”) (emphasis added). And, as an unsworn statement, Mr. Williams' letter is not admissible to create a genuine issue of material fact. *See* Fed.R.Civ.P. 56(e)(2).

Second, even if the letter were admissible, it would not create a genuine issue of material fact because the FSA found that Plaintiffs failed to disclose *two* debts—the debts associated with the 4650 tractor and the debts associated with repairs and parts purchased from Key Brothers. *See* Defs.' Mot., Ex. 28 (5/1/08 Letter from L. Owens to Plaintiffs). Mr. Williams' letter does not even address his omission of this second debt. Third, Plaintiffs' argument does nothing to undermine the other legitimate, non-discriminatory reason for rejecting Plaintiffs' application—that Plaintiffs' Plan was not feasible. There is nothing in the

record demonstrating otherwise.<sup>6</sup>

Plaintiffs' third and final argument is that they should be allowed additional discovery under Federal Rule of Civil Procedure 56(f) in the hopes that they may locate evidence of discrimination that would allow them to oppose successfully Defendants' Motion for Summary Judgment. *See* Pls.' Opp'n at 16-18. This argument has no merit. As an initial matter, this request is not accompanied by an affidavit demonstrating that Plaintiffs "cannot present facts essential to justify opposition," as is required by Rule 56(f). *See* Fed.R.Civ.P. 56(f). Equally problematic, the two issues identified by Plaintiffs as potential targets for additional discovery are nonsensical. The first issue relates to whether one of the two potential comparators identified in discovery "is in fact a similarly situated comparator to Plaintiffs." Pls.' Opp'n at 17. Plaintiffs need no discovery to ascertain this information, as this individual<sup>7</sup> was deposed during the discovery phase of this case, and he testified that he last applied for a loan from the FSA in 1992 (not 2003), that his application sought loan subordination (not a new operating loan), and that Mr. Kalina had no involvement with his 1992 application. *See* Defs.' Ex. 23 at 8:8-8:25. In short, no additional discovery could convert this individual into a comparator. The second issue identified by Plaintiffs concerns whether Plaintiffs' potential

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<sup>6</sup> Plaintiffs are not helped by the record evidence concerning two potential white comparators identified in discovery. The first potential comparator did not apply for a loan from the FSA in 2003. The second potential comparator applied for loan subordination, which requires an already outstanding loan with the USDA. Plaintiffs proffer no evidence that this farmer's credit situation and farm operation were similar to that of Plaintiffs by showing that he omitted debts from his loan application or proposed an operation that was not feasible. *See, e.g.,* Defs.' Stmt. ¶ 48. For these reasons, Plaintiffs' Opposition appears to concede that these individuals cannot be considered comparators. *See* Pls.' Opp'n at 12 (arguing that the legal standards articulated in *Latimore* applied in this case because the *McDonnell Douglas* framework is inapplicable "where there is no basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other, similarly situated persons'") (quoting *Latimore*, 151 F.3d at 714).

<sup>7</sup> The Court shall refrain from using this individual's name based on the Protective Order approved by the Court on December 4, 2007.

income would have been supplemented in 2003 by the commencement of a catering business. Pls.' Opp'n at 17. Here, Plaintiffs clearly do not require a re-opening of discovery because, if they began to operate a catering business in 2003, such records would already be in their possession. In fact, Plaintiffs' Opposition appears to concede that they did *not* operate a catering business in 2003. *Id.* (referring to the income that “may” have been earned, suggesting that such income was not actually earned).

Even if Plaintiffs had submitted an appropriate affidavit and identified appropriate areas for additional discovery, the purposes supporting application of Rule 56(f) clearly do not exist in this case. “ [T]he purpose of Rule 56(f) is to prevent railroading the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery. ” *Kakeh v. United Planning Org.*, 537 F.Supp.2d 65, 71 (D.D.C.2008) (quoting *Bancoult v. McNamara*, 217 F.R.D. 280, 282 (D.D.C.2003)). There is nothing premature about Defendants' Motion for Summary Judgment. As discussed above, Plaintiffs were given a full opportunity to engage in discovery from July 2005 through June 2007. That Plaintiffs failed to take the discovery they now deem necessary does not make Defendants' motion premature. Similarly, the fact that Plaintiffs were represented by counsel whose conduct resulted in discovery sanctions (as to which they were fully informed), or that Plaintiffs have now switched counsel, provides no basis to reopen discovery. If that were not the case, every plaintiff who is subject to sanctions based on discovery abuses or whose counsel failed to pursue appropriate discovery would simply switch counsel and seek to reopen discovery pursuant to Rule 56(f). In short, the position in which Plaintiffs now find themselves is a product of their own choices and those of their counsel.

Because Defendants' reasons for denying Plaintiffs' loan application are supported by undisputed evidence in the record, and because Plaintiffs proffer no evidence from which to find that Defendants denied their loan application based on racial discrimination, the Court finds that entry of summary judgment in favor of Defendants is appropriate.

#### IV. CONCLUSION

For the reasons set forth above, the Court shall GRANT Defendants' Motion for Summary Judgment. This case shall be DISMISSED in its entirety. An appropriate Order accompanies this Memorandum Opinion.

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**TIMOTHY PIGFORD, et al., v. USDA<sup>1</sup>**  
**CECIL BREWINGTON, ET AL., v. USDA**  
**Civil Action Nos. 97-1978 (PLF), 98-1693 (PLF).**  
**May 12, 2009.**

[Cite as: 613 F.Supp.2d 78].

**ECO A – EAJA – Hensley test prong – Unsuccessful claims not allowable.**

#### United States District Court

Under Equal Credit Opportunity Act (ECO A), there is no certain method of determining when claims are related or unrelated. Generally speaking “interrelated claims” are those that cannot be viewed as a series of discrete claims. Claims may be “related,” for purposes of an award of attorney fees under (EAJA) and Equal Credit Opportunity Act (ECO A), if they are brought under different legal theories but are intended to establish the illegality of the same conduct. When a plaintiff's claims overwhelmingly involve distinct legal and factual issues, then they are “unrelated,” even though claims all invoked the same legal authority and relied on the same legal standard; claims did not require the resolution of identical, interlocking, or overlapping legal questions or mixed questions of law and fact. Inability to recover attorneys' fees on unsuccessful claims that are unrelated to a plaintiff's successful claims ensures that a plaintiff will not be able to force his opponent to pay for the legal services involved in bringing groundless claims simply because those unsuccessful claims were brought in a lawsuit that included successful claims. [Editor's Note: *See Purdue v Kenny* 599 U.S. \_\_\_\_ (2010) for approval of the “lodestar” principal ].

#### United States District Court

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<sup>1</sup> Petitioners initially named Edward T. Schafer, former Secretary of Agriculture, as the party defendant. The Court now substitutes Tom Vilsack, current Secretary of Agriculture, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

## OPINION AND ORDER

PAUL L. FRIEDMAN, District Judge.

This matter is before the Court on a motion for attorneys' fees, costs and expenses by Covington & Burling LLP ("Covington"), counsel for class member Robert E. Holmes, Sr. ("Mot."); an opposition to Covington's motion by the United States Department of Agriculture ("Opp."); Covington's reply ("Reply"), and USDA's surreply ("Surreply").

### I. BACKGROUND

On October 1, 2007, "Mr. Holmes prevailed against the [ USDA ] in a Track B arbitration, which was conducted pursuant to the Court's April 14, 1999 consent decree[.]" Mot. at 1-2; *see also id.*, Declaration of Joshua A. Doan, Ex. 1, In Re: Track B Claim of Robert E. Holmes, Sr. (Claim No. 19230, Arb. No. 131) (Oct. 1, 2007) ("Arbitrator's Decision").<sup>2</sup> The USDA chose not to appeal the arbitrator's decision, and

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<sup>2</sup>The Court approved the Pigford Consent Decree on April 14, 1999. See Pigford v. Glickman, 185 F.R.D. 82, 113 (D.D.C. 1999). The Consent Decree

creates a mechanism for resolving individual claims of class members outside the traditional litigation process. See Pigford v. Glickman, 185 F.R.D. 82, 94 (D.D.C. 1999). Class members may choose between two claims procedures, known as Track A and Track B. Track A awards \$50,000 in monetary damages, debt relief, tax relief, and injunctive relief to those claimants able to meet a minimal burden of proof. See *id.* at 96-97. Track A claims are decided by a third-party neutral known as an adjudicator. Track B imposes no cap on damages and also provides for debt relief and injunctive relief. Claimants who choose Track B must prove their claims by a preponderance of the evidence in one-day mini-trials before a third-party neutral known as an arbitrator. See *id.* at 97. Decisions of the adjudicator and the arbitrator are final, except that the monitor, a court-appointed third-party neutral, may on petition direct the adjudicator and the arbitrator to re-examine

(continued...)

it became final on January 29, 2008.

In the Track B proceeding, Mr. Holmes alleged that the Farmers Home Administration, an agency of the USDA, discriminated against him in the provision and servicing of farm loans on various occasions between 1985 and 1994. Presumably because they occurred at different times and rested on distinct facts, the arbitrator treated Mr. Holmes' various allegations of discrimination as eleven discrete claims. The arbitrator found in Mr. Holmes' favor with respect to some but not all of his claims. Specifically, the arbitrator found in Mr. Holmes' favor on Claim 1 ("Failure to Provide Limited Resource Interest Rate[ ] [Loan in] 1985"); Claim 2 ("Delay in Processing 1986 Loan"); Claim 3 ("Delay in Processing 1987 Loan"), Claim 4 ("Delay in Processing the 1988 Loan"); and two of three allegations in Claim 6 ("Denial of Loans and Loan Servicing in 1990"). The arbitrator did not find in Mr. Holmes' favor on Claim 5 ("Delay in Processing the 1989 Loan and Servicing Request"); one of three allegations in Claim 6; Claim 7 ("Denial of Loans and Loan Servicing in 1991"); Claim 8 ("Denial of Loans and Loan Servicing in 1992"); Claim 9 ("Denial of Loan Servicing in 1993 and 1994"); Claim 10 ("Denial of Loans for Machinery Purposes"); and Claim 11 ("Denial of Farm Ownership Loans"). See Arbitrator's Decision at 21-33. The arbitrator awarded Mr. Holmes a total of \$202,290.87 in actual damages and \$100,000 in emotional distress damages. *Id.* at 36. He also directed that any outstanding loan balances in the Operating Loan program dating from 1985 were to be forgiven. *Id.*

Covington represented Mr. Holmes throughout the litigation of his Track B claim. The firm now seeks \$192,180.93 in attorneys' fees, costs

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<sup>2</sup>(...continued)

claims if the monitor determines that "a clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." See *id.*

Pigford v. Schafer, Civil Action No. 97-1978, Memorandum Opinion and Order at 2 (D.D.C. Nov. 12, 2008).

and expenses under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d) (“ECOA”), and the Equal Access to Justice Act, 28 U.S.C. § 2412 (“EAJA”).<sup>3</sup> The USDA concedes that Mr. Holmes is a prevailing party for fee-shifting purposes, and thus that the ECOA and the EAJA entitle Covington to reasonable fees, costs and expenses. *See Opp.* at 1. The USDA contends, however, that Covington's fee should be reduced to account for the fact that Mr. Holmes did not prevail on all of his claims. *See id.*

The USDA's argument is based on *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and its progeny. In *Hensley*, the Supreme Court “defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney fees” under fee-shifting statutes like the ECOA and the EAJA. *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C.Cir.1992).<sup>4</sup> In such cases, *Hensley* prescribes the following two-part inquiry for assessing a plaintiff's “degree of success,” *Goos v. Nat'l Ass'n of Realtors*, 997 F.2d 1565, 1568 (D.C.Cir.1993), and hence the reasonableness of the fees sought:

First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

*Hensley v. Eckerhart*, 461 U.S. at 434, 103 S.Ct. 1933. If the answer to the first question is “yes,” then “no fee may be awarded for services on the unsuccessful claim[s],” because “[t]he congressional intent to

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<sup>3</sup> Under the ECOA, parties who prosecute “successful action[s]” against the government are entitled to reasonable fees. 15 U.S.C. § 1691e(d). Similarly, under the EAJA, “prevailing part[ies]” are entitled to reasonable fees-unless the government's position was substantially justified or special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A).

<sup>4</sup> “Though the *Hensley* analysis was crafted in the ... context [of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988], it was explicitly designed by the Court to apply to all federal statutes limiting fee awards to ‘prevailing part[ies].’” *George Hyman Construction Co. v. Brooks*, 963 F.2d at 1535.

limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits[.]” *Id.* at 435, 103 S.Ct. 1933. *See also Sierra Club v. EPA*, 769 F.2d 796, 801 (D.C.Cir.1985) (fees should not be awarded for meritless or unsuccessful claims “simply because those unsuccessful claims were brought in a lawsuit that included successful claims”).

If, however, the court finds that a prevailing party's unsuccessful and successful claims are “interrelated,” then it is instructed “to skip the first *Hensley* [prong] and move to its second.” *George Hyman Construction Co. v. Brooks*, 963 F.2d at 1537. Under *Hensley*'s second prong, the court must consider “whether the success obtained ... is proportional to the efforts expended by counsel,” *George Hyman Construction Co. v. Brooks*, 963 F.2d at 1535, and then “award only that amount of fees that is reasonable in relation to the results obtained.” *Hensley v. Eckerhart*, 461 U.S. at 440, 103 S.Ct. 1933. In other words, if the successful and unsuccessful claims “share a common core of facts or are based on related legal theories, then a court should simply compute the appropriate fee as a function of degree of success.” *George Hyman Construction Co. v. Brooks*, 963 F.2d at 1537.

The USDA's principal argument is that Covington's fee request should be reduced under *Hensley*'s first prong. Specifically, the USDA contends that Covington is not entitled to fees for its work on Mr. Holmes' unsuccessful claims because those claims are “unrelated” to Mr. Holmes' successful claims. *See Opp.* at 2; *see also id.* at 11-13. In the alternative, the USDA argues that if the Court disagrees with its principal argument-*i.e.*, if the Court concludes that Mr. Holmes' claims are “related” under *Hensley*'s first prong-then Covington's fee request should be reduced under *Hensley*'s second prong. The USDA asserts that it would be disproportionate and excessive to award Covington fees for its work on all of Mr. Holmes' claims when Mr. Holmes prevailed on only some of those claims. *See id.* at 16-17.

Covington, of course, disagrees on both points. With respect to the first point, Covington argues that Mr. Holmes' unsuccessful claims were

related to his successful claims because all of his claims were formulated as “disparate treatment claims under the Equal Credit Opportunity Act that relied on the *McDonnell Douglas* framework (because of an absence of direct evidence of racial animus).” Reply at 7; *see also id.* at 10 (arguing that “Mr. Holmes' successful and unsuccessful claims were closely related because they were brought using related legal theories under the same statute using the same legal framework and relying on the same type of evidence.”).<sup>5</sup> With respect to the second point, Covington argues that it is entitled to the full fee sought because that fee would reasonably compensate the firm for its work on Mr. Holmes' Track B claim, particularly in light of the excellent results obtained. *See id.* at 10.

## II. SCOPE

As an initial matter, the Court will accept the USDA's invitation to (1) limit its analysis to the first issue raised by the parties—that is, whether Mr. Holmes' unsuccessful claims are “related” to his successful claims under *Hensley's* first prong—and (2) order the parties to attempt to settle this matter in light of the Court's ruling on that issue. *See Opp.* at 2, 16; *see also Ass'n of Admin. Law Judges, Inc. v. Heckler*, Civil Action No. 83-0124, 1988 WL 30760, at \*6-7 & n. 4 (D.D.C. Mar. 21, 1988) (utilizing this approach). Because “[a] request for attorney's fees should not result in a second major litigation,” and “[i]deally ... litigants will settle the amount of a fee,” *Hensley v. Eckerhart*, 461 U.S. at 437, 103 S.Ct. 1933, the Court concludes that it is both wiser and more efficient to give the parties one last chance to resolve this dispute. *See Morgan v. District of Columbia*, 824 F.2d 1049, 1067 (D.C.Cir.1987) (noting the “Supreme Court's call for [parties to make a] conscientious effort to resolve differences over [fee] awards”).

## III. “RELATEDNESS” OF CLAIMS

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<sup>5</sup> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court set forth a burden-shifting formula for evaluating claims of discrimination when direct evidence of discriminatory animus is lacking.

According to the D.C. Circuit, unsuccessful claims are unrelated to successful claims when the unsuccessful claims are “ ‘distinctly different’ in all respects, *both legal and factual*, from the ... successful claims.” *Morgan v. District of Columbia*, 824 F.2d at 1066 (quoting *Hensley v. Eckerhart*, 461 U.S. at 434, 103 S.Ct. 1933) (emphasis added); *see also Williams v. First Gov't Mortgage and Investors Corp.*, 225 F.3d 738, 746 (D.C.Cir.2000) (same). Although “there is no certain method of determining when claims are ‘related’ or ‘unrelated,’ ” *Hensley v. Eckerhart*, 461 U.S. at 436 n. 12, 103 S.Ct. 1933, generally speaking “interrelated claims are those that ‘cannot be viewed as a series of discrete claims.’ ” *George Hyman Construction Co. v. Brooks*, 963 F.2d at 1539 (quoting *Hensley v. Eckerhart*, 461 U.S. at 435, 103 S.Ct. 1933). Thus, for example, a plaintiff's claims may be related if they are brought under different legal theories but are intended to establish the illegality of the same conduct. *See Goos v. Nat'l Ass'n of Realtors*, 997 F.2d at 1569 (concluding that a common law contract claim and a statutory claim were related because “both claims focused on a single, necessary factual issue:” whether plaintiff was dismissed from her job for retaliatory and hence unlawful reasons). But when a plaintiff's claims “overwhelmingly involve[ ] distinct legal and factual issues,” then they are unrelated under *Hensley's* first prong. *Martin v. Lauer*, 740 F.2d 36, 47 (D.C.Cir.1984). Applying these principles, the Court concludes that Mr. Holmes' unsuccessful claims are unrelated to his successful claims, and that Covington therefore is not entitled to a fee award for work performed on Mr. Holmes' unsuccessful claims.

It is beyond dispute that Mr. Holmes' unsuccessful claims are factually distinct from his successful claims. As the arbitrator's 38-page decision illustrates, each of Mr. Holmes' eleven claims of discrimination were based on different factual allegations, with no discernible factual overlap among claims. *Compare, e.g.,* Arbitrator's Decision at 21 (discussing Claim 1, based on Mr. Holmes' allegation that “in 1985, a similarly-situated white farmer ... received a Limited Resource loan while he did not”) *with id.* at 30 (discussing Claim 7, based on Mr. Holmes' allegation that he “applied for and was qualified for an OL loan and servicing in January 1991 but never received the desired funding”).

Thus, not surprisingly, Covington does not contend that Mr. Holmes' unsuccessful claims are *factually related* to his successful claims. *See, e.g., Goos v. Nat'l Ass'n of Realtors*, 997 F.2d at 1569 (claims were related because they “shared a common core of facts”). Rather, Covington argues that Mr. Holmes' unsuccessful claims are *legally related* to his successful claims because all of Mr. Holmes' claims were based on the same legal argument: that is, that specific actions by the USDA were motivated by racial discrimination in violation of the ECOA. *See, e.g., Reply* at 7.

This argument has some surface plausibility, but it must be rejected for at least three reasons. First, Covington cites no authority (and the Court has discovered none) which supports its theory that a series of otherwise discrete, easily separable claims are “legally related” simply because they invoke the same legal authority and rely on the same legal standard. Rather, the case law indicates that claims are legally related for *Hensley* purposes when they require the resolution of identical, interlocking or overlapping legal questions (or mixed questions of law and fact). *See, e.g., Williams v. First Gov't Mortgage and Investors Corp.*, 225 F.3d at 746 (statutory and common law claims were related because they all required resolution of whether defendant's sale of insurance to plaintiff was fraudulent); *Morgan v. District of Columbia*, 824 F.2d at 1066 (claims were related because they all arose from plaintiff's “central claim that the [defendants] had been deliberately indifferent to [plaintiff's] eighth amendment rights in connection with the assault [suffered by plaintiff]”).

Mr. Holmes' claims did not require the resolution of identical, interlocking or overlapping legal questions or mixed questions of law and fact. Instead, each claim required the arbitrator to resolve a unique and distinct legal question: whether Mr. Holmes' allegations and evidence pertaining to a specific governmental action (for example, the denial of a loan to Mr. Holmes in a particular year), evaluated under the *McDonnell Douglas* framework, were sufficient to establish by a preponderance of the evidence that the specific action in question was motivated by discriminatory animus. *See Sierra Club v. EPA*, 769 F.2d

at 803 (claims were unrelated because “petitioners could be granted relief on any one issue without necessarily obtaining their desired relief on any other issue”); *Martin v. Lauer*, 740 F.2d at 47 (claims under the First Amendment and a whistleblower statute were unrelated because “the legal issues raised by the First Amendment claim were largely distinct from those implicated by the whistleblower claim”); *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Svc.*, Civil Action No. 01-0765, 2004 WL 2239483, at \*6 & n. 3 (D.D.C. Sept. 27, 2004) (claims could be “compartmentalized” for *Hensley* purposes). Thus, Mr. Holmes' claims are easily “viewed as a series of discrete claims”-both factually and legally-and his unsuccessful claims therefore should be regarded as unrelated to his successful claims. *Hensley v. Eckerhart*, 461 U.S. at 435, 103 S.Ct. 1933.

Second, to accept Covington's theory would be to severely undermine the purpose and intent of *Hensley's* first prong. As the D.C. Circuit has explained, *Hensley's* first prong is intended to ensure that “a plaintiff [will] not be able to force his opponent to pay for the legal services involved in bringing groundless claims simply because those unsuccessful claims were brought in a lawsuit that included successful claims.” *Sierra Club v. EPA*, 769 F.2d at 801. Under Covington's theory, however, a prevailing party could seek fees for any number of groundless claims so long as those groundless claims were submitted under the same legal authority as the party's successful claims. In other words, Covington's theory would permit a prevailing party to seek fees that were not in any cognizable way “premised on successful litigation of a claim,” *Trout v. Winter*, 464 F.Supp.2d 25, 30 (D.D.C.2006)-in direct contravention of *Hensley's* first prong.

Third, and relatedly, it would be particularly inappropriate to adopt Covington's theory in the context of Track B adjudications under the *Pigford* Consent Decree. As the USDA points out, “only disparate treatment claims under the ECOA can be brought under Track B, and all [or nearly all] are subject to the *McDonnell Douglas* standard of proof.” Surreply at 2 (emphasis added). Thus, under Covington's theory, “all claims in a Track B arbitration would always be ‘interrelated[.]’ ” *Id.*

That result would be unacceptable because-as Mr. Holmes' case illustrates-Track B claims may well include many “truly fractionable” claims. *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211, 216 (D.C.Cir.1984) (internal quotation marks and citation omitted).

#### IV. CONCLUSION

In sum, the Court concludes that Mr. Holmes' unsuccessful claims are unrelated to his successful claims under the principles of *Hensley* and its progeny. As the parties will be ordered to try to settle this matter in light of that conclusion, it is worthwhile to note what that conclusion does *not* entail or imply. In deciding that Mr. Holmes' unsuccessful claims are unrelated to his successful claims, and hence that Covington is not entitled to fees for its work on Mr. Holmes' unsuccessful claims, the Court does not mean to endorse “a mathematical approach” to calculating a reasonable fee. *Hensley v. Eckerhart*, 461 U.S. at 435 n. 11, 103 S.Ct. 1933. The Court recognizes-as the USDA seems to concede, *see* Surreply at 7-that simply reducing Covington's fee by a fraction corresponding to the number of unsuccessful claims is not likely to result in a fair and reasonable fee for Covington's services. After all, “even when a lawsuit involves distinct claims, there inevitably may be some overlap in the requisite factual and legal analysis.” *Martin v. Lauer*, 740 F.2d at 47. *Cf. Int'l Center for Technology Assessment v. Vilsack*, 602 F.Supp.2d 228, 233 (D.D.C.2009) (concluding that plaintiffs' unsuccessful claims were unrelated to their successful claims, but noting that “[p]laintiffs spent a good deal of time ... working on other issues not directed to any of the three claims specifically, but which was necessary to plaintiffs' successes”). Moreover, Covington likely would have had to perform certain litigation-related tasks whether or not it brought the unsuccessful claims. *See Ustrak v. Fairman*, 851 F.2d 983, 988 (7th Cir.1988).<sup>FN6</sup>

The Court also expresses no view as to the USDA's argument that Covington is not entitled to certain fees related to this fee dispute. *See* Surreply at 8-9.

For all of these reasons, it is hereby

ORDERED that the parties shall attempt to settle Covington's motion for an award of attorneys' fees in light of this Opinion and Order. If the parties are able to settle this matter, they shall inform the Court immediately in writing and shall file the appropriate settlement or dismissal papers. If the parties are unable to settle this matter, they shall file a joint report so informing the Court on or before June 8, 2009.

SO ORDERED.

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**ENERGY POLICY ACT**

**DEPARTMENTAL DECISIONS**

**In re: PUBLIC SERVICE COMPANY OF COLORADO d/b/a  
XCEL ENERGY TACOMA HYDROELECTRIC PROJECT.**

**EPAct Docket No. 09-0055.**

**FERC No. 12589-001.**

**Decision and Order.**

**April 28, 2009.**

**EPAct – Burden of persuasion on moving party – Best available science – Best professional judgement – Mandatory conditions – Best biological potential.**

Donald H Clarke, Rekha K. Roa for Petitioners

Lois G. Wittee, Steve C. Silverman, Randall J Bremer for FS.

*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

**Decision and Order**

In this decision, which is the first issued by the United States Department of Agriculture (USDA) under the FERC Hydropower Licensing Provisions of the Federal Power Act, I find that Petitioner Public Service of Colorado (“PSCo”) d/b/a Xcel Energy did not meet their burden of persuasion on six of the seven contested issues of material fact that were the subject of this proceeding. I find in favor of PSCo on the 7th contested issue in that there was not a determination that the construction of the stream flow device required by Condition 18 made the project economically viable.

**Procedural Background**

This matter arises out of a process whereby the USDA’s Forest Service may impose mandatory conditions on licenses to operate hydropower facilities which have an impact on lands under the

jurisdiction of the Forest Service. PSCo, the current license holder for the facility in question, applied on June 25, 2008, for a new license to continue operation of the facility. On October 29, 2008, the Forest Service imposed a number of preliminary conditions to the issuance of the license. On December 3, 2008, PSCo filed a request for a trial-type hearing under Section 4(E) of the Federal Power Act, identifying eight issues of material fact which it alleged were in dispute. All eight issues were related to two of the conditions (17 and 18) imposed by the Forest Service.

On January 28, 2009, this matter was referred by the Forest Service to the United States Department of Agriculture's Office of Administrative Law Judges. Under the Rules of Procedure governing hydroelectric matters, 7 CFR §1.601 et seq., these cases are handled in a particularly expeditious manner, with discovery, an on-the-record hearing, and a written decision by the administrative law judge all to be accomplished within 90 days of referral.

On February 2, 2009, I entered a Docketing Order in which I set a prehearing telephone conference for February 17, 2009. The parties entered into a pre-trial Stipulation on February 15, agreeing on a number of procedural matters, such as the utilization of electronic filing, the agreement that the appropriate hearing site would be at the Forest Service's Regional Office in Golden Colorado, and that the hearing would be conducted during the week of March 30, 2009. The parties also agreed that PSCo would have the burden of proof in this case,<sup>1</sup> and that PSCo witnesses would testify before Forest Service witnesses.

On February 17, 2009, I conducted a pre-trial conference related to discovery issues and issued a Summary of the Pre-Hearing conference on February 20, 2009. On March 18, 2009, the parties entered into a Joint Stipulation related to Discovery matters.

The Forest Service filed motions to dismiss all eight of the issues proposed by PSCo. On February 27, 2009, I dismissed the sixth

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<sup>1</sup> This would be consistent with my ruling in *Idaho Power Company*, 65 Agric. Dec. 278 (2006), as well as with the rulings in *Avista Corporation v. U.S. BIA*, FERC Docket 2545, 12606, and *Klamath Hydroelectric Project*, FERC Docket 2082.

numbered issue<sup>2</sup>, and denied the motions with respect to the remaining seven issues. I also ordered that all discovery be completed by March 16, 2009.<sup>3</sup>

On March 23, 2009, the parties filed written direct testimony<sup>4</sup> as required by the rules of procedure. The rules in these hydroelectric cases require that all witnesses present their testimony in writing within five days after the close of discovery, and that any witness submitting such written testimony must be presented in person at the hearing to be available for cross examination. The written testimony must be authenticated via affidavit or declaration. PSCo presented the written testimony of five witnesses, while the Forest Service presented the written testimony of eight witnesses. Each witness indicated the exhibits he or she was proposing to be introduced into evidence.

I conducted a hearing in Golden, Colorado on March 31-April 1, 2009. Donald H. Clarke, Esq. and Rekha Rao, Esq. represented PSCo, while the Forest Service was represented by Lois G. Witte, Esq. and Randy Bramer, Esq. Each of the thirteen witnesses who submitted written testimony was made available for cross examination. In addition, after the Forest Service objected to the admission of an affidavit<sup>5</sup> by Jon Ickes, an individual who was not slated to testify, I allowed PSCo to present Mr. Ickes to validate his affidavit and to be subject to cross examination.

At the start of the hearing, the Forest Service moved that PSCo be

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<sup>2</sup> “PSCo’s development and operation of the project has established existing conditions in the bypass reach that are inconsistent with those goals established by the USFS in the Forest Service plan.”

<sup>3</sup> There was some confusion as to whether the interrogatory responses were due earlier than March 16 pursuant to Rule 1.643(c), which resulted in the Forest Service submitting their responses several days earlier than PSCo, but I determined that PSCo was entitled to rely on my order, and that no prejudice resulted in any event.

<sup>4</sup> Exhibits are styled as follows: Forest Service as FS Ex., Public Service of Colorado as CX, Joint Stipulation as JS, Joint Exhibit as JS Ex., Transcript as Tr.

<sup>5</sup> CX 17.

sanctioned for failure to fully comply with discovery, in that thousands of pages of emails and other documents were turned over to the Forest Service in the days immediately before the hearing. The Forest Service contended that they did not have the time to review the documents, particularly as they would apply to the cross examination of John Devine. I declined to impose sanctions, but indicated, repeating what I had stated in an earlier telephone conference concerning discovery, that I would continue the hearing for a few days if necessary. When Mr. Devine was presented for cross-examination on March 31, the Forest Service declined to cross-examine him, requesting that I continue the hearing until Tuesday, April 7, 2009 so that they could cross-examine Mr. Devine through audio-visual means. I indicated that I would reluctantly grant this request, even though it would not change the due dates for briefing and the issuance of my decision.

At the conclusion of the cross-examination of the Forest Service witnesses on April 1, the Forest Service indicated that they were able to review all the documents submitted by PSCo, and that they would waive their right to cross-examine Mr. Devine. Accordingly, I closed the hearing at that point.

On April 13, 2009, the parties submitted their post-hearing briefs and proposed findings of fact.

In these proceedings, the administrative law judge plays a more limited role than in traditional adversarial proceedings. Rather than make findings of fact and conclusions of law, I am only allowed to make “findings of fact on all disputed issues of material fact.” Rule 1.671(b)(1)(i). I may only make “[c]onclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence).” Rule 1.671(b)(1)(ii). I cannot make any conclusions on the ultimate issues—whether conditions should be adopted, modified or rejected. Rule 1.671(b)(3).

### **Statutory and Regulatory Background**

The Energy Policy Act of 2005 ("EPAct") amended Section 4(e) of the Federal Power Act ("FPA") to include the following language: The license applicant and any party to the proceeding shall be entitled

to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding.

See Pub. L. No. 109-58, Title II, § 241, 119 Stat. 675 (Aug. 8, 2005) (codified at 16 U.S.C. § 797(e)).

In response to this legislative direction, the USFS issued interim procedural regulations implementing the changes set forth by the EPAAct, effective November 17, 2005 (codified at 7 C.F.R. Part 1). These interim regulations remain in effect.

The interim regulations, at 7 C.F.R. § 1.621, provide that a license applicant or other license party may submit a request for a trial-type hearing on disputed issues of material fact to the Deputy Chief, National Forest Systems, USFS. Any such hearing request must be filed within 30 days after the deadline for the agencies to file preliminary conditions with FERC.

This expedited trial-type proceeding arises under Section 241 of the Energy Policy Act of 2005, Pub. L. No. 109-58, § 241, 119 Stat. 594, 674-75 (Aug. 8, 2005) ("EPAAct"), codified at 16 USC § 797(e). Section 241 amends sections 4(e) and 18 of the Federal Power Act ("FPA"), amended and codified at 16 USC. §§ 791-823d. Those sections provide certain federal agencies authority to include conditions and/or fishway prescriptions in any hydroelectric license issued or re-issued by FERC. See 16 USC § 797(e). The EPAAct creates a new administrative hearing procedure, within the FERC application review process, to resolve disputed issues of fact material to those proposed conditions.

Under section 4(e), the Secretary of the Department of the Agriculture – Forestry Service ("FS"), may establish conditions deemed necessary for the protection of national forests: and public lands to be included in a hydroelectric license. See 16 USC § 797(e).

Pursuant to section 241 of the EPAAct, "[t]he license applicant and any

party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions." 16 USC. § 797(e).

### **Factual Background Project Description**

PSCo filed an application for a new license for the continued operation of the Project on June 25, 2008.<sup>6</sup> The Commission issued a Notice of Application Ready for Environmental Analysis on September 4, 2008.<sup>7</sup> On October 29, 2008, USFS submitted its preliminary Section 4(e) conditions.<sup>8</sup>

The Project is located approximately 20 miles north of Durango, Colorado, on a high intermountain plateau west of the Animas River in La Plata and San Juan Counties. Water used by the Tacoma Project for generation purposes originates in three drainage basins: Cascade Creek, Little Cascade Creek, and Elbert Creek. The primary water storage reservoir is Electra Lake. The Cascade Creek diversion dam and conveyance facilities provide the primary water supply for the Project. These diversion facilities consist of a diversion dam on Cascade Creek. The Cascade Creek diversion dam is located approximately 4,400 feet upstream of where U.S. Highway 550 crosses Cascade Creek and 3.2

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<sup>6</sup> *Public Service Company of Colorado*, Application for License, FERC Docket No. 12589 (June 25, 2008), <http://elibrary.ferc.gov/idmws/search/intermediate.asp?linkfile=yes&doclist=13624685>.

<sup>7</sup> *Public Service Company of Colorado*, Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions, FERC Docket No. 12589 (Sept. 4, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11794507>.

<sup>8</sup>  
*USDA Forest Service*, Comments, Preliminary Terms, Conditions, Recommendations, and Summary of Evidence by the USDA Forest Service, Rocky Mountain Region, FERC Docket No. 12589 (Oct. 29, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11840863>.

miles upstream of the confluence of Cascade Creek and Lime Creek at Purgatory Flats. The diversion dam is approximately 30 feet long and 10 feet high.

The Project has been in existence for over a century. It has been resold and expanded a number of times and has been licensed under the Federal Power Act since 1936. The current license expires on June 30, 2010. Public Service Company of Colorado (PSCo) acquired the Project in 1992. FERC transferred the license to PSCo by order dated April 15, 1992.

The annual operation of the Project is significantly affected by the hydrology of Cascade Creek, especially the annual snow pack and its rate of runoff, the severe winter conditions experienced at the site, and the remote location of certain project facilities. The general arrangement of the Project facilities is shown in Figure B-1 of Exhibit CX-47. Given the altitude and the climate, Cascade Creek unsurprisingly has greatly reduced flow during the winter.

Water diverted from Cascade Creek flows through Little Cascade Creek, and eventually to PSCo's plant for hydraulic conversion to electricity. The water is stored in Electra Lake so as to balance variations in seasonal stream flows. The waters diverted from Cascade Creek are such that the full flow of the Creek is captured by the diversion dam approximately 95% of the time and transported via an open flume and pipe to Little Cascade Creek. J.S. ¶ 1. The bypassed water continuing on as Cascade Creek plus accretions into Cascade Creek flow without controls (run of stream) to the hydroelectric facility downstream. PSCo also owns substantial water rights and trades or sells water to the Durango Mountain Resort, primarily for use in snow making.

The diversion dam, and the 6.6 miles of Cascade Creek impacted by the flow loss until the confluence of the Creek and the Animas River, is located on National Forest System lands, and is part of the San Juan National Forest (SJNF). The Tacoma Project currently operates under FERC license No. 400, which will expire on June 30, 2010. JS ¶1. The SJNF operates under a comprehensive plan filed with FERC which documents how waterways affected by hydroelectric projects will be

improved or developed for beneficial public uses, including the protection of fish and wildlife. JS ¶ 1. This plan was last amended in 1992.

#### B. The Delphi study

As part of the relicensing process, the Forest Service requested that PSCo conduct an Instream Flow Incremental Methodology (IFIM) using the Physical Habitat Simulation (PHABSIM) model to evaluate the effects of flow on aquatic habitat. This study would be for the purpose of determining whether the SJNF plan's standard that "Habitat for each species on the forest will be maintained at least at 40% or more of potential" is met. FS Ex. 151, p. 13, FS Ex. 95, p. III-26. The PHABSIM is considered a precise quantitative tool, but can be costly and time-consuming. In fact, PSCo was concerned about the expense of a PHABSIM and countered with a proposal that a "Delphi-type" assessment be used. FS Ex. 151, p. 25. The Forest Service agreed to the Delphi study. A study team was chosen to identify site specific management objectives and carry out the study. The Delphi Study team consisted of four biologists with voting authority, and one facilitator, who did not have a vote. The facilitator, Stephen Arnold, was employed by Devine Tarbell & Associates, Inc. (DTA),<sup>9</sup> a consultant firm hired by PSCo. The voting members of the Delphi team were Andrew Scott, also of DTA, Mark Uppendahl of the Colorado Division of Wildlife (CDOW), and David Gerhardt and Justin Jiminez of the Forest Service. The purpose of a Delphi-type study is to utilize a team of experts using their collective best professional judgment ("BPJ") to resolve quantitative issues where absolute answers may not be possible via a consensus method. The philosophy behind it is essentially that a consensus of experts attempting to resolve complex technical questions can come up with a more accurate answer than the opinion of a single expert. FS Ex. 192, p. 2. The primary purpose of the Delphi Team was to develop biologically based flow recommendations based on changes to fish habitat from various released flows. FS Ex. 16, p. 3. The team crafted management objectives and underlying attainment criteria with

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<sup>9</sup> By the time of the hearing, the name of DTA had been changed to HDR, but DTA was the name used throughout the hearing, and in all pertinent documents. Tr. 123.

the notion of examining what flows would be needed to achieve the 40% minimum habitat standard required by the SJNF Forest Plan. FS Ex. 31, pp. 7-9.

While several aspects of the Delphi study will be discussed in the context of the specific disputed material facts, several general points apply across the board. First, the study was undertaken at the behest of PSCo after they decided the PHABSIM study would be too costly and time consuming. Second, the study was agreed to by the Forest Service and approved by FERC. Third, there was no evidence of absence of consensus on any aspect of the study; in fact, it is clear that Mr. Scott kept his boss, John Devine, and PSCo, informed of all issues and decisions of the Delphi team. Tr. 173-174. Fourth, after the Delphi team had issued its initial conclusions, Mr. Devine issued clear instructions to Mr. Scott, Devin Malkin and Alfred Hughes in an email on April 24, 2008, that “we”—presumably DTA on behalf of PSCo—“are going to need to construct a well-conceived and technically sound approach to disprove the need for, and merit of, the likely bypass flow to be recommended by the USFS.” FS Ex. 188. While Mr. Scott testified that he was never issued the hydrology assignment, designed to question the flows recommended by the Delphi team, he also testified that Mr. Devine did not have any problem with the assumptions of the Delphi team, and that part of his job, which he accomplished, was to keep Devine informed. Thus, even though the Delphi study was proposed by PSCo, actively participated in and adopted by all members of the Delphi team, and that DTA and PSCo knew of the recommendations of the study team, there was an 11<sup>th</sup> hour decision made to attempt to overturn the key recommendation that the study was set up for in the first place.

The Delphi Report, FS Ex. 16, was issued in July 2007. However, a final report was resubmitted to FERC by PSCo in December 2007. CX 67. While the two reports remained substantially the same, the December submission contained, as an attachment, a hydrology study prepared by PSCo. The study was not made a part of the actual Delphi team’s recommendations because the team members were unable to reach consensus on its applicability or usefulness. The Delphi report

clearly started with the premise that the “Project's diversion of flow from Cascade Creek has affected downstream aquatic and riparian resources and has altered the natural conditions related to aquatic habitats, fish populations, macroinvertebrates, water quality, and riparian vegetation communities downstream of the diversion dam. Many of the present physical and biological attributes of the stream system are the product of the altered flow regime.” FS Ex. 16, p. 1, CX 67, p. 7 (p. 1 of the Delphi Report). The target species of the study included brook, brown, rainbow and cutthroat trout.

Overall, the team concluded “that project diversions limit the quantity and quality of fish habitat within the bypass reach during much of the year. The project diverts the majority of natural flow with the exception of leakage at the dam and accretion downstream of the diversion dam. As a result, wetted perimeter and overall stream depth on Cascade Creek is decreased, as well as pool frequency, residual pool depth, and overall pool quality, which results in a reduction of overwintering habitat quality and year-round cover features.” CX 67, p. 18. After evaluating three different flows, the team came to a consensus that the 9 cfs would be the minimum necessary to safeguard the habitat at the standard required by the SJNF plan.

The Delphi Team consensus on biologically-based minimum instream flows and proposed flow sharing plan are as follows:

- ▲ When inflow to the diversion dam equals or exceeds 9 cfs, the minimum flow at the diversion dam to Cascade Creek (as measured immediately below the dam) is recommended to be 7 cfs, plus accretion downstream of that point, and the minimum flow diverted to the flume to Little Cascade Creek (as measured at the point of diversion) will be 2 cfs plus any additional inflow above 9 cfs.
- ▲ When inflow to the diversion dam is less than 9 cfs, the minimum flow diversion to the flume will remain at 2 cfs, and the flow to Cascade Creek will be equal to inflow minus 2 cfs. This accomplishes two goals: (1) two cfs diverted into the flume will prevent winter freezing and subsequent failure of the flow line; and (2) it allows for the diversion structure to be set at 2 and 7 cfs before the winter season begins without

- concern for constant monitoring, at this inaccessible location, based on variable stream flows.
- ▲ This proposal is based on the assumption that the 2 cfs flow diverted to the flume is for the primary purpose of preventing ice damage to the flow line flume and pipe, which could threaten the long term operation and viability of the Tacoma Project.
  - ▲ This proposal also assumes that natural flows and accretions to Little Cascade Creek will equal or exceed 2.5 cfs where, in combination with the 2 cfs diversion from Cascade Creek, it will achieve the biologically-recommended minimum flow of 4.5 cfs at the spawning site.

There were two reasons for this assumption: (1) modeled hydrology predicts that 2 cfs is always available in Cascade Creek to be diverted into the flume to prevent winter freezing and subsequent failure of the flow line; and (2) accretion flows were assumed to be locally enhanced due to the presence of Columbine Lake and its potential influence on local groundwater.

#### **List of Factual Issues in Dispute**

Each of the remaining seven disputed issues relates to two conditions imposed by the Forest Service. Condition Number 17<sup>10</sup> required that PSCo provide year round continuous minimum flows to the bypass reach in Cascade Creek of 9 cubic feet per second (cfs), of which 2 cfs

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<sup>10</sup> **Condition No. 17— Instream Flow Requirements**

The Licensee shall provide year-round continuous minimum flows in the bypass reach in Cascade Creek as follows:

- When flows upstream of the diversion dam equal or exceed 9 cubic feet per second (cfs), the Licensee shall release an instantaneous instream flow of 7 cfs downstream into Cascade Creek (as measured approximately 100 yards below the dam). This will allow a minimum of 2 cfs to be maintained in the Project flume.
- When flows upstream of the diversion dam are less than 9 cfs, the Licensee shall release an instream flow downstream of the dam in Cascade Creek equal to inflow less 2 cfs; said 2 cfs shall be diverted to the Project flume. JS Ex. 18 at 84.

would be directed to the Project flume. Where the flows upstream of the diversion are less than 9 cfs, the first 2 cfs would be directed to the flume, to prevent damage from freezing. Condition 18<sup>11</sup> required that PSCo construct, operate and maintain a device that would guarantee the stream flows required by Condition 17 and also construct means to measure and record compliance with the stream flow requirements.

Disputed Issue #1: There is a direct relationship between Project operations and reduced ecosystem sustainability in Cascade Creek.

Disputed Issue #2: The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is consistent with the results of the Delphi Study.

Disputed Issue #3: The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is required to comply with the USFS' quantitative "standard", set forth in the Forest-Wide Direction, Wildlife and Fish Resource Management, of maintaining habitat for each species on the forest at 40 percent or more of potential.

Disputed Issue #4: PSCo's water diversion on Cascade Creek degrades aquatic habitats and has diminished the aquatic ecosystem from the Cascade Creek diversion dam to the Animas River.

Disputed Issue #5: Only "minor flow accretions" occur between the diversion dam and Mill Creek and therefore the dewatering of Cascade Creek diminishes public uses of the aquatic resources in the bypass reach.

Disputed Issue #7: The USFS requirement in Condition No. 18 that PSCo construct and operate a stream flow device to deliver the flows required by Condition No. 17 is based on a collaborative determination with utility representatives and allows PSCo to maintain an economically viable project.

Disputed Issue #8: The Delphi Team made a technical assessment of the

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<sup>11</sup> **Condition No. 18— Guaranteed Priority Flow Bypass Device and Gaging**

In order to ensure that the instream flows required are released, the Licensee shall construct, operate, and maintain a guaranteed priority streamflow device, approved by the US Forest Service, as part of the diversion/intake structure. Minimum flows required by the instream flow condition shall be automatically released through this device. At least 60 days prior to beginning construction of the diversion structure, the Licensee shall file for Commission approval functional design drawings and an implementation schedule for the guaranteed priority streamflow device. JS Ex. 18 at 85.

storage capacity of Columbine Lake, its contribution to local groundwater sources, the amount of local groundwater flows to Little Cascade Creek, and the resulting impacts of the Delphi Team recommendation on the aquatic resources of Little Cascade Creek.

### **Findings of Fact**

Findings 1 through 28 have been stipulated to by the parties.

1. The Tacoma Hydroelectric Project ("Project") is located approximately 20 miles north of Durango, on a high intermountain plateau west of the Animas River in Las Plata and San Juan Counties. It is owned by Public Service Company of Colorado (PSCo). Water used by the Tacoma Project for power generation purposes originates in three drainage basins; Cascade Creek, Little Cascade Creek, and Elbert Creek. The primary water source for the Project comes from the watershed of Cascade Creek. "Except for leakage at the diversion facilities, the Cascade Creek diversion dam captures the full flow of Cascade Creek approximately 95 percent of the time." JS Ex.1; FERC Accession No. 20050523- 0021. The primary storage reservoir is Electra Lake.
2. The Cascade Creek diversion dam and conveyance facility provides the primary water supply for the Project. These diversion facilities consist of a diversion dam on Cascade Creek has a current hydraulic capacity of approximately 250 cfs.
3. The Cascade Creek diversion dam is located approximately 4,400 feet upstream of the U.S. Highway 550 crossing of Cascade Creek. The Project's inverted siphon crosses over Cascade Creek immediately upstream of U.S. Highway 550. Mill Creek enters Cascade Creek less than 0.5 miles downstream of U.S. Highway 550. Approximately 3 miles downstream from the Cascade Creek diversion structure is a stream reach referred to as Purgatory Flats. Lime Creek flows into Cascade Creek at Purgatory Flats.
4. Portions of the Project, in particular the diversion structure located on Cascade Creek, are located on National Forest System ("NFS") lands, specifically on the San Juan National Forest ("SJNF")
5. There are no gages on Cascade Creek which record the flow of

Cascade Creek.

6. The water diverted from Cascade Creek is transported through the Project's conveyance facilities, and then released into Little Cascade Creek. A gaging station used by the Colorado Division of Water Resources ("CDWR") for recording diverted flows exiting the Cascade Creek diversion pipe is located at the outlet of the pipe where the diverted flow enters the channel of Little Cascade Creek. Little Cascade Creek conveys water to Aspaas Lake which then diverts water into Electra Lake. Water stored in Electra Lake is conveyed to the Tacoma powerhouse.

7. The Tacoma Project operates primarily as a peaking facility.

8. The SJNF Land and Resource Management Plan, as amended in 1992 (SJNF Forest Plan) is filed with the Federal Energy Regulatory Commission ("FERC") pursuant to FERC requirements as a comprehensive plan that documents how the waterways affected by hydroelectric projects will be improved or developed for all beneficial public uses, including the protection of fish and wildlife and other beneficial public uses. See SJNF LAND AND RESOURCE MANAGEMENT PLAN, AS AMENDED IN 1992 (SJNF Forest Plan) JS Ex. 2; PSCo Hearing Request Ex.4.

9. The Tacoma Project currently operates pursuant to FERC license No. 400 (Tacoma-Ames Project). This license will expire on June 30, 2010.

10. FERC established new rules, including the establishment of a new Integrated Licensing Process (ILP) for licensing of hydropower projects, on July 23, 2003 (Final Rule and Tribal Policy Statement). Although FERC did not require license applicants to use the ILP as the default licensing process until July 23, 2005, PSCo chose to use the ILP and commenced informal meetings of interested stakeholders, which included establishment of Resource Working Groups (RWG) in 2004.

11. The ILP is a well-defined process with both short time frames and strict time lines; the intent of the informal meetings proposed by PSCo was to provide opportunity for stakeholders to work closely together prior to formal commencement of the proceeding to identify resource issues, review existing studies and data, identify information needs, and review study plans.

12. On May 20, 2005, PSCo filed a Notice of Intent to File License

Application for a New License (NOI) and a Pre-Application Document (PAD) [JS Ex. 3; FERC Accession No. 20050523-0020].

13. In response to the NOI and PAD, FERC issued Scoping Document 1 (SD1) on July 12, 2005 [JS Ex. 4; FERC Accession No. 20050712-3009]. The public scoping process is done to "ensure that all pertinent issues are identified and analyzed and that the Environmental Assessment is thorough and balanced" [JS Ex. 4; FERC Accession No. 20050712-3009, page 2]. Because PSCo intends to seek separate licenses for the Tacoma and Ames Projects, SDI also established a new project number for the Tacoma license proceeding, P-12589.

14. FERC subsequently commenced the proceeding, starting the relicensing process through recognition of the PSCo NOI filing, and solicited comments on the PAD, SD1, and study requests on July 21, 2005 [JS Ex. 5; FERC Accession No. 20050721-3065].

15. The U.S. Forest Service (USFS) filed comments on the PAD and SD1, on September 16, 2005 which included Forest Service comments on PSCo's proposed studies. [JS Ex. 6 (Answer FS Ex. 13); FERC Accession No. 20050916-5020]. The USFS noted that the PAD did not disclose resource impacts from the Cascade Creek diversion, including effects to "water quantity, fish and aquatic resources, and wildlife" and that "diverting all flows from a stream 95% of the time is likely to affect resources" [JS Ex. 6 (Answer 3 FS Ex. 13); FERC Accession No. 20050916-5020, page 4]. Additionally, the USFS formally requested a study based on the Water RWG issue assessment "Instream Flows below Cascade Creek Diversion Dam" [JS Ex. 6 (Answer FS Ex. 13); FERC Accession No. 20050916-5020, page 8].

16. PSCo informed the RWG that it was concerned about the costs of a PHABSIM study and suggested as an alternative, the use of a "Delphi-type assessment" in their comments to FERC on stakeholder study requests and in their Proposed Study Plan package dated November 1, 2005 [JS Ex. 7 (Answer FS Ex. 24); FERC Accession No. 200511015038, pages 4, 7-24].

17. The USFS committed to working with PSCo to make the Delphi process work. USFS informed PSCo that it would fallback to using the PHABSIM assessment unless the management objectives and attainment

criteria met FS information needs [JS Ex. 8 (Answer FS Ex. 23); FERC Accession No. 20051220-5016, pages 1-4].

18. On January 26, 2006, the USFS provided comments to PSCo's draft Delphi-type study plan. [JS Ex. 9; FERC Accession No. 20060127-5049]

19. PSCo filed their revised Study Plan with FERC on March 1, 2006. PSCo proposed the Delphi Study Plan. [JS Ex. 10 (PSCo Hearing Request Ex. 11; FERC Accession No. 20060301-5047).

20. The USFS filed comments on PSCo's revised Study Plan on March 9, 2006. JS Ex. 11 FERC Accession No. 20060309-5130.

21. PSCo filed the final Delphi Report. This report was based upon, and reviewed by, a technical study conducted by a technical team which included the USFS, Devine Tarbell and Associates, and Colorado Division of Wildlife, on July 9, 2007 [JS Ex. 12 (FS Answer Ex. 16); FERC Accession No. 20070709-5029].

22. The USFS filed comments with FERC (dated July 26, 2007) on the final Delphi Report on July 27, 2007 [JS Ex. 13 (FS Answer Ex. 14); FERC Accession No. 200707275023].

23. PSCo filed with FERC the Response to Comments on the Initial Draft Study Reports and Study Report Meeting Summary on July 20, 2007 (JS Ex. 14; FERC Accession No. 20070720-5065)

24. The USFS filed with FERC a request for an economic study for the Project on May 24, 2007 [JS Ex. 15 (FS Answer Ex. 18); FERC Accession No. 20070524-5075].

25. FERC staff denied the study request by letter dated July 30, 2007. [JS Ex. 16 FERC Accession No. 20070730-3003]

26. The USFS filed comments on the Final Study Reports and Preliminary Licensing Proposal on March 10, 2008 [JS Ex. 17 (FS Answer Ex. 6); FERC Accession No. 200803105006].

27. The USFS filed comments on the License Application on October 29, 2008 [JS Ex. 18 (FS Answer Ex. 2); FERC Accession No. 20081029-5072].

28. PSCo filed another final Delphi Study Report dated November 2007 with FERC on December 14, 2007, with the addition of the Hydrology Study. [JS Ex. 19; FERC Accession No. 20071214-5133].

Ultimate Finding 1-- There is a direct relationship between Project operations and reduced ecosystem sustainability in Cascade Creek.

Ultimate Finding 4-- PSCo's water diversion on Cascade Creek degrades aquatic habitats and has diminished the aquatic ecosystem from the Cascade Creek diversion dam to the Animas River.

After review of the record, I have decided that Disputed Issues 1 and 4 are essentially the same issue stated differently. The parties seem to have recognized this as well in their proposed findings and supporting argument.

1-1. The Forestry Plan requires the attainment of 40% of habitat potential for viable populations of all existing vertebrate wildlife species. "Habitat for each species on the forest will be maintained at least at 40 percent or more of potential." FS Ex. 95, III-26, Joint Stipulation ("JS") ¶ 8.

1-2. The Delphi Study team evaluated the degree of attainment of management objective goals<sup>12</sup> for Cascade Creek at a nominal water bypass [thru to Cascade Creek] rates of 3 CFS (Q3), 7 CFS (Q7), and 12 CFS (Q12)<sup>13</sup> and using agreed measuring criteria - determined that the nominal 7 CFS and higher did meet the 40% quality standard required in the Forestry Plan, but the nominal 3 CFS did not. FS Ex. 16, p. 12, Table 2-5.

1-3. It is not unreasonable to conclude that diverting nearly 100% of Cascade Creek's flow over 95% of the time would have an adverse effect on aquatic habitat.

1-4. The concept of "reduced ecosystem sustainability" was not contained in any of the studies that are part of this record. It is not mentioned in either condition 17 or 18, but is only contained in a cover letter. There was no formal study of "ecosystem sustainability."

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<sup>12</sup> "The primary purpose of the Delphi Team was to develop biologically based flow recommendations based on changes to fish habitat from various released flows." FS Ex. 16, p. 3.

<sup>13</sup> The target flow rates were set at the diversion dam to be 3 cfs, 7 cfs, and 12 cfs. The field measured flow was actually 4.49 cfs, 10.89 cfs, and 13.75 cfs, respectively which were thereafter identified as Q3, Q7, and Q12. FS Ex. 16 at Table 2-2.

Practically speaking, the ultimate finding by the Forest Service was that a certain minimum flow was necessary to sustain the 40% quality standard required in the Forestry Plan.

1-5. The Forest Service proposed a PHABSIM study to develop flow-habitat relationships over a range of flows for resident trout in Cascade Creek. FS Ex. 26, p. 11. Such a study would be consistent with agency recommendations in other FERC licensing proceedings. FS Ex. 154, p. 12.

1-6. PSCo proposed to use the Delphi study as an alternative habitat based assessment, generally because of its lower cost.

1-7. Both the Forest Service and FERC agreed to the Delphi Study, which is the only FERC approved habitat based assessment for this license proceeding. FS Ex. 156.

1-8. The Delphi Study was an appropriate alternative approach to the PHABSIM study. The Delphi Study involved the participation of PSCo, through its contractor DTA, which included one of the four voting members of the team, Andrew Scott, as well as the facilitator of the study, Stephen Arnold. The CDOW was represented on the team by Mark Uppendahl, and the Forest Service was represented by David Gerhardt and Justin Jiminez.

1-9. The Delphi team devised management objectives and underlying attainment criteria to principally evaluate what flows would be necessary to maintain the 40% habitat of potential standard. The team conducted a number of meetings in which all members participated, as well as a field study participated in by all voting team members but which facilitator Arnold did not attend.

1-10. The study team agreed to evaluate three different flow rates to determine what minimum stream flows would meet or exceed the minimum standard for aquatic habitat. They selected specific observation sites, and evaluated flow releases of 3, 7 and 12 cfs during their field assessment conducted from September 11-14, 2006. The team members each rated these flows according to the degree that they met the attainment criteria cited in the management objectives for the study.

1-11. The Delphi Team met on December 6-7, 2006 and came up with a team consensus for the appropriate flows. They found that the

nominal 7 cfs (Q7) was the appropriate flow objective.

1-12. Over the winter months, trout generally prefer deeper, slower habitat. Pool depth generally increases with increasing flow to the benefit of resident trout.

1-13. There is no basis to find that an increase in winter flow as prescribed in Condition 17 will have any harmful effect on fish or fish habitat.

1-14. The initial “final” Delphi Report was filed with the FERC on July 9, 2007. FS Ex. 16. PSCo filed a second Final Delphi Study Report with FERC on December 14, 2007. CX 67. The body of the report was the same, but the December filing contained, as an attachment, an estimated hydrology study. The Delphi team could not reach consensus on the contents of the hydrology report, but it did reach consensus to include it as an attachment. PSCo CX 67, p. 119 thru 155.

1-15. The Forest Service flow recommendation in Condition 17 is totally consistent with the consensual minimum instream flow recommendation that was developed through the Delphi process.

1-16. On April 24, 2008, John Devine, on behalf of PSCO, sent a communication to Alfred Hughes, the manager of the Tacoma Project, DTA employee and Delphi Team member Andrew Scott, and DTA employee and botanist Devin Malkin. This communication was to craft ways to “[d]isprove the need for, and the merit of, the likely bypass flow to be recommended by the USFS.” This communication clearly delineates a strategy to overturn expected recommendations of the USFS derived from the very Delphi study that PSCo suggested be used as an alternative to the PHABSIM recommended by the Forest Service.

1-17. To further the strategy discussed in the April 24, 2008 memo, PSCo and DTA attempted to conduct several other studies and analyses. I find that the PSCo’s analysis of CDOW’s fish studies does not support their conclusion that fish habitat below the diversion dam is healthy or robust; I find that the Proper Functioning Condition (PFC) assessment was not conducted according to protocol or for the purposes for which such a study is designed, and that the conclusions from the macroinvertebrate assessment conducted by PSCo are not supported by the evidence submitted.

#### A. The CDOW fish data

- (i) The historic fish data is not reliable for making comparative analysis of fish densities above or below the diversion structure.
- (ii) Andrew Scott testified that he recommended that the entire reference section to fish data be removed from the Delphi Study, and the Delphi team agreed that the use of such data was not appropriate for comparison purposes. Mr. Scott's testimony on cross examination indicated that he had much doubt about how to use this data, including how to deal with issues such as statistical reliability, sampling protocol, etc.
- (iii) On the other hand, Michael Japhet, the former Senior Aquatic Biologist for CDOW, testified that the CDOW data on fish population does not support the conclusion that the fish population below the dam was superior to that above the dam, and that there was no factual evidence that the Project enhances the ecology of Cascade Creek. He stated that a true and valid comparison study would involve multiple samplings and locations over time, that the electrofishing sampling relied on by PSCo was the product of improper methodologies, including utilizing sampling reaches of too small a size, and that the studies were not comparable sampling events. FS Ex. 107.
- (iv) All-in-all, the CDOW fish data were not sufficient to show by a preponderance of the evidence, that the fish population below the dam was equal to or superior to that above the dam.

#### B. The PFC Study

- (i) The studies necessary to determine channel and riparian conditions in this case have not been conducted by PSCo. FS Ex. 99, pp. 3-4, 9-10.
- (ii) The PFC conducted by PSCo was not objective, and was not appropriate for the type of use urged by PSCo. FS Ex. 99, p. 4.
- (iii) A PFC study is designed to assess livestock impacts to streams and is not an assessment tool that can be used to ascertain whether the bypass reach of Cascade Creek was degraded. FS Ex. 99, p. 11, Tr. 337-340.
- (iv) The fact that the PFC study as used in this case was conducted

solely by DTA personnel acting under instructions to "disprove" the recommendations generated by the Delphi study and the fact that it was used for a purpose outside the normal scope of PFC use renders it untrustworthy.

C. The macroinvertebrate assessment

(i) The Macroinvertebrate *Assessment* conducted by PSCo in 2008 was not sufficient to conclude that the macroinvertebrate populations above and below the diversion are equally robust. Roper Direct FS Ex. 122, p. 7:21-23.

(ii) PSCo's assessment was flawed because PSCo relied on a large scale index rather than finer scale evaluation in order to determine if communities differed in the reaches just above and below the Tacoma Diversion. Roper Direct FS Ex. 122, pp. 10-11.

(iii) PSCo failed to build an appropriate Index of Biological Integrity. FS Ex. 112, pp. 33-34; FS Ex. 50, p. 887; FS Ex. 141, Abstract; FS Ex. 179, p. 3; FS Ex. 180A

(iv) When properly analyzed the macroinvertebrate studies provides evidence that the downstream of the diversion has been degraded. Roper Direct FS Ex. 122, p. 35-36

1-18. The fish abundance or biomass studies done by DTA does not overcome the presumption of correctness of the Delphi Study that the [current] reduced flow volume from “. . .project diversions . . . results in reduction of over-wintering habitat quality and year-round cover features.” FS Ex. 16, p. 12.

Ultimate Finding 2-- The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is consistent with the results of the Delphi Study.

2-1. The consensus of the Delphi team was that a biologically-based minimum flow at the diversion dam to Cascade Creek should be 7 cfs. FS Ex. 16, p. 13.

2-2. Andrew Hughes, the manager of the Tacoma Project, addressed the Delphi team at one of its meetings on December 6-7, 2006, and

emphasized that the team should not only consider the needs of the fish, but should take measures to assure that enough water was diverted to Little Cascade creek in the winter so that the flow in the flume would not freeze. CX 15, p. 8.

2-3. Mr. Hughes stated that there had never been a freeze as described above and that the flow had been as little as 2 cfs “so that is as good an estimate as any.” CX 15, p. 8.

2-4. While Mr. Hughes testified that he had not been quoted accurately in the notes of the meeting, Tr. 252, he had been copied with a variety of documents which reflected those same meeting notes and never asked the team or FERC to correct his statement. Tr. 252-257.

2-5. PSCo’s consultant Scott testified that John Devine and PSCo’s representative Hughes was aware of the Delphi Team instream flow recommendation, including the assumptions relied upon by the Delphi Team in reaching that flow recommendation and that he was never informed either by PSCo or by his employer that he was without authority to make these assumptions as their representative on the Delphi Team. Tr. 174-175, 183-184.

2-6. In its FERC Application, PSCo asserts it has always maintained 3 to 4 cfs into the flume and siphon and that this has been sufficient to keep the pipeline from freezing. CX 47, p. B-6.

2-7. Mr. Hughes provided the only information about minimum flows to the pipeline so as to allow the Delphi Team had to make their instream flow recommendation. The Delphi Team minimum bypass flow recommendation provided for a minimum flow of 2 cfs to the Little Cascade Creek flume and the pipeline as a first priority. FS Ex. 16, p. 13.

2-8. Historic diversion practices over the past 36 years show conclusively that winter diversions into the pipeline have been 2 cfs or less. FS Ex.119, pp. 13-14; FS Ex 126, p. 5, FS Ex. 126A, p.1.

2-9. The Forest Service had no need to balance flows between Cascade Creek and Little Cascade Creek.

2-10. While the Forest Service elected not to cross-examine John Devine, his direct testimony was not undisputed, as it was contradicted by the testimony of several other witnesses and the conclusions of the Delphi Study.

2-11. I find that the testimony of Mr. Devine regarding the minimum flows necessary to protect the flowline from freezing is less persuasive than the consensus conclusion of the Delphi team, particularly after the team received input from Mr. Hughes, the manager of the Tacoma Project.

Ultimate Finding 3-- The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is required to comply with the USFS' quantitative "standard", set forth in the Forest-Wide Direction, Wildlife and Fish Resource Management, of maintaining habitat for each species on the forest at 40 percent or more of potential.

3-1. The Forestry Plan requires the attainment of 40% of habitat potential for viable populations of all existing vertebrate wildlife species. "Habitat for each species on the forest will be maintained at least at 40 percent or more of potential." FS Ex. 95, III-26, JS ¶ 8.

3-2. Delphi team member D. Gerhardt stated that the USFS management plan is 40% of bank full wetted perimeter (FS Ex. 16, Appendix B-9), however there are two additional criteria.

3-3. Using only the 40 percent bank full wetted perimeter criteria, PSCo's consultant calculated that only 0.8 cfs of bypass into Cascade Creek is required to meet the 40% requirement.<sup>14</sup>

3-4. The Cascade Creek Riffle and Pool at Observation point #1 appears to achieve a 40% wetted perimeter bank at a bypass discharge flow rate [at the diversion dam] of less than 2 cfs. FS Ex. 16, Appendix D-2 and D-4.

3-5. FS follows a more rigorous three part measurement criteria. These criteria include: 1) Average velocity of one foot-per second; 2) Fifty (50%) of bank wetted perimeter, and 3) an average water depth of 1% of bank full top width, or 0.2 ft, whichever is less. FS Ex. 16 at Appendix. B-9, (Espgren, 1994, FS Ex. No. 153.).<sup>15</sup>

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<sup>14</sup> "The flow needed to meet the 40% quantitative standard is 0.8 cfs" [Exhibit No. CX-51, p. 18, line 18].

<sup>15</sup> The State of Colorado invested in the Colorado Water Conservation Board ("CWCB") the power to implement a statute where the CWCB must "determine that the  
(continued...)

3-6. The FS and the State of Colorado follow standardized field and office procedures for determining initial instream flow recommendations based upon R2CROSS (a proprietary software program) output.

3-7. I find that the PSCo technique of satisfaction of the 40% criteria solely by percentage of bank wetted perimeter measurements was not scientifically rigorous. (See 3-3 above).

3-8. I find that the three criteria method prescribed by the CWCB and resolved in the prescribed software program known as R2CROSS is a more rigorous evaluation of the degree that a stream has achieved a 40% of its habitat potential.

3-9. All of Cascade Creek and parts of Little Cascade Creek are within SJNF lands and subject to the 1992 SJNF Plan. PSCo's position is that because Little Cascade Creek's water flow will be diminished under the minimum instream flow recommendations of the Delphi Study, therefore Little Cascade Creek's biological potential mandated under the SJNF Plan will not be achieved.

3-10. The Forest Service, in applying its own regulations, has resolved the potentially conflicting definitions of (a) "existing [flow] conditions," (b) "native flow conditions," (c) "baseline [flow] conditions" to mean "flow without augmentation." Thus, the pre-project stream flow of Little Cascade Creek is zero cfs instream flow diverted from Cascade Creek.<sup>16</sup> In performing its duties under applicable statutes

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<sup>15</sup>(...continued)

natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; that there is a natural environment that can be preserved to a reasonable degree with the CWCB's water right, if granted; and that such environment can exist without material injury to water rights" (§ 37-92-102(3c), C.R.S. (1990)). The CWCB makes these findings based upon a synthesis of the supporting technical data and a final instream flow recommendation prepared by the CWCB staff. **Standardized field and office procedures** (emphasis added) help to ensure that the CWCB staffs final instream flow recommendations are reasonable, necessary, and consistent. As such, standard field procedures have been established for selecting transect sites and collecting hydraulic and biologic data.

<sup>16</sup> The minimum flow recommendation for Cascade Creek is consistent with Forest Service law and policy. The decision not to impose a minimum flow recommendation on Little Cascade Creek is also consistent with Forest Service law and policy. FS Ex. 151, p.56.

and its own regulations and procedures, a government agency may interpret its own regulations.<sup>17</sup>

3-11. Under the FS interpretation, if Little Cascade Creek is augmented by the priority flow of 2 cfs (under the Delphi Study Plan), then it will always exceed its un-augmented biological potential and there is no need for further analysis.

3-12. Under the FS interpretation, if the maximum bypass of instream flow (under the Delphi Study Plan) to Cascade Creek is implemented, then it will come as close as possible to meeting its biological potential. Thus Condition 17, which diverts limited [2 cfs] priority instream flow to Little Cascade Creek, will come as close as possible to meeting the biological potential of Cascade Creek.

3-13. It is undisputed that PSCo has valid existing water rights to waters of Cascade Creek on SJNF lands<sup>18</sup>. The water rights claimed by PSCo are the antithesis of the Forest Service instream requirements for Cascade Creek. The resolution of controlling Cascade Creek water use rights are beyond the scope of my inquiry.

Ultimate Finding 5-- Only "minor flow accretions" occur between the diversion dam and Mill Creek and therefore the dewatering of Cascade Creek diminishes public uses of the aquatic resources in the bypass reach.

5-1. Except during spring run-off periods, PSCo operates the diversion dam during the majority of the year to give flow priority to the diversion to Little Cascade Creek. JS ¶ 1

5-2. PSCo states plant operators' estimates of flow from approximately 15 individual springs range from 0.25 to 0.75 cfs each and accumulate to roughly 1.5 to 2.5 cfs (total estimated accretion) at the

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<sup>17</sup> See *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (holding that "agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."(internal quotations and citations omitted)).

<sup>18</sup> PSCo holds water rights that provide for the diversion of up to 400 cubic feet per second (cfs) from Cascade Creek. Currently, PSCo diverts flows up to the capacity of the wooden flume, which is reported to be 250 cfs. FS Ex. 2, p. 17.

US Highway 550 crossing.” FS Ex. 4A, p. B-16, Section 3.2.7.1. PSCo witness Devine stated that field measurements of the full stream flow of Cascade Creek on during various seasons (after the diversion dam and before U.S. Highway 550 bridge) showed that accretions ranged from 1.3<sup>19</sup> to 3.0 cfs<sup>20</sup>. No independent validation of the 10 cfs accretions referenced by PSCo witness Devine could be found.<sup>21</sup> Standard streamflow meter measurements were performed using comparison of the differential of volumes of water between the diversion dam and the bottom of the reach (U.S. Highway 550). CX 34, p. 24 at line 9 -12. The PSCo field team suggested that private cabin owners on FS lands are withdrawing waters from Cascade Creek thus absorbing some of the stream accretions. PSCo CX 34, p. 25.

5-3. Forest Service spring flow measurements for 15 separate springs in this section of Cascade Creek showed accretion quantities as less than those reported by PSCo. Forest Service measured the largest spring flow as 0.02 cfs (two one hundredths of a cubic foot per second) at the source. FS Ex. 120. PSCo pointed out that the point of accretion stream measurement should be at the point of confluence with the main stream body - not the spring source as reported by the FS team. A three person FS measured the full flow of Cascade Creek as 1.12 cfs. avg. (FS Ex. 121) on two winter dates which closely matches PSCo witness Scott's observations at 1.3 cfs. (see 5-2 above). There is no credible proof that the day to day winter flow rates (in upper Cascade Creek) fluctuate significantly in the winter. FS Ex. 119, p. 10. PSCo has records showing that “Excepting minor leakage at the diversion facilities (normally less than 0.2 cfs), the Cascade Creek diversion dam captures the full flow of Cascade Creek approximately 95 percent of the time” FS Ex. 4B, p. E-23.

5-4. Even with PSCo's largest reported accretion of 3.0 cfs (using

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<sup>19</sup> Accretions from these inflows provided an approximate net gain of approximately 1.3 cfs from top to bottom of the bypass reach during the monitoring period. PSCo CX-5, p. 2, CX 22, p.10.

<sup>20</sup> Total accretions actually measured during field studies averaged 3.0 cfs upstream of U.S. Highway 550. FS Ex. 4A, Section 3.2.7.1

<sup>21</sup> Devine Direct Testimony PSCo CX 34, p. 7 line 5, p. 24 line 14.

multi-source validation), the total flow of Cascade Creek is less than Q3 (FS Ex. 16) which means the upper part of the stream (Reach 1) does not meet the Forest Plan of 40% of biological aquatic potential.

5-5. All of Management Objective Criteria 1 thru 4 and 6 thru 9 relate to the spawning and growth of fish in the (upper) Cascade Creek stream habitat. FS Ex. 16, Table 2-1. None of the management objectives related to fish are met at a nominal Q3 (FS Ex. 16) flow rate. In fishery biology, it is a commonly accepted fact that trout require water to survive; more water generally produces more trout. FS Ex. 107, p. 37. I note that the cross-examination of FS witness Michael Japhet failed to overcome this simple premise.

5-6. The uncontradicted testimony of professional fishing guide Tom Knopick concurs with the Delphi Management Object findings and that of FS biologist Michael Japhet.<sup>22</sup>

5-7. I find that current PSCo operational parameters (e.g. nearly complete diversion of instream flow over to Little Cascade Creek ) causes the public uses (fishing) of aquatic resources of (upper) Cascade Creek to be diminished.

Ultimate Finding 7-- The USFS requirement in Condition No. 18 that PSCo construct and operate a stream flow device to deliver the flows required by Condition No. 17 was not based on a collaborative determination with utility representatives. The economic viability of the project may be adversely affected by the imposition of Conditions 17 and 18.

7-1. The Delphi study team collaborated to arrive at a biologically-based instream flow sharing plan between Little Cascade Creek and Cascade Creek. FS Ex. 16, p. 13.

7-2. The flow sharing formula specifically prioritized a minimum flow of 2 cfs to go to Little Cascade Creek so as to minimize the

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<sup>22</sup> “The diversion dam removes almost all the flow from Cascade Creek most of the time. This has a tremendous negative impact on the quality of the fish habitat and on the fish population in Cascade Creek. All things being equal, more water in Cascade Creek below the diversion dam would mean more fish in the stream below the diversion.” FS Witness Knopick Ex. 110, p. 5.

operational difficulties of successful continuous un-manned operation during low flow conditions in the winter season at high mountain altitudes.

7-3. The assigned flow regime for Little Cascade Creek was not based upon a detailed engineering study of the operational parameters of un-manned operation of the diversion dam, open flume, and pipeline at high mountain attitudes in winter conditions.<sup>23</sup>

7-4. PSCo computes that the water flow diversion scheme contained in the Delphi study will result in approximately 16% annual reduction in electricity generation. PSCo CX -43.

7-5. There was no specific economic study conducted, and therefore “the Forest Service has no basis for any statement concerning the economic viability of the project.” FS Ex. 151, p. 59.

7-6. The Forest Service requested that PSCo conduct an economic study, but “PSCo refused to conduct the analysis.” FS Ex. 151, p. 59.

7-7 The decision to recommend that the first 2 cfs be diverted to Little Cascade Creek was based on a collaborative determination with PSCo, in that the Delphi Team, and the Forest Service, attempted to incorporate the recommendations made by Mr. Hughes at the December 6-7, 2006 Delphi Team meeting.

7-8. I find that the record does not contain evidence that the costs of the stream flow device required by Condition 18 to guarantee the flow required by Condition 17 were considered by the Forest Service; therefore the economics of the construction of the stream flow device was not the product of a collaborative effort between PSCo and the Forest Service<sup>24</sup>.

Ultimate Finding 8-- The Delphi Team made an assessment of the storage capacity of Columbine Lake, its contribution to local groundwater sources, the amount of local groundwater flows to Little

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<sup>23</sup> “There is no room for error or assumption because getting that number wrong could lead to the type of catastrophic failure of Project water transmission facilities described above.” CX-28, p. 3 line 19.

<sup>24</sup> Whether the extra costs are justified by the benefits, and whether PSCo is at fault for not providing the requested economic study is beyond the scope of my fact-finding role in this hearing.

Cascade Creek, and the resulting impacts of the Delphi Team recommendation on the aquatic resources of Little Cascade Creek.

8-1. Although the term “technical assessment” is not formally defined in this record, I find that the Delphi team came to a consensus opinion regarding the storage capacity of Columbine Lake, and the overall aquatic resources of Little Cascade Creek without anything that can be construed as a formal “technical assessment.” This is in contrast to the type of assessment that was conducted to determine the condition and flows of Reach 1 of Cascade Creek.

8-2. In the absence of any technical information, the Delphi Team used the Delphi process and applied their best professional judgment to estimate a minimum level of naturally occurring flow in Little Cascade Creek at the spawning habitat location. FS Ex. 151, pp. 59-60.

8-3. The 2.5 cfs that is at issue is relevant to the spawning habitat at the bottom of the Little Cascade Creek study area, and is located on private land. Tr. 132. This habitat was not a matter of big concern to the Forest Service. FS Ex. 151, p. 24. See discussion in Issue 3-11 above.

8-4. To achieve the Delphi Study biologically-recommended minimum flow in Little Cascade Creek, the Delphi Study Team assumed the existence of a year-round accretion flow of 2.5 cfs. CX-33, p. 19.

8-5. Unlike on Cascade Creek where a number of accurate accretion flow measurements were made, no measurements of accretion flows have been made on Little Cascade Creek.

8-6. The Forest Service did review the Little Cascade Creek information on accretion flows provided in PSCo’s FERC application, and there was no information in that report that caused the Forest Service to change the flow recommendation in condition No. 17 or any other opinion relative to Little Cascade Creek. Tr. 399-400.

8-7. Given that the participants in the Delphi Study, conducted at PSCo’s behest, determined that their analysis was sufficient to establish a consensual determination as to Columbine Lake capacity and the flows and aquatic resources of Little Cascade Creek, I find that PSCo’s post hoc attempts to bring in a variety of studies to attack the recommendations of the Delphi Team do not establish, by a

preponderance of the evidence, that the Delphi Team's conclusion that there was a 2.5 cfs accretion flow in Little Cascade Creek, was incorrect.

### **Discussion**

At the heart of this case is the conflict between: (a) the desire of the licensee (PSCo) to continue operations related to the Cascade Creek diversion dam as it has for decades, and (b) the responsible governmental agency (FS) carrying out its duties as it interprets the applicable statutes and regulations. There was no issue raised in this case as to why these particular FS regulations (and ultimately condition 17 and 18) are being applied at this license renewal and not previously. Similarly, the matter of the ownership and applicability of historical water rights held by PSCo are not for my consideration. There is no claim by PSCo that the regulations being applied by FS, which results in Condition 17 and 18, are being applied unlawfully or that PSCo is being singled out for discriminatory treatment at the hands of the regulating agency. Both parties are bound by the 1992 Amended Land and Resource Management Plan for the San Juan National Forest (SJNF) a.k.a. San Juan National Forest Plan which sets out goals and criteria for the enhancement<sup>25</sup> and protection of biological habitat and lawful uses of the SJNF. The SJNF Plan sets out duties that the agency FS are bound to follow.<sup>26</sup> On page 58 of 555 pages of the SJNF Plan are the Standards and Guidelines for fish in the SJNF. Key is

"Habitat for each species on the forest will be maintained at least at 40 percent or more of potential."

It is clear that the decision to utilize the 40% standard, and whether it should be applied against native or actual conditions, is outside the

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<sup>25</sup> "Improve fish habitat on suitable streams and low elevation ponds and lakes". FS Ex. 95 at III-3.

<sup>26</sup> The management requirements in the Forest Direction section set the baseline conditions that must be maintained throughout the Forest in carrying out this Forest Plan. FS Ex. 95 page III-6.

scope of my authority<sup>27</sup>.

Even with the relative paucity of decisions issued under the EPA Act, it is already well-established that the burden of proof in resolving issues of material fact is on the party that is challenging conditions imposed by the regulatory agency. In reviewing the material facts at issue, I generally found that determinations made via the consensus route of the Delphi Study, which involved the participation of the Forest Service, PSCo and the CDOW, were entitled to significant weight. By definition the Delphi Study was conducted to make quantitative determinations by a team of experts. The theory behind the Delphi Study is that where such consensus is achieved after methodologies are agreed upon and executed, that the results achieved are more valuable and accurate than determinations made by individual experts. This is particularly appropriate where the studies being offered to refute the conclusions of the Delphi Team are themselves somewhat lacking in reliability and are not used for the purposes for which they are designed.

I also find it significant that the Delphi Study was proposed by PSCo as a less costly and time-consuming, if admittedly less reliable, approach than the IFIM PHABSIM study proposed by the Forest Service. For PSCo to propose this approach, and have it accepted by the Forest Service and FERC, and then to deliberately set out to nullify many of the conclusions of the Study is more than a little ironic, particularly where the facilitator and one of the team members were employees of PSCo consultant DTA. It is also noteworthy that Delphi Team Member Scott was not only part of the team's consensus, but kept his manager fully apprised of the team's flow and other recommendations, and was never told until April 2008 that DTA and PSCo management had any opposition to these consensus findings.

I also find it significant that 36 C.F.R. § 219.11 Role of science in planning, requires that responsible officials utilize best available science

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<sup>27</sup> Although the contention that native flows applied was ably supported by the testimony during cross-examination of David Gerhart, Tr. 360-362, among others.

in forest planning.<sup>28</sup> I generally find that the best available science supports the findings of the consensus driven Delphi Study rather than the after-the-fact attacks on the study by means that were not persuasive. With respect to the specific disputed material facts, it has become evident to me after the hearing and review of evidence that there is not much of a difference between issues 1 and 4. Thus, the factual findings I have made on these two issues are combined in one section. Briefly stated, I am applying the same principle throughout this decision, namely that the Delphi Study is presumed to be the better science and that the later PSCo studies that were conducted with the specific purpose of countering the Study. The Forest Service has provided ample evidence that the methodology used by PSCo in attempting to use other studies in a manner other than their intended use, and that studies PSCo conducted without Forest Service participation were flawed in a variety of ways.

With respect to issue 2, the primary purpose of the Delphi Team was to develop biologically based flow recommendations based on changes to fish habitat from various released flows. The Delphi team started with the premise that the diversion of flow from Cascade Creek has affected downstream aquatic and riparian resources. Using their collective Best Professional Judgment they analyzed the minimum flow needed in Cascade Creek to achieve the biological potential required by the SJNF Plan. The diversion of all of Cascade Creek over to Little Cascade Creek up to 95% of the time was contrary to their mandated responsibilities with respect to the “40% of biological potential” required in the SJNF

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<sup>28</sup> (a) The Responsible Official must take into account the best available science. For purposes of this subpart, taking into account the best available science means the Responsible Official must:

- (1) Document how the best available science was taken into account in the planning process within the context of the issues being considered;
- (2) Evaluate and disclose substantial uncertainties in that science;
- (3) Evaluate and disclose substantial risks associated with plan components based on that science; and

(4) Document that the science was appropriately interpreted and applied.

(b) To meet the requirements of paragraph (a) of this section, the Responsible Official may use independent peer review, a science advisory board, or other review methods to evaluate the consideration of science in the planning process.

Plan. After conducting field tests at flow levels Q3, Q5, and Q12, the Team analyzed the achievement of management objectives at each flow level at Reach 1 on Cascade Creek. The results of their collective Best Professional Judgment are expressed in Table 2-1 of FS Ex.16. The results of Table 2-1 are summarized with the Team's Instream Flow Recommendation in FS Ex. 16 at 13 and it is consistent with the results of the Delphi Study.

With respect to issue 3, the mandatory standards of the SJNF Plan require the FS to work toward the achievement of 40% of biological potential (as a minimum requirement) for all species in the forest. The Delphi Study team was tasked with finding the stream flow conditions that were likely to achieve success in meeting the SJNF Plan Management Objectives. A study was designed and executed which focused on the field measurement of the parameters necessary to provide reliable data for the R2CROSS (software) stream evaluation. R2CROSS is a standardized field and office procedure to help ensure that final stream flow recommendations are reasonable. The standard methods prescribed by R2CROSS are significantly more rigorous than those relied upon by PSCo. The methods utilized by PSCo to calculate the 40% biological potential do not meet the burden of persuasion sufficient to overcome the FS prescription for stream flow rates.

As to issue 5, PSCo acknowledges that it diverts nearly all of Cascade Creek approximately 95% of the time, but counters with the argument that upper Cascade Creek (Reach #1) is biologically healthy because the accretions (ranging from 1.3 to 3.0 cfs) from minor springs and seeps coalesce with leakage around the diversion dam on upper Cascade Creek (Reach 1) to provide adequate fish habitat until such time as lower streams of Mill Creek and Lime Creek converge with Cascade Creek. The Delphi Study team did not measure the volumes of minor springs and seeps flowing into Cascade Creek. FS employees measured the aggregated springs and seeps on two winter days and tend to agree with the lower end of the PSCo accretion estimate. PSCo witness Devine stated that accretions into the upper section of Cascade Creek ranged from 1.3 cfs to 10 cfs. The record does not indicate where the 10 cfs measurement was properly documented. Mr. Devine stands alone as the

source and thus the claim of a large accretion flow rate (10 cfs) does not rise to the level sufficient to meet PSCo's burden of proof. PSCo's APPLICATION FOR LICENSE (6/25/08) filing makes reference in Section 3.2.7.1 to a measured accretion of "3.0 cfs upstream of U.S. Highway 550." Even using PSCo's highest documented accretion flow rate of 3.0 cfs added to the leakage around the diversion dam still only achieves the Q3 flow level which the Delphi Study Team determined did not meet SJNF Management Objective criteria. The only valid conclusion that can be drawn from the evidence in the record is that the biological potential of Cascade Creek remains diminished until such time as the flow rate increases to a level approaching Q7.

Issue 7 is the only issue where I feel that PSCo has met its burden of proof, at least to the extent of demonstrating that there is a lack of evidence that the Forest Service and PSCo reached a collaborative decision on the economic impact of Condition 18. While it is reasonably clear that the Delphi Team, and the Forest Service, believed they were making an economic accommodation to PSCo by assuring that the first 2 cfs would be diverted to prevent winter freeze-up situations, I could not find anything that was pointed out to me in this record that would indicate that the construction and operation of the device mandated in condition 18 was the product of a collaborative determination. On the contrary, Mr. Devine's undisputed direct testimony indicates that there may be significant economic consequences to the construction and operation of this device that may call into question the economic viability of the project. While economics may have been a consideration for the Delphi Team and the Forest Service, I cannot find that Condition 18 was the result of a collaborative determination.

With respect to issue 8, I agree that there was far less technical consideration given by the Delphi Team to their findings in this area. The Team apparently made some decisions concerning where to focus their actual technical activities and made consensus decisions, based on some assumptions and review of a variety of documents. While I do not find that the Team made a "technical assessment" compared to what they did regarding the flow to Cascade Creek, it is clear that they made an assessment, based on their combined technical expertise and best

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professional judgment, which has not been refuted by PSCo.

**Order**

Copies of this decision shall be served upon the parties. This decision, along with the complete hearing record, shall be immediately forwarded to FERC, pursuant to Rule 1.669(c)(2).  
Done at Washington, D.C.

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**HORSE PROTECTION ACT**

**DEPARTMENTAL DECISIONS**

**In re: KIMBERLY COPHER BACK, LINDA RUTH PATTON,  
d/b/a SWEET REVENGE STABLES, and RICHARD EVANS.**

**HPA Docket No. 08-0007.**

**Decision and Order.**

**May 12, 2009.**

**HPA – Thermography – Digital palpation.**

Robert Ertman for APHIS.

David Broderick for Respondents.

*Decision and Order by Administrative Law Judge Peter M. Davenport.*

**DECISION AND ORDER**

**Preliminary Statement**

On October 22, 2007, Kevin Shea, the Acting Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture, (“APHIS”) initiated this disciplinary proceeding against the Respondents by filing a complaint alleging violations of the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.*) (the “Act”). On November 13, 2007, counsel for the Respondents filed an Entry of Appearance and Answer denying generally the material allegations of the Complaint, raising certain affirmative defenses, and requesting that an oral hearing be scheduled.

The case was assigned to the docket of Administrative Law Judge Victor W. Palmer and on April 23, 2008, he conducted a telephonic pre-hearing conference at which time dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Louisville, Kentucky on November 6 and 7, 2008. On request of Respondents’ counsel, the hearing date was rescheduled for November 18 and 19, 2008. Following a second telephonic conference prompted by another scheduling conflict, Judge Palmer again continued the hearing and rescheduled it to commence on February 2, 2009. On

January 16, 2009, the case was transferred to my docket.

At the oral hearing held on February 2, 2009 in Louisville, Kentucky, the Complainant was represented by Robert A. Ertman, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC<sup>1</sup> and the Respondents were represented by David F. Broderick, Esquire and Christopher T. Davenport, Esquire, both of the firm Broderick & Associates of Bowling Green, Kentucky.<sup>2</sup> Eleven witnesses testified and nine exhibits were identified and received into evidence.<sup>3</sup> Following the hearing, proposed findings of fact, conclusions of law and briefs in support of their respective positions were submitted by both parties and a Reply Brief was filed by the Respondents.

#### **Discussion**

The complaint alleges that on or about April 20, 2007, the Respondent Kimberly Copher Back violated §5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)), by showing or exhibiting “Reckless Youth” as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; that on or about April 20, 2007, Respondents, Kimberly Copher Back, Linda Ruth Patton (doing business as Sweet Revenge Stables), and Richard Evans violated §5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) entered for the purpose of showing or exhibiting the horse known as “Reckless Youth” as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; and that on or about the same date, Respondent Kimberly Copher Back, violated § 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)), by allowing the entry for the purpose of showing or exhibiting the horse known as “Reckless

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<sup>1</sup> The Complainant was initially represented by Frank Martin, Jr., Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC.

<sup>2</sup> Tad T. Pardue, Esquire, of the Broderick firm also appears as counsel of record on some of the pleadings.

<sup>3</sup> GX-1 through 8 and RX-1. References to the Transcript of the proceedings will be to “Tr.”

Youth” as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

In addition to denying generally the allegations of the Complaint, the Respondent raised a number of affirmative defenses, including collateral estoppel, and/or judicial estoppel, any applicable statutes of limitation, and *res judicata*. The affirmative defenses may be disposed of summarily. It is well established that the United States is not bound by any state statute of limitation. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp.*, 412 F.2d 1076 (2d Cir. 1970). Similarly, counsel’s attempt to invoke the federal statute of limitations is without merit as the Complaint in this action was brought well within the five years set forth in 28 U.S.C. § 2462, limiting the enforcement of civil fines, penalty, or forfeiture, pecuniary or otherwise. The general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). Even were all the requisite threshold elements present necessary to trigger such defenses, which they are not, a detailed discussion of the doctrines of *res judicata*, collateral estoppel and judicial estoppel is not necessary as the issue of whether any determination or disciplinary proceedings instituted by entities other than the Secretary bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondent by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell, et al.*, 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S. Department of Agriculture*, WL 2430314 (6<sup>th</sup> Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

Congress passed the Horse Protection Act in 1970, finding that the practice of deliberately injuring show horses to improve their performance was “cruel and inhumane.” 15 U.S.C. § 1822(1). Known

as “soring,” the technique employed included fastening action devices, such as chains or padded shoes to the horses’ limbs or forefeet and/or applying caustic or irritating chemicals or solutions to their forefeet. The term “sore” is defined in both the Act and the regulations as:

The term "sore" when used to describe a horse means that-

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given. 15 U.S.C. § 1821(3); 9 C.F.R. §11.1

In 1976, Congress amended the Act “to stop an inhumane and harmful practice that the Congress thought would end when it enacted the Horse Protection Act of 1970 (Pub. Law 91-540), but which has not in fact ended.” S. Rep. 418, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1 (1975). Not only did Congress seek to put an end to the unnecessary cruelty of soring, it also sought to eliminate the competitive disadvantage faced by horse owners who do not practice soring techniques. *American Horse Protection Association, Inc. v. Lyng*, 812 F. 2d 1, at 7 (D.C. Cir. 1987).

In this case, as in most cases brought under the Horse Protection Act, the Complainant relies primarily upon the statutory presumption found in 15 U.S.C. § 1825(d)(5) which provides:

In any civil or criminal action to enforce this chapter or any regulation

under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court ruled that in order to be constitutional, the §1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that rule does not directly apply to this type of administrative proceeding.

Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In most pre 1993 cases brought under the Act, the statutory presumption does have a direct connection between the presence of bilateral sensitivity and the ultimate fact of soreness and it is logical that an inference of soreness may well be drawn from evidence of bilateral sensitivity, even were there no presumption. *Thornton v. U.S. Department of Agriculture*, 715 F.2d 1508, 1511 (11<sup>th</sup> Cir. 1983). In 1992, Congress manifested its desire to require greater proof than merely failure of a Veterinary Medical Officer (VMO) digital palpation test.<sup>4</sup> While the case law is replete with examples of affidavits and testimony from examining “veterinarians” concerning a horse’s reaction to palpation alone being sufficient to constitute substantial evidence of

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<sup>4</sup> See, Pub. L No. 101-341, 105 Stat. 873, 881-82 (1992) ...*Provided further*, That none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

violations of the Act, if not meaningfully controverted, the statutory presumption is not irrebuttable and cannot be used to shift the ultimate burden of persuasion. *Vlandis v. Kline*, 412 U.S. 441 (1972); *In re: Larry Edwards*, 49 Agric. Dec. 188, 198 (1990).

In applying the statutory presumption, the Department's Judicial Officer and other Administrative Law Judges have consistently noted that "it is the Secretary's belief that the opinions of its veterinarians<sup>5</sup> as to whether a horse is sore is more persuasive than the opinion of DQPs." *In re: Timothy Fields, et al.*, 54 Agric. Dec. 215 at 219 (1995) (citing *In re: Bill Young and Floyd Sherman*, 53 Agric. Dec. [1232] (slip op at 64, August 31, 1994));<sup>6</sup> *In re: C. M. Oppenheimer*, 54 Agric. Dec. 221 (1995); *In re: William Dwaine Elliott*, 51 Agric. Dec. 334 (1992), *aff'd* 990 F.2d 140 (4<sup>th</sup> Cir.), *cert. den.* 510 U.S. 867 (1993); *In re: Pat Sparkman*, 50 Agric. Dec. 602 (1991); *In re: Larry Edwards*, 49 Agric. Dec. 188 (1990), *aff'd. per curiam*, 943 F. 2d 1318 (11<sup>th</sup> Cir. 1991), *cert.den.* 503 U.S. 937 (1992). As was the case in *Young*, even though possibly misplaced, the same greater weight and preference has been afforded the testimony of VMOs even where there has been testimony from veterinarians who are equine specialists employed by Respondents. *Young* at 1277<sup>7</sup>. Despite the fact that the holding in *Landrum* makes it clear that the possibility exists that the presumption may be rebutted by a Respondent, even a casual reading of the recent cases tends to belie such a notion, strongly suggesting instead that rebutting the presumption

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<sup>5</sup> Although the cases routinely interchange the term veterinarian and VMO, the evidence in this case establishes that not all Veterinary Medical Officers are licensed veterinarians.

<sup>6</sup> The Judicial Officer's decision in the *Young* case was reversed on appeal, 53 F.3d 728 (5<sup>th</sup> Cir. 1995).

<sup>7</sup> See also, *In re: Perry Lacy*, 66 Agric. Dec. 488 (2007); *aff'd*, 278 Fed Appx. 616 (6<sup>th</sup> Cir. 2008) In *Lacy*, the Administrative Law Judge relied upon testimony of a licensed equine practitioner with years of significant experience treating West Nile cases. The Judicial Officer relied instead upon the testimony of VMO Bourgeois as being entitled to greater weight despite the fact that his testimony made it clear that he had little familiarity with the disease. The testimony in that case did not disclose the fact that the VMO was not licensed.

is an all but impossible burden in any case where a Veterinary Medical Officer employed by the Department opines that the horse is sore after being palpated.<sup>8</sup> While it now appears from the testimony at the hearing that the Department will be transitioning to the use of thermography to determine soreness in future cases, digital palpation was the sole diagnostic means employed to prove the existence of soreness in this

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<sup>8</sup> See: *In re: Ronald Beltz and Christopher Jerome Zahnd*, 64 Agric. Dec. 1438 (2005), *rev.*, 64 Agric. Dec. 1487 (2005); *Motion for reconsideration denied*, 65 Agric. Dec. 281 (2006); *Aff'd. sub nom. Zahnd v. Sec'y of the Dep't of Agric.*, 479 F. 3d 767 (11<sup>th</sup> Cir. 2007). In *In re: Perry Lacy*, 65 Agric. Dec. 1157 (2006), the Administrative Law Judge found that evidence that the horse suffered from West Nile virus was sufficient to rebut the findings of the DQPs and VMOs that the horse was sore. On appeal, the Judicial Officer disagreed, reversed the ALJ's findings, found the statutory presumption was not rebutted and imposed a civil penalty and suspension upon Mr. Lacy. 66 Agric. Dec. 488 (2007). On appeal, the Sixth Circuit affirmed the decision of the Judicial Officer, indicating that the decision of the Department was entitled to significant deference under the *Chevron* doctrine (*Chevron, USA, Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). 278 Fed. Appx. 616 (6<sup>th</sup> Cir. 2008). In that case, contrary to the instant case, the veterinary licensure status of Lynn P. Bourgeois, the VMO who was the principal government witness (who is also one of the witnesses in this case) was not called into question. Had the Court been aware of the fact that the VMO was not licensed as a veterinarian in any state, it remains to be seen as to whether the Court would have reached the same result in affording his opinion testimony any serious consideration or weight as an expert when his testimony was in diametrical opposition to that coming from a highly experienced licensed veterinarian having superior qualifications and 35 years of specialized equine practice, including the experience of handling numerous West Nile cases. The witness's (Bourgeois) blanket conclusion in the Lacy case that there was no naturally occurring condition, no disease condition, and no kind of injury which would cause bilateral sensitivity other than the deliberate application of either caustic chemicals or the use of chains was legally incorrect in light of the holding in *In re: Horenbein*, 41 Agric. Dec. 2148 (1982). By way of contrast, the Office of Personnel Management (OPM) requires that incumbent Administrative Law Judges must be licensed to practice law or be in good standing, despite the fact that they are generally precluded from practicing law while performing duties as a judge. See, 5 C.F.R. § 930.204(b). A similar requirement exists for military attorneys who are serving as judge advocates or who are detailed to perform legal duties. 10 U.S.C. §3065(e); Article 27, Uniform Code of Military Justice, 10 U.S.C § 827; and DA Pam 600-3, ¶39-2(b)(1). Similarly, the Army also requires all members of its Veterinary Corps to be licensed. DA Pam 600-4, ¶13-1(a).

case.<sup>9</sup>

The evidence in this case indicates that the Respondent Kimberly Copher Back is the owner of the horse known as “Reckless Youth” and that the horse was entered as entry number 35, class 49 (the Novice Amateur class) in the Spring Jubilee Charity Horse Show held in Harrodsburg, Kentucky on April 20, 2007. “Reckless Youth” is a stallion and had been trained by the Respondent Richard Evans for approximately two years before this particular show. Prior to being allowed to compete in the class, “Reckless Youth” was presented by Evans for a pre-show inspection which was performed by Designated Qualified Person (a “DQP”) Greg Williams. (Tr. 215). The pre-show inspection was unremarkable and the horse was moved to the warm up area for last minute preparations and pre-competition warm up by the Respondents Richard Evans and Kimberly Copher Back, the latter of whom would be riding the horse in the event. (Tr. 266-269). “Reckless Youth” ridden by Respondent Back tied for third place in the competition and was taken back to the inspection area and subjected to a post-show inspection.

During the course of the post-show inspection, “Reckless Youth” was examined initially by VMO Miava Binkley who after digitally palpating the horse concluded that the animal exhibited bilateral sensitivity and thus was sore. VMO Binkley did not observe any abnormality of gait, problem with locomotion, swelling, redness, scarring, blisters, or chemical odors. Tr. 59 at 1-5, 77 at 15-18. The horse then was re-examined by DQP Greg Williams who testified that his post-show examination produced no sensitivity on the left and inconsistent responses upon digital palpation on the right; as a result, in his opinion, the horse was not sore. Tr. 217. The horse was then examined by VMO Lynn P. Bourgeois who agreed with VMO Binkley’s

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<sup>9</sup> See, [http://www.aphis.usda.gov/animal\\_welfare/hp/](http://www.aphis.usda.gov/animal_welfare/hp/); [http://www.aphis.usda.gov/animal\\_welfare/hp/downloads/thermography\\_presentation.pdf](http://www.aphis.usda.gov/animal_welfare/hp/downloads/thermography_presentation.pdf); [http://www.aphis.usda.gov/animal\\_welfare/hp/downloads/faq\\_use\\_ofthermo.pdf](http://www.aphis.usda.gov/animal_welfare/hp/downloads/faq_use_ofthermo.pdf); and [http://www.aphis.usda.gov/animal\\_welfare/hp/downloads/stakeholder/ac su 04-08-09.pdf](http://www.aphis.usda.gov/animal_welfare/hp/downloads/stakeholder/ac_su_04-08-09.pdf).

findings.<sup>10</sup> VMO Bourgeois also failed to observe any abnormality of gait, problem with locomotion, swelling, redness, scarring, blisters, or chemical odors. Tr. 153 at 7-13, 18-20. The two VMOs conferred as to their findings, an APHIS Form 7077 was prepared by VMO Binkley, the form was first signed by her, and then countersigned by VMO Bourgeois.<sup>11</sup>

While as noted previously the exclusive reliance upon the use of digital palpation to determine whether a horse has been sores has in the past been upheld in numerous cases, including both the Sixth and District of Columbia Circuits,<sup>12</sup> despite at least one invitation to do so

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<sup>10</sup> Richard Evans, who was present with the horse throughout the post-show examination, testified the reactions the VMOs received were not in the same areas. Tr. 290.

<sup>11</sup> In many prior cases, each of the VMOs would mark the form, with one using “x”s and the other using “o”s so that the findings of each individual VMO were distinguishable as to where they found sensitivity. In this case, only the “x”s were placed on the form by VMO Binkley and VMO Bourgeois signed the form indicating that he agreed with what had been marked. According to VMO Bourgeois, all that is needed is that “we agree on some spots.” Tr. 152.

<sup>12</sup> See, e.g., *In re: William J. Reinhart*, 59 Agric. Dec. 721, 751 (2000), *aff’d. per curiam*, 39 Fed. Appx. 954 (6<sup>th</sup> Cir. 2002), *cert. den.* 123 S. Ct. 1802 (2003); *In re: David Tracey Bradshaw*, 59 Agric. Dec. 228 (2000); *In re: Gary Edwards*, 55 Agric. Dec. 892 (1996); *In re: John T. Gray*, (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re: Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re: Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re: C.M. Oppenheimer*, 54 Agric. Dec. 221, 309 (1995); *In re: Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff’d. per curiam*, 113 F. 3d 1249 (11<sup>th</sup> Cir. 1997) (unpublished); *In re: Danny Burks*, 53 Agric. Dec. 322 (1994); *In re Eddie Tuck*, 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 1994); *In re: Ernest Upton*, 53 Agric. Dec. 239 (1994); *In re: William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff’d.* 52 F.3d 1406 (6<sup>th</sup> Cir. 1995); *In re: Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F. 3d 999 (8<sup>th</sup> Cir. 1994); *In re: Charles Sims*, 52 Agric. Dec. 1243, 1259-60 (1993); *In re: Cecil Jordan*, (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff’d. sun nom. Crawford v. United States Department of Agriculture*, 50 F. 3d 46 (D.C. Cir.), *cert. den.*, 516 U.S. 824 (1995); *In re: Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re: Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re: Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff’d.*, 39 F. 3d 670 (6<sup>th</sup> Cir. 1994); *In re: Linda Wagner*, 52 Agric. Dec. 298 (1993); *In re: John Allan*  
(continued...)

(which was rejected), the Department's continued use of the "scientific" technique has never been subjected to evaluation standards using the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).<sup>13</sup> In *Daubert*, the Supreme Court imposed upon trial judges the task of ensuring that an expert's testimony both rests upon a reliable foundation and is relevant to the task at hand. The Court set forth four factors to be considered in deciding whether a scientific technique or theory is sufficiently reliable as to allow expert testimony based upon it. There, the Court noted:

Proposed testimony must be supported by appropriate validation—*i.e.*, "good grounds," based upon what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. *Id.* at 590

In enumerating the factors to be considered in determining reliability, the Court indicated that:

"a key question to be answered was whether a ... technique is scientific ... will be whether it can be (and has been) tested." ...

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<sup>12</sup>(...continued)

*Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re: Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re: A. P. Holt, et al.* (Decision as to Richard Polch and Merie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd. per curiam*, 32 F. 3d 569 (6<sup>th</sup> Cir. 1994); *In Re: Larry E. Edwards, et al.*, 49 Agric. Dec. 919 (1990); *In re: A. P. Sonny Holt, et al.*, 49 Agric. Dec. 853 (1990); *In re: A.S. Whitcomb*, 36 Agric. Dec. 1165 (1976).

<sup>13</sup> The Judicial Officer considered *Daubert* not to apply because the Federal Rules of Evidence do not normally apply to the Department's disciplinary proceedings. *In re: Carl Edwards & Sons Stables, et al.*, 56 Agric. Dec. 529, 582 (1997). In light of *Landrum*, however, it would appear that in order for the statutory presumption to pass constitutional muster, there is at least limited applicability of the Federal Rules of Evidence and an obligation to determine whether there is sufficient reliability to the technique when prior reliance appears to have been based upon the testimony of USDA "veterinarians" who had superior qualifications and decades years of significant experience with horses.

“Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.” ...

“in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error,” ...

“Finally, “general acceptance” can yet have a bearing on the inquiry.”  
*Id.* at 593-594

In its decision to transition to the use of thermography as the basis for enforcement actions, despite contrary earlier positions that the Auburn and Ames studies were obsolete,<sup>14</sup> the Department appears to have finally vindicated and accepted as valid the comprehensive body of studies pioneered by Dr. Ram C. Purohit, Associate Professor, Department of Large Animal Surgery and Medicine at the Auburn University School of Veterinary Medicine in Auburn, Alabama between 1978 and 1982 (Auburn Study) along with those of numerous others which have consistently found thermography and other available diagnostic tools to provide a more accurate and objective means of determining whether a horse had been sore than relying exclusively upon palpation.<sup>15</sup> The reliability of the exclusive use of palpation as a

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<sup>14</sup> Departmental Decision of Judicial Officer Donald A. Campbell in *In re: Bill Young and Floyd Sherman*, 53 Agric. Dec. 1232 at 1268 (1994). Both the Ames Study and the Auburn Study were done before the Scar Rule was promulgated in 1979. (9 C.F.R. § 11.3). See also: *American Horse Protection Association, Inc. v. Lyng*, 681 F. Supp. 949 (D.D.C. 1988). In that case, the Department attempted to characterize the Auburn Study as a study of the use of thermography as a diagnostic tool, rather than its actual scope as a study of soring methods and techniques. The Auburn Study is actually a series of 18 separate studies.

<sup>15</sup> R. Purohit, D.V.M., Ph.D., *Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors*, (Summary of Research from September 1978 to December 1982), School of Veterinary Medicine, Auburn University, 1982; T. Turner, D.V.M., M.S. *Utilizing Thermography to Assess Compliance with the Horse Protection Act*, School of Veterinary Medicine, 2009; See also, H.A. Nelson, D.V.M. and D.L. Osheim, B.A., *Soring in Tennessee Walking Horses: Detection by Thermography*, (USDA, National Veterinary Services Laboratories, Ames, Iowa, 1975 (Ames Study); *Thermographic Enforcement of the* (continued...)

diagnostic tool was questioned and the possible adoption of the use of thermography was recommended by United States District Judge Gasch in his 1988 decision in *American Horse Protection Association, Inc. v. Lyng*, 681 F. Supp. 949, 956-958 (D.D.C. 1988).<sup>16</sup> Congress has also expressed reservations and some concern on the use of palpation as the sole basis for determining whether a horse had been sored.<sup>17</sup> Thus far however, only the Fifth Circuit has found the use of palpation alone to determine whether a horse has been sored to be unacceptable. *Young v. United States Department of Agriculture*, 54 Agric. Dec. 208, 53 F. 3d 728 (5<sup>th</sup> Cir. 1995); *Bradshaw v. United States Department of Agriculture*, 254 F. 3d 1081 (5<sup>th</sup> Cir. 2001) (Table).<sup>18</sup>

Applying the *Daubert* factors to the use of palpation as the sole diagnostic tool to determine whether a horse has been sored, it appears

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<sup>15</sup>(...continued)

*Horse Protection Act*, Vol 172, J.A.V.M.A. (1978); L.vanHoogmoed, J.R. Snyder, A.K. Allen and J.D. Waldsmith, *Use of Infrared Thermography to Detect Performance-Enhancing Techniques in Horses*, University of California at Davis School of Veterinary Medicine, 2001. USDA previously took the position that the Auburn Study was a study of the use of thermography as a diagnostic tool, rather than a study of soring methods and techniques. *American Horse Protection Association, Inc. v. Lyng*, 681 F. Supp. 949, 953 (D.D.C. 1988).

<sup>16</sup> This action was originally brought as *American Horse Protection Association, Inc. v. Block*, No. 84-3298 memo op (October 30, 1985), *rev and remanded, sub. nom. American Horse Protection Association, Inc. v. Lyng*, 812 F. 2d 1 (D.C. Cir. 1987); *on remand*, 681 F. Supp. 949 (D.D.C. 1988)

<sup>17</sup> Restrictive and precatory language were inserted in the Animal Plant and Health Inspection Service (APHIS) appropriations for the fiscal years 1993 and 1994 which were critical of the continued use of digital palpation as the exclusive means of determining whether a horse had been sored. For a brief summary and discussion of those provisions, *See: Young*, 53 Agric. Dec. at 1283-1286.

<sup>18</sup> The Court noted the testimony of several highly qualified expert witnesses who testified that soring could not be diagnosed through palpation alone and also that Congress had expressed its disapproval of soring diagnoses based solely upon palpation in an appropriation bill. *Young* at 54 Agric. Dec. 208, 211-212; *See*, Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992); *see also*, H.R. Rep. No. 617, 102d Cong., 2d Sess. 48 (1992); S. Rep. No. 334, 102 Cong. 2d Sess. 49 (1992).

that its exclusive use fails each of the criteria required provide the degree of reliability deemed appropriate and necessary under the four factors. Palpation is subjective in nature<sup>19</sup> and not susceptible to being objectively tested; it has been found wanting in publications; due to its subjectivity, error rates are not quantifiable, and its general acceptance is no longer universal, a matter apparently now conceded by the Department with its promulgation of the use of thermography on April 9, 2009 as an additional and more objective tool in the detection of the soring of horses.

Given my conclusion that despite precedent palpation is not sufficiently “scientific” as to be a reliable diagnostic means under the *Daubert* standard, I find that in light of the conflict between the opinion of the DQP that the horse gave inconsistent responses and that of the VMOs that the responses were consistent enough,<sup>20</sup> that the Department failed to establish that “Reckless Youth” had been “sored” by either chemical or mechanical means and accordingly, the statutory presumption was not triggered. Neither VMO Binkley nor VMO Bourgeois found evidence that any illegal device had been used, nor did they find any evidence of the use of caustic chemicals. Tr. 27, 29, 34, 142-3, 145. Although in the past, the testimony of VMOs has been afforded unquestioned and nearly unanimous weight and acceptance on the basis of their being highly qualified “veterinarians,<sup>21</sup>” the practice of unconditional acceptance of their opinion as to the ultimate facts of a case without supporting acceptable scientific evidence would appear to

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<sup>19</sup> VMO Binkley conceded that palpation was subjective. Tr. 77. Bourgeois while acknowledging that thermography was an objective test producing objective findings, indicated “Yeah, that’s why I don’t like it.” Tr. 135. In describing the scientific technique of palpation, he testified “...you touch an ouchy spot and you get a response. “*Id.* The fact that three individuals got different results with the same procedure would tend to strongly indicate the subjectivity of the method.

<sup>20</sup> The manner in which the APHIS Form 7077 was completed made it impossible to verify the extent of consistency between the two VMOs. VMO Bourgeois testified that the two of them did not have to agree on all reaction points, but only that they had to agree on some spots. Tr. 152. Richard Evans felt the examinations of the VMOs produced reactions in different spots. Tr. 290.

<sup>21</sup> To refer to VMOs as veterinarians might be considered a catachresis.

make the purpose of any hearing nugatory, if not totally meaningless.<sup>22</sup> Moreover, acceptance of the testimony of VMOs as that of “veterinarians” appears misplaced as the term “veterinarian” is defined by Websters as “one qualified and authorized to treat diseases and injuries of animals.”<sup>23</sup> In this case, neither VMO was able to testify as to the means by which the horse had been sore, i.e., whether done by chemical or mechanical means. Although APHIS Form 7077 contains separate boxes specifically designed to indicate the method of soring, in this case, only the ultimate conclusion of the VMOs that the horse was sore was entered on the APHIS Form 7077 without further elaboration. None of the boxes indicating what method was used in making the horse “sore” were marked and on cross examination, neither VMO found fault with the horse’s locomotion or could determine what method had been used, only that they were of the opinion that the horse was “sore.”<sup>24</sup> In light of my finding that the horse was not sore, it is unnecessary to determine to discuss or make findings as to whether there was inappropriate or questionable interaction with the DQP’s fiancé by one

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<sup>22</sup> Although both VMOs are graduates of a school of veterinary medicine, neither at the present time would meet the requirements of 9 C.F.R. § 11.7(1) to be licensed as a DQP as that paragraph incorporates the accreditation provisions under part 161 of chapter I of title 9. 9 C.F.R. § 161.2(a)(2)(ii) requires that the veterinarians be licensed or legally able to practice in the state in which he or she wishes to be accredited.

<sup>23</sup> Websters Ninth New Collegiate Dictionary, Merriam Webster, Springfield, Massachusetts, 1990, p. 1312. The requirement “authorized” implicitly requires licensure. *See*, [http://www.aphis.usda.gov/animal\\_health/vet\\_accreditation/apply.shtml](http://www.aphis.usda.gov/animal_health/vet_accreditation/apply.shtml)

<sup>24</sup> Only Item 28 Is Horse Sore was marked “Yes.” No entries were made on Item 22 Action Devices; VMO Binkley indicated that she did weigh the chains and found them to be within the regulatory limits of 6 ounces, but did not record the weights. Tr. 23, 26-27, 96-97. Neither was any entry was made on Item 24 Prohibited Substances. If the chains were within regulatory limits, Phase XI of the Auburn Study indicates that chains of up to and including 6 ounces will not produce harmful effects, other than possible hair loss.

of the VMOs<sup>25</sup> which could possibly have provided motivation to commit calumny or at least cast the DQP in a less than favorable light, or to have to consider what, if any, inference to draw from the absence of evidence of the DQP having been disciplined for of substandard performance at the show<sup>26</sup> despite what was characterized by VMO Binkley as his “general pattern of poor performance.” Tr. 48. Suffice it to say that after viewing the excerpt of the video of the examinations and the lighting conditions at the time of the examinations,<sup>27</sup> it is difficult to fully accept as credible the testimony of VMO Binkley that she was capable of observing whether the DQP’s thumb was “blanched” during his examination of the horse, particularly in view of her admission that her eyesight was not that good. Tr. 14-17, 67-68; GX-8. VMO Bourgeois testified that he did observe the DQP’s examination. Tr. 132. In assessing the credibility of the witnesses, I found the testimony of the DQP to be credible and based upon a genuine belief that his examination on digital palpation produced inconsistent responses from the horse. Tr. 217, 224. Although VMO Binkley faulted his examination technique as she felt that the DQP was not exerting sufficient pressure, she admitted that her eye sight “is not that good” and agreed that his examination did not elicit a pain response. Tr. 68. As the owner of Tennessee Walking horses who from time to time exhibited his horses himself in shows

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<sup>25</sup> Both the DQP and his fiancé, Kim Angel, testified about their interaction with VMO Bourgeois. Tr. 208-11, 234-5. VMO Binkley noted that there had been a “heated discussion” and described it as a “confrontation.” Tr. 49, 54.

Q. But there was a confrontation.

A. There was.

Q. And in fact Dr. Bourgeois was told very pointedly in your presence that the DQP would not tolerate his wife being talked to the way she was.

A. I remember something to that effect. Tr. 54 at 6-13

VMO Bourgeois testified that he had a “problem” with the DQP’s wife (actually his fiancé), but in contrast to his recall of the specifics of his examination of the horse, indicated that he didn’t remember that night “that well.” Tr. 122. *See also*, Para. 7, Code of Ethics for Veterinarians.

<sup>26</sup> Both VMOs indicated that their duties included monitoring the performance of the DQP. Tr. 47, 105.

<sup>27</sup> GX-8.

where he was not involved as a DQP,<sup>28</sup> rather than having any predisposition to be lenient to other exhibitors, the DQP would have significant incentive to fairly examine the horses at the shows at which he was employed to preclude unfair competition by others in the industry.

Even had I found “Reckless Youth” to have been sore, which I do not, I would not have found Linda Ruth Patton to have violated the §5(2)(B) of the Act by reason of entering the horse. In this action, although such documents are typically introduced, no effort was made to enter documentary evidence such as any of the entry forms or cancelled checks paying entry fees. While admissible as having been prepared in the course of preparation of the case, Government Exhibit 4 was given little weight given the failure of the investigator to obtain Ms. Patton’s signature or initials as to its accuracy and the exhibit’s paraphrasing style<sup>29</sup> rather than the question and answer format typically taught at the Federal Law Enforcement Training Center at Glynco, Georgia or other law enforcement training facilities. When called by the Government as a rebuttal witness,<sup>30</sup> while she acknowledged that Sweet Revenge Stables was located on land that she owned, she indicated that she did not operate the horse training business. Tr. 313.

Although VMO Binkley testified that she informed the custodian (Respondent Evans) that the horse was sore after the examination was concluded (Tr. 91-2), Evans denied that was communicated to him. Tr. 291. In fact, Evans testified that he was told that he was not going to get a ticket:

Q Now at that stage, she’s asking you the number, and presumably we’ve seen everything that they have videotaped, at least that’s the tape they provided to us to introduce as an exhibit. At any time did she or Dr.

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<sup>28</sup> Tr. 197.

<sup>29</sup> Stephen Fuller testified that when Interview Logs were prepared, they would “typically try to write up the interview where it will flow smooth.” Tr. 186.

<sup>30</sup> Although the Government was allowed to call Ms. Patton as a rebuttal witness over objection of Respondent’s counsel, the questions asked should properly have been asked during the Government’s case rather than as rebuttal testimony.

Bourgeois give you the information that they thought that you were in violation of the Horse protection Act?

A. All I was ever told, I asked if I was being issued a ticket, and they said no. They said, we're going to take information on two feet. But they never told me that he was sore in two feet.

They said they were taking information, and they said it would be up to someone else to decide, and they did mention a hearing officer, they said would be the one to decide. Tr. 291-2

Evans went on to indicate that had he known that they found the horse to be sore, he would have quarantined the horse in Harrodsburg and waited on the vet to get there, as it was illegal to transport a sore horse. Tr. 292. If credence is given to the account related by Evans, an examination by a licensed veterinarian might have also provided either confirmation that the horse was sore or evidence which might have been exculpatory.

Upon consideration of the testimony given at the hearing the evidence of record, and the proposed findings, conclusions and briefs filed by the parties, I find that the allegations of violations contained in the Complaint brought against the Respondents should be dismissed. The following Findings of Fact, Conclusions of Law and Order will entered.

#### **Findings of Fact**

1. The Respondent Kimberly Copher Back is a resident of Mount Sterling, Montgomery County, Kentucky. At all times material herein, she owned "Reckless Youth," a registered Tennessee Walking Horse that was entered as entry number 35, class number 49 of the Jubilee Spring Charity Horse Show held on April 19-21, 2007 in Harrodsburg, Kentucky for the purpose of showing or being exhibited.
2. The Respondent Richard Evans is a resident of Mount Sterling, Montgomery County, Kentucky. He had trained "Reckless Youth" at Sweet Revenge Stables which is located on property owned by his

mother-in-law, Respondent Linda Ruth Patton, for approximately 24 months prior to the horse being entered in the show which is the subject of this action and was the one responsible for entering the horse at the show.

3. Respondent Linda Ruth Patton is a resident of Mount Sterling, Montgomery County, Kentucky where she owns the land upon which Sweet Revenge Stables is located, however, the training and stable operation is the responsibility of Respondent Richard Evans.

4. At the pre-show inspection for class 49 on April 20, 2007, "Reckless Youth" was found to have no evidence bilateral sensitivity by the examining DQP and was passed as being eligible to compete.

5. "Reckless Youth" was ridden by Kimberly Copher Back during the competition and was tied for third in the class. By reason of placing in the class, "Reckless Youth" was subjected to a post-show inspection, where the horse was examined in turn by means of digital palpation by VMO Binkley, DQP Williams, and VMO Bourgeois.

6. The DQP Williams has three or four years of experience as a DQP and has no record of disciplinary action ever having been taken against him for the performance of his duties as a DQP. Tr. 194, 202. More specifically, no record exists of any recommendation of disciplinary action being made against him for his performance of his duties at the show where the alleged violations occurred in this action.

7. Although both VMOs are graduates of a school of veterinary medicine, neither is currently licensed to practice veterinary medicine in any state and licensure is not a condition of employment as a VMO.

8. Although the DQP found the horse not to be sore, the VMOs concluded that the horse was sore. Although the Department is transitioning to the use of thermography as an additional technique, the more subjective test of digital palpation (as evidenced by the differing findings of the examiners) was the sole diagnostic criteria used in this case.

9. There was no testimony or documentary evidence that "Reckless Youth" exhibited any abnormality of gait, locomotion, swelling, redness, scarring, blisters or chemical odor.

10. On the basis of the evidence before me, the Department failed to

meet its burden of proof in establishing that “Reckless Youth” was “sore” on April 20, 2007.

#### **Conclusions of Law**

The Secretary has jurisdiction in this matter.

1. As “Reckless Youth” was not “sore” within the meaning of the Act on April 20, 2007, the Respondents did not violate the Act as alleged in the Complaint.
2. The evidence of alleged violations of the Act were based upon diagnostic techniques which were not sufficiently reliable using *Daubert* criteria as to raise the 15 U.S.C. §1825(d)(5) presumption.

#### **Order**

For the foregoing reasons, the Complaint is dismissed on its merits.

This Decision will become final and effective 35 days after service thereof upon the Respondent unless there is an appeal to the Judicial Officer by a party to the proceeding.

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

Done at Washington, D.C.

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**INSPECTION AND GRADING**

**COURT DECISIONS**

**LION RAISINS, INC. v. USDA.**  
**No. 1:08-CV-00358-OWW-SMS.**  
**Filed January 21, 2009.**

[CITE AS: 2009 WL 160283 (E.D.Cal.)].

**I&G – F.O.I.A.**

**United States District Court,**  
**E.D. California.**

**MEMORANDUM DECISION AND**  
**ORDER RE PLAINTIFF'S MOTION FOR DISCOVERY**

OLIVER W. WANGER, District Judge.

**I. INTRODUCTION**

Before the court is a “motion for discovery” brought by Plaintiff Lion Raisins, Inc. (“Lion”) pursuant to Federal Rules of Civil Procedure 26 and 56(f)(2).<sup>1</sup> Lion seeks discovery in connection with various requests it made, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records of the United States Department of Agriculture (“USDA”). The court heard oral argument on the motion on January 16, 2009. For the reasons discussed below, Lion's motion for discovery is denied.

**II. DISCUSSION AND ANALYSIS**

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<sup>1</sup> After filing its principal brief in support of its motion, Lion submitted a supplemental memorandum of points and authorities (Doc. 22). Lion also submitted a twenty-four-page supplemental declaration (Doc. 21), and then later a “further” declaration (Doc. 22-2). Lion motioned for approval of its supplementation (Doc. 22), and the court grants this motion.

#### A. Lion's Motion Under Rule 56(f)(2)

The USDA has not yet moved for summary judgment in this case. Accordingly, Lion's motion under Rule 56(f)(2) is premature and, on that basis, is denied. *See Pabaon Osvaldo v. U.S. Penitentiary Lewisburg Warden*, No. Civ. 3:CV-05-155, 2006 WL 485574, at \*4 n. 6 (M.D.Pa. Feb.28, 2006) (“Plaintiff's motion is not properly made pursuant to Rule 56(f) as Defendants have not moved for summary judgment in this action.”); *FEC v. Carlucci*, CIV. A. No. 87-1747, 1988 WL 35378, at \*2 (D.D.C. Mar.31, 1988) (“[P]laintiff cannot rely on Rule 56(f) because no motion for summary judgment is pending at this time.”). When the USDA files a motion for summary judgment, Lion can move under Rule 56(f)(2) and attempt to establish that discovery is warranted under this rule.

#### B. Lion's Motion Under Rule 26

##### 1. Local Rule 37-251

Lion also moves for discovery under Rule 26, and such motions are subject to the meet and confer requirements of Local Rule 37-251, with which Lion did not comply. Non-compliance with Local Rule 37-251 typically results in a denial of the discovery motion. *See, e.g., Peyton v. Burdick*, No. 07-cv-0453 LJO TAG, 2008 WL 880573, at \*1 (E.D.Cal. Mar.31, 2008) (“Plaintiff's motion is not accompanied by a certification or an affidavit indicating that he conferred with Defendants' counsel and attempted to resolve this discovery dispute without resorting to filing a motion. Accordingly, Plaintiff's motion to compel discovery fails to comply with FRCP 37(a)(1) and L.R. [3]7-251, and must be denied.”); *Abubakar v. City of Solano*, No. CIV S-06-2268 LKK EFB, 2008 WL 508911, at \*3 (E.D.Cal. Feb.22, 2008) (denying a discovery motion without prejudice to extent it dealt with discovery issues over which the parties did not “meet and confer” as required by Local Rule 37-251). When questioned by the court whether there was a reason why Lion did not comply with the Local Rules, Lion offered no reason for its non-compliance. Lion was allowed to present oral argument on its

motion nonetheless, and, after hearing from both parties, it was apparent that granting Lion's motion and permitting discovery at this time would be inappropriate.<sup>2</sup>

## 2. Discovery In FOIA Cases

In a FOIA case, like in others, “[a] district court has wide latitude in controlling discovery, and its rulings will not be overturned in absence of a clear abuse of discretion.” *Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir.2008) (internal quotation marks omitted). Given that *Lane* explicitly recognized that a district has “wide latitude in controlling discovery” in a FOIA case, it is indisputable that discovery is permissible in a FOIA case (otherwise there would be no latitude). Although discovery is permissible in a FOIA case, “discovery is limited because the underlying case revolves around the propriety of revealing certain documents. Accordingly, in these cases courts may allow the government to move for summary judgment before the plaintiff conducts discovery.” *Lane*, 523 F.3d at 1134 (citation omitted).

FOIA cases are usually decided at the summary judgment stage. *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep't of the Treasury*, 534 F.Supp.2d 1126, 1131 (N.D.Cal.2008) (“Procedurally, district courts typically decide FOIA cases on summary judgment before a plaintiff can conduct discovery.”); *Sakamoto v. EPA*, 443 F.Supp.2d 1182, 1188 (N.D.Cal.2006) (“It is generally recognized that summary judgment is a proper avenue for resolving a FOIA claim.”). At the summary judgment stage, the government is often the moving party and ordinarily it submits affidavits and argument to establish the applicability of an exemption as to withheld records, the adequacy of its search for responsive records, and any other matters necessary to support the motion. To obtain summary judgment in its favor, the government must establish that an exemption applies as to withheld documents, *Dobronski v. FCC*, 17 F.3d 275, 277 (9th Cir.1994), and that its search for responsive records was adequate, *Zemansky v. EPA*, 767 F.2d 569, 571-73 (9th Cir.1985). See also *U.S. Dep't of Justice v. Reporters*

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<sup>2</sup> Future compliance with the Local Rules is expected.

*Comm. for Freedom of the Press*, 489 U.S. 749, 755, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (“Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden ‘on the agency to sustain its action’ and directs the district courts to ‘determine the matter de novo.’ ”) (quoting 5 U.S.C. § 552(a)(4)(B)). If the government affidavits submitted in connection with a motion for summary judgment are sufficient to meet the government's burden, the case can be decided without discovery. See *Lane*, 523 F.3d at 1125-36; *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1329 (9th Cir.1995).

After a government defendant has moved for summary judgment in a FOIA case and submitted its supporting affidavits, some courts have permitted, or have indicated a willingness to permit, certain discovery relating to the exemption(s) claimed and/or the adequacy of the search when the plaintiff impugns the government affidavits with evidence of bad faith or when some other deficiency renders the affidavits insufficient. See, e.g., *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.1994) (noting that “discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's [summary judgment] submissions are adequate on their face[,]” and “[i]n order to justify discovery once the agency has satisfied its burden [on summary judgment], the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations ... or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.”); *Van Strum v. EPA*, 680 F.Supp. 349, 352 (D.Or.1987) (permitting discovery in a FOIA case, stating “[s]ummary judgment without discovery is appropriate where the plaintiff has made no showing of agency bad faith sufficient to impugn the agency affidavit[,]” but “where plaintiff or the agency's response raises serious doubts as to the completeness and good faith of the agency's search, discovery is appropriate”); *Exxon Corp. v. FTC*, 466 F.Supp. 1088, 1094 (D.D.C.1978) (noting, in a FOIA case, that a “court should not, of course, cut off discovery before a proper record has been developed; for example, where the agency's response

raises serious doubts as to the completeness of the agency's search ... where the agency's response is patently incomplete ... or where the agency's response is for some other reason unsatisfactory”), *aff'd*, 663 F.2d 120 (D.C.Cir.1980).<sup>3</sup> Even where discovery is allowed in a FOIA case, it is limited. *Lane*, 523 F.3d at 1134; *Giza v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 748, 751 (1st Cir.1980) (“To the extent that discovery is allowed in a [ ] FOIA action, it is directed at determining whether complete disclosure has been made, e.g., whether a thorough search for documents has taken place, whether withheld items are exempt from disclosure.”); *Lawyers' Comm. for Civil Rights*, 534 F.Supp.2d at 1131-32 (noting that in FOIA cases discovery is “sparingly granted, and is most often limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like”) (internal quotation marks omitted); *Van Strum*, 680 F.Supp. at 352 (“In general, the scope of discovery in a [ ] FOIA case is limited to whether complete disclosure has been made by the agency in response to the request for information”).<sup>4</sup> Although the government often moves for summary judgment in a FOIA case, a plaintiff can also move or cross-move for summary judgment or summary adjudication. *See, e.g., Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 984 (9th Cir.1985); *Van Strum*, 680 F.Supp. at 350.

Here, Lion has submitted affidavits and argument in an attempt to show bad faith and other misconduct on the part of the USDA in hopes of demonstrating that discovery should be allowed. Lion's motion for discovery, which is factually detailed, touches upon the USDA's

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<sup>3</sup>. At least one court has also permitted discovery relating to a plaintiff's FOIA claim for a “pattern and practice of untimely responses to FOIA requests.” *Gilmore v. U.S. Dep't of Energy*, 33 F.Supp.2d 1184, 1188, 1190 (N.D.Cal.1998). The discovery was limited to the Department of Energy's “policies and practices for responding to FOIA requests, and the resources allocated to ensure its compliance with the FOIA time limitations.” *Id.* at 1190. No such discovery is sought here.

<sup>4</sup>As an alternative to permitting discovery, if the government affidavits are insufficient, a court can order the government to submit additional affidavits. *See Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir.1983).

responses to Lion's FOIA requests, the applicability of FOIA exemptions and the agency's search for records. In other words, Lion has submitted evidence and argument in its motion for discovery that, in a FOIA case, would normally be advanced at the summary judgment stage. The USDA has responded to Lion's motion with only legal argument as to the propriety or impropriety of discovery in FOIA cases, and the USDA contends that a decision as to discovery should be made only after the USDA files its motion for summary judgment. The USDA has not supplied affidavits or briefing regarding its responses to the FOIA requests, any claimed exemptions, the searches conducted, or other substantive matters that might bear on the disposition of this case. Without the USDA's position and evidence on substantive matters pertinent to disposition of this case (e.g., the extent of its search for responsive records), there is not enough information to conclusively determine, at this time, whether or to what extent discovery should be permitted, or whether this case or particular issues can be properly decided without discovery. *See Murphy v. FBI*, 490 F.Supp. 1134, 1137 (D.D.C.1980) (“[C]ases uniformly establish that discovery may proceed in a FOIA controversy when a factual issue arises concerning the adequacy or completeness of the government search and index. But they further establish a self-evident principle: a factual issue that is properly the subject of discovery can arise only after the government files its affidavits and supporting memorandum of law.”).

Rather than engage in an unproductive exercise of directing the USDA to respond to Lion's discovery motion with more information, and given that Lion's discovery motion contains evidence and argument that is typically advanced at the summary judgment stage, the previously set deadline (May 18, 2009) for summary judgment motions (Doc. 13 at p. 7.) is advanced. Such motions, from either party, shall be filed by March 2, 2009. Opposition to such motions shall be filed by March 16, 2009. Replies thereto shall be filed by March 23, 2009. The motion(s) will be heard on March 30, 2009, at 10:00 a.m. In the interest of efficiency, the parties may incorporate by reference any affidavits or briefing submitted in connection with Lion's motion for discovery.

For the foregoing reasons, Lion's motion for discovery is denied.

IT IS SO ORDERED.

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## INSPECTION AND GRADING

### DEPARTMENTAL DECISIONS

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.**

**I & G Docket No. 04-0001.**

**Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.**

**Filed April 17, 2009.**

**I&G – Agricultural Marketing Act – Raisins – Debarment from inspection services – Statute of limitations – Misrepresentation or deceptive or fraudulent practices or acts – Falsifying inspection certificates – U.S. Grade B – U.S. Grade C.**

Colleen Carroll, for the Administrator, AMS.

Wesley T. Green, Selma, CA, for Respondents Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

### PROCEDURAL HISTORY

The Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this debarment proceeding by filing a Complaint on November 20, 2003.<sup>1</sup> The Administrator instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act]; the regulations governing the inspection and certification of processed

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<sup>1</sup>The Administrator filed an Amended Complaint on June 8, 2004, and a Second Amended Complaint on September 10, 2004.

fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice]. The Administrator seeks to debar Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Alfred Lion, Jr.; Bruce Lion; Daniel Lion; Jeffrey Lion; Larry Lion; and Isabel Lion [hereinafter Respondents] for violations of the Agricultural Marketing Act and the Regulations.

The Administrator alleges Respondents engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results during the period May 24, 1996, through May 11, 2000 (Second Amended Compl. ¶¶ 11-198). Respondents answered, denying the factual allegations contained in the complaints and asserting affirmative defenses.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] dismissed the allegations in paragraphs 11 through 89 of the Second Amended Complaint pertaining to conduct occurring more than 5 years prior to the date of the filing of the Complaint as being barred by the statute of limitations in 28 U.S.C. § 2462 (December 20, 2005, Memorandum of Conference and Order at 3).

The ALJ conducted an oral hearing, commencing February 21, 2006, and continuing through February 23, 2006, in Washington, DC, and then reconvening in Fresno, California, on February 27, 2006, and concluding on March 3, 2006. Colleen A. Carroll, Office of General Counsel, United States Department of Agriculture [hereinafter USDA], Washington, DC, represented the Administrator (Tr. 4). Wesley T. Green, Selma, California, represented Lion Raisins, Inc. (Tr. 5). James A. Moody, Washington, DC, represented Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion (Notice of Entry of Appearance, filed December 1, 2005; Tr. 6-7). During the oral hearing, the Administrator called two witnesses and Respondents called 13 witnesses. In addition to the transcript of the hearing, the evidence includes 74 exhibits introduced by the Administrator that were admitted

and 22 exhibits introduced by Respondents that were admitted. The Administrator and Respondents submitted post-hearing briefs in support of their respective positions.

On June 9, 2006, the ALJ issued a Decision and Order in which he: (1) concluded that on 33 occasions, during the period November 11, 1998, through May 11, 2000, Respondents willfully violated section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)) by engaging in misrepresentation or deceptive or fraudulent practices or acts and (2) debarred Respondents from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 5 years.<sup>2</sup> On July 13, 2006, Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion [hereinafter the Lions] appealed to, and requested oral argument before, the Judicial Officer.<sup>3</sup> On September 25, 2006, the Administrator filed a response to the Appeal Petition. The Hearing Clerk transmitted the record to the Judicial Officer on October 2, 2006, but later withdrew it. On June 5, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ's Decision and Order as the final Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

### DECISION

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<sup>2</sup>*In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 224, 232-33 (2006).

<sup>3</sup>On June 15, 2006, the Hearing Clerk served Lion Raisin Company, Lion Packing Company, and Isabel Lion with the ALJ's Decision and Order (United States Postal Service Domestic Return Receipts for article number 7004 1160 0004 4087 9979 and article number 7004 1160 0004 4087 9368), and on June 16, 2006, the Hearing Clerk served Larry Lion with the ALJ's Decision and Order (United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4087 9993). Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion did not file an appeal petition within 30 days after service of the ALJ's Decision and Order and the ALJ's Decision and Order became final and effective as to Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion 35 days after service of the ALJ's Decision and Order on Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion. (See 7 C.F.R. § 1.142(c)(4).)

### **Background**

David W. Trykowski, Chief of Investigations, Agricultural Marketing Service [hereinafter AMS] Compliance Office, USDA, testified that the investigation of the Lions was initiated after the AMS inspection office in Fresno, California, received an anonymous telephone call indicating Bruce Lion was falsifying USDA inspection certificates (Tr. 37). The information from the anonymous caller was subjected to a “credibility check” which was accomplished by sending letters to 109 overseas buyers of California raisins requesting that they provide information concerning the USDA inspection certificates they had received in connection with their raisin purchases (Tr. 38). The information provided in the responses received was then compared to the USDA inspection records maintained in the AMS Fresno inspection office, a preliminary report was drafted confirming that irregularities had been found, and the matter was referred to the Office of the Inspector General, USDA, for criminal investigation (Tr. 38-49). Incident to the criminal investigation, a search warrant was obtained and executed on October 19, 2000, and a number of the Lions’ records were seized. These records primarily pertained to the Lions’ export customers and covered the period from approximately 1995 through October 2000 (Tr. 49).

Mr. Trykowski personally reviewed both the USDA records and the Lions’ records, compared the parallel sets of records for each transaction, and noted the non-conforming records (Tr. 49-55).<sup>4</sup> A comparison of the Lions’ shipping files with USDA’s inspection files reveals that during the period November 11, 1998, through May 11, 2000, different results were reported in the respective files with respect to 33 invoices in three general areas: moisture, grade, and size. Moisture differences were the most prevalent, with 20 such variances.

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<sup>4</sup>The results of the analysis of the two sets of records are summarized in tabular form in CX 126A. The exhibit identifies the type of conduct complained of, the alteration involved, the USDA inspection certificate (if applicable), the date of inspection, the customer, the product, the Lions’ order number, the sales amount, the cash incentive received, the applicable paragraphs of the Second Amended Complaint, and the applicable exhibit numbers.

Grade differences, with changes from U.S. Grade C to U.S. Grade B,<sup>5</sup> accounted for 14 variances, and there was a single instance in which a mixed-size determination was changed to midget size.<sup>6</sup>

Aside from the single instance in which a USDA certificate was altered to lower the moisture results from 16.0% to 15.4% (CX 72-CX 73), the allegations are primarily based upon the Lions' use of facsimile certificates prepared on Lion letterhead, but prepared in the same general format and containing the same information as that used by USDA and in which the source of the sample is identified as being an "officially drawn sample," a term defined in the Regulations.<sup>7</sup> (7 C.F.R. § 52.2.)

The Lions argue, because the moisture content of raisins tends to drop rapidly after processing and even after packing, USDA moisture testing does not accurately reflect results that are representative of the moisture content of the raisins when they are received by the Lions' overseas customers. The Lions also suggest their customers were neither misled nor dissatisfied with the raisins they received,<sup>8</sup> and USDA's testing results often are so negligently performed as to be inherently unreliable (Tr. 651, 1435). The Lions further argue the results from their own independent quality control moisture testing, the specifics of which differ from those used by USDA, are a far more

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<sup>5</sup>U.S. Grade B requires a higher quality of raisin than U.S. Grade C.

<sup>6</sup>The record contains evidence of two instances in which both moisture and grade variances were present (CX 56-CX 57 and CX 59).

<sup>7</sup>The Lions note the use of a certificate, similar to the Lion certificate, by Sun-Maid (RX 3-0187 (LR 0745)). On Sun-Maid's certificate, however, the source of samples is "Sun-Maid" rather than "Officially Drawn."

<sup>8</sup>The testimony indicates that only one of the Lions' customers (Western Commodities) involved in this proceeding is no longer purchasing raisins from the Lions, but that Western Commodities is no longer purchasing California raisins (Tr. 1462).

accurate indication of actual raisin moisture content than USDA results.<sup>9</sup> However, the relative accuracy of USDA testing results and the Lions' testing results is not at issue in the instant proceeding. Instead, the issue is whether the Lions engaged in misrepresentation or fraudulent or deceptive practices or acts. The record amply demonstrates a pattern of repeated conduct by the Lions to either deliberately alter or impermissibly misrepresent USDA inspection results to meet the Lions' needs.

As a remedy, the Administrator seeks debarment of each of the Lions for a period of 15 years (Tr. 374). Although the "remedy" witness, G. Neil Blevins, the Associate Deputy Administrator for Compliance Safety and Security, AMS, testified USDA did not intend to end the use of the Lion name on raisins sold from California (Tr. 516),<sup>10</sup> he did indicate that in almost 20 years on this job, he had never seen a company as unethical in its dealing with USDA (Tr. 377) and stated that "[i]t is clearly the aim of the Agency that we never wish to provide service to this corporation or this family ever again." (Tr. 375.) In arriving at the 15-year period, Mr. Blevins suggested that normally debarment for 2 to 4 years for each willful violation would be appropriate in cases such as this one (Tr. 374-75).

On the basis of the evidence before me, I find the Lions engaged in a pattern of misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results as alleged but the requested relief of debarment for 15 years sought by the Administrator against each of the Lions is excessive.

### **Findings of Fact**

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<sup>9</sup>The differences between USDA and the Lions' testing included the stage of processing at which the raisins were tested for moisture, with the Lions testing before the application of oil in the processing and USDA testing after application of the oil. Other differences include the timing of the testing as well as the size of the sample. The Lions would also retain samples and would test the retained sample on occasion.

<sup>10</sup>Mr. Blevins was also asked if USDA intended to put the Lion family out of the raisin growing, handling, and marketing business and he answered "[a]bsolutely not and I don't see how it would do that." (Tr. 522.)

1. Lion Raisins, Inc., is a California corporation, formerly known as Lion Raisins and Lion Enterprises, Inc. (CX 1 at 6-14), with offices currently in Selma, California.<sup>11</sup> Lion Raisins, Inc., processes, packs, and sells processed raisins both domestically and internationally, being the second largest such company in the raisin industry. Lion Raisins, Inc., is a closely held Subchapter S family corporation, with the corporation's 1,000 shares of stock being held by only three individuals: Alfred Lion, Jr. (500 shares), Isabel Lion (499 shares), and Larry Lion (1 share).<sup>12</sup> (Tr. 1085-86, 1113-17.) Lion was incorporated in 1967;<sup>13</sup> however, members of the Lion family have been in the raisin business for over 100 years (Tr. 1117-18).

2. Alfred Lion, Jr., is one of Lion Raisins, Inc.'s directors and is named as Lion Raisins, Inc.'s president on filings with the Raisin Administrative Committee [hereinafter the RAC] (CX 3 at 1-17). On other filings with the California Secretary of State's Office, Alfred Lion, Jr., is listed as the chief executive officer, chief financial officer, and registered agent of Lion Raisins, Inc. (Tr. 1186-88; CX 1 at 4-5). Bruce Lion, Daniel Lion, and Jeffrey Lion are Alfred Lion, Jr.'s sons. The Lion family involvement in the raisin industry began with Alfred Lion Jr.'s grandfather; prior to Lion's incorporation, he and his brother, Herbert Lion, owned the partnership known as Lion Packing Company (CX 1 at 40-46; Tr. 1082).

3. Bruce Lion is listed as one of Lion Raisins, Inc.'s directors on the 1997 and 2000 filings with the California Secretary of State and as a vice president of Lion Raisins, Inc., on the filings with the RAC for the crop years 1996 through 2004. Bruce Lion exercised responsibility and control over the sales and shipping operations of Lion Raisins, Inc. (CX 1 at 4-5, CX 3 at 1-11; Tr. 1111-21). Bruce Lion testified that he was an officer and director of the corporation (Tr. 1350) and that he

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<sup>11</sup>Lion Raisins, Inc., moved its operation from 3310 East California Avenue, Fresno, California, to 9500 South Dewolf, Selma, California, in 1999 (CX 3; Tr. 1373).

<sup>12</sup>Isabel Lion is Herbert Lion's widow; Larry Lion is their son (Tr. 1086).

<sup>13</sup>Lion was initially incorporated as Lion Enterprises, Inc.; however, its failure to file an annual report with the California Secretary of State's Office allowed another to take that name and the corporation was renamed Lion Raisins, Inc. (Tr. 1084).

exercised exclusive authority over whether raisins were to be “released” (Tr. 1467).

4. During 1998, 1999, and 2000, Daniel Lion exercised responsibility and control over Lion Raisins, Inc.’s production or processing department and was listed as one of Lion Raisins, Inc.’s vice presidents in the filing with the RAC only in 1997 (CX 3 at 9, CX 4; Tr. 1119-21).

5. During 1998, 1999, and 2000, Jeffrey Lion exercised responsibility and control over Lion Raisins, Inc.’s ranch and grower’s operations and was named as one of Lion Raisins, Inc.’s vice presidents in filings with the RAC beginning in 1992 (CX 3 at 1-15; Tr. 119-21).

6. Lion failed to observe corporate formalities in numerous ways, including filing of inconsistent documents with the California Secretary of State’s Office and the RAC, naming different individuals as officers and directors of Lion with the California Secretary of State’s Office and the RAC, failing to file required annual reports (which resulted in Lion losing its original corporate name of Lion Enterprises, Inc.), naming of officers of the corporation with a variety of different titles, using titles other than those contained on filings with the California Secretary of State’s Office, designating individuals as vice presidents of the corporation without apparent approval or action by the board of directors,<sup>14</sup> failing to hold annual shareholder meetings, failing to hold annual meetings of the board of directors, and failing to maintain accurate and appropriate minutes of those meetings<sup>15</sup> (CX 1 at 3-4, CX 127; Tr. 1100-06, 1113-17, 1121-22).

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<sup>14</sup>The use of various titles was explained as “being management titles” rather than a corporate officer (Tr. 1044, 1046).

<sup>15</sup>Alfred Lion, Jr., testified that Susan Keller, one of Lion Raisins, Inc.’s employees, prepared the minutes, but did not attend the meetings (Tr. 1109-10). In one set of minutes, Larry Lion was indicated as being present for the meeting of the board of directors for 1999, 2000, and 2001; however, the testimony indicated Larry Lion did not attend corporate meetings or otherwise perform the duties of corporate secretary (Tr. 1102-05, 1109-10). None of the minutes refers to any litigation in which Lion Raisins, Inc., was involved, the retention of outside counsel, or personnel appointments, such as that of Kalem Barserian as general manager.

7. During the period November 11, 1998, through May 11, 2000, as is indicated in the AMS Inspection and Grading Manual (RX 3-0189 (LR 0748-1025)), AMS inspectors recorded the results of their inspection sampling on line check sheets. AMS inspectors provided copies of their line check sheets to Lion Raisins, Inc. AMS inspectors retained the original line check sheets, along with the pack-out report provided by the packer. (RX 3-0189 (LR 0955, 0957).)

8. During the period November 11, 1998, through May 11, 2000, AMS' Processed Products Branch used Form FV-146 Certificate of Quality and Condition (Processed Foods), a packet form that comprised multiple pages, with the top page on white paper, identified as "original" in red in the lower right-hand corner, followed by seven blue tissue pages (separated by carbon paper) each identified by the word "copy" (also in red) in the lower right-hand corner. Each FV-146 form was identifiable by a singular serial number at the top right side. (Tr. 39-40; CX 47 at 15-16.) On the top page only, the serial number was printed in red. (See, e.g., CX 47 at 15.)

9. During the period November 11, 1998, through May 11, 2000, if requested by the packer, AMS inspectors prepared a certificate worksheet, using the inspection information from their line check sheets, and product labeling and buyer information supplied by the packer (RX 3-0189 (LR 0998)). The worksheet was essentially a "draft" of the inspection certificate (Tr. 40-41).

10. Packers could and did request USDA Certificates of Quality and Condition (FV-146) after the product had been shipped. In that event, the inspector would prepare the form using the inspection documents and the order information (RX 3-0189 (LR 0980)).

11. Once the FV-146 was prepared and signed, the original and up to four of the blue tissue copies were provided to the packer (or designee) (RX 3-0189 (LR 0981)). USDA retained a blue tissue copy in its files, along with any order information that had been provided by the packer when the certificate was requested, and the certificate worksheet, if it had been returned to the inspector (Tr. 39-42; RX 3-0189 (LR 0981)). The certificates were recorded in a ledger maintained by the AMS Inspection Service, with voided certificates being so noted. The voided original certificate was retained in the USDA files, and all

blue tissue copies were destroyed. (CX 14; Tr. 39-42, 52-53; RX 3-0189 (LR 0976-77).) If the AMS inspector could not recover the original and all of the blue tissue copies, the inspector would issue a superseded certificate, according to the procedures set forth in the AMS inspection manual (Tr. 43; RX 3-0189 (LR 0977)).

12. AMS filed the blue tissue copies, in the case of valid certificates, and the original, in the case of void certificates, together in numerical order (Tr. 40-42; RX 3-0189 (LR 0977, 0981)).

13. During the period November 11, 1998, through May 11, 2000, AMS inspectors performed on-line in-plant inspections of product at Lion Raisins, Inc. Although AMS personnel were provided with office space, the inspectors lacked the capability of printing official inspection certificates and instead provided Lion Raisins, Inc.'s shipping clerks with blank FV-146 forms (CX 4). When Lion Raisins, Inc., requested a certificate, it would generally give the AMS inspector a copy of Lion Raisins, Inc.'s "outside" order form, which contained information regarding the buyer, codes, labels, and product specifications (Tr. 84).

14. Lion Raisins, Inc.'s shipping files in evidence typically contain a customer order form, prepared by the sales department, and an "inside" invoice and "invoice trail," prepared by the shipping department. The customer order form, prepared by the sales department, contains the customer's order specifications. The "inside" invoice is an internal shipping department document that precedes the "invoice trail." The "invoice trail" denotes the customer's specifications, the contract price, the manner and date of shipment, and, usually, the date when the order documentation was mailed to the customer, generally by United Parcel Service.

15. Under a program operated by the RAC, packers who sold raisins for export could apply for, and receive, "cash back" for such sales by filing a RAC Form 100C. The amount of "cash back" was based on the weight of the raisins (See, e.g., CX 47 at 12). Lion Raisins, Inc., applied for "cash back" from virtually all of the sales that are the

subject of the instant proceeding.<sup>16</sup>

16. Once Lion Raisins, Inc., developed a “Lion” certificate, Lion implemented the practice of charging its customers for USDA certificates, thereby creating a disincentive to request the USDA certificate FV-146 (CX 7). Customers were advised a “Lion” certificate would be provided without charge and Lion certificates contained the same information as USDA certificates. (See CX 73 at 44 (“Please note that the Lion certificate and the USDA certificate for each order is the same.”)).

17. Lion certificates were prepared not by Lion Raisins, Inc.’s quality control personnel, but rather by employees in the shipping department (CX 7). Lion certificates were prepared on Lion Raisins, Inc.’s letterhead but followed the same format used on the FV-146 in the body of the document, providing the same information categories found on the USDA worksheet and/or USDA certificate.

18. Order Number 43387. On October 26, 1998, Western Commodities, Ltd., contracted for 1,660 cases of oil-dressed, select raisins that were certified U.S. Grade B (CX 47 at 1-2). On November 11, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 46 at 8).<sup>17</sup> Lion Raisins, Inc., requested an inspection certificate, USDA inspectors prepared a worksheet, provided it to Lion Raisins, Inc.’s shipping department, USDA certificate Y-869392 was prepared, and the inspector signed it (CX 46 at 1). Lion Raisins, Inc., retained the original inspection certificate Y-869392 and one copy in its shipping file (CX 47 at 15-16). Lion Raisins, Inc.’s shipping file contains a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information concerning the raisins as the USDA

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<sup>16</sup>See generally Findings of Fact numbers 18-49. CX 126A does not reflect “cash back” from all transactions.

<sup>17</sup>According to the line check sheet, one pallet (which inspectors had found failed because of mold) was set aside, and Lion Raisins, Inc., elected to dump it back into the processing line. On a subsequent sampling, the raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.’s processing personnel. (CX 46 at 8 (see entries for mold and remarks: “C grade OK by Graham”).)

certificate — except that “U.S. Grade B” was substituted for the U.S. Grade C found by USDA inspectors (CX 47 at 14). Lion Raisins, Inc., mailed the order documents to the buyer on December 2, 1998, and requested and received \$13,661.76 “cash back” from the RAC (CX 47 at 1, 12).

19. Order Number 43588. On November 5, 1998, Central Import contracted for 2,880 cases of oil-dressed, midget raisins, not more than 18% moisture (CX 99 at 1). On November 28, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 17.8 to 18.0% in the officially drawn samples (CX 98 at 1). Lion Raisins, Inc., requested an inspection certificate, USDA inspectors prepared a worksheet, provided it to Lion Raisins, Inc.’s shipping department, USDA certificate B-033610 was prepared, and the inspector signed it (CX 98 at 1-2). Lion Raisins, Inc., retained the original USDA certificate B-033610 and one copy in its shipping file (CX 99 at 18-19). Lion Raisins, Inc.’s shipping file contains a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was stated to be “17.8 Percent” rather than 17.8 to 18.0% as was found by the USDA inspectors (CX 99 at 17). Lion Raisins, Inc., mailed the order documents to the buyer on December 10, 1998, and requested and received \$23,702 “cash back” from the RAC (CX 99 at 1, 13).

20. Order Number 43598. On November 5, 1998, Central Import placed an order for 1,440 cases of oil-treated, midget raisins, U.S. Grade B (CX 49 at 1). On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 114 at 7). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 49 at 11). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the worksheet was found in Lion Raisins, Inc.’s shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES:

Officially Drawn” and contained the identical information as the USDA worksheet — except that “U.S. Grade B” was substituted for the U.S. Grade C found by the USDA inspectors (CX 49 at 6, 11). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received \$10,572.50 “cash back” from the RAC (CX 49 at 2, 9).

21. Order Number 43601. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 51 at 1). On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant grading the officially drawn samples as mixed raisins and as U.S. Grade C (CX 50 at 6, CX 51 at 14).<sup>18</sup> The raisins were shipped that day (CX 51 at 1). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 50 at 6). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.’s shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA worksheet — except that the “U.S. Grade B” was substituted for the U.S. Grade C found by the USDA inspectors (CX 51 at 13-14).<sup>19</sup> Lion Raisins, Inc., mailed the order documents to the buyer on February 11, 1999, and requested and received \$12,187.75 “cash back” from the RAC (CX 51 at 1, 11).

22. Order Number 43603. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 101 at 1). On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant grading the officially drawn samples as mixed size and as U.S. Grade C (CX 50 at

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<sup>18</sup>According to the line check sheet, the samples exceeded the maximum allowable number of substandard and underdeveloped raisins (CX 50 at 6). The raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.’s processing personnel (CX 50 at 6 (see remarks: “C grade sub OK’d by Robert”).

<sup>19</sup>The USDA certificate worksheet contains both the range and average berry count; the “Lion” certificate gives only the average. This difference is present in a number of transactions.

6).<sup>20</sup> Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 50 at 6, CX 101 at 12, 21). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors (CX 101 at 12, 21-22). Lion Raisins, Inc., mailed the order documents to the buyer on March 3, 2000, and requested and received \$12,187.75 "cash back" from the RAC (CX 101 at 1, 9).

23. Order Number 43612. On November 5, 1998, Shoei (U.S.A.) Foods, Inc., placed an order for 1,250 cases of oil-treated, midget raisins, U.S. Grade B, and requested a USDA certificate (CX 103 at 1). On November 21, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 102 at 1). Lion Raisins, Inc., requested an inspection certificate after the raisins were loaded in a container and sealed. USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 102 at 2). Lion Raisins, Inc., returned the USDA worksheet and a typed USDA certificate Y-869393 which the inspector signed (CX 102 at 1, CX 103 at 12). The original USDA certificate Y-869393 and a blue tissue copy were found in Lion Raisins, Inc.'s shipping file for this order (CX 103 at 12-13). The blue tissue copy was annotated with the words "don't send" written on its face in pencil (CX 103 at 13). Lion Raisins, Inc.'s shipping file also contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "GRADE" is typed as "U.S. Grade B" instead of the U.S.

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<sup>20</sup>The line check sheet reflects that the samples exceeded the maximum allowable number of substandard and underdeveloped raisins and were graded as U.S. Grade C. This grade was accepted by Lion Raisins, Inc. (see remarks: "C grade sub OK'd by Robert"). (CX 50 at 6.)

Grade C found by the USDA inspectors (CX 103 at 11-12). Lion Raisins, Inc., mailed the order documents to the buyer on November 23, 1998, and requested and received \$8,199.39 “cash back” from the RAC (CX 103 at 1, 10). On the “inside” order sheet located in Lion Raisins, Inc.’s shipping file, there was a post-it note from “Yvonne” to “Bruce,” stating:

Bruce—  
USDA shows Grade C -  
Do you want to send Lion  
Cert of Quality instead  
of USDA for both orders.  
Tx, Yvonne

In pencil, the word “yes” was written in response. (CX 103 at 2.)

24. Order Number 43694. On November 12, 1998, Central Import placed an order for 1,440 cases of oil-treated, midget raisins, U.S. Grade B (CX 105 at 1). On November 24, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 104 at 6). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 104 at 2-3). Lion Raisins, Inc., returned the worksheet and a typed certificate Y-869397 (CX 104 at 1, CX 105 at 24-25). The original USDA certificate Y-869397 (and one official copy) were found in Lion Raisins, Inc.’s shipping file for this order (CX 105 at 24-25). Lion Raisins, Inc.’s shipping file also contained a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA certificate — except that the “U.S. Grade B” is substituted for the U.S. Grade C found by the USDA inspectors (CX 105 at 23). Lion Raisins, Inc., mailed the order documents to the buyer on December 8, 1998, and requested and received \$15,025.38 “cash back” from the RAC (CX 105 at 1, 13).

25. Order Number 43922. On December 1, 1998, Farm Gold

placed an order for 3,200 cases of oil-treated, midget raisins, U.S. Grade B (CX 107 at 1). On November 29, 1998, and December 6, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 105 at 5, 8). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 106 at 2). Lion Raisins, Inc., returned the worksheet and a typed certificate B-033629 (CX 106 at 1, CX 107 at 33-34). The original USDA certificate B-033629 (and one of the official copies) were found in Lion Raisins, Inc.'s shipping file for this order (CX 107 at 33-34). In addition, the shipping file contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the U.S. Grade C found by the USDA inspectors (CX 107 at 32). Lion Raisins, Inc., mailed the order documents to the buyer on December 24, 1998, and requested and received \$33,361.84 "cash back" from the RAC (CX 107 at 3, 22).

26. Order Number 43956. On December 3, 1998, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 109 at 1). On January 20, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 108 at 5, CX 109 at 21). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 109 at 21). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors (CX 109 at 20-21). Lion Raisins, Inc., mailed the order documents to the buyer and requested and received \$15,844.08 "cash back" from the RAC (CX 109 at 1, 12).

27. Order Number 43957. On December 3, 1998, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, and requested a USDA certificate (CX 111 at 1, 4). On January 20, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 108 at 5, CX 111 at 25). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 111 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors. (CX 111 at 21, 25.) Lion Raisins, Inc., mailed the order documents to the buyer and requested and received \$15,844.08 "cash back" from the RAC (CX 111 at 1, 13).

28. Order Number 43975. On December 4, 1998, Central Import Muenster placed an order for 2,880 cases of oil-treated, midget raisins, U.S. Grade B (CX 53 at 2). On December 16, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 52 at 17, CX 53 at 13-14). Lion Raisins, Inc., requested an inspection certificate after the raisins were loaded in a container and sealed.<sup>21</sup> USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 52 at 2). Lion Raisins, Inc., returned the worksheet and a typed certificate B-033631 (CX 53 at 13-14). Lion Raisins, Inc.'s shipping file contained the original USDA certificate and a photocopy as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the U.S.

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<sup>21</sup>CX 52 at 3. The document provided to the USDA inspectors reflects this order was loaded by "BH" in containers APMU 2751550 and TRIU 3706610 with seal numbers 0017053 and 0017054.

Grade C found by the USDA inspectors (CX 53 at 12-14). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received \$23,682.12 “cash back” from the RAC (CX 53 at 1, 10).

29. Order Number 44120. On December 14, 1998, Navimpex, S.A., placed an order for 1,660 cases of oil-treated, select raisins, U.S. Grade B, with no more than 15% moisture and requested copies of the USDA’s line check sheets (CX 55 at 1). On January 21, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 16.4 to 16.5% in the officially drawn samples (CX 54 at 5, CX 55 at 7). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 55 at 7). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.’s shipping file for this order contained the USDA worksheet as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn.” (CX 55 at 6-7.) The Lion certificate contained the identical information about the raisins as the USDA worksheet — except that the “Moisture” was typed as “15.0 Percent” instead of the 16.4 to 16.5% found by the USDA inspectors (CX 55 at 6-7.) On the invoice, next to “LINE CHECK SHEETS,” there appeared a handwritten notation “Do not send (per Bruce).” (CX 55 at 1.) Lion Raisins, Inc.’s shipping file also contained a copy (redacted) of the USDA’s line check sheet for the inspection of these raisins. The copy bore a post-it note, in red ink:

Bruce—  
Please note USDA  
Line check sheets  
show higher moisture  
than spec.  
Tx, Yvonne

The response, in pencil, said: “don’t send or reduce them.” The “don’t send” was circled (CX 55 at 5). Lion Raisins, Inc., mailed the order

documents to the buyer on February 3, 1999, and requested and received \$12,187.75 “cash back” from the RAC (CX 55 at 1, 15).

30. Order Number 44122. On December 14, 1998, Navimpex, S.A., placed an order for 1,660 cases of oil-treated, select raisins, U.S. Grade B, with no more than 15% moisture (CX 113 at 1). On March 1, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 15.0 to 17.0% in the officially drawn samples (CX 112 at 4).<sup>22</sup> Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.’s shipping file for this order contained the USDA worksheet as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA worksheet — except that the “Moisture” was typed as “15.0 Percent” rather than the 15.0 to 17.0% found by USDA inspectors (CX 113 at 14). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received \$15,844.08 “cash back” from the RAC (CX 57 at 1, 12).

31. Order Number 44184. On December 16, 1998, Heinrich Bruning placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 57 at 1). On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 16.7 to 17.0% in the officially drawn samples and grading the raisins as U.S. Grade C (CX 56 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a certificate worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 57 at 22). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.’s shipping file for this order contained the USDA worksheet as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA worksheet — except that the “Moisture” was typed as “16.0

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<sup>22</sup>The USDA inspector noted that she “notified Joe on moisture.” (CX 112 at 4.)

Percent” and the “GRADE” is typed as “U.S. Grade B” rather than the moisture of 16.7 to 17.0% and U.S. Grade C found by the USDA inspectors (CX 57 at 17, 22). Lion Raisins, Inc., mailed the order documents to the buyer on March 11, 1999, and requested and received \$12,187.75 “cash back” from the RAC (CX 113 at 1, 7).

32. Order Number 44185. On December 16, 1998, Heinrich Bruning placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 59 at 1). On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 16.7 to 17.0% in the officially drawn samples and grading the raisins as U.S. Grade C (CX 56 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 59 at 19). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.’s shipping file for this order contained the USDA worksheet as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA worksheet — except that the “Moisture” was typed as “16.0 Percent” and the “GRADE” is typed as “U.S. Grade B” instead of the moisture level of 16.7 to 17.0% and U.S. Grade C found by the USDA inspectors (CX 59 at 18-19). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received \$15,844.08 “cash back” from the RAC (CX 59 at 1, 11).

33. Order Number 44351. On January 4, 1999, Central Import placed an order for 290 cases of oil-treated, midget raisins, with no more than 15.5% moisture (CX 115 at 1). On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 17% in the officially drawn samples (CX 114 at 7). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 115 at 21). Lion Raisins, Inc., returned a typed certificate B-033650 which stated that the raisins sampled were “officially drawn” and certified at 17% moisture

(CX 114 at 1). Lion Raisins, Inc.'s shipping file contained the original USDA certificate B-033650 and the worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.5%" rather than the 17% found by the USDA inspectors (CX 115 at 18-19, 21). Lion Raisins, Inc.'s shipping file also contains a post-it note from "RW" to "Bruce, as follows:

3/9

Bruce,  
(See order attached)  
The Berry count met the specs,  
however the moisture did not.  
According to USDA moisture  
was 17%.

Tx,  
RW

CX 115 at 15. Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received \$2,768.03 "cash back" from the RAC (CX 115 at 1, 13).

34. Order Number 44488. On January 11, 1999, Heinrich Bruning placed an order for 4,980 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 61 at 1). On January 22, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 16.6 to 17.0% in the officially drawn samples (CX 60 at 5). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 61 at 16). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed

as “16.0 Percent” instead of the 16.6 to 17.0% found by the USDA inspectors (CX 61 at 15-16). Lion Raisins, Inc., mailed the order documents to the buyer on February 3, 1999, and requested \$47,531.90 “cash back” from the RAC (CX 61 at 1, 24).

35. Order Number 44865. On February 4, 1999, Primex International placed an order for 440 cases of oil-treated, select raisins, with no more than 15% moisture, and requested a USDA certificate (CX 117 at 1). On February 8, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Fresno plant finding moisture levels of 17.2% in the officially drawn samples (CX 116 at 2). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 117 at 14). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.’s shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA worksheet — except that the “Moisture” was typed as “15.0 Percent” instead of the 17.2% found by the USDA inspectors (CX 117 at 13). There was a post-it note on the “Lion” certificate from “RW” to “Bruce”:

Bruce,  
Moisture did not  
meet spec of 15%  
Actual moisture  
is 17.2%.  
RW

CX 117 at 13. Lion Raisins, Inc., mailed the order documents to the buyer on February 12, 1999, and requested and received \$3,235.41 “cash back” from the RAC (CX 117 at 1, 11).

36. Order Number 45199. On March 5, 1999, Sunbeam Australian Dried Fruits Sales placed an order for 3,320 cases of oil-treated, zante currant raisins, U.S. Grade B, with no more than 17.5%

moisture (CX 63 at 1). On April 15, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17.6 to 18.9% in the officially drawn samples (CX 62 at 8).<sup>23</sup> Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 63 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate to USDA; however, the USDA worksheet was located in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "17.5 Percent" instead of the 17.6 to 18.9% found by the USDA inspectors (CX 63 at 25, 46). Lion Raisins, Inc., requested and received "cash back" from the RAC (CX 63 at 42 (the amount is obscured)).

37. Order Number 46171. On May 21, 1999, Sunbeam Australian Dried Fruits Sales placed an order for 3,320 cases of oil-treated, zante currant raisins, U.S. Grade B, with no more than 16.5% moisture (CX 65 at 1). On July 26, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17.6 to 18.9% in the officially drawn samples (CX 64 at 5). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 65 at 41). Lion Raisins, Inc., failed to return the worksheet or a typed certificate to USDA; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.9 to 17.0 Percent" rather than the

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<sup>23</sup>The inspector notified the processing staff that the moisture was high (CX 62 at 8 ("notified Robert on moist")). The maximum allowable moisture percentage for zante currant raisins is 20%. (7 C.F.R. § 52.1857.)

17.6 to 18.9% found by the USDA inspectors (CX 65 at 31, 41).<sup>24</sup> Lion Raisins, Inc.'s shipping file also contained a letter, dated July 21, 1999, sent to Sunbeam Australian Dried Fruits Sales, which stated:

Your PO 8863 has already been processed. Enclosed please find a copy of the signed USDA certificate showing the moisture content of 17 percent which is below the maximum requirement of 18 percent.

Per your PO 9003 we have adjusted the maximum moisture specification to 17 percent to ensure the moisture level is reduced as per your request.

We will try testing under 17 percent but our production thinks it might be difficult to obtain the moisture any lower than the 17 percent.<sup>25</sup>

Lion Raisins, Inc., mailed the order documents to the buyer on August 9, 1999, and requested and received \$36,032.50 "cash back" from the RAC (CX 65 at 26).

38. Order Number 46371. On May 14, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 16% moisture (CX 67 at 1). On September 1, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 15.5 to 17.0% in the officially drawn samples (CX 66 at 5).<sup>26</sup> Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet

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<sup>24</sup>USDA stated that the certificate covered 91,489.24 pounds of product, while the "Lion" certificate referred to 91,489 pounds.

<sup>25</sup>CX 65 at 12-13; see also CX 65 at 14 (noting "USDA readout 17.0%"). "PO" appears to refer to Sunbeam Australian Dried Fruits Sales' purchase orders. See CX 65 at 6 (reference to PO9003), 14.

<sup>26</sup>According to the line check sheets, the maximum moisture for the order was 17% (CX 66 at 5).

and provided it to Lion Raisins, Inc.'s shipping department (CX 67 at 23). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, both of which used the legend "SOURCE OF SAMPLES: Officially Drawn." (CX 67 at 21-22.) One of the "Lion" certificates contained – in typewriting – the identical information about the raisins as the USDA worksheet — including the non-conforming "15.5 to 17.0" percent moisture (CX 67 at 22). The entire page, however, was struck through with a red line, and, in pencil, the "17.0 Percent" was obliterated and corrected with a handwritten "16." (CX 67 at 22.) On the other "Lion" certificate, presumably the final version, the "Moisture" was typed as "15.5 to 16.0 Percent" instead of the 15.5 to 17.0% found by the USDA inspectors (CX 67 at 21, 23). Lion Raisins, Inc., mailed the order documents to the buyer on September 19, 1999, and requested and received \$10,725.22 "cash back" from the RAC (CX 67 at 1, 16).

39. Order Number 46811. On July 19, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 69 at 1). On September 19, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant grading the officially drawn samples as U.S. Grade C (CX 68 at 3).<sup>27</sup> Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 69 at 18). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that on one Lion certificate, the "GRADE" was typed as it is on the USDA worksheet, as "U.S. Grade C." (CX 69 at 17-18.) The "C" was circled in pencil and a "B" placed next to it, also in pencil (CX 69 at 17-18).

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<sup>27</sup>The samples were graded U.S. Grade C as the maximum allowable number of substandard and underdeveloped raisins was exceeded for U.S. Grade B. The remarks reflect "C grade Sub OK. Robert" (CX 68 at 3).

The other "Lion" certificate was corrected to read "GRADE: U.S. GRADE: B." (CX 69 at 16.) Lion Raisins, Inc., mailed the order documents to the buyer on October 5, 1999, and requested and received \$10,725.22 "cash back" from the RAC (CX 69 at 1, 25).

40. Order Number 47456. On September 8, 1999, Farm Gold placed an order for 3,320 cases of oil-treated, midget raisins, U.S. Grade B (CX 119 at 1). On September 23, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant grading the officially drawn samples as U.S. Grade C (CX 118 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well a "Lion" certificate, signed by Barbara Baldwin, which used the legend "SOURCE OF SAMPLES: Officially Drawn" and stated that the "GRADE" was "U.S. GRADE: B" rather than the U.S. Grade C found by the USDA inspectors (CX 119 at 26). The "Lion" certificate also included an additional case code that does not appear on the USDA worksheet (CX 119 at 26). Lion Raisins, Inc., mailed the order documents to the buyer on October 14, 1999, and requested and received \$28,762.80 "cash back" from the RAC (CX 119 at 1, 12).

41. Order Number 48052. On October 20, 1999, Demos Ciclitira, Ltd., placed an order for 1,660 cases of oil-treated, Medos zante currant raisins, U.S. Grade B, with no more than 17% moisture, and requested a USDA certificate (CX 71 at 1, 6, 26). On October 27, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 17.0 to 18.0% in the officially drawn samples (CX 70 at 8). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 71 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and

contained the same information about the raisins as the USDA worksheet — except that the moisture read “[blank] To 17.0 Percent” and the principal label marks contained additional information not found on the USDA worksheet (CX 71 at 24-25).<sup>28</sup> Lion Raisins, Inc., mailed the order documents to the buyer on November 18, 1999, and requested and received \$1,632.25 “cash back” from the RAC (CX 71 at 1, 14).

42. Order Number 48137.

a. On October 25, 1999, Borges, S.A., contracted to buy 665 cases of oil-treated, Lion Select raisins, at no more than 16% moisture (CX 121 at 1). On November 4, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant finding moisture levels of 16.8 to 17.0% in the officially drawn samples (CX 120 at 14).<sup>29</sup> After the raisins were loaded in a container, Lion Raisins, Inc., requested an inspection certificate, and the USDA inspector gave a worksheet to Lion Raisins, Inc.’s shipping department and received the USDA worksheet and typed USDA certificate B-034321 (CX 120 at 3-5). Lion Raisins, Inc.’s shipping file contained the original USDA certificate as well as a “Lion” certificate, signed by Barbara Baldwin, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and represented the moisture as “16.0 Percent” instead of the 16.86 to 17.0% found by the USDA inspectors (CX 121 at 36, 38).

b. On October 25, 1999,<sup>30</sup> Borges contracted to buy 735 cases of oil-treated, golden raisins, at no more than 18% moisture (CX 121 at 1). On October 15, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant finding moisture levels of

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<sup>28</sup>The Lion Raisins, Inc., shipping file contains an outside order form with the same label information that appears on the “Lion” certificate, but not on the USDA worksheet (CX 71 at 22).

<sup>29</sup>The USDA line check sheet reflects only 16.8 to 17.0% moisture levels; however, the FV-146 reflects the 16.86 to 17.0% figures (CX 120 at 1, 14, CX 121 at 42).

<sup>30</sup>October 25, 1999, appears to be the incorrect order date as it is well after the inspection of the raisins, but this order date is reflected in the exhibits.

16.5 to 17.3% in the officially drawn samples (CX 120 at 12).<sup>31</sup> After the raisins were loaded in a container, Lion Raisins, Inc., requested an inspection certificate, and the USDA inspector gave a worksheet to Lion Raisins, Inc.'s shipping department and received the USDA worksheet and typed USDA certificate B-034317 (CX 120 at 1-2). Lion Raisins, Inc.'s shipping file contained the original USDA certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as 16.0% rather than the 16.0 to 17.9% found by the USDA inspectors (CX 121 at 35, 37).

c. Lion Raisins, Inc., mailed the documents for order 48137 (both parts) to the buyer on January 6, 1999, and requested and received \$6,109.95 "cash back" from the RAC (CX 121 at 1, 10).

43. Order Number 48397. On November 10, 1999, NAF International AMBA placed an order for 650 cases of bagged, oil-treated, raisins, U.S. Grade B, with no more than 15% moisture, and 800 cases of oil-treated, select raisins, U.S. Grade B, with no more than 16% moisture (CX 73 at 1). On December 6, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 15.1 to 15.3% in the officially drawn samples (CX 72 at 12). Lion Raisins, Inc., requested an inspection certificate after the raisins were loaded in a container and sealed, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 72 at 8). Lion Raisins, Inc., returned the USDA worksheet and a typed USDA certificate B-034343 (CX 72 at 4).<sup>32</sup> Lion Raisins, Inc.'s shipping file contained the original USDA certificate B-034343 (and several photocopies of the certificate) for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and

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<sup>31</sup>The USDA line check sheet reflects moisture of 16.5 to 17.3%; however, the worksheet and the certificate reflected moisture levels of 16.0 to 17.9% (CX 120 at 1-2, 12).

<sup>32</sup>Although the USDA worksheet records state the moisture as being 15.1 to 15.3% consistent with the line check sheet, USDA certificate B-034343 contains a moisture level of 15.3 to 15.4%.

contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was typed as “15.3 TO 16.0 Percent” rather than the 15.3 to 15.4% recorded on the USDA certificate found in the USDA file (CX 72 at 4, CX 73 at 34 (original), 39, 40-43). The original USDA certificate was altered to read “Moisture - 15.3 TO 16.0 Percent,” and a copy of the altered original was in the shipping file as well (CX 73 at 34, 39). Lion Raisins, Inc., mailed the order documents to the buyer on January 5, 2000, and requested and received \$6,751.94 “cash back” from the RAC (CX 73 at 1, 16).

44. Order Number 48416. On November 11, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, with no more than 17% moisture (CX 123 at 1). On December 13, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant finding moisture levels of 17.9 to 18.0% in the officially drawn samples (CX 122 at 3). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.’s shipping file for this order as well as a “Lion” certificate, signed by Barbara Baldwin, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and stated that the “Moisture” was 17.0% rather than the 17.9 to 18.0% found by the USDA inspectors. (CX 123 at 30-31.) Lion Raisins, Inc., mailed the order documents to the buyer on January 12, 2000, and requested and received \$17,664.63 “cash back” from the RAC (CX 123 at 1, 10).

45. Order Number 48487. On November 16, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, select raisins, with no more than 16% moisture (CX 125 at 1). On November 30, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant finding moisture levels of 15.1 to 15.8% in the officially drawn samples (CX 124 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.’s shipping file for this

order as well as a “Lion” certificate, signed by Barbara Baldwin, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and stated that the “Moisture” was 15.1 to 15.5% rather than the 15.1 to 15.8% found by the USDA inspectors (CX 125 at 29-30). Lion Raisins, Inc., mailed the order documents to the buyer on December 23, 1999, and requested and received \$17,664.63 “cash back” from the RAC (CX 125 at 3, 14).

46. Order Number 48523. On November 18, 1999, Heinrich Bruning placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 75 at 1). On December 2, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant finding moisture levels of 16.6 to 17.0% moisture in the officially drawn samples (CX 74 at 3). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 75 at 22). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.’s shipping file for this order as well as a “Lion” certificate, signed by Barbara Baldwin, that used the legend “SOURCE OF SAMPLES: Officially Drawn” and contained the identical information about the raisins as the USDA worksheet — except that the “Moisture” was typed as “16.0 Percent” rather than the 16.6 to 17.0% found by the USDA inspectors (CX 75 at 18, 22). The “Lion” certificate bore a post-it note (CX 75 at 18) stating:

USDA certificate shows a moisture of 16.6-17.0.

Lion Raisins, Inc., mailed the order documents to the buyer on December 30, 1999, and requested and received \$17,664.63 “cash back” from the RAC (CX 75 at 1, 9).

47. Order Number 49334. On January 20, 2000, EKO Produkter AB placed an order for 1,660 cases of oil-treated, select raisins, U.S. Grade B, with no more than 17% moisture (CX 77 at 1). On December 21 and 22, 1999, USDA inspectors had sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant finding moisture levels of 16.6 to 17.8% in the officially drawn samples (CX 76 at 4, 13). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors

prepared a worksheet which bore Order Number 49334 and provided it to Lion Raisins, Inc.'s shipping department (CX 77 at 22).<sup>33</sup> Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and which stated that the pack dates were January 21 and 22, 2000, and bore the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.6 To 17.0 Percent" rather than the 16.6 to 17.8% found by the USDA inspectors (CX 77 at 21). The "Lion" certificate bore a post-it note (CX 77 at 21) stating:

USDA shows no packing on the 21 & 22<sup>nd</sup> of January.  
The moisture for the Dec. pack date shows 16.6 - 17.8%.

Lion Raisins, Inc., mailed the order documents to the buyer on February 7, 2000, and requested and received \$11,573.38 "cash back" from the RAC (CX 77 at 1, 12).

48. Order Number 50431. On April 14, 2000, NAF International AMBA placed an order for 1,440 cases of oil-treated, select raisins, U.S. Grade B, with 16 to 18% moisture (CX 79 at 1). On April 17, 2000, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 17.2 to 17.5% in the officially drawn samples (CX 78 at 3). Lion Raisins, Inc., requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 79 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file contains two "Lion" certificates, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" (CX 79 at 23-24). One certificate contained the USDA's moisture results and bore a handwritten (in pencil) notation "16-17 adjacent to the moisture entry." (CX 79 at 23.) The second "Lion" certificate contained the typewritten moisture of 16 to 17% (CX 79 at 24). Lion Raisins, Inc., mailed the order documents

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<sup>33</sup>The record is not entirely clear as the order date is well after the inspection date.

to the buyer on April 20, 2000, and requested and received \$13,421.36 “cash back” from the RAC (CX 79 at 1, 4.)

49. Order Number 50750. On May 8, 2000, J.L. Priestly & Company, Ltd., placed an order for 1,660 cases of oil-treated, midget raisins (CX 81 at 1). On April 14 and May 11, 2000, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.’s Selma plant grading the officially drawn samples as mixed size raisins (CX 80 at 6, 11). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.’s shipping department (CX 81 at 21). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.’s shipping file for the order contained the USDA worksheet as well as two “Lion” certificates (one signed by Barbara Baldwin) that used the legend “SOURCE OF SAMPLES: Officially Drawn.” (CX 81 at 23-24, 26.) One certificate contained USDA’s size result and the other recorded the size as “Midget.” (CX 81 at 23-24, 26.) The shipping documents related to this order number 50750 also include a post-it note which stated:

Bruce,  
The USDA certificate  
shows a size of Mixed.

The handwritten response, in pencil indicated:

“Change to Midget,” circled. (CX 81 at 25.)

Lion Raisins, Inc., mailed the order documents to the buyer on May 25, 2000, and requested and received \$15,471.78 “cash back” from the RAC (CX 81 at 1, 3).

### **Conclusions of Law**

1. The Secretary of Agriculture has the authority under the Agricultural Marketing Act to: (a) prescribe regulations for the inspection, certification, and identification of the class, quality, and

condition of agricultural products and (b) issue regulations and orders to carry out the purposes of the Agricultural Marketing Act, including authority to issue debarment regulations and to debar persons and entities from benefits under the Agricultural Marketing Act.

2. The term “officially drawn sample,” as defined in 7 C.F.R. § 52.2, is limited to those samples selected by USDA inspectors, licensed samplers, or any other persons authorized by the Administrator. The use of the term “officially drawn” on Lion Raisins, Inc., certificates, indicating that the source of samples was “officially drawn,” impermissibly attempts to extend the term “officially drawn sample” to sampling results performed by an entity’s quality control personnel. While no regulation prohibits the use of a non-USDA certificate or guarantee by a processor, packer, or seller of raisins, the use of the term “officially drawn” allows no leeway or deviation from the sampling results found by USDA inspectors.

3. U.S. Grades, as applied to raisins, are based upon a variety of components, only one of which is the maturity of the raisin. Lion Raisins, Inc.’s false representation that certain orders (which had been graded by USDA inspectors as U.S. Grade C) were in fact U.S. Grade B, based only upon maturity, was an impermissible use of the U.S. Grade designation given to the raisins in question.

4. Lion Raisins, Inc., impermissibly attempted to use its own standards to define the term “midget” when that term is defined and used by USDA as part of the identification of the size of a raisin.

5. By reason of Lion Raisins, Inc.’s failure to observe corporate formalities, Lion Raisins, Inc., is not an entity separate and apart from Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

6. On 33 occasions during the period November 11, 1998, through May 11, 2000, in connection with 32 orders, Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion willfully violated section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)), by engaging in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results, as follows:

a. Order Number 43387 (November 11, 1998). The Lions used

an official inspection certificate (Y-869392) as a basis to misrepresent the U.S. Grade of 45,744.62 pounds of raisins sold by the Lions to Western Commodities, Ltd., as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B, when USDA had certified them as U.S. Grade C, as shown on the official certificate. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part the official inspection certificate issued for these raisins for the purpose of purporting to evidence the U.S. Grade of the raisins. (7 C.F.R. § 52.54(a)(1)(v).)

b. Order Number 43588 (November 28, 1998). The Lions used an official inspection certificate (B-033610) as a basis to misrepresent the moisture content of 79,364 pounds of raisins sold by the Lions to Central Import Meunster. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins to be 17.8% moisture, when the USDA’s officially drawn sample of those raisins was certified as 17.8 to 18.0% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part the official inspection certificate issued for these raisins for the purpose of purporting to evidence the officially drawn moisture level of the raisins. (7 C.F.R. § 52.54(a)(1)(v).)

c. Order Number 43598 (January 6, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by the Lions to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

d. Order Number 43601 (February 3, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by

the Lions to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

e. Order Number 43603 (February 3, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

f. Order Number 43612 (November 21, 1998). The Lions used an official inspection certificate (Y-869393) as a basis to misrepresent the U.S. Grade of 37,500 pounds of raisins sold by the Lions to Shoei Foods (U.S.A.), Inc., as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate for the raisins certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

g. Order Number 43694 (November 24, 1998). The Lions used an official inspection certificate (Y-869397) as a basis to misrepresent the U.S. Grade of 39,682.08 pounds of raisins sold by the Lions to Central Import Meunster, as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate for the raisins certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also

used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

h. Order Number 43922 (December 6, 1998). The Lions used an official inspection certificate (B-033629) to misrepresent the U.S. Grade of 88,182.40 pounds of raisins sold by the Lions to Farm Gold as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

i. Order Number 43956 (January 20, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold as U.S. Grade B, when the officially drawn sample for that product was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

j. Order Number 43957 (January 20, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

k. Order Number 43975 (December 16, 1998). The Lions used an official inspection certificate (B-033631) as a basis to misrepresent the U.S. Grade of 79,364.16 pounds of raisins sold by the Lions to Central Import Meunster as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The

Lions also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

l. Order Number 44120 (January 21, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Navimpex, S.A., at 15.0% moisture, when the officially drawn sample for that product was certified at 16.4 to 16.5% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

m. Order Number 44122 (March 1, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Navimpex, S.A., at 15.0% moisture, when the officially drawn sample for that product was not certified at such moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

n. Order Number 44184 (January 12, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture and U.S. Grade B, when the officially drawn sample for those raisins was certified at 16.7 to 17.0% moisture and as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

o. Order Number 44185 (January 12, 1999). The Lions used a

legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture and U.S. Grade B, when the officially drawn sample for that product was certified at 16.7 to 17.0% moisture and as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

p. Order Number 44351 (January 6, 1999). The Lions used an official inspection certificate (B-033650) as a basis to misrepresent the moisture of 7,991.53 pounds of raisins sold by the Lions to Central Import Meunster as 15.5%. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as having 15.5% moisture, when the officially drawn sample was certified at 17% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

q. Order Number 44488 (January 22, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 137,233.86 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

r. Order Number 44865 (February 8, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 13,200 pounds of raisins sold by the Lions to Primex International, with final destination of Manila, Philippines, at 15.0% moisture, when the officially drawn sample for those raisins was certified as 17.2% moisture. (7 C.F.R. §

52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

s. Order Number 45199 (April 15, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 91,489.24 pounds of raisins sold by the Lions to Sunbeam Australian Dried Fruits Sales, at 17.5% moisture, when the officially drawn sample for those raisins was certified at 17.6 to 18.9% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

t. Order Number 46171 (July 26, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 91,489 pounds of raisins sold by the Lions to Sunbeam Australian Dried Fruits Sales, at 16.9 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.9 to 17.5% moisture and the officially drawn sample for that product also had identified 91,489.24 pounds of product. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

u. Order Number 46371 (September 1, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold, at 15.5 to 16.0% moisture, when the officially drawn sample for those raisins was certified at 15.5 to 17.0% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

v. Order Number 46811 (September 19, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by

the Lions to Farm Gold, to be U.S. Grade B, when the officially drawn sample for that product was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

w. Order Number 47456 (September 19, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified that 92,489.24 pounds of raisins sold by the Lions to Farm Gold were inspected on September 19, 1999, code marked “PKD 19 SEP 99L” and determined to be U.S. Grade B. The officially drawn sample for that product was drawn and inspected on September 23, 1999, was code marked “PKD 23 SEP 99L,” and the officially drawn sample was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

x. Order Number 48052 (October 27, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Demos Ciclitira, Ltd., at 17.0% moisture. The officially drawn sample for that product was certified at 17.0 to 18.0% moisture and the product was to have been packed under a different label. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

y. Order Number 48137 (November 4, 1999). The Lions used an official inspection certificate (B-034321) as a basis to misrepresent the moisture percentage of 19,950 pounds of raisins sold by the Lions to Borges, S.A. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified these raisins as containing 16% moisture, when the officially drawn sample for that product was not certified at such moisture percentage. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate

for the purpose of purporting to evidence the U.S. Grade and officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

z. Order Number 48137 (October 15, 1999). The Lions used an official inspection certificate (B-034317) as a basis to misrepresent the moisture of 22,050 pounds of raisins sold by the Lions to Borges, S.A. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified these raisins at 16% moisture, when the officially drawn sample for that product was not certified at such moisture percentage. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

aa. Order Number 48397 (December 9, 1999). The Lions altered an official inspection certificate (Y-034343) to misrepresent the moisture of 22,045.6 pounds of raisins sold by the Lions to NAF International AMBA, by falsifying the moisture of the officially drawn sample. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified these raisins at 15.3 to 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture and the product from which the official sample was drawn was to be packed under a different label. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

bb. Order Number 48416 (December 13, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold, at 17% moisture, when the officially drawn sample for that product was not certified at such moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

cc. Order Number 48487 (November 30, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold, at 15.1 to 15.5% moisture, when the officially drawn sample for that product was not certified at such moisture percentage. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

dd. Order Number 48523 (December 2, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.0% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

ee. Order Number 49334 (December 22, 1999). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to EKO Produkter AB, at 16.6 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.8% moisture and the product from which the official sample was drawn was to be packed in containers bearing different code marks. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

ff. Order Number 50431 (April 17, 2000). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by the Lions to NAF International AMBA, at 16.0 to 17.0% moisture, when the officially drawn sample for that product was certified at 17.2 to 17.5% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a

facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

gg. Order Number 50750 (May 11, 2000). The Lions used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to J.L. Priestly & Company, Ltd., as “midget” size raisins, when the officially drawn sample for that product certified it as “mixed” size raisins and the product was to have been packed under a different label. The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn size of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

7. Each of the acts and practices described in Conclusions of Law number 6 was a willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).

8. The acts and practices described in Conclusions of Law number 6, in connection with inspection documents for the Lions’ raisins and raisin products, constitute sufficient cause for the debarment of Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

#### **The Lions’ Request for Oral Argument**

The Lions’ request for oral argument, which the Judicial Officer may grant, refuse, or limit,<sup>34</sup> is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

#### **Timeliness of the Lions’ Appeal Petition**

The Administrator asserts the Hearing Clerk served counsel for the Lions with the ALJ’s Decision and Order on June 13, 2006; therefore, the Lions were required to file an appeal petition with the Hearing Clerk

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<sup>34</sup>7 C.F.R. § 1.145(d).

no later than 4:30 p.m., July 13, 2006.<sup>35</sup> The Administrator argues the Lions' Appeal Petition was late-filed as the Lions sent a facsimile of the Appeal Petition to the Hearing Clerk beginning at 3:18 p.m., July 13, 2006, and ending at 4:38 p.m., July 13, 2006.

The most reliable evidence of the date and time a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document.<sup>36</sup> The Office of the Hearing Clerk stamped the Lions' Appeal Petition as having been received at 4:28 p.m., July 13, 2006. The Administrator further asserts the Lions' Appeal Petition was late-filed because the July 13, 2006, filing was a facsimile and the original of the Lions' Appeal Petition was not filed until July 14, 2006. I have long found that an appeal petition is timely-filed if a facsimile of the appeal petition is received by the Hearing Clerk within the time for filing the appeal petition and an original of the appeal petition is promptly filed after the filing of the facsimile, even if the original is not filed within the time for filing the appeal petition. Therefore, I find the Lions timely filed their Appeal Petition with the Hearing Clerk, and I reject the Administrator's contention that the Appeal Petition was late-filed.

### **The Lions' Appeal Petition**

The Lions raise 30 issues in the Appeal Petition. First, the Lions contend the Secretary of Agriculture lacks authority to issue debarment regulations or to debar the Lions from raisin inspections by USDA (Appeal Pet. at 12-14, 85-108, 127-30, 135).

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<sup>35</sup>The Rules of Practice provide that an appeal petition must be filed with the Hearing Clerk within 30 days after receiving the administrative law judge's written decision (7 C.F.R. § 1.145(a)). The Office of the Hearing Clerk receives documents from 8:30 a.m. to 4:30 p.m. *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

<sup>36</sup>*In re Bruce Lion* (Ruling Granting Complainant's Motion Not to Consider Reply to Complainant's Appeal Petition; and Order Vacating the Administrative Law Judge's Initial Decision and Remanding Proceeding to the Administrative Law Judge), 65 Agric. Dec. 1214, 1221 (2006).

As an initial matter, the Lions' argument that the Secretary of Agriculture's debarment authority cannot be extended to mandatory inspection requirements under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], is misplaced. The AMAA does not authorize the Secretary of Agriculture to inspect the Lions' raisins. The instant proceeding concerns only debarment from receiving USDA inspection services under the Agricultural Marketing Act.

I agree with the ALJ's conclusion that the Secretary of Agriculture has authority to debar the Lions from receiving USDA inspection services under the Agricultural Marketing Act (ALJ's Decision and Order at 3-4). The Agricultural Marketing Act directs and authorizes the Secretary of Agriculture to develop and improve standards of quality, condition, quantity, grade, and packaging and to recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.<sup>37</sup> The Secretary of Agriculture is also directed and authorized to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products under orders, rules, and regulations as the Secretary of Agriculture deems necessary to carry out the Agricultural Marketing Act.<sup>38</sup> The Secretary of Agriculture's debarment regulations (7 C.F.R. § 52.54) establish a means to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary is directed and authorized to administer. Based on the plain language of the Agricultural Marketing Act, I conclude the Secretary of Agriculture has authority to promulgate debarment regulations and to debar persons who engage in misrepresentation or deceptive or fraudulent practices or acts in connection with the inspection services provided by the Secretary of Agriculture.

Moreover, the United States Court of Appeals for the Ninth Circuit specifically addressed the issue of the Secretary of Agriculture's authority to promulgate debarment regulations under the Agricultural Marketing Act, as follows:

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<sup>37</sup>7 U.S.C. § 1622(c).

<sup>38</sup>7 U.S.C. §§ 1622(h), 1624(b).

American Raisin's contention that 7 U.S.C. § 1622(h) prohibits debarment for innocent or negligent misconduct is unavailing. Section 1622(h) provides ample authority for the promulgation of Section 52.54, in addition to establishing penalties for other abuses.

*American Raisin Packers, Inc. v. U.S. Dep't of Agric.*, 66 F. App'x 706 (9th Cir. 2003). Similarly, the United States Court of Appeals for the Eighth Circuit concluded the Agricultural Marketing Act authorizes the Secretary of Agriculture to promulgate regulations to withdraw meat grading services and affirmed the district court's denial of a request to enjoin the Secretary of Agriculture from holding an administrative hearing to determine whether meat grading services under the Agricultural Marketing Act should be withdrawn, as follows:

In summary, we uphold regulation 53.13(a), which permits the Secretary to withdraw grading services for misconduct in order to ensure the integrity of the grading service. The Secretary's interpretation of his power to enforce the substance of 53.13(a) has been followed, unchallenged, for at least thirty years. Moreover, the regulation was issued pursuant to express rule making authority and is reasonably designed to preserve the integrity and reliability of the grading system the Secretary is directed and authorized to administer. Thus, although not expressly authorized, the regulation enjoys an especially strong presumption of validity which West has not rebutted. The regulation is not inconsistent either with an express statutory provision or with agriculture laws taken as a whole. Finally, the legislative history tends to support rather than strongly oppose the view that the regulations are authorized by Congress.

*West v. Bergland*, 611 F.2d 710, 725 (8th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980). Finally, in response to certified questions submitted to me by Administrative Law Judge Jill S. Clifton, I held the Secretary of Agriculture has authority under the Agricultural Marketing

Act to debar persons from USDA inspection services.<sup>39</sup> The Lions characterize that Ruling on Certified Questions as conclusory. Admittedly, I viewed and continue to view the issue of the Secretary of Agriculture's debarment authority as a simple issue that does not require exhaustive discussion. The Lions have thoroughly addressed the issue of the Secretary of Agriculture's debarment authority in their Appeal Petition; however, the Lions' arguments fail to convince me that *In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004), is error or that the Secretary of Agriculture lacks authority to debar the Lions from receiving inspection services from USDA under the Agricultural Marketing Act.

Second, the Lions contend debarment from inspection services under the Agricultural Marketing Act constitutes withdrawal of a license and the Administrative Procedure Act (5 U.S.C. § 558(c)) requires the Administrator to provide the Lions with notice of the conduct which may warrant withdrawal of the license and an opportunity to demonstrate or achieve compliance with all lawful requirements (Appeal Pet. at 14-16, 82, 123-27).

The ALJ found debarment from inspection services under the Agricultural Marketing Act did not constitute withdrawal of a license; hence, the Administrator was not required by 5 U.S.C. § 558(c) to provide the Lions with notice of the conduct which may warrant withdrawal of the license and an opportunity to demonstrate or achieve compliance with all lawful requirements (ALJ's Decision and Order at 4-5).

The Administrative Procedure Act defines the word "license" as follows:

**§ 551. Definitions**

For the purpose of this subchapter—

....

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership,

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<sup>39</sup>*In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004).

statutory exemption or other form of permission[.]

5 U.S.C. § 551(8). Inspection and grading services performed by USDA for the Lions are not forms of permission granted to the Lions, but rather services performed by USDA for the Lions. The United States Court of Appeals for the Ninth Circuit, responding to a claim identical to that raised by the Lions, stated 5 U.S.C. § 558 is not applicable to debarment of inspection service under the the Agricultural Marketing Act, as follows:

American Raisin's claim that 5 U.S.C. § 558 requires that a party be given an opportunity to cure its misrepresentation before it is debarred also fails because Section 558 applies only to the revocation of a license and is not otherwise applicable to the facts of this case.

*American Raisin Packers, Inc. v. U.S. Dep't of Agric.*, 66 F. App'x 706 (9th Cir. 2003). Therefore, I reject the Lions' claims that debarment from the benefits of the Agricultural Marketing Act constitutes withdrawal of a license and that 5 U.S.C. § 558(c) is applicable to the instant proceeding.

Third, the Lions contend the ALJ's finding that Lion Raisins, Inc., lost its corporate form, is error (Appeal Pet. 16-27, 111-12).

Lion Raisins, Inc., failed to observe corporate formalities in numerous ways, including the filing of inconsistent documents with the California Secretary of State's Office and the RAC; naming different individuals as officers and directors of Lion Raisins, Inc., with the California Secretary of State's Office and the RAC; failing to file required annual reports (which resulted in Lion losing its original corporate name, Lion Enterprises, Inc.); naming of officers of the corporation with a variety of different titles; using titles other than those contained on filings with the California Secretary of State's Office; designating individuals as vice presidents of the corporation without apparent approval or action by the board of directors; failing to hold annual shareholder meetings; failing to hold annual board of directors

meetings; and failing to maintain accurate and appropriate minutes of shareholder and board of directors meetings (CX 1 at 3-4, CX 127; Tr. 1100-06, 1113-17, 1121-22).

Lion Raisins, Inc., identified different officers and directors on different forms and records for the same years (CX 130). Alfred Lion, Jr., testified that Susan Keller, one of Lion's employees, prepared the minutes, but did not attend the meetings (Tr. 1109-10). In one set of minutes, Larry Lion was indicated as being present for the meeting of the board of directors for 1999, 2000, and 2001; however, the record indicates he did not attend corporate meetings or otherwise perform the duties of corporate secretary (Tr. 1102-05, 1109-10). None of the minutes refers to litigation in which Lion Raisins, Inc., was involved, the retention of outside counsel, or personnel appointments, such as that of Kalem Barsarian as general manager.

Therefore, I agree with the ALJ's conclusion that Lion Raisins, Inc., is not an entity separate and apart from Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion (ALJ's Decision and Order at 9-11, 37).

Fourth, the Lions contend the ALJ erroneously failed to find that USDA inspectors did not follow USDA procedures when inspecting the Lions' raisins and that USDA inspectors issued unreliable and inaccurate documents relating to the inspection of the Lions' raisins (Appeal Pet. at 27-28, 82-84, 131, 135-37).

I find irrelevant the Lions' contentions that USDA failed to follow its own procedures and issued unreliable documents. The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results. Even if I were to find that USDA inspectors issued unreliable documents in connection with the inspection of the Lions' raisins (which I do not so find), the Lions would be prohibited from altering USDA certificates or misrepresenting their own inspection results as USDA's inspection results.

Fifth, the Lions contend the ALJ erroneously found the invoice trail is the last document prepared with respect to the transactions that are the subject of the instant proceeding, the invoice trail denotes customer specifications, and the invoice trail indicates whether the customer requested a USDA certificate. The Lions contend the invoice trail is a

Lion order form that indicates, among other things, whether the Lions requested a USDA certificate. (Appeal Pet. at 29-31.)

The record establishes that the invoice trail for each transaction that is the subject of the instant proceeding was prepared after the product reflected on the invoice trail had been inspected, graded, and shipped; therefore, the invoice trail could not be a “request” for a USDA certificate. Moreover, the record does not establish that the invoice trail was the last document prepared with respect to each transaction that is the subject of the instant proceeding. Consequently, I do not adopt the ALJ’s finding that the invoice trail was “the last document prepared,” and I do not find that the invoice trail establishes whether the Lions’ customers requested a USDA certificate.

Sixth, the Lions, citing the ALJ’s Decision and Order at 12 ¶ 14, contend the ALJ erroneously found USDA provided USDA certificates to the Lions’ designee (Appeal Pet. at 32).

As an initial matter, the ALJ did not find that USDA provided USDA certificates to the Lions’ designee, as the Lions assert. Instead, the ALJ found “[o]nce the FV-146 was prepared and signed, the original and up to four of the blue tissue copies were provided to the packer (or designee).” (ALJ’s Decision and Order at 12 ¶ 14.) Further, the ALJ’s Findings of Fact numbers 11 through 15 contain a description of AMS procedures applicable to packers generally, not simply procedures applicable to the Lions. Therefore, I reject the Lions’ contention that the ALJ’s Findings of Fact number 14, is error. I further note, the ALJ’s description of the manner in which AMS distributed inspection certificates to the packer or the packer’s designee comports with the Regulations, which provide as follows:

**§ 52.21 Disposition of inspection certificates.**

The original of any inspection certificate, issued under the regulations in this part, and not to exceed four copies thereof, if requested prior to issuance, shall be delivered or mailed promptly to the applicant, or person designated by the applicant. All other copies shall be filed in such manner as the Administrator may

designate. Additional copies of any such certificates may be supplied to any interested party as provided in § 52.49.

7 C.F.R. § 52.21.

Seventh, the Lions contend the ALJ's findings that the Lions requested and received cash back from the RAC are unsupported, irrelevant, and prejudicial (Appeal Pet. at 32-33).

The record establishes that, under a program operated by the RAC, packers who sold raisins for export could apply for, and receive, "cash back" for such sales by filing a RAC Form 100C. The amount of "cash back" was based on the weight of the raisins. The documents applicable to the transactions that are the subject of the instant proceeding establish that the Lions requested and received "cash back" from the RAC in virtually all of the transactions.<sup>40</sup> Therefore, I reject the Lions' contention that the ALJ's findings that the Lions applied for and received "cash back" are unsupported. Further, I find the ALJ's descriptions of the transactions, which are the subject of the instant proceeding, are neither irrelevant nor prejudicial.

Eighth, the Lions contend the ALJ's finding that the Lions charged a fee to customers that requested a USDA certificate, is error. The Lions state there is no evidence in the shipping files to support this finding of fact. (Appeal Pet. at 33-34.)

The ALJ found that "[o]nce Lion developed a 'Lion' certificate, Lion implemented the practice of charging its customers for USDA certificates" (ALJ's Decision and Order at 14 ¶ 19). The ALJ did not rely on the shipping files for this finding of fact. Instead, the ALJ relied upon an interview conducted by David W. Trykowski, Chief of Investigations, AMS Compliance Office, with Rosangela Wisley, a shipping clerk employed by the Lions. Ms. Wisley stated the Lions' customers were charged a fee for USDA certificates, as follows:

WISLEY said that at a certain point in time Lion Raisins began charging an extra fee for customers to receive a USDA certificate

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<sup>40</sup>CX 126A reflects the Lions' receipt of "cash back" from the RAC in all but six transactions.

but the customers were told they could receive a Lion certificate that contained the same information for no charge. WISLEY said Bruce LION had instructed the employees to tell customers that the Lion certificate was the equivalent of a USDA certificate.

CX 7. Therefore, I reject the Lions' contention that the ALJ's finding that the Lions had a practice of charging their customers for USDA certificates, is error.

Ninth, the Lions contend the ALJ's finding that the Lions advised their customers that Lion certificates contain the same information as USDA certificates, is error. The Lions contend the ALJ's support for this finding is unreliable hearsay. (Appeal Pet. at 35-37.)

The ALJ found "[c]ustomers were advised a 'Lion' certificate would be provided without charge and that Lion certificates contained the same information as a USDA certificate. See CX 73 at 44 ('Please note that the Lion certificate and the USDA certificate for each order is the same.')." (ALJ's Decision and Order at 14 ¶ 19.) The exhibit (CX 73 at 44) relied upon by the ALJ is a letter dated January 12, 2000, from Lion Raisins, Inc.'s export traffic administrator to NAF International - Copenhagen, which states, as follows:

Please find enclosed the USDA Certificates for the above mentioned shipments, per your request. We have also included copies of the Lion Certificates of Quality and Condition. Please note that the Lion certificate and the USDA certificate for each individual order is the same.

In an effort to remain competitive in the market, we began issuing Lion Quality and Condition certificates in place of the USDA. We do not feel it is justified to require Lion to absorb the cost of issuing USDA certificates when the Lion Certificate provides the same information (obtained from USDA). Please advise your customer that we will issue only Lion Certificates of Quality and Condition for future shipments, unless they are willing to compensate Lion for the administrative/clerical costs.

CX 73 at 44. I disagree with the Lions' contention that the letter is unreliable hearsay. As an initial matter, I find the Lions' own letter a reliable reflection of the advice the Lions provided to their customers. Moreover, I do not find the letter hearsay as it was used by the ALJ not as support for the matter asserted ("the Lion certificate and the USDA certificate for each individual order is the same"), but merely to show that the Lions gave the advice that the Lion certificate and the USDA certificate for each individual order is the same.<sup>41</sup>

Tenth, the Lions contend the ALJ's finding that Lion certificates were prepared not by the Lions' quality control personnel, but rather by those in the shipping department is misleading because the shipping department prepared Lion certificates from Lion check sheets and either USDA line check sheets or USDA worksheets (Appeal Pet. at 37-38).

The Lions do not allege error by the ALJ, and I find none. The Lions appear to agree with the ALJ's finding that "Lion certificates were prepared not by Lion's quality control personnel, but rather by those in the shipping department." (ALJ's Decision and Order at 14 ¶ 20.)

Eleventh, the Lions contend the ALJ's finding that Lion certificates follow the same format and provide the same information as USDA certificates, is error (Appeal Pet. at 38-41).

The ALJ found "Lion certificates were prepared on Lion letterhead but follow the same format used on the FV-146 in the body of the document, providing the same information categories found on the USDA's worksheet and/or certificate." (ALJ's Decision and Order at 14 ¶ 20.) Based upon a comparison of the USDA certificates and the Lion certificates in the record, I agree with the ALJ's finding that Lion certificates followed the same format as USDA certificates and provided the same information categories as are found on the USDA's certificates. (Compare, e.g., CX 73 at 34 and CX 73 at 49.)

The Lions also state no customers complained that they mistook Lion certificates for USDA certificates and state they have changed the Lion certificates and improved their audit trails in an attempt to satisfy

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<sup>41</sup>*In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2508 (1985) (stating "Mr. Gentry's testimony as to what Mr. Kostecky requested would not have been hearsay since it would have been offered only to show that Mr. Kostecky made the request; not to show the truthfulness of what Mr. Kostecky said. See 6 Wigmore, *Evidence* § 1766 (Chadbourne rev. 1976).").

USDA's concerns (Appeal Pet. 40-41). I find both of these statements irrelevant to the issues in the instant proceeding.

The Lions suggest that I decline to adopt the ALJ's finding that the Lion certificates "follow" the same format used on the USDA certificates, and, instead, use the past tense "followed" to indicate that the finding regarding similarity of format with regard to the Lion certificates and the USDA certificates relates only to the period material to the instant proceeding. I adopt the Lions' suggestion. (See Finding of Fact number 17, *supra*.)

Twelfth, the Lions contend the ALJ erroneously found the Lions' customers requested USDA certificates (Appeal Pet. at 41-47).

The ALJ relied on the notation "USDA Cert: YES" on the invoice trails as support for his finding that the Lions' customers requested USDA inspection certificates (see, e.g., CX 107 at 1); however, Mr. Trykowski testified he had been informed by former Lion employees that the notation "USDA Cert: YES" on the invoice trails indicates the Lions requested a USDA certificate (Tr. 161) and Mr. Bruce Lion confirmed Mr. Trykowski's testimony (Tr. 1483-84). Therefore, except for the four transactions in which the Lions state their customers did request USDA certificates (Appeal Pet. at 46-47; Findings of Fact 23, 27, 35, and 41, *supra*), I do not adopt the ALJ's findings that the Lions' customers requested USDA certificates.

Thirteenth, the Lions contend the ALJ erroneously suggested the Lions' retention of USDA worksheets and certificates was wrongful (Appeal Pet. at 41-47).

The evidence indicates the Lions' retention of USDA certificates and worksheets was lawful (Tr. 289-90). However, the Lions do not cite and I cannot locate any finding by the ALJ suggesting the Lions' retention of USDA worksheets and certificates was wrongful. Therefore, I reject the Lions' contention that the ALJ erroneously suggested the Lions' retention of USDA worksheets and certificates was wrongful.

Fourteenth, the Lions contend the ALJ erroneously found the Lions' customers ordered U.S. Grade B raisins in the majority of orders. The Lions assert that the ALJ based this finding on the notation "Grade: B" on the invoice trails and that the notations on those invoice trails only

relate to maturity. The Lions further assert their customers were willing to accept raisins that met the overall standards for U.S. Grade C raisins as long as the raisins met the U.S. Grade B standards for maturity. (Appeal Pet. at 47-53, 109-10, 112-14.)

U.S. Grades, as applied to raisins, are based upon a number of factors, only one of which is maturity.<sup>42</sup> The Regulations contain no U.S. Grade B designation for maturity only. The Lions' representations that raisins that had been graded by USDA as U.S. Grade C, were U.S. Grade B, because the raisins met the standards for U.S. Grade B based only upon maturity of the raisins was an impermissible use of the U.S. Grade designation. Therefore, I reject the Lions' argument that they accurately represented raisins as U.S. Grade B, even though the raisins had been graded by USDA as U.S. Grade C.

Fifteenth, the Lions contend the ALJ erroneously found that on 21 occasions the Lions' customers ordered raisins with a maximum moisture percentage. The Lions contend customers specified a maximum moisture percentage with respect to only four loads of raisins (CX 71, CX 73, CX 117) and the remaining moisture percentages specified in documents related to these transactions are merely the Lions' internal targets for moisture percentage, not customer specifications. (Appeal Pet. at 53-61.)

I have reviewed the invoice trails and other documentation related to the transactions in question and find the record supports the ALJ's findings that the Lions' customers ordered raisins with maximum moisture percentages. For example, with respect to order number 44351, the record establishes that Central Import placed an order for raisins with a maximum moisture content of 15.5 percent. The invoice trail reflects this order (CX 115 at 1 ("Moisture %: 15.5% Max")) and all of the documents related to this transaction indicate that Central Import specified the maximum moisture percentage. I find nothing in the documents related to this transaction indicating that the maximum moisture percentage is merely an internal target set by the Lions. If the maximum moisture percentage were merely an internal target set by the Lions, there would be no basis for the post-it note to Bruce Lion from a Lion employee stating the moisture percent did not meet the

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<sup>42</sup>See 52 C.F.R. §§ 52.1846, .1849, .1852, .1853, .1855, .1857, .1858.

specifications in the order (CX 115 at 15) and no reason for the Lion certificate to reflect the information in the USDA certificate, except to indicate that the moisture was 15.5% rather than the 17% found by USDA inspectors (CX 115 at 18-19, 21).

Sixteenth, the Lions contend their test results more accurately reflect the quality and condition of raisins than the USDA test results, contend USDA inspections are not accurate or reliable, and contend USDA line check sheets, worksheets, and certificates are untrustworthy (Appeal Pet. at 57, 62-64, 74-81, 114-16, 131, 135-37).

Even if I were to find that the Lions' test results more accurately reflect the quality and condition of raisins than USDA test results and that USDA inspections are not accurate or reliable, I would not dismiss the instant proceeding. The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results, not whether the Lions' test results more accurately reflect the quality and condition of raisins than USDA test results or whether USDA inspections are accurate and reliable. I find the relative accuracy of USDA test results and the Lions' test results and the accuracy and reliability of USDA inspections irrelevant to the instant proceeding.

Seventeenth, the Lions contend the ALJ concluded the Lions obliterated USDA certificate Y-034343, but did not make a finding that the Lions had obliterated USDA certificate Y-034343 (Appeal Pet. at 62).

The ALJ concluded the Lions obliterated "a portion of the remarks section of [USDA] certificate" B-034343 (ALJ's Decision and Order at 47 ¶ 6aa). I agree with the Lions that the ALJ made no finding of fact that corresponds to this conclusion; therefore, I do not adopt the ALJ's conclusion regarding obliteration of a portion of the remarks section of USDA certificate B-034343.

Eighteenth, the Lions contend the ALJ concluded the Lions used USDA certificate B-034321 to misrepresent the moisture and size of raisins sold by the Lions to Borges, S.A., but the ALJ did not make a finding that the Lions misrepresented the size of the raisins (Appeal Pet.

at 61-62).

The ALJ concluded the Lions used an official inspection certificate (B-034321) as a basis to misrepresent the size of raisins sold by the Lions to Borges, S.A. (ALJ's Decision and Order at 46 ¶ 6y). I agree with the Lions that the ALJ made no finding of fact that corresponds to this conclusion; therefore, I do not adopt the ALJ's conclusion regarding the misrepresentation of raisin size with respect to this transaction.

Nineteenth, the Lions contend that they presented reasonable explanations for handwritten post-it notes that are in the Lions' shipping files (Appeal Petition at 64-74).

The record contains handwritten post-it notes (CX 55 at 5, CX 75 at 18, CX 77 at 21, CX 81 at 25, CX 103 at 2, CX 115 at 15, CX 117 at 13). The ALJ correctly quoted statements on the post-it notes, and I reject the Lions' explanations for the post-it notes. Instead, I find each of the post-it notes indicates that Bruce Lion instructed the Lions' employees to prepare Lion certificates so that those certificates contained information indicating that the Lions' raisins met customer specifications, when USDA did not certify the raisins as meeting customer specifications. (See Findings of Fact numbers 23, 29, 33, 35, 46-47, 49, *supra*).

Twentieth, the Lions assert the ALJ failed to address a number of relevant and material facts. The Lions identify those purportedly relevant and material facts, as follows: (1) USDA has a contractual obligation to warn the Lions of their violations of the Agricultural Marketing Act and the Regulations; (2) the Lions received complaints about the accuracy of USDA certificates; (3) the Lions implemented a quality control department and testing procedures; (4) USDA's testing and inspection procedures were faulty; (5) the Lions' certificates accurately reflected the quality of their raisins; (6) the Lions did not receive complaints from their customers; (7) the Lions had outstanding business ethics; (8) the Lions made good faith efforts to demonstrate and achieve compliance with the Agricultural Marketing Act and the Regulations; (9) debarment would have an adverse impact on the Lions, the Lions' employees, minorities, the local community, the California raisin industry, growers, packers, and vendors; and (10) USDA found that Lion Raisins, Inc., is a responsible bidder to be awarded contracts.

(Appeal Pet. at 82-84, 123-24.)

I do not address whether the evidence supports any of the facts listed by the Lions. However, I find that none of the purported facts listed is relevant and material to the issue of whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in violation of the Agricultural Marketing Act and the Regulations. Therefore, I reject the Lions' assertion that the ALJ erroneously failed to address relevant and material facts.

Twenty-first, the Lions contend the ALJ erroneously concluded that the Lions' use of the term "officially drawn" on Lion certificates is an impermissible attempt to extend the meaning of the term "officially drawn sample" to include results found by the Lions' quality control personnel (Appeal Pet. at 108-09, 116-18).

I find the ALJ correctly determined that the Lions used the term "officially drawn" on Lion certificates to falsely equate the Lion certificates and the information on the Lion certificates with USDA certificates (ALJ's Decision and Order at 37 ¶ 2). The term "officially drawn sample" is defined in the Regulations, as follows:

**§ 52.2 Terms defined.**

Words in the regulations in this part in the singular form shall be deemed to import the plural and vice versa, as the case may demand. For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

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*Officially drawn sample.* "Officially drawn sample" means any sample that has been selected from a particular lot by an inspector, licensed sampler, or by any other person authorized by the Administrator pursuant to the regulations in this part.

7 C.F.R. § 52.2. Samples drawn by the Lions' quality control personnel are not "officially drawn sample[s]." The term "officially drawn" on Lion certificates is a legend signifying that the product has been

officially inspected. The results on the Lion certificates are in fact not from officially inspected samples; therefore, the Lion certificates constitute misrepresentations.

Twenty-second, the Lions contend the ALJ's conclusion that they willfully violated the Agricultural Marketing Act and the Regulations, is error (Appeal Pet. at 122-23).

An act is considered "willful" under the Administrative Procedure Act if the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice or (2) acts with careless disregard of statutory requirements.<sup>43</sup> The Lions' long-standing pattern of misrepresentation or deceptive or fraudulent practices or acts, in connection with the use of official inspection certificates and/or inspection results, constitutes careless disregard of the Agricultural Marketing Act and the Regulations, and the Lions' violations are clearly willful.

Twenty-third, the Lions contend USDA is attempting to punish the Lions for their violations of the Agricultural Marketing Act and the Regulations (Appeal Pet. at 123, 130, 133-35).

Debarment from the benefits of the Agricultural Marketing Act is remedial, not punitive.<sup>44</sup> The purpose of debarment is to prevent those who engage in misrepresentation or deceptive or fraudulent practices or acts from

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<sup>43</sup>*Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991).

<sup>44</sup>*See United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir.) (determining debarment is not punishment), *cert. denied*, 519 U.S. 1047 (1996); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) (stating the provision in the Generic Drug Enforcement Act for civil debarment was remedial where debarment served compelling government interests unrelated to punishment and punitive effects were merely incidental to the overriding purpose to safeguard the integrity of the generic drug industry while protecting public health); *United States v. Holtz*, 1993 WL 482953 \*11 (E.D. Pa. 1993) (stating debarment is designed to purge government programs of corrupt influences and to prevent improper dissipation of public funds; removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition), *aff'd*, 31 F.3d 1174 (3d Cir. 1994) (Table).

protect the integrity of the inspection service and to protect the public.<sup>45</sup> Debarment of such persons is designed to ensure that quality and condition standards are uniform and consistent, so that consumers obtain the quality product they desire unaffected by corrupt influences. Therefore, I reject the Lions' contention that USDA is attempting to punish the Lions.

Twenty-fourth, the Lions assert the ALJ had discretion to reject the Administrator's recommended remedy and impose no debarment even if the ALJ found the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts. The Lions also assert the Administrator's remedy recommendation is not entitled to any weight. (Appeal Pet. at 132-33, 138-41.)

I agree with the Lions' assertion that the ALJ had discretion to impose no period of debarment despite a finding that the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts. The Regulations clearly provide that any misrepresentation or deceptive or fraudulent practice or act "may be deemed sufficient cause for . . . debarment[.]"<sup>46</sup> However, I find no indication that the ALJ was unaware that he could find the Lions violated the Agricultural Marketing Act and the Regulations and also determine that the Lions' violations were not a sufficient cause for debarment.

I reject the Lions' assertion that the remedy recommendations of administrative officials are entitled to no weight. Instead, I conclude the recommendations of administrative officials charged with the responsibility for achieving the congressional purposes of the Agricultural Marketing Act are entitled to great weight and must be considered by the administrative law judge when determining whether

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<sup>45</sup>See *Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (stating a 5-year suspension from the Medicare program was remedial because its purpose was to protect the public from those who defraud the program); *United States v. Drake*, 934 F. Supp. 953, 959 (N.D. Ill. 1996) (stating suspension from obtaining loans from the Commodity Credit Corporation for failure to employ good faith in disposition of secured crops "is not punitive in nature, rather, the regulation exists to protect the integrity of the CCC and the price support loan program").

<sup>46</sup>7 C.F.R. § 52.54(a).

to debar a person for engaging in fraud or misrepresentation described in 7 C.F.R. § 52.54(a). However, administrative officials' recommendations are not controlling and may be rejected by the administrative law judge. The ALJ rejected the 15-year debarment period recommended by administrative officials and imposed a 5-year debarment period; thereby indicating the ALJ fully understood that the recommendations of administrative officials are not controlling.

Twenty-fifth, the Lions contend one of the purposes of the Agricultural Marketing Act is the promotion of the marketing of agricultural products through voluntary inspections and debarment of the Lions from receiving USDA inspection services is contrary to this purpose of the Agricultural Marketing Act (Appeal Pet. at 135).

The Secretary of Agriculture is directed and authorized to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products in accordance with orders, rules, and regulations as the Secretary of Agriculture deems necessary to carry out the Agricultural Marketing Act.<sup>47</sup> The Secretary of Agriculture's debarment regulations (7 C.F.R. § 52.54) establish a means to maintain public confidence in the integrity and reliability of the processed products inspection service by withdrawing USDA services from persons who have engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with inspection certificates and/or inspection results. I find the maintenance of public confidence in the integrity and reliability of the processed products inspection service is fully consistent with the purposes of the Agricultural Marketing Act.

Twenty-sixth, the Lions assert any conclusion that the Lions lack present business integrity would be arbitrary and capricious (Appeal Pet. 144-51).

The Lions do not cite and I cannot locate any conclusion of law by the ALJ that states the Lions "lack present business integrity." Therefore, I reject, as speculative, the Lions' assertion that any conclusion that the Lions lack present business integrity "would be" arbitrary and capricious.

Twenty-seventh, the Lions contend the ALJ's imposition of a 5-year period of debarment is unreasonable under the circumstances (Appeal

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<sup>47</sup> 7 U.S.C. §§ 1622(h), 1624(b).

Pet. at 151-54).

In light of the number and the nature of the Lions violations of the Agricultural Marketing Act and the Regulations and the 2-year period during which the Lions violated the Agricultural Marketing Act and the Regulations, I find the ALJ's imposition of a 5-year period of debarment reasonable and conclude the 5-year period of debarment is sufficient and necessary to maintain public confidence in the integrity and reliability of the processed products inspection service.

Twenty-eighth, the Lions contend the ALJ erroneously debarred Lion Raisins, Inc.'s employees, successors, and assigns (Appeal Pet. at 154).

The Regulations provide any person committing an act or engaging in a practice or causing an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all of the benefits of the Agricultural Marketing Act. In addition, the Regulations provide that "agents, officers, subsidiaries, or affiliates" of the person who actually committed an act or engaged in a practice or caused an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all benefits of the Agricultural Marketing Act. The Regulations do not identify "employees, successors, and assigns" as subject to debarment. Therefore, I do not adopt the ALJ's Order debarring Lion Raisins, Inc.'s "employees, successors, and assigns." Instead, I debar Lion Raisins, Inc., and its agents, officers, subsidiaries, and affiliates, as provided in the Regulations.

Twenty-ninth, the Lions contend the Administrator did not present one "iota or scintilla of evidence" that Alfred Lion, Jr.; Isabel Lion; Larry Lion; or Jeffrey Lion violated the Agricultural Marketing Act or the Regulations; therefore, the ALJ's debarment of Alfred Lion, Jr.; Isabel Lion; Larry Lion; and Jeffrey Lion, is error (Appeal Pet. at 154).

As an initial matter, Isabel Lion and Larry Lion did not appeal the ALJ's June 9, 2006, Decision and Order and the ALJ's debarment of Isabel Lion and Larry Lion became final and effective in July 2006. As for Alfred Lion, Jr., and Jeffrey Lion, the record establishes they were officers of Lion Raisins, Inc., and Lion Raisins, Inc., is not an entity separate and apart from Alfred Lion, Jr., and Jeffrey Lion. Therefore, even if I were to find that the Administrator presented no evidence that

Alfred Lion, Jr., and Jeffrey Lion violated the Agricultural Marketing Act and the Regulations, that finding would not affect my disposition of the instant proceeding as to Alfred Lion, Jr., and Jeffrey Lion.

Thirtieth, the Lions contend the ALJ's Decision and Order providing that the Lions may petition the Secretary of Agriculture or the Secretary's designee, is error, and the Order should be modified to provide that the Lions may petition the ALJ or the Judicial Officer (Appeal Pet. at 154-55).

The ALJ provided that the 5-year period of debarment may be suspended, as follows:

3. After a period of one year, upon a showing of good faith and adequate assurances of future compliance, the Respondents, or any of them, may petition the Secretary or his designee to suspend the balance of the period of debarment; however, with such suspension conditioned upon no violations being found during the remaining period of suspension. In the event additional violations were to be found, the full suspended balance of the period of debarment would then be reinstated.

ALJ's Decision and Order at 50. I find the third paragraph in the ALJ's Order is superfluous as a party may seek suspension of a period of debarment from benefits under the Agricultural Marketing Act and the ALJ lacked authority to impose restrictions on a party's request for suspension of a period of debarment. Therefore, I do not adopt that portion of the ALJ's Order which limits the Lions' right to seek suspension of the 5-year period of debarment from benefits under the Agricultural Marketing Act.

#### **The ALJ Erred in Dismissing Allegations as Time-Barred**

On December 20, 2005, the ALJ issued a Memorandum of Conference and Order dismissing paragraphs 11 through 89 of the Second Amended Complaint on the ground that they alleged violations that were time-barred by reason of 28 U.S.C. § 2462.

The limitation in 28 U.S.C. § 2462 applies only to proceedings for

“civil fines, penalties, and forfeitures,” and is strictly construed in favor of the government.<sup>48</sup> Debarment is not a fine, penalty, or forfeiture. Debarment is “the act of precluding someone from having or doing something” and “does not extract payment in cash or in kind.”<sup>49</sup> Forfeiture, on the other hand, imposes a loss by the taking away of some specific property or preexisting valid right without compensation.<sup>50</sup> Moreover, 28 U.S.C. § 2462 applies to “penalty actions”<sup>51</sup> and debarment is not penal.

The United States Supreme Court, interpreting the predecessor

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<sup>48</sup>*E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (stating statutes of limitations sought to be applied to bar rights of the government must receive a strict construction in favor of the government); *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918) (stating this court strictly construes statutes of limitations when urged to apply those statutes to bar the rights of government); *United States v. Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886) (stating the United States, asserting its rights vested in it as a sovereign government, is not bound by any statute of limitations unless Congress has clearly manifested its intention that the United States should be so bound).

<sup>49</sup>*In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 186 n.6 (2001) (citing *Printup v. Alexander & Wright*, 69 Ga. 553, 556 (Ga. 1882) (“to debar” is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); *Haynesworth v. Hall Constr. Co.*, 163 S.E. 273, 277 (Ga. Ct. App. 1932) (“to debar” is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); BLACK’S LAW DICTIONARY 407 (7th ed. 1999) (defining debarment as the act of precluding someone from having or doing something; exclusion or hindrance); WEBSTER’S COLLEGIATE DICTIONARY 296 (10th ed. 1997) (defining “debar” as to bar from having or doing something); 4 THE OXFORD ENGLISH DICTIONARY 308 (2d ed. 1991) (defining “debar” as to exclude or shut out from a place or condition; to prevent or prohibit from entrance or from having, attaining, or doing anything)).

<sup>50</sup>*L & K Realty Co. v. R.W. Farmer Const. Co.*, 633 S.W.2d 274, 279 (Mo.App.1982).

<sup>51</sup>*United States v. Rebelo*, 358 F. Supp.2d 400, 408 (D.N.J. 2005) (stating 28 U.S.C. § 2462, the catch-all statute of limitations, has particular applicability to penalty actions).

statute to 28 U.S.C. § 2462, has said that “penalty or forfeiture” means “something imposed in a punitive way for an infraction of public law.” *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed 644 (1915). Where the liability sought to be enforced is not punitive, but rather “strictly remedial,” the catch-all statute of limitations does not apply. *Id.*

*United States v. Rebelo*, 358 F. Supp.2d 400, 408-09 (D.N.J. 2005) (footnote omitted). Debarment from the benefits of the Agricultural Marketing Act is strictly remedial.<sup>52</sup> The purpose of debarring those who engage in misrepresentation or deceptive or fraudulent practices or acts is to protect the integrity of the inspection service and to protect the

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<sup>52</sup>See *United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir.) (determining categorically that debarment is not punishment), *cert. denied*, 519 U.S. 1047 (1996); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) (stating the Generic Drug Enforcement Act’s provision for civil debarment was remedial where debarment served compelling government interests unrelated to punishment and punitive effects were merely incidental to the “overriding purpose to safeguard the integrity of the generic drug industry while protecting public health.”); *United States v. Furlett*, 974 F.2d 839, 844 (7th Cir. 1992) (stating debarment from all trading activity reasonably can be viewed as a remedial measure); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (stating removal of persons whose participation in government programs is detrimental to public purposes is remedial by definition); *Taylor v. Cisneros*, 913 F. Supp. 314, 320 (D.N.J. 1995) (stating, while debarment manifestly carried the “sting of punishment” in the eyes of the defendant, that alone could not recast a remedial measure as punishment because the analysis does not proceed from the defendant’s perspective; purposes, not deterrent effects, are paramount), *aff’d*, 102 F.3d 1334 (3d Cir. 1996); *United States v. Holtz*, 1993 WL 482953 (E.D. Pa. 1993) (holding the Federal Aviation Administration’s revocation of an aviation license for violating federal aviation regulations by falsifying maintenance records subject to FAA inspection was not a punitive sanction), *aff’d*, 31 F.3d 1174 (3d Cir. 1994) (Table); *Doe v. Poritz*, 142 N.J. 1, 43 (1995) (stating a statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions; a law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: the intent to punish.).

public.<sup>53</sup> The exclusion of such persons helps to ensure that quality and condition standards are uniform and consistent, so that consumers may be able to obtain the quality product that they desire unaffected by corrupt influences.

Therefore, I conclude debarment under section 52.54 of the Regulations (7 C.F.R. § 52.54) is not “a fine, penalty, or forfeiture” and the statute of limitations in 28 U.S.C. § 2462 does not apply to the instant proceeding. The ALJ’s determination that paragraphs 11 through 89 of the Second Amended Complaint are time-barred, is error; however, even if I were to remand the instant proceeding to the ALJ and he were to find the Lions committed the violations alleged in paragraphs 11 through 89 of the Second Amended Complaint, I would not change the disposition of the instant proceeding. Therefore, I decline to remand the proceeding to the ALJ, and I dismiss paragraphs 11 through 89 of the Second Amended Complaint.

For the foregoing reasons, the following Order is issued.

### ORDER

1. Lion Raisins, Inc., and its agents, officers, subsidiaries, and affiliates are debarred for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.
2. Alfred Lion, Jr.; Bruce Lion; Daniel Lion; and Jeffrey Lion are each debarred for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.
3. This Order shall become effective 30 days after service of this Order on the Lions.

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<sup>53</sup>See *Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (stating a 5-year suspension from the Medicare program was remedial because its purpose was to protect the public from those who defraud the program); *United States v. Drake*, 934 F. Supp. 953, 959 (N.D. Ill. 1996) (stating suspension from obtaining loans from the Commodity Credit Corporation for failure to employ good faith in disposition of secured crops “was not punitive in nature, rather, the regulation exists to protect the integrity of the CCC and the price support loan program.”).

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**AND**

**In re: BRUCE LION, AN INDIVIDUAL; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AND LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.**

**I&G Docket No. 01-0001.**

**I&G Docket No. 03-0003.**

**Decision and Order.**

**May 4, 2009.**

**I&G – Debarment – Inspection certificates, forged, altered or falsified.**

Colleen Carroll for AMS.

James A. Moody, Wesley T. Green, Daniel A. Bacon for Respondents.

*Decision and Order by Administrative Law Judge Jill S. Clifton.*

### **Decision Summary**

1. To protect the integrity of USDA inspection, analysis, and reporting of raisin quality, considering the unauthorized and unlawful alteration or fabrication of official USDA inspection certificates that occurred in the shipping department of Lion Raisins, Inc., in Fresno or Selma, California, in 1997-98, I decide the length of debarment (being banned from receiving USDA inspection and grading services), if any, that is necessary, appropriate and proportionate, as to each Respondent. I

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decide that, for Bruce Lion, who managed the shipping department, debarment not to exceed 36 months is necessary, appropriate and proportionate. Bruce Lion was responsible for what the shipping department did (or failed to do), and the shipping department's actions (or failures to act) cause each of the three respondent companies (1) Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and Lion Raisins; (2) Lion Raisin Company, a partnership or unincorporated association; and (3) Lion Packing Company, a partnership or unincorporated association; to be subjected, likewise, to debarment not to exceed 36 months. Dan Lion, also known as Daniel Lion, managed production and the packing department and did not know of the shipping department's unauthorized and unlawful alteration or fabrication of official USDA inspection certificates, but I nevertheless decide that, for Dan Lion, debarment not to exceed three months is necessary, appropriate and proportionate, based on the contribution of the packing department to product being out-of-customer-specifications. For the four remaining Respondents, each an individual, I decide that no debarment is necessary, appropriate or warranted: (1) Al Lion, Jr., also known as Alfred Lion, Jr.; (2) Jeff Lion, also known as Jeffrey Lion; (3) Larry Lion; and (4) Isabel Lion; each of whom could not have known, nor should any of them have known, of the unauthorized and unlawful alteration or fabrication of official USDA inspection certificates that occurred in the shipping department. 7 U.S.C. § 1621 *et seq.*, 7 C.F.R. § 52 *et seq.*

### **Introduction**

2. Lion's shipping department, on occasion, provided an inspection certificate to a customer, to apprise the customer of the condition and quality of a shipment of raisins. Lion's shipping department was managed by Bruce Lion during the time material herein, including about March 14, 1997 through about April 27, 1998 ("01" case, referring to I&G Docket No. 01-0001) including August 26, 1997 ("03" case, referring to I&G Docket No. 03-0001). What Lion provided to its customer did not, at times, match the USDA inspection certificate copy in USDA's files. Lion asserts that the fault lay with USDA's record-keeping failures. Evidence to the contrary comes from two sources: documentation surrounding inspection certificate issuance, found in Lion's own files as well as USDA's files; and the experience of Lion office workers, who testified, who were responsible for creating inspection certificates that never were issued by USDA. What Lion Raisins FAXed to its customer was not what USDA records showed that USDA had issued. The sinister explanation: In order to convey to Lion's customer that the customer got what it ordered, Lion personnel in the shipping department routinely forged, altered, or otherwise falsified the official USDA results. The innocent explanation: USDA did determine the condition of the raisins to be as stated on the certificate that was FAXed to Lion's customer, but USDA's record-keeping did not keep up with events on the ground. Further, the certificate that was FAXed to Lion's customer conveyed the true condition of the raisins.

3. There are seven (7) inspection certificates at issue, delivered to Lion customers, six (6) in the "01" case; one (1) in the "03" case. Of the seven certificates delivered to Lion customers, one certificate has a discrepancy between the USDA official grade, based on USDA records, and the grade shown to the Lion customer AS IF it were the USDA official grade. The remaining six certificates have discrepancies between the USDA official moisture content, based on USDA records, and the moisture content shown to the Lion customer AS IF it were the USDA official moisture content.

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#### **Parties and Counsel**

4. The Complainant is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (frequently herein “AMS” or the “Complainant”).

5. AMS is represented by Colleen A. Carroll, Esq., with the Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

6. By “Lion,” I refer to all Respondents, collectively. The Respondents are Bruce Lion, who was an important salesman, the manager of the shipping department, and the corporate Vice President; the three respondent companies (1) Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and Lion Raisins; (2) Lion Raisin Company, a partnership or unincorporated association; and (3) Lion Packing Company, a partnership or unincorporated association; Dan Lion, also known as Daniel Lion, who was the manager of the packing department (“processing”) (Dan was given an operating title of “Vice President” to acknowledge his importance, but Dan was not truly a corporate officer); Al Lion, Jr., also known as Alfred Lion, Jr., who was Chief Executive Officer and Chief Financial Officer, handled the check book, was the corporate President, a corporate Director, a corporate shareholder, and the corporate registered agent; Jeff Lion, also known as Jeffrey Lion, who was the manager of the farm operations (“growing” and “growers”) (Jeff also was given an operating title of “Vice President” to acknowledge his importance, but Jeff was not truly a corporate officer); Larry Lion, who was corporate Secretary-Treasurer, a corporate Director, and a corporate shareholder; and Isabel Lion, who was a corporate Director, and a corporate shareholder.

7. The Respondents are represented by James A. Moody, Esq., Suite 300, 1101 30th St. N.W., Washington, D.C. 20007; and Wesley T. Green, JD MBA, Corporate Counsel for Lion Raisins, Inc., 9500 S. DeWolf Avenue, P.O. Box 1350, Selma, CA 93662. Bruce Lion was also represented by Daniel A. Bacon, Esq.

### Procedural History

8. Violations are alleged of the Agricultural Marketing Act of 1946, as amended, 7 U.S.C. § 1621 *et seq.*, and the regulations, 7 C.F.R. Part 52, in both the Second Amended Complaint filed on July 2, 2002 in the “01” case, and the Amended Complaint filed on July 12, 2005 in the “03” case. Respondents’ Answer was filed July 29, 2002. Ironically, it was Brian Leighton, former attorney for Lion, who then asked that any other amendments be filed in a new case. That’s what gave rise to the “03” case. The “03” case has a dramatic history. The “03” case was decided in AMS’s favor by default, but the U.S. District Court put a stop to that. Then the “03” case was decided in Lion’s favor by dismissal based on the statute of limitations, but the Judicial Officer has put a stop to that.

9. The hearing in the “01” case took 72 days; the hearing in the “03” case began on June 9 and 10, 2008 and was not concluded. The transcript is referred to as “Tr.” All of the proposed transcript corrections are accepted, and the transcript is ordered corrected accordingly.

10. Respondents’ oral motion for consolidation is hereby granted; I hereby consolidate for decision the two cases (the “01” case and the “03” case); receive into evidence in the “03” case all the evidence admitted in the “01” case; and receive into evidence in the “03” case, over objection, the exhibits delivered to me on June 9, 2008: Complainant’s exhibits CX 1 through CX 4; and CX 6 through CX 12; and the three volumes of Respondents’ exhibits, RX 1 through RX 148.

11. All motions to reopen the evidence in the “01” case are denied, and no additional evidence will be received in either case, the “01” case or the “03” case. On careful review of the record before me, I find sufficient evidence to render a decision; additional proceedings will do nothing more than waste resources, mine, AMS’s and Lion’s. More proceedings will not provide new insight into Lion’s business operations or AMS’s inspection and grading operations and will not alter my views on the outcome of these proceedings.

12. All motions to certify questions to the Judicial Officer are denied.

13. On the statute of limitations issue in the “03” case, I adopt in its

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entirety the reasoning on that issue of the Judicial Officer in his Decision and Order issued April 17, 2009 in *In re Lion Raisins, Inc.*, I&G Docket No. 04-0001 (the “04” case), except that I do not dismiss any of the “03” case. *See pp. 87-91.*

14. AMS’s Motion to Rescind Order Assigning Mediator is denied.
15. All other pending motions are denied, to the extent that they are not addressed in this Decision and Order.

#### **Findings of Fact and Conclusions**

16. Paragraphs 17 through 35 contain intertwined Findings of Fact and Conclusions.

17. The Secretary of Agriculture has jurisdiction over each Respondent and the subject matter involved herein.

18. No penalties are imposed by this Decision & Order. No civil penalties are authorized by Statute. 7 U.S.C. § 1621 *et seq.* The Statute authorizes criminal penalties, but no criminal case was filed, and this is a civil case.

19. Regarding the inspection certificates addressed in this Decision, seven of them, from 1997-98, which were provided to Lion customers by Lion’s shipping department, the evidence shows that Lion’s shipping department took impermissible short cuts, conforming inspection certificates to customers’ specifications without taking the required steps designed to re-determine the actual quality and condition of the raisins.

20. What is really alarming is that, in 1997-98, Lion shipping clerks routinely fabricated or altered official USDA inspection certificates when the inspector’s worksheet (the worksheet was used to communicate the findings that go on the inspection certificate), reflected something other than the customer’s specifications. Lion shipping clerks even forged inspectors’ names, and even used “white-out” to change the grade (the “white-out” and alteration are quite noticeable on the original but would not be noticeable on a FAXed photocopy). The testimony of Dorothy Proffitt Hamilton (CX 31a, 31b, Tr. 495-96) and the testimony of Ken Turner (CX 36, 36a, Tr. 1552-53, 1559-1563)

persuade me that this is true, that they both had done it, too, routinely enough that they did not even remember the occasion of their first forgery, and that Bruce Lion was aware it was being done.

21. By altering or fabricating official USDA inspection certificates, Lion's shipping department thereby attributed to USDA unfounded statements of quality and condition. Thus, since USDA had not made the findings, creating an inspection certificate that said USDA had, was a misrepresentation, or deceptive or fraudulent practice or act. That may be deemed sufficient cause for debarment. 7 C.F.R. § 54.

22. Even when the altered or fabricated inspection certificate was more accurate as to the quality and condition of the raisins, creating it was still a misrepresentation, or deceptive or fraudulent practice or act, because its findings are falsely attributed to USDA.

23. Lion worked hard to deliver to its customers what its customers requested; which is one reason why Lion had sold and continued to sell a huge quantity of its California raisins all over the world. There is no evidence of what the moisture content was, of the raisins delivered to Lion's customers, or how that compared to the raisins' moisture content shown on the inspection certificates addressed in this Decision. Bruce Lion testified that if a certificate did not match customer specifications, Lion's salesman would get upset, point a finger at the shipping department employee, who would point finger at USDA, "and so it created quite a commotion." Tr 13,368. What DID customers complain about? Not that raisins were too wet, testified Bruce Lion. Tr 13,367. Sometimes that they were too hard (too dry). Stems, capstems, stickiness. Tr 13,367. Free-flowingness (related to damage more than to moisture).

24. Lion was aware that measuring raisin moisture content is not an exact science. There is of course variability from raisin to raisin: 12 pounds of raisins taken as a sample during an hour, when 40,000 pounds of raisins passed through the stemmer, may vary from a different 12 pounds taken as a sample. Tr. 12,808-10. Even using the same sample can yield a different moisture content reading, depending on the method of taking the reading. Lion was aware that many of its shipments would lose moisture during shipping. Lion was aware that many of its customers used different equipment to measure moisture than that used

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by the inspectors at Lion's plant. If Lion needed to communicate all such factors to its customers, to assure them they were getting what they requested, despite a USDA inspection certificate that said something else, a cover letter, or a phone call, could have been the remedy. To choose unauthorized and unlawful alteration or fabrication of official USDA inspection certificates, was an arrogant and stupid choice.

25. AMS has good cause to be outraged by the unauthorized and unlawful alteration of official USDA inspection certificates that I find happened in 1997-98. Lion showed disrespect to AMS's authority over raisin inspection and grading. Of the individual respondents, only Bruce Lion could have known of the unauthorized and unlawful acts. Not even the USDA inspection and grading personnel on Lion's premises knew (all of whom worked for USDA, some as USDA employees and some as "contractors"), and they had control mechanisms in place to prevent just such happenings, accountability mechanisms. No, were it not for the anonymous tip, and the subsequent investigative work by Ms. Martinez-Esquerria and Mr. David W. Trykowski, no one but shipping department workers would have known. Therefore debarment makes no sense for the individuals who did not know and could not reasonably have been expected to know of the unauthorized and unlawful acts: Al Lion, Jr., Jeff Lion, Larry Lion, and Isabel Lion.

26. AMS sought 36 years debarment for each Respondent, for the six inspection certificates (described in 18 alleged violations) in the "01" case. AMS Br. at 105, 180.

27. A primary value of debarment is deterrence, not only at Lion, but also where others use inspection and grading services. Deterrence is a benefit in remedial actions, such as this, as well as in punitive actions. I conclude that, for all the wrongdoing, not only in the "01" case and the "03" case, but the "04" violations included, a 36-month debarment, maximum, suffices as deterrent. For that reason I conclude that the 36-month debarment, maximum, should be a concurrent remedy.

28. What this Decision and Order imposes, as to all but four of the Respondents, is the temporary loss of privileges. Being debarred triggers the loss of inspection and grading privileges. The impact

extends not only to those who lose privileges but also to onlookers who are warned. The deterrent effect of remedies is valuable, just as the deterrent effect of punishments is valuable. [The classic example of a remedy having a deterrent effect is the driver losing his privilege to drive.]

29. I now take into consideration Lion's many reasons why no debarment is necessary: all the changes during the past 11 years that make it impossible for the wrongdoing to happen again. Assuming all Lion's reasons are true and valid, I still choose a 36-month debarment, maximum, for the deterrent effect.

30. I now take into account all the frustration that Lion had in 1997-98 with the inadequacies of USDA's inspection and grading. Lion was frustrated with the lack of precision by USDA inspectors. Bruce Lion testified that AMS never put enough inspectors on the job to keep up. Lion was frustrated that incoming raisins that should have been failed were passed; making it more difficult to have them meet specifications after processing (Lion bought from others and paid accordingly; Lion could have reconditioned failing raisins for a better end result; Lion could have chosen better which raisins to match with which orders (paste was one option). Lion points to the great number of 18% moistures in a row, proving to Lion that USDA was not getting the job done. Lion was frustrated that USDA did not time the moisture measurement, contending that the moisture results vary, depending on how much time elapses. (The inspectors were busy doing other things while getting the moisture readings, and the time was variable.) Bruce Lion testified that oil treatment "would probably make the reading be 1.5 to 2 percent higher than it really was." Tr. 13,334. The moisture measuring machines that USDA used were not the same as what Lion Raisins Quality Control used and not the same as used by some of Lion Raisins' European customers. There was even the difficulty of desired results for some Lion customers being partially thwarted by the maximum allowable moistures of 18%, where some customers wanted more moisture than that. Agreeing that all these concerns are important, they do not justify the unauthorized and unlawful alteration or fabrication of official USDA inspection certificates, and I still choose a 36-month debarment, maximum, for the deterrent effect.

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31. I now consider that Lion has been at a tremendous disadvantage throughout this litigation. Lion's original shipping files were seized by the U.S. Government for a criminal investigation. Lion's attempts to get copies of what had been seized were frustrated and not fully successful. Even when Lion got copies, copies do not always suffice to evaluate alleged alterations or forgeries. Lion's handwriting expert did not have originals to work from. Some paperwork had been destroyed that showed the disposition of product that was "set out" - - Lion refers to the missing documentation as the "red tag ledger log." The destroyed documentation might have been valuable when inspectors may not have noted everything on the line check sheets with respect to product that was "set out". Lion's FOIA (Freedom of Information Act) requests were thwarted in many ways. I regretted USDA detaching the worksheets from certificates before supplying copies of the certificates. I, too, wanted to see the worksheets. Lion was unable to persuade me of its theory: that the seven certificates that do not match the official USDA data are the result of USDA failing to follow its own procedures, taking short cuts of its own; that USDA inspectors made changes but failed to document them properly. I take all these disadvantages to Lion into account and believe still that Lion got a fair trial, and that the most believable explanation for the discrepancies is that USDA official inspection certificates were at times changed by Lion office workers ("shipping clerks") to reflect the customer's specifications without regard for the actual condition of the raisins, which could have been determined with extra effort. Methods were in place to coordinate review of the raisins' condition with USDA, but at times no methods for review were employed. Rather, an unauthorized inspection certificate that purported to show USDA results was created by Lion office workers, without regard for the truth or falsity of its representations.

32. I have taken into account that Ken Turner used pencil, like Bruce Lion, and that some of the instructions for which Bruce Lion is blamed, may have been authored by Ken Turner. Maralee Berling's testimony, looking at handwriting, was especially persuasive to me in this regard. Bruce Lion also identified one of Ken Turner's instructions that could

have been mistaken for Bruce Lion's. Bruce Lion supervised Ken Turner, as Bruce Lion also supervised the others in the shipping department. Whether the unauthorized alterations and fabrications were done in direct response to Bruce Lion or not, Bruce Lion was aware they were happening. I conclude that all seven certificates at issue here are the responsibility of a Lion employee who worked in the shipping department, either Bruce Lion or someone under his direction or supervision.

33. Regarding the credibility of witnesses, to the extent that Bruce Lion did not acknowledge knowing that unauthorized alterations and fabrications of USDA official inspection certificates were being done in 1997-98 in Lion's shipping department, I conclude that he did know. Especially valuable witnesses were Maralee Berling, Dorothy Hamilton (formerly Proffitt), and David Trykowski, each of whom had an impressive command of facts important during March 14, 1997 through April 27, 1998, and each of whom was totally credible.

34. Each of the seven (7) inspection certificates at issue, delivered to Lion customers, six (6) in the "01" case; one (1) in the "03" case, is an example of a violation of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621, *et seq.*), and 7 C.F.R. § 54. In each of these seven instances, the preponderance of the evidence shows that alteration or fabrication was not authorized by USDA; consequently delivering the altered or fabricated certificate to a customer constitutes falsification of a USDA certificate (whether the falsified certificate was accurate or not).

A. Violation(s) on or about March 14, 1997: Lion's shipping department altered a valid USDA Certificate which showed the U.S. Grade to be "C" and then provided the altered Certificate to a raisin customer in Denmark showing the U.S. Grade to be "B". Paragraphs 8 and 15 of the Second Amended Complaint.

B. Violation(s) on or about April 22, 1998: Lion's shipping department fabricated a Certificate and provided it to a raisin customer in Macau, showing moisture content to be 16.0% when the valid USDA Certificate had shown the moisture content to be 16.0% to 16.4%. Lion's shipping department placed a non-authorized signature (forged) of a USDA inspector on the fabricated Certificate. Paragraphs 9, 10, and 15 of the

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C. Violation(s) on or about December 18, 1997: Lion's shipping department fabricated a Certificate and provided it to a raisin customer in France, showing moisture content to be 15.9% when the valid USDA Certificate had shown the moisture content to be 16.0% to 17.8%.

Lion's shipping department placed a non-authorized signature (forged) of a USDA inspector on the fabricated Certificate. Paragraphs 11, 12, and 15 of the Second Amended Complaint.

D. Violation(s) on or about March 18, 1998: Lion's shipping department utilized a form it had created (that mimics - - impersonates - - a USDA Certificate except that it's on Lion Raisins letterhead) and provided it to a raisin customer in France, showing the moisture to be 15% when the valid USDA results had shown the moisture to be 16.0% to 16.6%. This "facsimile" Certificate (unauthorized and misleading, in that it appears to report results determined by a USDA inspector) simulates a USDA Certificate. Paragraphs 13 and 16 of the Second Amended Complaint.

E. Violation(s) on or about April 27, 1998: Lion's shipping department utilized a form it created (that mimics - - impersonates - - a USDA Certificate except that it's on Lion Raisins letterhead) and provided it to a raisin customer in France, showing the moisture to be 15% when the valid USDA results had shown the moisture to be 14.8% to 16.8%. This "facsimile" Certificate (unauthorized and misleading, in that it appears to report results determined by a USDA inspector) simulates a USDA Certificate. Paragraphs 14 and 16 of the Second Amended Complaint.

F. Violation(s) on or about December 18, 1997: Lion's shipping department fabricated a Certificate and provided it to a raisin customer in Austria, showing moisture content to be 17% when the valid USDA Certificate had shown the moisture content to be 18%. Lion Raisins placed a non-authorized signature (forged) of a USDA inspector on the fabricated Certificate. Paragraphs 15, 17 and 18 of the Second Amended Complaint.

G. Violations on or about August 26, 1997: Lion's shipping department altered a Certificate and provided it to a raisin customer in Macau,

showing the moisture content to be 16% when the valid USDA Certificate had shown the moisture content to be 18%. Paragraphs 11, 12 and 13 of the Amended Complaint. “03” case.

35. Only Bruce Lion, the three Lion companies, and Dan Lion shall be denied inspection services (debarred), for any time, under 7 C.F.R. § 52.54; the four remaining individual respondents should not, as they had no culpability in these violations and could not have known they were occurring. The periods of debarment shown in the following Order are necessary, appropriate, and proportionate, and shall run **concurrently** (in the “01” case and the “03” case and the “04” case).

### Order

36. The debarments specified in this Order shall be effective (shall begin) on the tenth day after this Decision & Order becomes final.<sup>1</sup>

37. For a period not to exceed thirty-six months Respondent Bruce Lion, an individual, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

38. For a period not to exceed thirty-six months Respondent Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and Lion Raisins, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

39. For a period not to exceed thirty-six months Respondent Lion Raisin Company, a partnership or unincorporated association, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

40. For a period not to exceed thirty-six months Respondent Lion Packing Company, a partnership or unincorporated association, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for

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<sup>1</sup> See paragraph 46.

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actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

41. For a period not to exceed three months Respondent Dan Lion, an individual, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

42. Respondent Al Lion, Jr., an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. He did not know and could not have known what the Lion shipping department was doing in 1997-98.

43. Respondent Jeff Lion, an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. He did not know and could not have known what the Lion shipping department was doing in 1997-98.

44. Respondent Larry Lion, an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. He did not know and could not have known what the Lion shipping department was doing in 1997-98.

45. Respondent Isabel Lion, an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. She did not know and could not have known what the Lion shipping department was doing in 1997-98.

#### **Finality**

46. This Decision & Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice. 7 C.F.R. § 1.145.

Copies of this Decision and Order (as to both I&G 01-0001 and I&G 03-0001) shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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**SUGAR MARKETING ACT**

**COURT DECISIONS**

**AMALGAMATED SUGAR CO LLC v. USDA.**

**No.07-35971.**

**Filed: April 06, 2009.**

**[Cite as 563 F. 3d 822].**

**SMA – Beet sugar allotments – Sugar processor – Permanent termination of operations – *Chevron* standard – Arbitrary, capricious, not in accordance with the law – Sale of all assets – New entrants Rational connection by agency administrator..**

Ordinarily, courts give deference to an agency's interpretation of its own regulations. Where an agency interprets or administers a statute in a way that furthers its own self-serving administrative or financial interests, the agency interpretation must be subject to greater scrutiny. The USDA Inspector General reported that Washington Sugar (the seller of the sugar beet allotment) had defaulted on a \$20 million USDA guaranteed loan and approved the transfer of sugar beet allotment upon conditions.

Before: J. CLIFFORD WALLACE, STEPHEN S. TROTT and N.R. SMITH, Circuit Judges.

**ORDER AND AMENDED OPINION**

**ORDER**

The opinion in the above-captioned matter filed on February 11, 2009, and published at 555 F.3d 816 (9th Cir.2009), is amended as follows:

1. On slip Opinion page 1631, line 3, replace "to be" with "are".
2. On slip Opinion page 1632, lines 20-21, replace "Section 1359cc" with "§1359cc".
3. On slip Opinion page 1648, lines 13-23, delete in their entirety the two sentences that state:

Where an agency interprets or administers a statute in a way that

further its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny. Chevron deference is also inappropriate where an agency has a self-serving, pecuniary interest in advancing a particular interpretation of a statute. Cf. *Nat'l Fuel Gas Supply v. F.E.R.C.*, 811 F.2d 1563, 1571 (D.C.Cir.1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract).

4. On slip Opinion page 1648, line 14, insert a new paragraph after the sentence ending "Congressional intent." The new paragraph shall read as follows:

Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that "self-interest alone gives rise to no automatic rebuttal of deference." See *Independent Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C.Cir.2002).

However, Chevron deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is arguably inconsistent with Congressional intent. See *Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n*, 811 F.2d 1563, 1571 (D.C.Cir.1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract); *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Having made the foregoing amendments to the opinion, the panel has unanimously voted to deny Appellee's Petition for Panel Rehearing, and so that petition is DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

### OPINION

We are asked for the first time to review the construction and application of certain provisions of the Agricultural Adjustment Act (the “Act”), specifically 7 U.S.C. §§1359dd(b)(2)(E)-(F).<sup>1</sup> We conclude that the disputed provisions of the Act are unambiguous; therefore, the district court erred in granting Chevron deference to the interpretation advanced by the U.S. Department of Agriculture (the “USDA”). Within the Act, we hold that a “processor” is an entity who processes sugar, as defined by the USDA's own regulations and entirely within the natural and ordinary meaning of the word. The Act requires the USDA to eliminate a processor's sugar marketing allocation (“allocation”) when the processor has “permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor).” §1359dd(b)(2)(E). We hold that Pacific Northwest Sugar Company (“Pacific”) permanently terminated operations prior to and not in conjunction with the purported sale of assets to Defendant-Intervenor American Crystal Sugar Company (“American Crystal”). Therefore, we conclude that the USDA erred in approving the transfer of the allocation to American Crystal, and Pacific's sugar marketing allocation must be redistributed pro rata among all processors. §1359dd(b)(2)(E). We reverse the district court's summary judgment in favor of the USDA and American Crystal.

#### I. Factual and Procedural History

Pacific processed sugar beets during the 1998, 1999, and 2000 crop years at its only factory in Moses Lake, Washington. Facing substantial financial problems, Pacific wrote to one of its creditors in January 2001, describing its financial problems, stating that Pacific could not continue to operate in the coming years, and proposing liquidation of the company. Pacific stopped processing sugar at Moses Lake in February 2001, had no sugar beet crops in 2002 or 2003, and never resumed operations. In June 2001, Pacific sold the Moses Lake facility to Central

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<sup>1</sup> All statutory references herein are to title 7, United States Code, unless otherwise noted, and therefore omit “7 U.S.C.” from the citation.

Leasing for \$2.1 million and leased the plant back with a twelve-month option to repurchase the facility.<sup>2</sup> Also in June 2001, Pacific unsuccessfully attempted to secure capital to continue as a sugar beet processor. On July 23, 2001, Pacific was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application, as required by Washington State law. Also in 2001, Pacific terminated the majority of its employees, and by April 2002, Pacific employed no one at its only factory. In March 2002, Pacific's lease of the Moses Lake facility from Central Leasing ended when Pacific failed to pay the agreed rent, and the lease was not renewed.

On May 13, 2002, Congress amended the Act,<sup>3</sup> creating the Flexible Marketing Allotments for Sugar ("FMAS") program. The purpose of the program was to stabilize sugar prices by requiring the Secretary of Agriculture (the "Secretary") to determine the total amount of domestically produced sugar that can be marketed in the United States for the coming year (the "allotment") and then assign allocations for production of sugar to processing companies in the United States. §1359cc.<sup>4</sup> By rule, the program is administered by the CCC, an agency of the USDA. 7 C.F.R. §1435.1. Under the program, Congress directed the Secretary to make initial allocations based upon historical beet sugar production levels for the 1998 through 2000 crop years.

In June 2002, Central Leasing began disposing of the equipment formerly owned by Pacific. By July 2002, Pacific owned no sugar beet processing equipment, and its option to repurchase the Moses Lake facility had expired. Also in July 2002, Pacific's Board of Directors

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<sup>2</sup> Although Central Leasing acquired Pacific's plant and equipment, it never sought to acquire Pacific's sugar allocation.

<sup>3</sup> See Farm Security and Rural Investment Act of 2002, Pub.L. No. 107-171, 116 Stat. 134, 187-204 (May 13, 2002).

<sup>4</sup> The overall marketing allocation is divided between sugar derived from sugar beets and sugar derived from sugarcane. §1359cc(c). This case involves sugar beet sugar allocations. Sugar beet processors who knowingly market sugar or sugar products in excess of their allocation are liable to the Commodity Credit Corporation (the "CCC") for a civil penalty equal to three times the U.S. market value of the sugar involved in the violation. 7 C.F.R. §1435.318(a).

indicated that it would no longer expend money for financial or legal consulting. The Board also announced that Washington Sugar Company, LLC (“Washington Sugar”) would succeed Pacific and assume any debts or obligations relating to reviving processing operations at Moses Lake. On September 24 and October 3, 2002, Scott Lybbert, as President of Washington Sugar,<sup>5</sup> wrote to the CCC to request that Pacific's allocation be transferred to Washington Sugar. The CCC responded on October 11, 2002 that, as a “new entrant,” the allocation would be transferred “upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company.”<sup>6</sup> During this same period, appellant, Amalgamated Sugar Company, LLC (“Amalgamated”), and others also inquired of the CCC about acquiring Pacific's allocation.

On October 1, 2002, the CCC made the initial beet sugar marketing allocations for crop year 2002. Pacific received an allocation of 2.692 percent of the allotment, based on its production history for the 1998-2000 crop years.<sup>7</sup> However, the USDA immediately reassigned virtually all the allocation, because Pacific was not processing sugar and was unable to market its share.

In a December 2002 USDA audit, the USDA Inspector General reported that because of financial difficulties, Pacific defaulted on a \$20 million USDA guaranteed loan, which resulted in a loss of \$12.1 million to the USDA's Rural Development Agency. The USDA audit stated that in May 2001, “[t]he plant closed and the lender was forced to liquidate the company's assets.”

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<sup>5</sup>The USDA never transferred the allocation to Washington Sugar, we assume because Washington Sugar could not provide a bill of sale showing that it had purchased virtually all of Pacific's assets.

<sup>6</sup> Lybbert was a former Vice-President of Pacific and a member of Columbia River Sugar Company (“CRSC”), as well as the sole owner of Washington Sugar.

<sup>7</sup> The USDA apparently interpreted the Act to require them to make an allocation to Pacific, despite the fact that Pacific was no longer processing sugar.

On December 3, 2002, the CRSC<sup>8</sup> adopted a resolution purporting to transfer its allocation to Washington Sugar, in support of Washington Sugar's efforts to revive operations at Moses Lake. The resolution stated, "CRSC has no desire, interest or ability to move forward and operate[the Pacific] processing facility."

After purporting to convey its interest in the allocation to Washington Sugar and despite the fact that Pacific never used any of its 2002 allocation, representatives of Pacific sought to have the allocation increased for crop year 2003. After a hearing on June 16, 2003, the CCC denied Pacific's request. During the hearing, several processors (including American Crystal) testified that Pacific had been dissolved or seemingly terminated operations and was unlikely to resume operations.<sup>9</sup>

In July 2003, American Crystal began negotiating with Lybbert (on behalf of Washington Sugar) and Central Leasing to purchase the assets previously owned by Pacific, in an effort to secure the transfer of Pacific's allocation by the CCC. On July 3, 2003, American Crystal wrote to the CCC, discussing the proposed acquisition:

American Crystal[] is currently contemplating a transaction, which would effectively result in the allocation, currently owned by [Pacific], being transferred to [American Crystal]. As currently contemplated, substantially all of the assets of [Pacific] would be transferred to an intermediary company [, Washington Sugar]. Since [Pacific] has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), substantially all of the assets of [Pacific] consists [sic] mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of [Washington Sugar] to [American Crystal] The effect of the transaction would be to move the sugar marketing allocation from

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<sup>8</sup> CRSC is the sugar beet growers' association that wholly owned Pacific.

<sup>9</sup>For example, the President and CEO of Defendant-Intervenor American Crystal, wrote: "Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugarbeets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue operation in 2003"

[Pacific], through [Washington Sugar], to [American Crystal].(emphasis added).

On July 30, 2003, American Crystal informed the CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory." In the same letter to the CCC, American Crystal sought the CCC's preliminary approval and informed the CCC that American Crystal had no intention of ever operating the Moses Lake facility.

On August 28, 2003, the CCC replied: "We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest." The CCC also stated that it would condition approval of the transfer on: (1) receiving documentation of the purchase of Pacific's assets by American Crystal; (2) certification from Pacific that it had not marketed any sugar under the 2002 allocation; (3) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (4) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003.

On September 8, 2003, Pacific was reinstated as a legal corporation when it filed the necessary documents with the State of Washington. That same day, Washington Sugar also executed a cancellation agreement with Pacific, revoking the previous transfer of Pacific's allocation to Washington Sugar. These agreements were executed in conjunction with Pacific's purported conveyance of its allocation to American Crystal. That same day, American Crystal advised the CCC that it had acquired, through its wholly owned subsidiary Crab Creek Sugar Company "ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory." American Crystal paid \$6.8 million to acquire the allocation, including \$2.125 million to Central Leasing, \$300,000 to

Lybbert (in consideration of a non-compete agreement), and \$3.025 million to Pacific. On September 16, 2003, the CCC wrote to Lybbert to inform him that Pacific's allocation would immediately be transferred to American Crystal.

On December 4, 2003, Amalgamated filed a Petition for Review, administratively challenging the CCC's transfer decision. On February 7, 2005, the USDA's Administrative Law Judge ("ALJ") issued a decision ("Initial Decision") reversing the CCC's determination, finding that the transfer was not proper because Pacific had permanently terminated operations.

On February 28, 2005, the CCC appealed the decision to the USDA Judicial Officer ("JO"). The JO reversed the Initial Decision without a hearing and affirmed the CCC's determination. The JO construed the Act to mean that as long as the CCC had not eliminated and redistributed a processor's allocation, that allocation may be sold along with the processor's assets. Amalgamated subsequently appealed to the district court, seeking judicial review of the JO's decision. On cross-motions for summary judgment, the district court deferred to the USDA's construction of the Act and entered summary judgment in favor of the USDA and American Crystal. Amalgamated now appeals.

We are asked to decide whether the JO's interpretation of the Act was reasonable, supported by the administrative record, in accordance with the law, not arbitrary or capricious, and therefore entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

## **II. Standard of Review**

We review de novo the district court's decision on cross-motions for summary judgment. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir.2002). We are governed by the same standard used by the trial court and must determine whether the district court correctly applied the relevant substantive law. See *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir.2008). The USDA's "interpretation or application of a statute is a question of law reviewed de novo." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir.2007).

The Administrative Procedure Act governs our review of agency action, and consequently, we must determine whether the USDA's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. §706; *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir.2004). Our review is “searching and careful, but the arbitrary and capricious standard is narrow, and we cannot substitute our own judgment for that of the [Agency].” *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir.2005) (internal quotation marks omitted).

### **III. The Act Guarantees an Equitable Opportunity to Market Sugar to All Processors**

We begin by noting that the Act works to maintain sugar prices by limiting the total amount of sugar that can be produced and marketed, allocating the total sugar allotment for a given crop year among all sugar processors in a fair and equitable manner. See §1359bb. The Act makes clear that its purpose is to “afford all interested persons an equitable opportunity to market sugar under an allotment” and that “the Secretary shall allocate each such allotment among the processors covered by the allotment.” §1359dd(a). Because the Act places significant restrictions on the freedom of processors to produce and market sugar, the Act's overarching directive is to ensure predictable, fair, and transparent allocation of the allotments to reflect industry events and changes in industry conditions. See 148 Cong. Rec. S513, S514 (Feb. 8, 2002) (statement of Sen. Conrad) (“The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future [T]he formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of new processors, and so on. Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.”).

#### **A. Permanent Termination of Operations Triggers the Requirement**

that an Allocation be Redistributed or Transferred.

In construing the provisions of the Act, we first look to the language of the statute to determine whether it has a plain meaning. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir.2008). “The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *Id.* (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (internal quotations omitted)). Here, we conclude that the statutory text is unambiguous.

To maintain an equitable allocation among processors under the FMAS program, Congress directed the USDA to eliminate the allocation of a processor that permanently terminates operations and redistribute it equitably among all processors. Section 1359dd(b)(2)(E) provides:

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall-

- (i) eliminate the allocation of the processor provided under this section; and
  - (ii) distribute the allocation to other beet sugar processors on a pro rata basis.
- §1359dd(2)(E) (emphasis added).<sup>10</sup>

A single processor may receive and exclusively benefit from the

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<sup>10</sup> The related USDA regulation in effect in 2003 provides: that the “CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis.” 7 C.F.R. §1435.308(b) (2003). The USDA subsequently amended this regulation to conform the rule to the statute and to clarify the criteria by which a processor is determined to be permanently terminated. The rule defines permanently terminated operations as “(i) Not processing sugarcane or sugar beets for 2 consecutive years, or (ii) Notifying CCC that the processor has permanently terminated operations.” See Flexible Marketing Allotments for Sugar, 69 Fed.Reg. 39,811, 39,813 (Jul. 1, 2004) (codified at 7 C.F.R. §1435.308(b)(3)) (subsequently amended by 69 Fed.Reg. 48,765 (Aug. 11, 2004) and 71 Fed.Reg. 16,198 (Mar. 31, 2006)).

allocation of another processor by acquiring the processor or all of the processor's assets. Section 1359dd(b)(2)(F) provides:

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E). §1359dd(2)(F) (emphasis added).

Thus, the Act requires the USDA to eliminate and redistribute the allocation of a processor that has permanently terminated operations, except when the processor terminated operations because of a sale of the processor or all of its assets to another processor. See §1359dd(b)(2)(E).<sup>11</sup> Even when the USDA has not previously eliminated an allocation, the fact that a processor has permanently terminated operations (other than in conjunction with a sale of the processor or all assets of the processor) cannot be ignored when the USDA is subsequently asked to transfer the allocation pursuant to a purported sale of the processor's assets.

Reading the provisions together, before the USDA may grant an allocation transfer request pursuant to a sale, the Act requires:

- (1) that the buyer and seller are processors covered by the Act;
- (2) that the seller has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations, other than in conjunction with the sale or other disposition of the processor or the assets of the processor; and
- (3) that the sale involves a sale of the processor or all of the assets of the processor. See §1359dd(b)(2)(E)-(F).<sup>12</sup>

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<sup>11</sup> The USDA may find that a processor has temporarily reduced or stopped processing operations, in which case the statute gives the USDA authority to temporarily reassign a processor's allocation to other processors. See §1359ee(b)(2).

<sup>12</sup> The related USDA regulation in effect in 2003 does not provide criteria for when a processor permanently terminates operations, but does provide: "Subject to paragraph (a) of this section [regarding requests from growers to transfer an allocation from a closed facility], CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. §1435.308 (2003).

If any of these conditions is not met, the USDA cannot approve the transfer pursuant to a sale. Amalgamated argues that the transfer was not proper because Pacific was no longer a processor, since it had permanently terminated operations before (and not in conjunction with) the purported sale of assets to American Crystal. The USDA and American Crystal both argue that subparagraph (F) required the USDA to transfer Pacific's allocation because the USDA had not previously eliminated and redistributed Pacific's allocation pursuant to subparagraph (E). The district court deferred to this interpretation, concluding that it was reasonable, not arbitrary or capricious, and supported by the administrative record. We disagree with the district court and agree with Amalgamated.

B.The District Court Erred When it Deferred to the USDA's Interpretation of the Statutory Term "Processor".

The district court deferred to the USDA's interpretation of the statutory term "processor" in its decision, granting Chevron deference to the JO decision. We conclude that the district court erred. First, the term "processor" is not ambiguous as used in the Act. Second, the interpretation advanced by the USDA is not reasonable, because it is contrary to the USDA implementing regulation.

In reviewing the USDA's interpretation of a statute that it administers, the court must follow the two-step approach set out in *Chevron*, 467 U.S. at 842-44, 104 S.Ct. 2778. The first step is to determine whether Congress has unambiguously expressed its intent on the issue before the court. *Natural Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 602 (9th Cir.2008) (citing *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778). If the intent of Congress is clear, such as when the statute expressly defines the disputed term, the court "must follow that definition, even if it varies from that term's ordinary meaning." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir.2005) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000)).

If the statute is silent or ambiguous, the court must then decide whether the agency's interpretation "is based on a permissible construction of the statute." *Natural Res. Def. Council*, 526 F.3d at 602 (citing *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). Where Congress

explicitly or implicitly delegates legislative authority to the agency, the court must defer to an agency's statutory interpretation so long as it is reasonable and not arbitrary and capricious. *Id.* The court must consider the agency's position over time, and if the agency's interpretation of a relevant provision conflicts with the agency's earlier interpretation, the agency is "entitled to considerably less deference than a consistently held agency view." *Id.* (citations omitted). This deference also does not extend to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir.1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)).

The agency's own regulations are significant and cannot be disregarded when interpreting a statute. See *Vance v. Hegstrom*, 793 F.2d 1018, 1025 (9th Cir.1986). An agency's interpretation of its own regulation is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation." See *Auer v. Robbins*, 519 U.S. 452, 461-63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). "A regulation has the force of law; therefore, an agency's interpretation of a statute in a manner inconsistent with a regulation will not be enforced." *Nat'l Med. Enters. v. Bowen*, 851 F.2d 291, 293 (9th Cir.1988).

In this case, the Act does not define the terms "processor" or "processor of beet sugar." However, where a term is not ambiguous, its plain and ordinary meaning should be ascribed unless there is clear evidence to the contrary that Congress intended a different meaning. See *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir.1990).

We note that the term "processor" does not have any independent legal significance. One dictionary defines the word to mean "one that processes agricultural products, foods, or similar products." See *Webster's Third New International Dictionary* 1808 (1993). Two other common dictionaries likewise define "processor" as "one that processes." See *The American Heritage College Dictionary* 987 (2d ed.1985); *Webster's II New Riverside University Dictionary* 938 (1984).

Within the relevant provisions of the Act, we read “processor” to mean an entity who processes sugar, entirely within the natural and ordinary meaning of the word. For example, the Act requires the Secretary to establish allotments of sugar for “marketing by processors of sugar processed from sugar beets” See §1359bb(b)(1). The sugar marketing allotments “shall apply to the marketing by processors of sugar” §1359bb(c)(1) (emphasis added). A “processor” is not allowed to market more sugar than it has been allocated. See *id.* at §1359bb(d). The Act consistently uses “processor” to exclusively refer to that class of entities who process sugar. We find the term unambiguous and nothing in the Act contradicts or confuses the ordinary meaning.

Within the Act, it is not receipt of an allocation that makes an entity a processor, but rather the processing of sugar beets that entitles one to an equitable allocation. The Act directs, and therefore presumes, that any entity that processes sugar will have an equitable opportunity to market sugar and therefore receive an allocation. §1359dd(a).<sup>13</sup> The initial allocations were made to processors who had actual, historical production during the 1998-2000 crop years. §1359dd(b)(2)(C). New processors, referred to as “new entrants,” are equally entitled to an allocation under the Act when they start processing sugar beets or acquire an ongoing factory with a production history. §1359dd(b)(2)(H)-(I). Maintenance of the allocation is also conditioned on continuing operations and processing of sugar. *Id.* at §1359dd(b)(2)(E)-(F). Thus, we conclude that actual processing and capacity to produce sugar are what make an entity a processor, and it is this status as a processor that entitles it to an allocation.

The USDA argues that if the ordinary meaning of the term is applied, then Pacific could not have received the original allocation on October 1, 2002, because by that time Pacific was no longer processing sugar. Likewise, the USDA contends that if Pacific were not a “processor,” the USDA could not have temporarily reassigned Pacific's allocation to

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<sup>13</sup> The Act provides that “Whenever marketing allotments are established for a crop year under section [1359cc of this title], in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.” §1359dd(a).

other processors for crop years 2002 and 2003.<sup>14</sup> We are not asked to review the propriety of the original allocations or the temporary reassignments made by the USDA under the Act. Nonetheless, we find it unlikely that Congress intended that the USDA give a defunct sugar company, incapable of processing or marketing sugar, a sugar marketing allocation. The fact that the USDA gave the defunct Pacific an original allocation, which it temporarily reassigned to other processors, has no impact on our interpretation of this unambiguous statutory term.

The USDA also urges that “processor” must mean an entity with an allocation, because the provisions regarding disposition of an allocation upon termination of operations or sale of assets uses that term, and the provisions would not apply unless a “processor” had an allocation. §1359dd(b)(2)(E) & (F). This argument is not persuasive. As we stated above, the Act presumes that all processors will receive an equitable allocation, and therefore it is true that a processor would have or be entitled to an allocation. However, this does not mean that a processor is only a processor because it has an allocation.

To the extent that the USDA's argument exposes any ambiguity in the statute, which we do not believe it does, the USDA's interpretation is not reasonable and not entitled to deference, because it conflicts with the USDA's own implementing regulations. See *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir.1994) (refusing to defer to the USDA's construction of a statutory term because it was inconsistent with the plain language of the statute and contrary to the agency's own regulation). The USDA implementing regulation provides, “[s]ugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.” 7 C.F.R. §1435.2 (2003).<sup>15</sup> The

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<sup>14</sup> If a processor with a share of the allotment will be unable to market all of the allocation during a particular crop year, the Secretary may temporarily reassign to the “deficit” for that crop year. §1359ee(b)(2). The reassignment is redistributed to the other processors depending on their capacity to fill a portion of the deficit. *Id.*

<sup>15</sup> This definition has not changed since the rule was first effected. Compare 2002 Farm Security and Rural Investment Act of 2002 Sugar Programs and Farm Facility (continued...)

district court acknowledged this regulatory definition, but concluded that the interpretation advanced by the USDA was “reasonable given the use of the word throughout the statute.” We disagree. The USDA’s proposed interpretation that a processor is an entity that has an allotment, even if it is not processing anything, is not reasonable, precisely because it conflicts with its own regulation. See *Nat’l Med. Enters.*, 851 F.2d at 293-94.

Accordingly, we hold that the district court erred in deferring to the definition of the term “processor” advanced by the USDA. Within the Act, the term is unambiguous and used in a manner consistent with its natural and ordinary meaning. The USDA’s interpretation, advanced in the present dispute, not only conflicts with the ordinary meaning of the word but also conflicts with the USDA’s own regulatory definition of the term.

C.Pacific Permanently Terminated Operations and Ceased Being a Processor Prior to the Purported Sale of Assets to American Crystal.

There is no dispute that Pacific was a sugar beet processor during the 1998 through 2000 crop years. Whether Pacific was a “processor” by the time it purported to sell its assets to American Crystal in September 2003 depends on when and under what circumstances Pacific permanently terminated operations. We conclude that Pacific ceased being a processor when it permanently terminated operations prior to the purported sale to American Crystal.

After five days of evidentiary hearings, the ALJ found that Pacific had permanently terminated operations before the purported sale of assets to American Crystal. The record strongly supports this finding, given that Pacific had not processed sugar beets since February 2001. Pacific sold its factory and assets in June 2001 and had no sugar beet crops in 2001, 2002 or 2003. The State of Washington administratively dissolved Pacific in July 2001, even though it was subsequently reinstated in September 2003 in connection with the transaction with American Crystal. Pacific lost its lease and option to repurchase its factory in July 2002. Pacific’s Board of Directors also adopted a

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<sup>15</sup>(...continued)

Storage Loan Program, 67 Fed.Reg. 54,926, 54,930 (Aug. 26, 2002) with 7 C.F.R. §1435.2 (2008).

December 2002 resolution purporting to convey its allocation to Washington Sugar and stating that “CRSC has no desire, interest or ability to move forward and operate [the Pacific] processing facility.” The JO did not refute these findings.

Instead, the JO reasoned that as long as the USDA had not previously eliminated the allocation, it was available to be transferred pursuant to a sale. There is no basis for this reasoning. The determinative factor on the availability of the allocation is whether a processor has permanently terminated operations, not whether the USDA has failed to act. If we upheld the interpretation advanced by the USDA, the propriety of a transfer would not depend on events in the sugar beet industry, as Congress intended, but on whether the USDA has been diligent in fulfilling its statutory duties. Allowing such an interpretation would result in an arbitrary and capricious outcome that would be contrary to the intent of Congress.

We also conclude that the USDA had a self-serving and, possibly, a financial interest in interpreting the Act to allow the transfer of Pacific's allocation to American Crystal. First, the USDA gained administrative advantage by conditioning approval of the transfer on (1) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (2) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003. The record also indicates that the USDA may have had a financial interest in approving the transfer. Pacific owed the USDA as much as \$12.1 million after Pacific defaulted on a \$20 million loan guaranteed by the USDA. Pacific received \$3.025 million in payment from American Crystal for the sale of the allocation. As a creditor of Pacific, the USDA may have had a financial interest in approving the transfer. Even if the USDA received no direct financial benefit, the existence of a possible pecuniary interest is of concern in evaluating the manner in which the USDA administered the Act and interpreted its provisions. We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather than with an interest in administering the Act according to statutory requirements and

Congressional intent.

Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that “self-interest alone gives rise to no automatic rebuttal of deference.” See *Independent Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C.Cir.2002). However, Chevron deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is arguably inconsistent with Congressional intent. See *Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n*, 811 F.2d 1563, 1571 (D.C.Cir.1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract); *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

The uncontradicted findings of the ALJ show that Pacific permanently terminated operations prior to the purported sale of assets to American Crystal. Accordingly, Pacific was no longer a processor at the time of the purported sale. Because the permanent cessation of operations requires redistribution, the USDA should have redistributed Pacific's allocation among all processors pro rata as required by law. D.Termination of Operations Not in Conjunction with a Sale of All Assets.

The USDA argues that, even if Pacific terminated operations, the USDA was not required to redistribute the allocation among all processors, because Pacific permanently terminated operations in conjunction with a sale or other disposition of the processor or the assets of the processor. See §1359dd(b)(2)(E). The JO agreed. The district court expressed concern that there was no sale of “all the assets of the processor,” but nonetheless affirmed, finding the JO's conclusions to be reasonable and not arbitrary or capricious. We find this conclusion to

be unreasonable and not supported by the record.

American Crystal did not purchase Pacific itself. Thus, in order to satisfy the prerequisites for transfer, American Crystal must have purchased all of Pacific's assets. See §1359dd(b)(2)(F). Yet, Pacific's assets were liquidated well before the purported sale to American Crystal. The factory and all Pacific's processing equipment had been previously liquidated and sold to Central Leasing. American Crystal acknowledged that Pacific's remaining assets largely included "the marketing allocation and some other generally immaterial assets."

The USDA and American Crystal argue that to satisfy the requirements of the Act, the asset sale need only be "a sale of those assets that the processor has at the time, not those which the processor may have owned in the past." Therefore, the USDA argues that it is not relevant that the assets sold were immaterial so long as they include all the assets Pacific had at the time of the sale. We agree that the sale of all of Pacific's assets need not include all of the assets Pacific ever owned. However, the fact that Pacific had no material assets at the time of the sale is problematic.

First, at the time of the sale to American Crystal, Pacific's only purported asset of any value was its marketing allocation. The JO concluded that "if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with a sale of the assets of the beet sugar processor." We conclude this to be an erroneous statement of the law. A marketing allocation can be transferred only upon a sale of all assets belonging to a processor. §1359dd(b)(2)(F). Under the Act, however, while an allocation inevitably adds value to a processor, it is not an asset itself that can be owned or conveyed by the processor. As Amalgamated persuasively argues, an FMAS marketing allocation is "a right in the nature of a government license; it can be conveyed only by an act of the Secretary of Agriculture." The USDA has near plenary control over the allocations, subject to the mandates of the Act. The USDA must modify the allocations whenever a processor sells a factory or a new processor enters the industry, reopens a factory, or acquires an operating factory with a production history. See §1359dd. The allocation is also subject to the requirement that it "be shared among producers served by the processors in a fair and equitable

manner.” See §1359ff. When a processor closes, growers have the right to request that the USDA transfer the allocation to an alternate processor where they will deliver their crops. The USDA can also temporarily reassign an allocation when a processor is unable to fully use it in a given crop year. See §1359ee. Notably, the USDA is not required to compensate a processor for reductions in the allocation or seek the processor's permission. We conclude, as the ALJ did, that “[f]or there to be a ‘sale of all assets,’ more than the marketing allocation itself needs to be conveyed.”<sup>16</sup>

Second, assuming for the sake of argument that the sale of purely immaterial assets were sufficient, the fact that Pacific did not have any tangible assets of any value confirms that it was no longer a processor and that its permanent termination of operations was not in conjunction with but prior to and independent of the sale to American Crystal. We acknowledge that, if Pacific's only remaining assets were good will, production rights, production history, books, and records, it would not be unreasonable to conclude that American Crystal purchased all of Pacific's assets. However, this does not mean that Pacific was a processor at the time of the sale or that it terminated its operations in conjunction with the sale. Rather, the absence of material assets is a strong confirmation that Pacific permanently terminated operations prior to the sale. We believe the reasoning of the ALJ is persuasive in determining that Pacific did not terminate operations in conjunction with the purported sale to American Crystal. If Pacific had retained the assets it sold to American Crystal, could it have continued operations? Pacific had no financing, no equipment, no sugar beet crop, no factory, no right to operate a factory, and had not produced sugar for over two years. As the ALJ noted, “The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the

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<sup>16</sup> The fact that American Crystal ultimately purchased from Central Leasing some of the assets formerly owned by Pacific does not affect our analysis. Central Leasing was not a sugar processor and never acquired Pacific's allocation. Therefore, a purchase of assets from Central Leasing does not entitle American Crystal to a transfer of Pacific's allocation. Under the Act, for the USDA to approve a transfer of an allocation in conjunction with the sale of assets, both the purchaser and seller must be processors. See §1359dd(b)(2)(E).

physical assets [n]or the will.”

#### **IV. Conclusion**

We are sympathetic to the principals and investors of Pacific who sought to salvage what value they might from their failed investment. We also recognize that it was good business for American Crystal to seek to secure Pacific's marketing allocation solely for itself. The transaction between Pacific and American Crystal was a crafty effort to circumvent the Act's clear directive and avoid an equitable redistribution of Pacific's allocation, in favor of a single processor. However, when a sugar processor permanently terminates operations, Congress mandated that the USDA fairly and equitably redistribute the failed processor's allocation among all processors. The USDA failed to fulfill its responsibilities in this regard. It put administrative expediency ahead of the intent of Congress and sanctioned a questionable transaction that was attempting to resurrect a dead company for the sole purpose of effecting the transfer of its sugar marketing allocation.

We reverse the district court's order granting summary judgment in favor of the USDA and American Crystal. We remand for further proceedings consistent with this opinion. We award costs on appeal to Appellant, Amalgamated.  
REVERSED and REMANDED.

**MISCELLANEOUS ORDERS**

**In re: LION RAISINS, INC.  
AMA-FV Docket No. 09-0050.  
Miscellaneous Order.  
April 15, 2009.**

**I&G .**

Frank Martin, Jr. for AMS.  
Westley T. Green for Petitioner, Lion Raisins, et al.  
*Order by Administrative Law Judge Peter M. Davenport.*

**MEMORANDUM OPINION AND ORDER**

This matter is before the Administrative Law Judge upon the Respondent's Motion to Dismiss the Petition which has been filed "Challenging the Authority of the RAC President to Suspend Handlers from Participation in the Export Program, the Attempted Suspension Imposed on October 3, 2008, and the Authority of the RAC to Enact Binding Regulations with a 'Circular.'" The Petitioner has filed its Opposition to Respondent's Motion to Dismiss and the matter is now ripe for disposition at this time.

The Petitioner Lion Raisin, Inc., formerly Lion Enterprises, (hereafter "Lion") is a California corporation incorporated more than forty years ago in 1967 that describes itself as the second largest handler of raisins produced from grapes grown in California and one of the largest bulk exporters of raisins. Lion acknowledges that it is subject to the Federal raisin Marketing Order and the Regulations. The relationship between Lion and the Agricultural Marketing Service of the United States Department of Agriculture "USDA") may easily be characterized as having been more than a little acrimonious at times during recent years, with numerous actions being brought by one party or the other both at the administrative level and before the federal courts.<sup>1</sup>

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<sup>1</sup> The following listing may not be exhaustive, but certainly is sufficient to reflect a portion of the history between Lion and USDA. A number of prior Section  
(continued...)

The current action has been brought by Lion invoking Section 8c(15)(A) of the Agricultural Marketing Agreement Act, (AMAA), 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 989.1, *et seq.* and seeks relief in the form of an order or orders (1) declaring that the Raisin Advisory Committee (the “RAC”) or its agents or representatives, with or without the concurrence of USDA, has no authority to suspend handlers from the Export Program; (2) declaring that the September 24, 2008 notification from the RAC for delivery of raisins to the RAC was unreasonable and in violation of Section 989.66(b)(4) of the Order; (3) granting injunctive relief directing the RAC to remove offending language from all pending and future Circulars and/or Agreements for participation in the Export Program that confers any power to the RAC President (or any officer, agent or representative to suspend handlers from participation in the Export Program by withholding “cash back” or “raisins back” for non-compliance; (4) granting injunctive relief directing the RAC to provide

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<sup>1</sup>(...continued)

608c(15)(A) Petitions were filed by Lion: *In re: Boghosian Raisin Packing Co. and Lion Raisin, Inc.*, 2001 AMA Docket No F & V 989-1, 60 Agric. Dec. 645 (2001); *In re: Lion Raisins, Inc.*, 2002 AMA Docket No. F & V 989-1, 66 Agric. Dec. 585 (2007); *In re: Lion Raisins, Inc.*, 2003 AMA Docket No. F & V 989-7, 64 Agric. Dec. 11 (2005); *In re: Lion Raisins, Inc.*, 2005 AMA Docket No. F & V 989-1, 64 Agric. Dec. 27 (2005); *In re: Lion Raisins, Inc.*, 2005 AMA Docket No. F & V 989-2, 64 Agric. Dec. 637 (2005). Three separate debarment actions have been brought by the Department, *In re: Lion Raisins, et al.*, I & G Docket No. 01-0001 (currently pending before United States Administrative Judge Jill S. Clifton; *In re: Lion Raisins, et al.*, I & G Docket No.03-0001, Default entered by Judicial Officer, 63 Agric. Dec. 211 (2004), remanded upon appeal, *Lion Raisins, Inc., et al v. USDA*, No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005), *also reported in* 66 Agric. Dec. 531, on remand, further remanded by Judicial Officer to Judge Clifton, 64 Agric. Dec. 687 (2005), *See, also*, 65 Agric. Dec. 1205 (2006) and 65 Agric. Dec. 1207 (2006); *In re: Lion Raisins, et al.*, I & G Docket No. 04-0001, 65 Agric. Dec. 193 (2006) (currently on appeal to the Judicial Officer). Other litigation includes: *Lion Raisins, Inc. v. United States Department of Agriculture*, No. CIV-F-01-5050 OWW DLB (E.D. Cal.); *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238 (Fed Cl. 2001); *Lion Raisins, Inc. v. USDA*, 354 F 3d 1072 (9<sup>th</sup> Cir. 2004); *Lion Raisins, Inc. v. United States*, 416 F 3d 1356 (Fed Cir. 2005); *Lion Raisins, Inc. v. USDA*, No. CV F-02-5064 JKS, 2005 U.S. Dist LEXIS 29595; *Lion Raisins, Inc. v. United States*, 64 Fed Cl. 536 (Fed Cl. 2005); and *Lion Raisins, Inc. v. USDA*, 231 Fed. Appx 565 (9<sup>th</sup> Cir. 2007). Although Lion has expressed its willingness to participate in arbitration or mediation to reach a “global” settlement of all pending differences, USDA has resisted such a solution.

reasonable notice (consistent with past practice) for delivery pursuant to Section 989.66(b)(4) and, in the event of non-compliance with that Section, to pursue only the exclusive remedy authorized by Section 989.166 of the Regulations and Order; (5) granting injunctive relief enjoining the RAC President (or any other RAC officer, agent or representative) from suspending handlers from participation in the Export Program; (6) awarding monetary damages for interest on export subsidy payments wrongfully withheld for the period September 12, 2008 to October 17, 2008; and (7) awarding damages according to proof in value of raisins and loss of sales and customers caused by the suspension.

The Respondent presents two arguments supporting its Motion to Dismiss, asserting first that the Petitioner's Section 608c(15)(A) Petition should be dismissed as a matter of law as the Petitioner's claims are moot. Alternatively, the Respondent asserts that the Petitioner has failed to state claim upon which relief might be granted. In asserting that the Petitioner has failed to state a claim upon which relief might be granted, the Respondent has advanced multiple points, arguing (1) the Petitioner was properly suspended from the voluntary Marketing Export Program under an agreement which was voluntarily entered into with the RAC; (2) the Petitioner cannot challenge agency enforcement decisions in a Section 608c(15)(A) proceeding; (3) the Petitioner cannot use a Section 608c(15)(A) proceeding to challenge regulations that are based upon a completely different statute; (4) the Secretary is authorized after recommendation by the RAC to approve appropriate criteria to effectively regulate projects designed to promote the consumption of raisins in foreign markets; (5) reasonable time was afforded the petitioner to allow the RAC to pick up its reserve raisins; (6) the Petitioner was not the subject of retaliatory action; and (7) the Petitioner's claims as to available remedies are not [sic] justiciable.

The Petitioner has filed its Opposition to Respondent's Motion to Dismiss. In its Opposition, it initially notes that in the consideration of motions to dismiss, material facts must be construed in light most favorable to the Petitioner. It next asserts that the Respondent violated suspension regulations for non procurement transactions and that the Respondent's contention that the regulations are inapplicable as being

promulgated under a different statute than the AMAA is in error. The Petitioner then suggests that reliance upon the claim being moot is misplaced due to the existence of three recognized exceptions which are applicable to the case at issue. The exceptions include: (1) the action is capable of repetition and would evade review; (2) the action constitutes “voluntary cessation” of illegal conduct; and (3) although the primary injury has passed, there remains a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant granting relief. Last, the Petitioner argues that relief in the form of equitable restitution is clearly permissible.

When considering motions to dismiss petitions filed pursuant to Section 8c(15)(A) of the AMAA, 7 U.S.C. §608c(15)(A), allegations of material fact contained in the petitions must be construed in the light most favorable to the Petitioners. *In re: United Foods, Inc.*, 57 Agric. Dec. 329 (1998); *In re: Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997); *In re: Asakawa Farms, et al.*, 50 Agric. Dec. 1144, 1149 (1991). Here, the material facts do not appear to have been disputed or that there is any substantial dispute. On or about July 25, 2008, the RAC notified Lion by facsimile transmission that another handler had purchased 465 tons of “reserve” raisins<sup>2</sup>. This initial notification did not contain a removal date. A little over a month later, on August 28, 2008, the RAC sent Lion an email requesting that Lion make arrangements for the RAC to pick up the reserve raisins, with a proposed schedule for pick up starting on Tuesday, September 2, 2008. Lion apparently considered the proposed schedule onerous and responded by letter dated September 3, 2008, requesting reasonable notice.<sup>3</sup> Following a further exchange of letters, Lion confirmed that it had made arrangements for the pick up of the reserve raisins to begin on Wednesday, October 1,

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<sup>2</sup> Pursuant to the Raisin Marketing Order, after Lion acquires raisins, it must “set aside” a designated percentage of “reserve” raisins and store them for the RAC. 7 C.F.R. §989.65, 989.66 and 989.166. The raisins or the income from the sale of them are used by the RAC to subsidize the price differential between exported and domestic raisins. 7 C.F.R. §989.67.

<sup>3</sup> It had previously taken the RAC up to nine months to deliver reserve raisins to Lion that Lion had purchased from the RAC. In the instant case, the pick up date coincided with the harvest season which is the busiest time of year. Petition ¶6.

2008 and on that date, the RAC took delivery of the first load.<sup>4</sup> By letter dated October 2, 2008 (received by Lion the following day), the RAC advised Lion that it had violated Section 989.66(b)(4) by failing to deliver reserve raisins to the RAC as required,<sup>5</sup> that Lion was suspended from the Export Program, that subsidy payments would be withheld for raisins already exported, and that the RAC would not recognize pending or future subsidy payments and applications therefor.<sup>6</sup> Exchanges between the RAC and Lion continued, with Lion demanding rescission of the suspension and the RAC advising that it would consider Lion to be in compliance only after the delivery was complete.<sup>7</sup> Throughout the period that the RAC was removing the reserve raisins from the reserve storage location and delivering them to the purchasing handler, the suspension continued to remain in effect. Further communications were exchanged between the RAC and Lion as a result of the purchasing handler's objections to mechanically harvested raisins; however, the RAC agreed with Lion that Sun-Maid (the purchasing handler) had no right of rejection of the raisins on that basis and by October 17, 2008, the RAC agreed that the delivery had been completed, rescinded the suspension, released Lion's pending subsidy payments, agreed to resume accepting applications for subsidy payments and further agreed to release future payments on a timely basis.<sup>8</sup>

Assuming *pro arguendo* the allegations of the Petition to be true and that the Petitioner can establish evidence of disparate treatment in the delivery time by the RAC of raisins which Lion had purchased, it would appear to be a matter of proof as to whether "reasonable notice" was given by the RAC of their intent to require transfer of Lion's reserve

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<sup>4</sup> Petition, ¶7. As noted, although the raisins had recently passed inspection at the Lion facility, the first load failed reinspection at the purchasing handler's facility and the raisins were returned to Lion the following day. Removal of the reserve raisins by the RAC continued the following week.

<sup>5</sup> The use of the term "delivery" is somewhat misleading, as it appears that it was the RAC's obligation to arrange the pick up of the reserve raisins from Lion's storage site. While Lion was obligated to make the raisins available, it would appear that the time required to complete delivery was a factor largely, if not entirely, under the RAC's control.

<sup>6</sup> Petition, ¶8

<sup>7</sup> Petition, 13, 14.

<sup>8</sup> Petition, ¶16.

raisins for delivery to another handler. While it is clear that Lion was required to store “reserve” raisins at a facility separate and apart from other raisins for the RAC, 7 C.F.R. §989.66(b)(2), what is not clear at this point is what specific arrangements are required in order to make the raisins available for the RAC to take possession of the raisins for transfer to the purchasing handler. Additional questions come to mind as to whether withholding a seven figure subsidy fund remittance for a delivery date dispute with a suspension was an appropriate or an arbitrary and unauthorized sanction, given both the existence of a specified monetary remedy in the regulation and the fact that delivery of the raisins in question was being effected by the RAC on an ongoing basis contemporaneously with the continued running of the suspension.

While it will remain the obligation of the Petitioner to establish evidence of damage from the actions of the RAC, it does appear that the Petitioner’s claims have not been rendered moot by the lifting of the suspension after completion of delivery and the subsequent release of subsidy funds. Even were I to find that damage, if any, to Lion was *de minimus*, the action taken by the RAC, if established to be not in accordance with law, would nonetheless come within the ambit of the one or more of exceptions to the mootness doctrine,<sup>9</sup> as well as being within the parameters of 8c(15)(A) of the AMAA.

Section 8c(15)(A) of the AMAA provides:

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that such order or **any provision imposed in connection therewith is not in accordance with law** and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law. (Emphasis added)

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<sup>9</sup> See Argument III, Petitioner’s Opposition to Respondent’s Motion to Dismiss, pages 7-12

The Respondent has raised multiple alternative theories upon which it asserts that the Petitioner has failed to state a claim upon which relief might be granted. The first basis suggests that the Petitioner was properly suspended by virtue of having voluntarily entered into the Marketing Export agreement and appears to assume that Lion failed to allow the RAC to pick up the reserve raisins in a timely manner. Although Lion agreed to participate in the program, while the Circular does contain provisions for suspension from the program, failure to adhere to a delivery schedule is not one of the grounds set forth as an example justifying suspension. Whether the notice given was reasonable under the circumstances remains a factual determination reserved for the fact finder after hearing the evidence from both parties.

The Respondent next asserts that the Petitioner cannot challenge Agency Enforcement Decisions in a 8c(15)(A) Proceeding. Reliance upon this position appears misplaced as it was the suspension by the RAC and the withholding of subsidy by the RAC which is being called into question. In Marketing Orders, it has long been the position of the Department that the Secretary has retained all of the enforcement and implementation authority. To do otherwise would constitute an unlawful delegation of authority. *In re: Sequoia Orange Co.*, 47 Agric. Dec. 2, 180-185 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *on appeal affirmed in part and remanded sub nom. Riverbend Farms, Inc. v. Madigan*, 958 F. 2d 1479 (9<sup>th</sup> Cir. 1992). As noted in *In re: Asakawa Farms, Inc.*, 50 Agric. Dec. 1144 (1991), "The Committees have no lawmaking authority, therefore there is no unlawful delegation of authority." *Id.* at 1149. Should the suspension by the RAC been imposed at the suggestion of the Department, it would give credence to Lion's assertion that it has been vilipended and the action was retaliatory.

As it will be found that the Petitioner has set forth in sufficient detail the provision imposed in connection with the operation of the Raisin Marketing Order which Lion feels is not in accordance with law and has requested specific relief in connection with the action taken by the RAC to state a claim upon which relief might be granted, the other grounds upon which the Respondent asserts that a claim upon which relief cannot be granted need not be discussed and the following Order will be

entered.

The Respondent's Motion to Dismiss will be **DENIED**.

Exhibit copies, exhibit lists and witness lists will be exchanged between the parties in accordance with the following deadlines to provide disclosure of evidence that may be presented at the hearing. The exhibit copies should not be filed; however the exhibit lists and witness lists will be filed with the Hearing Clerk's Office. Exhibits shall be pre-marked, on the lower right corner, as PX-1, PX-2 *et seq.* (for Petitioner's exhibits) and RX-1, RX-2 *et seq.* (for Respondents' exhibits). Multi-page exhibits shall be paginated with numbers placed at the bottom of the pages. **At the hearing, both parties are requested to provide copies of the exhibit list and witness list for use by the judge and the court reporter.**

By **Thursday, May 14, 2009**, Counsel for the Petitioner will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to the Respondents, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of Petitioner's proposed exhibits, a list of the exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

By **Thursday, June 11, 2009**, Counsel for the Respondent will file with the Hearing Clerk Respondent's list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Petitioner, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of the Respondent's proposed exhibits, a list of exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

Failure to file the above lists, as directed, without good cause, may constitute grounds for excluding an exhibit or the testimony of a witness. Counsel shall consult with each other and advise the Administrative Law Judge whether they will be able to stipulate as to any facts, the authenticity, accuracy or admissibility of any documents, or to agree on any other matters that would expedite the resolution of the issues in this case. The parties are also requested to advise the Administrative Law Judge concerning the expected duration of any hearing, the parties' preferences as to location, any special needs that either party might have

Michael Lee McBarron d/b/a T&M Horse Company 353  
68 Agric. Dec. 353

and a list of available dates for a teleconference to set a hearing date.

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

Done at Washington, D.C.

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**In re: MICHAEL LEE MCBARRON, d/b/a T&M HORSE COMPANY.**

**A.Q. Docket No. 06-0003.**

**Notice.**

**Filed January 28, 2009.**

**AQ.**

Thomas Neil Bolick for APHIS.

Respondents Pro se.

*Notice Order by Administrative Law Judge Jill S. Clifton.*

**Notice that entire \$21,000.00 civil penalty  
is required from Respondent McBarron**

1. Respondent Michael Lee McBarron was assessed a civil penalty of **\$21,000.00** (twenty-one thousand dollars) by Decision and Order dated May 10, 2007. Respondent McBarron was instructed to pay the civil penalty by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States,**" referencing **A.Q. Docket No. 06-0003.**

2. I issue this Notice to confirm that Respondent McBarron is required to pay that entire civil penalty, **\$21,000.00**, plus authorized costs, interest, debt collection fees, penalties, and the like. The Application filed by APHIS on November 4, 2008, is supported by Declaration showing that a search found no record, as of October 30, 2008, of any payment (a) from Michael Lee McBarron, (b) from Trent Wayne Ward, or (c) identified by docket number A.Q. Docket No. 06-0003.

3. APHIS is represented by Thomas Neil Bolick, Esq., Office of the

General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

4. Because Respondent McBarron failed to pay the civil penalty in accordance with the Decision and Order dated May 10, 2007, he is required to pay the full **\$21,000.00** civil penalty plus authorized costs, interest, debt collection fees, penalties, and the like.

Copies of this Notice shall be served by the Hearing Clerk, by ordinary delivery (NOT by certified mail), upon each of the parties. Respondent McBarron shall be served by regular mail at both his last known business mailing address (Michael Lee McBarron, 154 Stanley Road, Hamburg, Arkansas 71646) and his attorney's address (Mark J. Calabria, Esq., 201 W. Mulberry, Kaufman, Texas 75142).

Done at Washington, D.C.

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**In re: TRENT WAYNE WARD, d/b/a T&M HORSE COMPANY.**

**A.Q. Docket No. 06-0003.**

**Notice.**

**Filed January 28, 2009.**

**AQ.**

Thomas Neil Bolick for APHIS.  
Respondents pro se.

*Notice Order by Administrative Law Judge Jill S. Clifton.*

**Notice that entire \$21,450.00 civil penalty  
is required from Respondent Ward**

1. Respondent Trent Wayne Ward was assessed a civil penalty of **\$21,450.00** (twenty-one thousand four hundred fifty dollars) by Decision and Order dated May 4, 2006. Respondent Ward was instructed to pay the civil penalty by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States,**" referencing **A.Q. Docket No. 06-0003.**

Randy G. Smith and Jeff Smith  
d/b/a Smith Horse Company  
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2. I issue this Notice to confirm that Respondent Ward is required to pay that entire civil penalty, **\$21,450.00**, plus authorized costs, interest, debt collection fees, penalties, and the like. The Application filed by APHIS on November 4, 2008, is supported by Declaration showing that a search found no record, as of October 30, 2008, of any payment (a) from Michael Lee McBarron, (b) from Trent Wayne Ward, or (c) identified by docket number A.Q. Docket No. 06-0003.

3. APHIS is represented by Thomas Neil Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

4. Because Respondent Ward failed to pay the civil penalty in accordance with the Decision and Order dated May 4, 2006, he is required to pay the full **\$21,450.00** civil penalty, plus authorized costs, interest, debt collection fees, penalties, and the like.

Copies of this Notice shall be served by the Hearing Clerk by ordinary delivery (NOT by certified mail), upon each of the parties. Respondent Ward shall be served by regular mail at his last known business mailing address (Trent Wayne Ward, d/b/a T&M Horse Company, 1037 Lakeview Circle, Kaufman, TX 75142).  
Done at Washington, D.C.

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**In re: RANDY G. SMITH AND JEFF SMITH D/B/A SMITH HORSE COMPANY.**

**A.Q. Docket No. 08-0146.**

**Miscellaneous Order.**

**January 30, 2009.**

**AQ.**

Thomas Neil Bolick for APHIS.

Gregory Bell for Respondent.

*Notice Order by Administrative Law Judge Jill S. Clifton.*

**Ruling Denying Motion to Grant Default Decision**

On June 19, 2008, Kevin Shea, Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a single complaint against Randy G. Smith and Jeff Smith d/b/a Smith Horse Company, alleging a number of violations of the Animal Health Protection Act and the Commercial Transportation of Equines for Slaughter Act. Each allegation in the complaint alleged that “respondents” committed the violations alleged.

A timely handwritten answer, dated July 14, 2008, and received by the Hearing Clerk on July 23, 2008 was filed by Randy G. Smith, essentially denying commission of the alleged violations. This document had no caption, other than the number of the case, and did not specifically indicate whether it was filed on behalf of Randy G. Smith as an individual or on behalf of the partnership.

Having received no response from Jeff Smith, Complainant on November 4, 2008 filed a Motion for Adoption of Proposed Default Decision and Order, seeking \$64,500 in civil penalties.

On November 24, 2008 Respondents, through counsel, objected to the Proposed Default Decision and Order. Complainant filed a response to Respondents’ Objections, essentially contending that because Respondent Jeff Smith did not file an answer to the complaint, he had admitted the allegations of the complaint and waived his right to a hearing. Respondents filed a reply to Complainant’s response on December 30, 2008 stating that the answer filed by Randy Smith was intended to be a response on behalf of both Respondents.

I find that, in the absence of clear evidence to the contrary, there is merit to the contention that the answer filed by Randy G. Smith was filed on behalf of the partnership, and that the Motion for a Default Decision against Jeff Smith should be denied. While no cases have been cited to me on this subject, and I am unable to locate any specific decision by the Judicial Officer or any USDA administrative law judge on this subject, a close look at the answer filed by Randy G. Smith indicates that “I” and “we” are used interchangeably, and that the explanations and denials offered apply to the allegations that were made against “respondents” in each case. Further, granting a judgment against

Leroy H. Baker, Jr. d/b/a Sugar Creek Livestock Auction, Inc. 357  
Larry L. Anderson and James Gadberry  
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Jeff Smith would, since the entity is a partnership, effectively be a judgment against the partnership, and thus against Randy G. Smith, effectively denying him his right to a meaningful hearing. While it would have been better if the answer filed by Randy G. Smith clearly indicated that he was filing on behalf of the partnership, in the absence of clear law on the effect of one partner filing an answer, combined with the answer clearly addressing the allegations in a manner that would pertain to both partners to the partnership, I decline to grant the Complainant's motion. Copies of this Order will be served upon the parties by the Hearing Clerk.

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**In re: LEROY H. BAKER, JR., d/b/a SUGARCREEK  
LIVESTOCK AUCTION, INC., LARRY L. ANDERSON, AND  
JAMES GADBERRY.  
A.Q. Docket No. 08-0074.  
Order of Dismissal.  
Filed May 27, 2009.**

**AQ.**

Thomas Neil Bolick for APHIS.  
Respondents Pro se.  
*Notice Order by Administrative Law Judge Jill S. Clifton.*

**Order Dismissing Case ONLY Larry L. Anderson Without  
Prejudice as to Respondents**

The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

The Respondent Larry L. Anderson (frequently herein "Respondent Anderson" or "Respondent") is an individual who represents himself

(appears *pro se*).

APHIS's Motion for Dismissal of the Complaint Against Respondent Larry L. Anderson, filed May 5, 2009, is GRANTED. Accordingly, as to only Respondent Anderson, this case is **dismissed without prejudice**.

Copies of this Dismissal Without Prejudice shall be served by the Hearing Clerk upon each of the parties (including the other two respondents), together with a copy of the Motion filed May 5, 2009. Done at Washington, D.C.

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**In re: LEROY H. BAKER, JR., d/b/a SUGARCREEK LIVESTOCK AUCTION, INC. LARRY L. ANDERSON, AND JAMES GADBERRY.**

**A.Q. Docket No. 08-0074.**

**Dismissal Order.**

**Filed May 27, 2009.**

**AQ.**

Thomas Neil Bolick for APHIS.

Respondents Pro se.

*Dismissal Order by Administrative Law Judge Jill S. Clifton.*

**Order Dismissing Case Without Prejudice as to  
ONLY James Gadberry**

The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

The Respondent James Gadberry (frequently herein "Respondent Gadberry" or "Respondent") is an individual who is represented by

Patrick E. Richardson, Esq., P.O. Box 987, Kirksville, Missouri 63501.

APHIS's Motion for Dismissal of the Complaint Against Respondent James Gadberry, filed February 27, 2009, is GRANTED. Accordingly, as to only Respondent Gadberry, this case is **dismissed without prejudice**.

Copies of this Dismissal Without Prejudice shall be served by the Hearing Clerk upon each of the parties (including the other two respondents).

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**In re: BILLY E. ROWAN.**  
**A.Q. Docket No. 06-0006.**  
**Post Decision Order.**  
**Filed June 16, 2009.**

**AQ.**

Thomas Neil Bolick for APHIS.  
Respondent Pro se.  
*Post Decision Order by Administrative Law Judge Jill S. Clifton.*

#### **Post-Decision Order**

1. The hearing was held on July 10, 2008, and the Decision and Order was issued on September 11, 2008.
2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas Neil Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.
3. The Respondent, Billy E. Rowan (frequently herein "Respondent Billy Rowan" or "Respondent"), appears *pro se* (represents himself).
4. APHIS's "Application for Payment of Full Civil Penalty" was filed

on March 16, 2009. APHIS's (1) photocopy of a Promissory Note dated April 6, 2009, and (2) photocopy of Respondent Billy Rowan's check #2827 in the amount of \$450.00, were presented to me by Mr. Bolick during May 2009; and, later, at my request, filed by Mr. Bolick on June 8, 2009.

5. It is **not** necessary for me to order Respondent Billy Rowan to pay the full amount of \$12,650.00 in civil penalties (plus interest, fees, and penalties), so long as Respondent Billy Rowan complies with the agreement expressed in the Promissory Note (paying the \$7,803.01 balance), and on condition that he through July 9, 2013, commit no further violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*).

6. Consequently, APHIS's "Application for Payment of Full Civil Penalty" is DENIED, without prejudice to file anew if, in the future, it becomes necessary.

Copies of this Post-Decision Order shall be served by the Hearing Clerk upon each of the parties, together with all pages of APHIS's June 8, 2009 filing, mailing Mr. Rowan's copies by ordinary mail to his post office box.

Done at Washington, D.C.

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**In re: CHRISTINE DOBRATZ, d/b/a WOLF HOWL-O EXOTIC  
PETS, a/k/a WOLF HOWL-O EXOTIC PETTING ZOO.**

**AWA Docket No. 08-0131.**

**Miscellaneous Order.**

**January 30, 2009.**

**AWA.**

Colleen Carroll for APHIS.

Respondent Pro se.

*Miscellaneous Order by Chief Administrative Law Judge Marc R. Hillson.*

**Order Denying Motion to Dismiss; Order Granting Request for  
Extension of Time to Submit Additional Witnesses and Exhibits for  
Trial**

After a telephone conference between the parties on September 9, 2008, I issued an order on September 11, 2008 scheduling this case for hearing in Portland, Oregon beginning March 3, 2009. My order directed Complainant to submit a witness list, summary of witness testimony and exhibits to counsel for Respondents by October 24, 2008, and for Respondents to submit a similar set of documents to counsel for Complainant on December 5, 2008. On November 3, 2008, Respondents moved that the action be dismissed for failure of Complainant to comply with my order. On or about November 25, 2008 Respondent received most of the required submission from Complainant. On December 3, 2008, Complainant filed an opposition to the motion.

While Complainant has offered no reason for the late submission, I decline to dismiss the case because there is no prejudice to Respondents, and because I am granting Respondents' January 28 motion allowing them to file on that date documents listing additional witnesses to testify and documents they intend to introduce into evidence at the hearing. The purpose of my setting exchange dates is to allow the parties to be apprised of each other's case in time to adequately prepare for the hearing. Here, where counsel for Respondents has received Complainant's witness list and proposed exhibits over three months

before the onset of the hearing, dismissal would be a draconian measure, and one not justified under the Rules of Procedure. Any possible prejudice to Respondents is obviated by the substantial amount of time before the hearing remaining after they received Complainant's exchange, and my allowance of their filing a supplemental list of witnesses and documents.

Accordingly, the motion to dismiss is **denied** and the motion for an extension of time to file a list of additional witness and exhibits on January 28, 2009 is **granted**.

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**In re: LOREON VIGNE, AN INDIVIDUAL, d/b/a ISIS SOCIETY FOR INSPIRATIONAL STUDIES, INC., A CALIFORNIA DOMESTIC NON-PROFIT CORPORATION, a/k/a TEMPLE OF ISIS AND ISIS OASIS SANCTUARY.**

**AWA Docket No. 07-0174.**

**Order Denying Petition To Reconsider.**

**Filed February 11, 2009.**

**AWA – Petition to reconsider – Endangered Species Act – Exhibitor – License Application – Disqualification – Termination of license.**

Bernadette Juarez, for the Acting Administrator, APHIS.

Ellen Mendelson, San Francisco, CA, for Respondent.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

*Order issued by William G. Jenson, Judicial Officer.*

#### **PROCEDURAL HISTORY**

On November 18, 2008, I issued a Decision and Order terminating Loreon Vigne's Animal Welfare Act license and disqualifying Ms. Vigne from obtaining, holding, or using an Animal Welfare Act license for 2 years.<sup>1</sup> On December 31, 2008, Ms. Vigne filed a petition to reconsider the November 18, 2008, Decision and Order. On February 6, 2009, Kevin Shea, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter

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<sup>1</sup>*In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008).

the Acting Administrator], filed a response to Ms. Vigne's petition to reconsider, and the Hearing Clerk transmitted the record to me for a ruling on Ms. Vigne's petition to reconsider. Based upon a careful review of the record, I deny Ms. Vigne's petition to reconsider and reinstate the Order in *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008).

### **CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION**

Ms. Vigne raises five issues in her "Petition for Reconsideration." First, Ms. Vigne contends my finding that she waived her right to an oral hearing violates due process because she was not provided with adequate notice of the procedural requirements applicable to the instant proceeding (Pet. for Recons. at 4-6).

On August 30, 2007, the Hearing Clerk served Ms. Vigne with the Order to Show Cause as to Why Animal Welfare Act License 93-C-0611 Should Not be Terminated [hereinafter Order to Show Cause], the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], and a service letter dated August 22, 2007.<sup>2</sup> The Rules of Practice contain the procedural requirements applicable to the instant proceeding and the Hearing Clerk's August 22, 2007, service letter specifically instructs Ms. Vigne that the Rules of Practice govern the conduct of the proceeding and that she should become familiar with the Rules of Practice. The Rules of Practice provide that failure to request a hearing within the time allowed for filing the answer constitutes a waiver of hearing (7 C.F.R. § 1.141(a)). Moreover, the Hearing Clerk explicitly states in the August 22, 2007, service letter that Ms. Vigne's answer may include a request for an oral hearing and that failure to file an answer or filing an answer which does not deny the material allegations in the Order to Show Cause constitutes an admission of the allegations in the Order to Show Cause and a waiver of the right to an oral hearing.

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<sup>2</sup>United States Postal Service domestic receipt for article number 7004 2510 0003 7022 9231.

I conclude the Rules of Practice and the Hearing Clerk's August 22, 2007, service letter provided Ms. Vigne with adequate notice of the procedural requirements applicable to the instant proceeding and specifically notified her that either failure to file a timely request for a hearing or admission of the allegations in the Order to Show Cause would result in the waiver of the right to a hearing. Nonetheless, Ms. Vigne failed to file a timely request for an oral hearing and admitted the material allegations in the Order to Show Cause. Under these circumstances, I find no violation of Ms. Vigne's right to due process.

Second, Ms. Vigne contends my application to her of the waiver of hearing provisions in the Rules of Practice is error because she is an elderly woman and, at the time her request for a hearing was due, she appeared pro se (Pet. for Recons. at 4-6).

The Rules of Practice do not distinguish between persons who appear pro se and persons represented by counsel,<sup>3</sup> and Ms. Vigne's status as a pro se litigant is not a basis on which to set aside her waiver of the right to an oral hearing.<sup>4</sup> Moreover, the Rules of Practice do not distinguish between elderly women and other persons, and Ms. Vigne's age and gender are not bases on which to set aside her waiver of the right to an oral hearing.<sup>5</sup> Therefore, I reject Ms. Vigne's contention that

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<sup>3</sup>*In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283, 1286 (2007); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 299 (2005); *In re Mary Meyers* (Order Denying Pet. for Recons.), 58 Agric. Dec. 861, 865 (1999).

<sup>4</sup>*Cf. In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 67 Agric. Dec. 1283, 1286 (2007) (holding the respondent's status as a pro se litigant is not a basis on which to grant his petition for rehearing or set aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

<sup>5</sup>*Cf. In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. 1673, 1678 (2005) (stating, generally, physical and mental incapacity are not bases for setting aside a default decision); *In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999) (stating the respondent's automobile accident, loss of memory, payment of taxes, status as a United States citizen, and status as a veteran of the United States are not bases for setting aside a default decision).

(continued...)

my application to her of the waiver of hearing provisions in the Rules of Practice, is error.

Third, Ms. Vigne asserts Complainant's Motion for Summary Judgment did not bear on its face the moving attorney's telephone number, fax number, and bar number or any other information which would assist Ms. Vigne in contacting the moving party (Pet. for Recons. at 5).

Ms. Vigne is correct that Complainant's Motion for Summary Judgment does not bear on its face the moving attorney's telephone number, fax number, and bar number or any other information which would assist Ms. Vigne in contacting the moving party. However, the Rules of Practice do not require that motions contain such information. Moreover, I note the Order to Show Cause, which had been served on Ms. Vigne 9 months 1 week prior to the Acting Administrator's filing Complainant's Motion for Summary Judgment, contains the name, address, telephone number, and facsimile number of counsel for the Acting Administrator. Thus, I find, while not relevant to the disposition of the instant proceeding, Ms. Vigne had sufficient information to contact counsel for the Acting Administrator.

Fourth, Ms. Vigne asserts termination of her Animal Welfare Act license breaches the terms of the plea agreement Ms. Vigne and the United States entered in *United States v. Isis Society for Inspirational Studies, Inc.*, CR-06-313-01-MO (D. Or. Jan. 5, 2007). Specifically, Ms. Vigne contends the United States agreed that she could continue to possess, breed, and exhibit ocelots and termination of her Animal Welfare Act license violates that agreement. (Pet. for Recons. at 6-9.)

I have reviewed the plea agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*, and I cannot locate any provision in which the United States agreed that Ms. Vigne could continue to exhibit ocelots. The plea agreement states "[t]he government does not

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<sup>5</sup>(...continued)

States Army are not bases for setting aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating the respondent's age, ill health, and hospitalization are not bases for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).

object to defendant, its affiliates, or the defendant's Secretary and Treasurer, Loreon Vigne continuing to possess and breed endangered animals at its facilities in Geysersville, CA[.]" (Plea Agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*, at 7.) The termination of Ms. Vigne's Animal Welfare Act license does not prohibit Ms. Vigne from continuing to possess and breed endangered animals; therefore, I reject Ms. Vigne's assertion that termination of her Animal Welfare Act license breaches the terms of the plea agreement Ms. Vigne and the United States entered in *United States v. Isis Society for Inspirational Studies, Inc.*

Fifth, Ms. Vigne argues her guilty plea to conspiracy to violate the Endangered Species Act does not support termination of her Animal Welfare Act license under 9 C.F.R. § 2.11(a)(6) (Pet. for Recons. at 9-10).

The regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards] specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). Section 2.11(a)(6) of the Regulations and Standards provides that an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines that the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

**§ 2.11 Denial of initial license application.**

(a) A license will not be issued to any applicant who:

....

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the

Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

**§ 2131. Congressional statement of policy**

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

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

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

7 U.S.C. § 2131.

Ms. Vigne was involved with violations of the Endangered Species Act, a federal law pertaining to the ownership of animals, and provided the government with false statements to conceal violations of the Endangered Species Act (Plea Agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*, at 3-4). These activities are specifically addressed in 9 C.F.R. § 2.11(a)(6) as bases for denying an initial Animal Welfare Act license application and an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). Therefore, I reject Ms. Vigne's contention that the record does not support termination of her Animal Welfare Act license under 9 C.F.R. § 2.11(a)(6).

In addition to the five issues raised by Ms. Vigne in the Petition for Reconsideration, Ms. Vigne requests permission to withdraw her guilty plea in *United States v. Isis Society for Inspirational Studies, Inc.*, and return of the \$60,000 monetary penalty she paid in connection with *United States v. Isis Society for Inspirational Studies, Inc.*

In January 2007, United States District Court Judge Michael W. Mosman accepted the Isis Society's guilty plea entered in *United States v. Isis Society for Inspirational Studies, Inc.* (Petition to Enter Plea of Guilty, Certificate of Counsel, and Order Entering Plea filed in *United States v. Isis Society for Inspirational Studies, Inc.*); adjudicated the Isis Society guilty of conspiracy to violate the Endangered Species Act (18 U.S.C. § 371) and violating the Endangered Species Act (16 U.S.C. §§ 1538(a)(1)(F), 1540(b)(1)); and sentenced the Isis Society to pay a \$60,000 fine and to serve a 2-year probationary period. This forum is not the forum in which to lodge a request to withdraw a guilty plea entered in the United States District Court for the District of Oregon. I have no jurisdiction either to entertain Ms. Vigne's request for permission to withdraw the guilty plea entered in the United States District Court for the District of Oregon or to entertain Ms. Vigne's request for return of the \$60,000 fine Ms. Vigne paid in connection with that guilty plea.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition

Wayne Edwards, d/b/a  
Oklahoma Wildlife Preserve  
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to reconsider. Ms. Vigne's petition to reconsider was timely filed and automatically stayed *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008). Therefore, since Ms. Vigne's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008), is reinstated; except that, the effective date of the Order is the date indicated in the Order in this Order Denying Petition To Reconsider.

For the foregoing reasons and the reasons in *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008), Ms. Vigne's petition to reconsider is denied and the following Order is issued.

#### **ORDER**

1. Animal Welfare Act license 93-C-0611 is terminated.
2. Loreon Vigne is disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

This Order shall become effective on the 60th day after service of this Order on Loreon Vigne.

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**In re: WAYNE EDWARDS, d/b/a OKLAHOMA WILDLIFE  
PRESERVE, INC.  
AWA Docket No. D-08-0149.  
Miscellaneous Order.  
March 11, 2009.**

**AWA.**

Colleen Carroll for APHIS.  
Respondent Pro se.  
*Order by Administrative law Judge Peter M. Davenport.*

#### **ORDER**

An oral hearing was scheduled in this matter on March 11, 2009 in

Washington, D.C. On the date and time set for the hearing, the Petitioner failed to appear, either in person, or by counsel. The Respondent was represented by Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. At the hearing, the Respondent moved that the Request for Hearing be Dismissed for failure to prosecute the Request for Hearing.

Being sufficiently advised, noting the Petitioner's failure to appear at the hearing, the Motion is **GRANTED**, and the case will be **DISMISSED**, with prejudice.

Copies of this Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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**In re: THUNDERHAWK BIG CAT ENCOUNTER, LLC.**  
**AWA Docket No. D-09-0040.**  
**Order Dismissing Case.**  
**Filed June 4, 2009.**

**AWA.**

Colleen Carroll for APHIS.  
Respondents Pro se.

*Miscellaneous Order by Administrative Law Judge Jill S. Clifton.*

Petitioner's Motion to Withdraw the request for hearing, dated June 1, 2009, and filed June 4, 2009, is **GRANTED**. This case is **dismissed**.

Copies of this Order Dismissing Case shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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**In re: WAYNE EDWARDS, d/b/a OKLAHOMA WILDLIFE  
PRESERVE, INC.**

**AWA Docket No. D-08-0149.**

**Order Denying Appeal Petition.**

**Filed June 22, 2009.**

**AWA – Appeal petition denied – License denial – Request for hearing – Dismissal.**

Colleen Carroll, for APHIS.

Petitioner Edwards, Pro se.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

*Decision issued by William G. Jenson, Judicial Officer.*

#### **DISCUSSION**

Wayne Edwards requested that the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], provide him the information necessary to obtain a license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]. On September 5, 2007, APHIS responded to Mr. Edwards' request by providing him the information and forms necessary to obtain an Animal Welfare Act license.<sup>1</sup> On September 19, 2007, Oklahoma Wildlife Preserve, Inc., was incorporated in the State of Oklahoma.<sup>2</sup> Mr. Edwards signed the articles of incorporation as one of the incorporators and was identified as one of three persons who would serve as trustee or director of Oklahoma Wildlife Preserve, Inc.<sup>3</sup>

On January 8, 2008, Oklahoma Wildlife Preserve, Inc., applied for an Animal Welfare Act license.<sup>4</sup> On June 6, 2008, pursuant to the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations], APHIS denied Oklahoma Wildlife Preserve, Inc.'s Animal Welfare Act license application on the grounds that the application was not complete and Oklahoma Wildlife

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<sup>1</sup>“License Denial” filed June 24, 2008 [hereinafter Request for Hearing], at Exhibit 8.

<sup>2</sup>Request for Hearing at Exhibit 12.

<sup>3</sup>*Id.*

<sup>4</sup>Request for Hearing at Exhibit 11.

Preserve, Inc., made false statements to APHIS employees during the application process.<sup>5</sup>

On June 24, 2008, pursuant to section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)), Mr. Edwards, d/b/a Oklahoma Wildlife Preserve, Inc., filed a Request for Hearing to show why Oklahoma Wildlife Preserve, Inc.'s application for an Animal Welfare Act license should not be denied. On July 15, 2008, APHIS filed "Respondent's Response to Petitioner's Request for Hearing and Respondent's Motion for Summary Judgment or to Amend Case Caption" seeking summary judgment against Mr. Edwards on the ground that Oklahoma Wildlife Preserve, Inc., applied for, and was denied, an Animal Welfare Act license; thus, only Oklahoma Wildlife Preserve, Inc., is entitled to a hearing pursuant to section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)). On July 21, 2008, Mr. Edwards replied to APHIS' motion for summary judgment stating he is the president of Oklahoma Wildlife Preserve, Inc., and authorized to conduct all business on behalf of Oklahoma Wildlife Preserve, Inc., including filing a response to APHIS' denial of Oklahoma Wildlife Preserve, Inc.'s application for an Animal Welfare Act license.

On February 19, 2009, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order scheduling a hearing to commence March 11, 2009,<sup>6</sup> and the Hearing Clerk served Mr. Edwards and APHIS with the ALJ's February 19, 2009, Order.<sup>7</sup> On March 11, 2009, the ALJ conducted a hearing in Washington, DC. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture, represented APHIS. Mr. Edwards did not appear at the hearing and APHIS moved to dismiss the proceeding based on Mr. Edwards' failure to prosecute his Request for Hearing.<sup>8</sup> During the hearing, the ALJ stated APHIS' motion to dismiss would be granted,<sup>9</sup> and, on March 11, 2009, after the close of the hearing, the ALJ issued a written Order dismissing the proceeding with prejudice on the

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<sup>5</sup>Request for Hearing at Exhibit 14.

<sup>6</sup>Order of Hearing Location.

<sup>7</sup>Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form regarding the ALJ's February 19, 2009, Order of Hearing Location.

<sup>8</sup>Transcript of the March 11, 2009, hearing at 3-4.

<sup>9</sup>*Id.*

ground that Mr. Edwards failed to appear at the hearing and prosecute his Request for Hearing.

On April 15, 2009, Richard Fischer, representing himself to be president of Oklahoma Wildlife Preserve, Inc., appealed the ALJ's March 11, 2009, Order issued against Mr. Edwards. On April 27, 2009, APHIS filed "Respondent's Response to Petition for Appeal" in which it argued that Mr. Fischer's appeal of the ALJ's March 11, 2009, Order must be denied because Mr. Fischer is not a party in the instant proceeding. On April 30, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a careful consideration of the record, I agree with APHIS that Mr. Fischer is not a party in the instant proceeding and Mr. Fischer's April 15, 2009, appeal petition must be denied.

#### **MR. FISCHER'S APPEAL PETITION**

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], provide that only a party in a proceeding may appeal an administrative law judge's decision, as follows:

##### **§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a). The parties in the instant proceeding are Mr. Edwards, d/b/a Oklahoma Wildlife Preserve, Inc., and APHIS; therefore, under the Rules of Practice, only Mr. Edwards and APHIS had

the opportunity to appeal the ALJ's March 11, 2009, Order. Mr. Fischer's appeal petition, even if filed on behalf of Oklahoma Wildlife Preserve, Inc., is denied on the ground that neither Mr. Fischer nor Oklahoma Wildlife Preserve, Inc., is a party in the instant proceeding.

Even if I were to find Mr. Fischer could substitute himself for Mr. Edwards and is a party in the instant proceeding (which I do not so find), I would deny Mr. Fischer's appeal petition. Mr. Fischer raises only one issue on appeal. Mr. Fischer asserts Oklahoma Wildlife Preserve, Inc., did not receive notice of the time and place of the March 11, 2009, hearing conducted in Washington, DC, and requests a second hearing to be held in Oklahoma City, Oklahoma.

As an initial matter, Oklahoma Wildlife Preserve, Inc., did not request a hearing pursuant to section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)) and is not a party in the instant proceeding. Instead, Mr. Edwards, d/b/a Oklahoma Wildlife Preserve, Inc., requested a hearing and was entitled to notice of the time and place of hearing. On February 19, 2009, the ALJ issued an Order of Hearing Location scheduling a hearing, as follows:

#### ORDER OF HEARING LOCATION

Notice is hereby given that the hearing in this case scheduled to commence at 9:00 AM (Eastern Standard Time) on March 11, 2009 will be conducted at the following location:

United States Department of Agriculture  
Room 1037, South Building  
1400 Independence Ave., S.W.  
Washington, DC 20250

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

Done at Washington, D.C.

On February 19, 2009, in accordance with the ALJ's Order of

Hearing Location, the Hearing Clerk, by ordinary mail, served Mr. Edwards at his last known principal place of business.<sup>10</sup> The Rules of Practice provide that a notice of hearing is deemed to be received at the time of mailing by ordinary mail to the last known principal place of business of a party (7 C.F.R. § 1.147(c)(2)). Therefore, in accordance with 7 C.F.R. § 1.147(c)(2), Mr. Edwards is deemed to have received the notice of the time and place of the hearing on February 19, 2009. Under these circumstances, I agree with the ALJ's dismissal of the case based upon Mr. Edwards' failure to appear and prosecute his Request for Hearing; therefore, even if I were to find Mr. Fischer is a party in the instant proceeding and were to consider the merits of Mr. Fischer's appeal petition, I would deny Mr. Fischer's request to schedule a second hearing to be held in Oklahoma City, Oklahoma.

For the foregoing reasons, the following Order is issued.

**ORDER**

Richard Fisher's April 15, 2009, appeal petition is denied. This Order shall become effective upon service on Mr. Fischer.

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**In re: MARY CONN.  
AWG Docket No. 08-0167.  
Miscellaneous Order.  
February 18, 2009.**

AWG.

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<sup>10</sup>Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form indicating the ALJ's February 19, 2009, Order of Hearing Location was sent by ordinary mail to Mr. Edwards on February 19, 2009, at the following address:

Mr. Wayne Edward [sic], President  
Oklahoma Wildlife Preserve, Inc.  
690-B South Highway 69/75  
Atoka, OK 74525

Petitioner Pro se.  
Mary Kimball for RD.  
*Order by Administrative Law Judge Victor W. Palmer.*

**NOTICE TO PARTIES**

I have been advised by the Hearing Clerk that Ms. Conn has not filed any documents showing she has filed for bankruptcy.

Unless such a document is filed by **March 19, 2009**, the Petition shall be dismissed with prejudice and the government will not be precluded from garnishing Ms. Conn's wages or withholding her income tax refund proceeds in payment of the debt she owes to FSA.

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**In re: PAULA MORRISON.**  
**AWG Docket No. 09-0059.**  
**Miscellaneous Order.**  
**May 6, 2009.**

**AWG.**

Petitioner Pro se.  
Mary Kimball for RD.  
*Order by Administrative Law Judge Peter M. Davenport.*

**ORDER**

This matter was before the Administrative Law Judge upon the request of the Petitioner for a hearing concerning the existence or amount of the debt alleged, and if established, the terms of any repayment. A Prehearing Order was entered on February 9, 2009 directing the parties to exchange information prior to the scheduling of a teleconference to set a hearing date.

On February 24, 2009, the Respondent filed their Narrative and supporting documentation. By letter dated April 20, 2009, the Petitioner's attorney advised that the Petitioner filed a petition for relief

under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas (Case No. 09-40649) and that USDA has been listed as a creditor in that action.

As the automatic stay mandated by 11 U.S.C. §362 precludes garnishment of wages, absent relief from the stay or dismissal of the petition, this action will be **DISMISSED**, without prejudice at this time. The matter may be reinstated upon Motion should the Bankruptcy action be dismissed or upon obtaining relief from the stay.

Copies of this Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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**In re: PUBLIC SERVICE COMPANY OF COLORADO D/B/A  
XCEL ENERGY TACOMA HYDROELECTRIC PROJECT.**

**EPAct Docket No. 09-0055.**

**FERC No. 12589.**

**Ruling.**

**February 27, 2009.**

Donald H Clarke, Rekha K. Roa for Petitioners

Lois G. Wittee, Steve C. Silverman, Randall J Bremer for FS.

*Ruling by Chief Administrative Law Judge Marc R. Hillson.*

**Ruling Granting in Part and Denying in Part Motions to Dismiss  
and Clarifying Discovery Schedule**

The United States Forest Service on February 4, 2009 filed a series of motions to dismiss all eight of the disputed issues raised by the Public Service Corporation of Colorado d/b/a Excel (PSCo), on the grounds that they each failed to identify material facts that are in dispute. PSCo filed an opposition on February 17, 2009, contending that each of the disputed issues did involve disputed material facts that could be relied on by ultimate decision makers in this matter. I find that each of the disputed issues, other than disputed issued # 6, involves facts that may be material to the ultimate decision makers, and accordingly deny the motions to dismiss disputed issues 1 through 5, 7 and 8. I grant the motion to dismiss disputed issued # 6.

Along with other administrative law judges who have ruled on similar issues, I am inclined to liberally interpret the regulations in favor of holding hearings if there is any reasonable dispute that material facts exist which could affect ultimate decisions in these cases. When Congress passed the relevant provisions of the Federal Power Act, 16 U.S.C. § 797 (e), it was because they wanted “to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the Federal Courts.” Idaho Power Company, Hells Canyon Complex, 65 Agric. Dec. 273 (2006). Failure to allow development of disputed facts that might be material would be counter to the intentions

of Congress in setting up this entire integrated license review process, which was clearly intended to “afford interested parties an opportunity to raise concerns and restore fairness to hydroelectric license proceedings.” Klamath Hydroelectric Project, Ruling of Judge McKenna, July 13, 2006; see, also, Judge Canorro’s detailed analysis in Yarkin-Pee Dee Hydroelectric Project, August 23, 2007.

With respect to all but the 6th disputed issue, I find that there appear to be disputed facts which may be material to the ultimate decision maker. For example, Issue 1, disputing the Forest Service position that there is a direct relationship between operations of the project and reduced ecosystem sustainability in Cascade Creek, cannot be simply categorized as not identifying a factual issue in dispute, as there may (or may not) be numerous facts concerning the impact of the project on Cascade Creek that would be beneficial to the ultimate decision maker. Likewise, the Forest Service’s contention that because “ecosystem sustainability” is subjective and not capable of precise measurement renders it outside the scope of this hearing misreads the holdings of the above-cited rulings that would allow the development of facts which would allow the ultimate decision maker to have a basis to consider whether the ecosystem sustainability is in fact reduced, and what the effect of such reduction would be on the conditions imposed on PSCo. Similar logic can be applied to the other disputed issues raised by PSCo, other than Issue 6.

Issue 6 would require me to make findings as to whether conditions imposed by the Forest Service are inconsistent with Forest Service goals. This appears to me to be a policy determination or legal conclusion for which no new material facts could be developed, although it appears to me at this juncture that such facts that are developed under several of the other issues might have a bearing on how the ultimate decision maker rules on this issue. However, with regard to disputed issue 6, the Act does not anticipate the administrative law judge in a hearing of this nature to make a finding as to whether conditions imposed by the Forest Service are consistent with the goals of the Forest Service. Accordingly, I grant the motion to dismiss issue number 6, and deny the motions to dismiss issues 1 through 5, 7 and 8.

I note that the parties have cooperated in a manner to render moot PSCo's objections to many of the Forest Service's discovery requests. Given that the parties have agreed to discovery, there is no need for me to issue an order in this area. At this point, pursuant to the Rules of Procedure, and our prehearing conference call of February 17, 2009. I do direct that all discovery must be completed by March 16, 2009, while the written direct testimony must be filed by March 23, 2009.

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**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION;  
LION RAISIN COMPANY, A PARTNERSHIP OR  
UNINCORPORATED ASSOCIATION; LION PACKING  
COMPANY, A PARTNERSHIP OR UNINCORPORATED  
ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL  
LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL;  
BRUCE LION, AN INDIVIDUAL; LARRY LION, AN  
INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.**

**I & G Docket No. 04-0001.**

**Ruling Dismissing Larry Lion's Petition to Suspend Balance of the  
Period of Debarment.**

**Filed March 19, 2009.**

**I&G.**

Colleen Carroll, for the Administrator, AMS.  
Wesley T. Green, Selma, CA, for Respondents.  
*Ruling issued by William G. Jenson, Judicial Officer.*

On February 27, 2009, Larry Lion filed "Petition to the Judicial Officer by Respondent Larry Lion to Suspend the Balance of the Period of Debarment." On March 17, 2009, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to 'Petition to the Judicial Officer'" stating I have no jurisdiction to grant Larry Lion's petition.

On June 9, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order debaring Larry Lion from receiving inspection services under the Agricultural Marketing Agreement Act of 1946, as amended (7 U.S.C. §§ 1621-1632) and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) for a period of 5 years. The ALJ also provided, after 1 year, Larry Lion may petition the Secretary of Agriculture or the Secretary's designee to suspend the balance of the

period of debarment. (ALJ's Decision and Order at 50.)

On June 16, 2006, the Hearing Clerk served Larry Lion with the ALJ's Decision and Order.<sup>1</sup> The rules of practice applicable to the instant proceeding<sup>2</sup> provide that the administrative law judge's decision shall become final and effective 35 days after service upon the respondent, unless appealed to the Judicial Officer (7 C.F.R. § 1.142(c)(4)). Larry Lion failed to file a timely appeal of the ALJ's Decision and Order,<sup>3</sup> and the ALJ's Decision and Order became final and effective as to Larry Lion on July 21, 2006. Therefore, Larry Lion's 5-year period of debarment began on July 21, 2006, and he became eligible to file a petition to suspend the balance of the 5-year period of debarment on July 21, 2007. However, I have not been designated by the Secretary of Agriculture to consider any petition to suspend the balance of the 5-year period of debarment ordered by the ALJ, and Larry Lion is not a party before me with respect to the pending appeal. Therefore, I have no jurisdiction to consider the February 27, 2009, Petition to the Judicial Officer by Respondent Larry Lion to Suspend the Balance of the Period of Debarment, and I dismiss the Petition.

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<sup>1</sup>United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4087 9993.

<sup>2</sup>Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

<sup>3</sup>Wesley T. Green, attorney for Lion Raisins, Inc. (Notice of Appearance and Statement of Representation filed Aug. 15, 2005), and James A. Moody, attorney for Lion Raisins, Inc., Alfred Lion, Jr., Bruce Lion, Daniel Lion, and Jeffrey Lion (Notice of Entry of Appearance filed Dec. 1, 2005), filed "Respondents' Appeal Petition to Decision and Order and Brief in Support Thereof and Respondents' Request for Oral Argument" on July 13, 2006. Mr. Moody stated his failure to enter an appearance on behalf of Larry Lion was an oversight which he would correct by filing a notice of appearance on behalf of Larry Lion (Tr. 7). Mr. Moody failed to file a corrected notice of appearance. Larry Lion appeared pro se beginning January 24, 2006, when Charles Pashayan, Jr., withdrew as his counsel (Respondents' Notice of Withdrawal as Attorney of Record; and Notice of Designations of Mr. Pashayan as Legal Counsel for Settlement Discussions). Larry Lion failed to appeal the ALJ's June 9, 2006, Decision and Order on his own behalf. Therefore, I conclude Larry Lion failed to file a timely appeal of the ALJ's Decision and Order.

**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION;  
LION RAISIN COMPANY, A PARTNERSHIP OR  
UNINCORPORATED ASSOCIATION; LION PACKING  
COMPANY, A PARTNERSHIP OR UNINCORPORATED  
ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL  
LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL;  
BRUCE LION, AN INDIVIDUAL; LARRY LION, AN  
INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.**

**I & G Docket No. 04-0001.**

**Ruling on Respondents' Petitions to Reopen Hearing.**

**Filed April 16, 2009.**

**I&G.**

Colleen Carroll, for the Administrator, AMS.  
Wesley T. Green, Selma, CA, for Respondents.  
*Ruling issued by William G. Jenson, Judicial Officer.*

### **Introduction**

The rules of practice applicable to the instant proceeding<sup>1</sup> provide that a party may file a petition to reopen a hearing to take further evidence, as follows:

**§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite*— . . . .

. . . .

(2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the

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<sup>1</sup>The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Respondents filed “Respondents’ Motion to Reopen Administrative Hearing Held Before ALJ Davenport” on April 5, 2007; “Respondents’ Second Supplemental Motion to Reopen Administrative Hearing Held before ALJ Davenport” on September 7, 2007; “Respondents’ Third Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport” on October 10, 2007; and “Respondents’ Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport” on October 15, 2007.

*Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion*

On June 9, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order in which he concluded that Respondents violated the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act] and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations] and debarred Respondents from receiving inspection services under the Agricultural Marketing Act and the Regulations.<sup>2</sup> On June 15, 2006, the Hearing Clerk served Lion Raisin Company, Lion Packing Company, and Isabel Lion with the ALJ’s Decision and Order,<sup>3</sup> and on June 16, 2006, the Hearing Clerk served Larry Lion with the ALJ’s Decision and Order.<sup>4</sup> Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion did not file an

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<sup>2</sup>*In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 224, 232-33 (2006).

<sup>3</sup>United States Postal Service Domestic Return Receipt for article numbers 7004 1160 0004 4087 9979 and 7004 1160 0004 4087 9368.

<sup>4</sup>United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4087 9993.

appeal petition within 30 days after service of the ALJ's Decision and Order, and, in accordance with the Rules of Practice, the ALJ's Decision and Order became final and effective as to Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion 35 days after service of the ALJ's Decision and Order. (See 7 C.F.R. § 1.142(c)(4).)

The Rules of Practice provide that the administrative law judge shall rule on all motions made prior to the filing of the appeal of the administrative law judge's decision, except motions directly relating to the appeal, and the Judicial Officer shall rule on all motions made after the filing of an appeal. (See 7 C.F.R. § 1.143(a).) The petitions to reopen do not directly relate to an appeal. Therefore, as to Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion, I lack jurisdiction to rule on the petitions to reopen.

*Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion*

Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion appealed the ALJ's June 9, 2006, Decision and Order and filed each of the petitions to reopen after they had filed their appeal. Therefore, as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion, I have jurisdiction to rule on the petitions to reopen.

Based upon my review of "Respondents' Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed April 5, 2007, I find Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion seek to adduce evidence that is cumulative or inadmissible. Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion had ample opportunity to obtain and present their evidence. The ALJ conducted an 8-day oral hearing. The Administrator presented his case in 3 days, calling two witnesses, who Respondents cross-examined, and introducing 74 exhibits that were admitted into evidence. Respondents presented their case during the remaining 5 days, calling 13 witnesses and introducing 22 exhibits that were admitted into evidence.

Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion identify two purposes for which they seek to reopen the hearing: (1) to establish Respondents' guarantees are "probably" reflected by the United States Department of Agriculture's [hereinafter USDA] re-inspection results and USDA withheld or destroyed documents on which re-inspection results are recorded; and (2) to establish USDA's record-keeping system was untrustworthy (Respondents' Motion to Reopen Administrative Hearing Held Before ALJ Davenport at 67). Respondents attempted to establish that their documents accurately reflected USDA inspection results and that USDA's inspection procedure was untrustworthy during the hearing. I find no reason to reopen the hearing to allow further evidence for these purposes.

The Rules of Practice do not provide an automatic right to file more than one petition to reopen the hearing.<sup>5</sup> Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion did not seek leave to file multiple petitions to reopen the hearing. Therefore, as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion, I deny "Respondents' Second Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed September 7, 2007; "Respondents' Third Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed October 10, 2007; and Respondents' Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed October 15, 2007.

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<sup>5</sup>*Cf. In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (holding, under the Rules of Practice, a party may not file more than one petition for reconsideration of a decision of the Judicial Officer); *In re Jerry Goetz* (Order Lifting Stay), 61 Agric. Dec. 282, 286 (2002) (holding the Rules of Practice do not provide for filing more than one petition for reconsideration of a decision of the Judicial Officer); *In re Fitchett Bros., Inc.* (Dismissal of Pet. for Recons.), 29 Agric. Dec. 2, 3 (1970) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

Charles A. Carter d/b/a C.C. Horses Transport 387  
Jeremy Pollitt d/b/a Wildcat Trucking  
68 Agric. Dec. 387

## ANIMAL QUARANTINE ACT

### DEFAULT DECISIONS

**In re: CHARLES A. CARTER d/b/a C.C. HORSES TRANSPORT;  
AND JEREMY POLLITT d/b/a WILDCAT TRUCKING.  
A.Q. Docket No. 09-0024.  
Default decision as to only JEREMY POLLITT.  
April 8, 2009.**

**AQ – Default.**

Thomas Neil Bolick for APHIS.  
Respondent Pro se.  
*Default Decision by Administrative Law Judge Jill S. Clifton.*

#### Default Decision

1. The Complaint, filed on November 17, 2008, alleges, among other things, that Jeremy Pollitt, doing business as Wildcat Trucking (one of the two respondents), an owner/shipper of horses (9 C.F.R. § 88.1), failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88.1 *et seq.*). The Complainant seeks \$7,200.00 in civil penalties (9 C.F.R. § 88.6) for Jeremy Pollitt's failures to comply on about December 16, 2004, and on or about March 30, 2005.

#### Parties and Counsel

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel (Regulatory

Division), United States Department of Agriculture, South Building Room 2319, 1400 Independence Ave. SW, Washington, D.C. 20250.

3. The Respondent, Jeremy Pollitt, doing business as Wildcat Trucking (frequently herein “Respondent Pollitt” or “Respondent”) has failed to appear.

#### **Procedural History**

4. APHIS’ Motion for Adoption of Proposed Default Decision and Order (as to only Respondent Jeremy Pollitt, doing business as Wildcat Trucking), filed February 18, 2009, is before me. Respondent Pollitt was served on February 28, 2009 with a copy of that Motion and a copy of the Proposed Default Decision and Order and failed to respond.

5. Regarding service of the Complaint, on December 18, 2008, Respondent Pollitt was served<sup>1</sup> with a copy of the Complaint, together with a copy of the Hearing Clerk’s notice letter and a copy of the Rules of Practice. *See* 7 C.F.R. § 1.130 *et seq.* The Respondent’s answer was due to be filed within 20 days after service, according to section 1.136(a) of the Rules of Practice. 7 C.F.R. § 1.136(a). The time for filing an answer to the Complaint expired on January 7, 2009. Respondent Pollitt failed to file an answer, so he is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

6. Respondent Pollitt was informed in the Complaint and the letter accompanying the Complaint that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent Pollitt never did file an answer to the Complaint. Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent’s

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<sup>1</sup> First, the certified mailing was returned, marked by the United States Postal Service “RETURN TO SENDER” “Unclaimed”. *See* 7007 0710 0001 3858 8298. Remailing by ordinary mail accomplishes service. 7 C.F.R. § 1.147(c)(1).

default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139. [*See also* 7 C.F.R. § 380.1 *et seq.*]

### **Findings of Fact and Conclusions**

7. Respondent Jeremy Pollitt, doing business as Wildcat Trucking, is the owner of a company that commercially transports horses to slaughter and was, at all times material to this Decision, a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter.

8. Respondent Pollitt was an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1. The Secretary of Agriculture has jurisdiction over Respondent Pollitt and the subject matter involved herein.

9. Respondent Pollitt's last known mailing address was 7708 3<sup>rd</sup> Street, Wellington, Colorado 80549, according to APHIS's Motion filed on February 18, 2009. Respondent Pollitt's delivery address is PO Box 483, Wellington, Colorado 80549, according to the Domestic Return Receipt [7007 0710 0001 3858 8298] returned to the Hearing Clerk by the United States Postal Service on December 17, 2008.

10. Respondent Pollitt is responsible not only for what he himself did or failed to do in violation of the Commercial Transportation of Equines for Slaughter Act and Regulations, but also for what others did or failed to do on his behalf in the commercial transportation of horses for slaughter, as his agents, in violation of the Act and Regulations. Respondent Pollitt is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers.

11. On or about December 16, 2004, Respondent Pollitt shipped 41 horses in commercial transportation from Loveland, Colorado, to Cavel International in Dekalb, Illinois for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); and (2) the name of

the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

12. (a) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the date and time when the horses were loaded onto the conveyance were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter. Respondent Pollitt and/or his driver unloaded the horses in Harlan, Iowa, and reloaded them sometime later for commercial transportation to Cavel International in Dekalb, Illinois for slaughter, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(c) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter. Respondent Pollitt's driver stated that horses fought each other constantly during said transportation. Respondent Pollitt thus failed to completely segregate each aggressive horse on the conveyance so that no aggressive horse could come into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.3(a)(2).

(d) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter. Respondent Pollitt's driver stated that horses fought each other constantly during said transportation. Respondent Pollitt thus failed to handle the horses as expeditiously and carefully as possible in a manner that did not cause

them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

13. During the two shipments detailed in paragraphs 11 and 12, Respondent Pollitt, doing business as Wildcat Trucking, failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*). The maximum civil penalty per violation is \$5,000.00, and each equine transported in violation of the regulations will be considered a separate violation. Civil penalties totaling \$7,200.00 are warranted and appropriate in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed February 18, 2009.

#### **Order**

14. Respondent Jeremy Pollitt, doing business as Wildcat Trucking, an owner/shipper, is assessed civil penalties totaling **\$7,200.00** (seven thousand two hundred dollars), which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States.**" Respondent Pollitt shall include with his payments any change in mailing address (from those shown in paragraph 9) or other contact information.

15 Respondent Pollitt shall reference **A.Q. Docket No. 09-0024** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

United States Department of Agriculture  
APHIS, Accounts Receivable  
P.O. Box 3334  
Minneapolis, Minnesota 55403

within sixty (60) days from the effective date of this Order. The provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 16 to determine when this Decision and Order becomes final.

**Finality**

16. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties (including the other respondent). Respondent Pollitt's copies shall be sent to both addresses in paragraph 9.

Done at Washington, D.C.

**APPENDIX A****7 C.F.R.:****TITLE 7--AGRICULTURE****SUBTITLE A--OFFICE OF THE SECRETARY OF  
AGRICULTURE****PART 1--ADMINISTRATIVE REGULATIONS**

.....

**SUBPART H--RULES OF PRACTICE GOVERNING  
FORMAL****ADJUDICATORY PROCEEDINGS INSTITUTED BY THE  
SECRETARY UNDER****VARIOUS STATUTES**

...

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days

after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral

argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a

Dennis R. Smebakken d/b/a Rushmore Livestock, Inc. 395  
Randall C. Brumbaugh d/b/a  
Randall's Transportation and Robert Paulson  
68 Agric. Dec. 395

petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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**In re: DENNIS R. SMEBAKKEN, d/b/a RUSHMORE LIVESTOCK, INC.; RANDALL C. BRUMBAUGH, d/b/a RANDALL'S TRANSPORTATION; and ROBERT PAULSON. A.Q. Docket No. 09-0026. Default Decision. May 6, 2009.**

**AQ – Default.**

Thomas Neil Bolick.  
Respondent Pro se.  
*Default Decision by Administrative Law Judge Peter M. Davenport.*

**DEFAULT DECISION AND ORDER  
AS TO ROBERT PAULSON**

**Preliminary Statement**

This is an administrative proceeding for the assessment of a civil penalty for violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, the regulations promulgated thereunder (9 C.F.R. part 88), and in accordance with the rules of practice applicable to this proceeding as set forth in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

On November 18, 2008, the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of

Agriculture (USDA), initiated this proceeding by filing an administrative complaint against Respondent Paulson. The complaint was mailed to Respondent Paulson at P.O. Box 134, Geddes, South Dakota 57342, his last known residence, via certified mail, return receipt requested. On December 1, 2008, the complaint mailed to Respondent Paulson was returned to the Hearing Clerk marked by the U.S. Postal Service as “unable to forward”, and the next day the Hearing Clerk sent counsel for the complainant a notice of unsuccessful service. Counsel for the Complainant was able to secure another address for Respondent Paulson, and on December 10, 2008, the Hearing Clerk re-mailed the complaint to Respondent Paulson at 106 East 7<sup>th</sup> Street, P.O. Box 113, Platte, South Dakota 57369, via certified mail, return receipt requested. On January 7, 2009, the complaint mailed to Respondent Paulson’s second address was returned to the Hearing Clerk marked by the U.S. Postal Service as as “unclaimed or refused.” Section 1.147(c)(1) of the rules of practice (7 C.F.R. § 1.147(c)(1)) provides that any document that is initially sent to a person by registered mailed to make that person a party Respondent in a proceeding but is returned marked by the postal service as unclaimed or refused shall be deemed to have been received by said person on the date that it is re-mailed by ordinary mail to the same address. Accordingly, the Hearing Clerk re-mailed the complaint to Respondent Paulson at the same address via regular mail on January 8, 2009. Therefore, Respondent Paulson is deemed to have been properly served with the complaint on January 8, 2009.

Section 1.136 of the rules of practice (7 C.F.R. § 1.136) provides that an answer to a complaint should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent Paulson’s answer thus was due no later than January 28, 2009, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent Paulson never filed an answer to the complaint and the Hearing Clerk mailed him a no answer letter on January 29, 2009.

Respondent Paulson failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and accordingly failed to deny or otherwise respond to an allegation of the complaint. Section 1.136(c)

of the rules of practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, because the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and Respondent Paulson's failure to file an answer is deemed such an admission pursuant to the rules of practice, Respondent Paulson's failure to answer is likewise deemed a waiver of hearing. Accordingly, the material allegations in the complaint are deemed admitted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Robert Paulson, hereinafter referred to as Respondent Paulson, is a truck driver for loads of horses being commercially transported to slaughter. He has a mailing address in Platte, South Dakota 57369.
2. (a) On or about March 28, 2005, Respondent Paulson shipped a load of 45 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois (hereinafter, Cavel), for slaughter. Respondent Paulson unloaded the horses in Platte, South Dakota, at 2 a.m. on March 29, 2005, and reloaded them about 12 hours later for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).  
(b) On or about March 28, 2005, Respondent Paulson shipped a load of 45 horses in commercial transportation from Billings, Montana, to Cavel for slaughter. One of the horses in the shipment, bearing USDA back tag # USBZ 6891, went down about 300 miles outside of Platte, South Dakota, indicating that it was in obvious physical distress, yet Respondent Paulson did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. §

88.4(b)(2).

3. On or about April 4, 2005, Respondent Paulson shipped a load of 56 horses in commercial transportation from Aberdeen, South Dakota, and Mobridge, South Dakota, to Cavel for slaughter. One of the horses in the shipment, an old mare bearing USDA back tag # USAW 1282, went down at least three times during said transportation, indicating that it was in obvious physical distress, yet Respondent Paulson did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

4. (a) On or about May 10, 2005, Respondent Paulson shipped a load of 44 horses in commercial transportation from St. Onge, South Dakota, to Cavel for slaughter. One of the horses in the shipment, a palomino mare bearing USDA back tag # USBJ 7961, went down right after loading and several times during said transportation, indicating that it was in obvious physical distress, yet Respondent Paulson did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(b) On or about May 10, 2005, Respondent Paulson shipped a load of 44 horses in commercial transportation from St. Onge, South Dakota, to Cavel for slaughter. One of the horses in the shipment, a palomino mare bearing USDA back tag # USBJ 7961, went down right after loading and several times during said transportation, and died while en route to the slaughter facility. Respondent Paulson thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

5. (a) On or about June 28, 2005, Respondent Paulson shipped 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel for slaughter. Four (4) of the horses were transported inside a removable/collapsible section of the conveyance, commonly known as the “dog house” or “jail box,” that did not provide the horses with adequate headroom. Respondent Paulson thus transported these four (4) horses to slaughter in a section of the conveyance that did not have sufficient interior height in its animal cargo space to allow each horse in that space to stand with its head extended to the fullest normal postural height, in violation of 9 C.F.R.

§ 88.3(a)(3).

(b) On or about June 28, 2005, Respondent Paulson shipped 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel for slaughter. Four (4) of the horses were transported inside a removable/collapsible section of the conveyance, commonly known as the "dog house" or "jail box," that did not provide the horses with adequate headroom. One of these four (4) horses, bearing USDA back tag # USCI 2393, became stuck in the "dog house" or "jail box" during the commercial transportation to slaughter and suffered cuts, scrapes, and bruises along its back and around its left eye. Respondent Paulson thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

6. (a) On or about August 18, 2005, Respondent Paulson shipped a load of 42 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. The conveyance had an elliptical air hole/vent opening with sharp edges that was located about two feet above the top deck floor. During said transportation, one of the horses in the shipment, a gray gelding with USDA back tag # USCO 3467, caught its foot in this hole, fell down, and was trampled to death by the other horses. Respondent Paulson thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) On or about August 18, 2005, Respondent Paulson shipped a load of 42 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. The conveyance had an elliptical air hole/vent opening with sharp edges that was located about two feet above the top deck floor. During said transportation, one of the horses in the shipment, a gray gelding with USDA back tag # USCO 3467, caught its foot in this hole, fell down, and was trampled to death by the other horses. Respondent Paulson thus failed to handle this horse as expeditiously and

carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

7. (a) On or about September 21, 2005, Respondent Paulson shipped 44 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. One of the horses in the shipment, bearing USDA back tag # USBP 1971, had a severe pre-existing head injury at the time that it was loaded onto the conveyance, yet Respondent Paulson failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(b) On or about September 21, 2005, Respondent Paulson shipped 44 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. One of the horses in the shipment, bearing USDA back tag # USBP 1971, had a severe pre-existing head injury at the time that it was loaded onto the conveyance, yet Respondent Paulson shipped it with the other horses. Respondent Paulson thus failed to handle the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

8. (a) On or about October 2, 2005, Respondent Paulson shipped 39 horses in commercial transportation from Gordon, Nebraska, to Cavel for slaughter in a conveyance that had a loose chain hanging from the roof of the conveyance. Respondent Paulson thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) On or about October 2, 2005, Respondent Paulson shipped 39 horses in commercial transportation from Gordon, Nebraska, to Cavel for slaughter in a conveyance that had a loose chain hanging from the roof of the conveyance. One of the horses in the shipment, bearing USDA back tag # USBP 1763, suffered a head injury consistent with being struck on the head by the chain during commercial transportation to slaughter. Respondent Paulson thus failed to handle the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation

of 9 C.F.R. § 88.4(c).

9. On or about November 8, 2005, Respondent Paulson shipped 39 horses in commercial transportation from Sisseton, South Dakota, to Cavel for slaughter. The shipment included at least one (1) stallion bearing USDA back tag # USBS 7958, but Respondent Paulson did not load the horses on the conveyance so that the stallion was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

10. (a) On or about December 13, 2005, Respondent Paulson shipped 42 horses in commercial transportation from Presko, South Dakota, to Cavel for slaughter. The owner-shipper certificate, VS Form 10-13, for this shipment indicated that the horses had been loaded on the conveyance at 5 p.m. on December 13, but they were not unloaded from the conveyance until 5 a.m. on December 15, indicating that they were on the trailer for 36 consecutive hours. Respondent Paulson thus allowed the horses to be on the conveyance more than 28 consecutive hours without being offloaded and provided with food, water, and the opportunity to rest for at least six (6) consecutive hours, in violation of 9 C.F.R. § 88.4(b)(3).

(b) On or about December 13, 2005, Respondent Paulson shipped 42 horses in commercial transportation from Presko, South Dakota, to Cavel for slaughter. Respondent Paulson delivered the horses outside of Cavel's normal business hours and left the slaughter facility, but they did not return to Cavel to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

11. (a) On or about January 25, 2006, Respondent Paulson shipped 37 horses in commercial transportation from Mitchell, South Dakota, to Cavel for slaughter but did not apply USDA back tags to 28 of the horses, in violation of 9 C.F.R. § 88.4(a)(2).

(b) On or about January 25, 2006, Respondent Paulson shipped 37 horses in commercial transportation from Mitchell, South Dakota, to Cavel for slaughter. The shipment contained one (1) stallion, USDA back tag # USBS 9051, but Respondent Paulson did not load the stallion

on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

12. On or about March 22, 2006, Respondent Paulson shipped 42 horses in commercial transportation from an unknown location to Cavel for slaughter. The shipment contained two (2) stallions, one bearing USDA back tag #s USCS 5089 and the other having no USDA backtag but bearing Cavel tag # 2535, but Respondent Paulson did not load the two stallions on the conveyance so that they were completely segregated from each other and the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

13. On or about June 13, 2006, Respondent Paulson was the driver of a shipment of 46 horses being commercially transported from St. Onge, South Dakota, to Cavel for slaughter. The top rear deck of the conveyance used to transport the horses was so overcrowded with horses that they did not have enough room to turn around and come off the conveyance at the slaughter plant. Respondent Paulson started poking the horses with a sorting stick in an effort to make them off-load, which caused a horse bearing USDA back tag # USCS 4974 to start kicking and injure its right hind leg. Respondent Paulson thus failed to transport the injured horse and the other horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

### **Conclusions of Law**

The Secretary has jurisdiction in this matter. By reason of the Findings of Fact set forth above, Respondent Paulson violated the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note).

### **Order**

Respondent Robert Paulson is hereby assessed a civil penalty of Sixty-Four Thousand Seven Hundred Twenty Five Dollars (\$64,725.00).

Cody D. Frame  
68 Agric. Dec. 403

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This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

Respondent Robert Paulson shall indicate that payment is in reference to A.Q. Docket No. 09-0026.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this default decision and order upon Respondent Robert Paulson unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

Done at Washington, D.C.

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**In re: CODY D. FRAME.**  
**A.Q. Docket No. 09-0025.**  
**Default Decision.**  
**June 18, 2009.**

**AQ – Default.**

Thomas Neil Bolick for APHIS.  
Respondent Pro se.  
*Default Order by Administrative Law Judge Jill S. Clifton.*

#### **Decision and Order by Reason of Default**

1. The Complaint, filed on November 17, 2008, alleges, among other things, that Cody D. Frame, Respondent, an owner/shipper of horses (9

C.F.R. § 88.1), on or about April 28, 2005, failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88.1 *et seq.*). The Complainant seeks \$7,000.00 in civil penalties (9 C.F.R. § 88.6) for Cody D. Frame's failures to comply.

#### **Parties and Counsel**

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel (Regulatory Division), United States Department of Agriculture, South Building Room 2319, 1400 Independence Ave. SW, Washington, D.C. 20250.
3. The Respondent, Cody D. Frame (frequently herein "Respondent Frame" or "Respondent") has failed to appear.

#### **Procedural History**

4. APHIS' Motion for Adoption of Proposed Default Decision and Order, filed February 6, 2009, is before me. Respondent Frame was served with a copy of that Motion and a copy of the Proposed Default Decision and Order on March 28, 2009, and failed to respond.
5. Regarding service of the Complaint, Respondent Frame was served (he personally signed for delivery of the certified mailing) in late November or early December 2008. What he was served with included a copy of the Complaint, a copy of the Hearing Clerk's notice letter dated November 18, 2008, and a copy of the Rules of Practice. *See* 7 C.F.R. § 1.130 *et seq.*
6. Respondent Frame's answer was due to be filed within 20 days after service, according to section 1.136(a) of the Rules of Practice. 7 C.F.R. § 1.136(a). Respondent Frame never did file an answer to the Complaint, and he is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).
7. Respondent Frame was informed in the Complaint and the letter accompanying the Complaint that an answer should be filed with the

Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

8. Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139. [*See also* 7 C.F.R. § 380.1 *et seq.*]

#### **Findings of Fact and Conclusions**

9. Respondent Cody D. Frame is a self-employed truck driver with a mailing address in Aladdin, Wyoming, who, on or about April 28, 2005, commercially transported horses to slaughter. Respondent Frame was an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1.

10. The Secretary of Agriculture has jurisdiction over Respondent Frame and the subject matter involved herein.

11. On or about April 28, 2005, Respondent Frame shipped a load of 49 horses in commercial transportation for slaughter from Billings, Montana, to Cavel International in Dekalb, Illinois:

(a) in a conveyance that had inadequate headroom for the horses.

Respondent Frame thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1); and

(b) at least five horses in the shipment suffered head and facial injuries during said transportation because the conveyance used for the transportation had inadequate headroom for the horses.

Respondent Frame thus failed to handle these horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or

trauma, in violation of 9 C.F.R. § 88.4(c).

12. During the shipment detailed in paragraph 11, Respondent Frame failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*). The maximum civil penalty per violation is \$5,000.00, and each equine transported in violation of the regulations will be considered a separate violation. Civil penalties totaling \$7,000.00 are warranted and appropriate in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed February 6, 2009.

#### **Order**

13. Respondent Cody D. Frame, an owner/shipper, is assessed civil penalties totaling **\$7,000.00** (seven thousand), which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States.**" Respondent Frame shall include with his payments any change in mailing address or other contact information.

14. Respondent Frame shall reference **AQ 09-0025** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

United States Department of Agriculture  
APHIS, Accounts Receivable  
P.O. Box 3334  
Minneapolis, Minnesota 55403

within sixty (60) days from the effective date of this Order. The provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 15 to determine when this Decision and Order becomes final.

#### **Finality**

15. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer

is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.  
Administrative Law Judge

**APPENDIX A**

**7 C.F.R.:**

**TITLE 7—AGRICULTURE**

**SUBTITLE A—OFFICE OF THE SECRETARY OF  
AGRICULTURE**

**PART 1—ADMINISTRATIVE REGULATIONS**

....

**SUBPART H—RULES OF PRACTICE GOVERNING  
FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE  
SECRETARY UNDER**

**VARIOUS STATUTES**

...

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding

evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in

advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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**In re: JACK REINERT.**  
**A.Q. Docket No. 08-0125.**  
**Default Decision.**  
**Filed June 19, 2009.**

**AQ – Default.**

Thomas Neil Bolick for APHIS.  
Respondent Pro se.

*Default Decision by Chief Administrative Law Judge Marc R. Hillson.*

#### **Default Decision and Order**

This is an administrative proceeding for the assessment of a civil penalty for violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, and 9 C.F.R. part 88 in accordance with the rules of practice in 7 C.F.R. §§ 1.130 et seq. and 380.1 et seq.

On May 22, 2008, the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), initiated this proceeding by filing an administrative complaint against Respondent. The complaint was eventually properly served on Respondent.<sup>1</sup>

On August 12, 2008, the Hearing Clerk received Respondent's partial answer to the complaint. Respondent's partial answer consists of an undated and unsigned handwritten statement that refers to an affidavit that respondent gave IES Investigator Don Borchert on August 24, 2006. This affidavit only addresses the violations alleged in counts XI and XII of the complaint. Respondent's answer failed to deny or otherwise address counts I through X of the complaint. Section 1.136(c) of the

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<sup>1</sup>The Motion for Adoption of Default Decision recites the rather convulsed history of the attempts to assure that Respondent was properly served. Since Respondent did file an answer the timeliness of which is not contested, I simply note that service was accomplished.

rules of practice (7 C.F.R. § 1.136(c)) provides that the failure to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Section 1.139 of the rules of practice (7 C.F.R. § 1.139) further states that the admission of the allegations in the complaint constitutes a waiver of hearing. Therefore, Respondent's failure to deny or otherwise address counts I through X of the complaint thus constitutes both an admission of the allegations set forth in those counts and a waiver of hearing on those counts. Accordingly, the material allegations in counts I through X of the complaint are adopted and set forth in this default decision as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Respondent Jack Reinert is a licensed livestock buyer in South Dakota and has been buying horses since 1987. Respondent has a mailing address of 23422 329<sup>th</sup> Avenue, Reliance, South Dakota 57569. Respondent has a second mailing address of 23808 333<sup>rd</sup> Avenue, Reliance, South Dakota 57569.<sup>2</sup>
2. On or about July 7, 2003, respondent shipped 32 horses in commercial transportation from Sisseton, South Dakota, to Dallas Crown, Inc., in Kaufman, Texas (hereinafter referred to as Dallas Crown), for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) it listed only 23 horses rather than each horse being transported, in violation of 9 C.F.R. § 88.4(a)(3); (2) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).
3. (a) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter but did not properly fill out the required owner-shipper

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<sup>2</sup>According to the Motion for Default Decision, Respondent is currently incarcerated.

certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv), and (2) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter. The shipment contained a stallion but Respondent did not load it on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(c) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter. At least two (2) horses in the shipment went down while en route to the slaughter plant such that they were not able to get up and had to be euthanized on the conveyance upon its arrival at Dallas Crown. The fact that these two (2) horses became nonambulatory en route indicated that they were in obvious physical distress, yet Respondent and/or his driver thus did not check the physical condition of the horses at least once every six (6) hours or, in the alternative, did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(d) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter. At least two (2) horses in the shipment went down while en route to the slaughter plant such that they were not able to get up and had to be euthanized on the conveyance upon its arrival at Dallas Crown. Respondent and/or his driver thus failed to handle these two (2) horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

4. On or about February 5, 2004, Respondent shipped 37 horses in commercial transportation from Gregory, South Dakota, to Dallas Crown for slaughter but did not properly fill out the required ownership certificate, VS Form 10-13. The form had the following

deficiencies: (1) it listed only 35 horses rather than each horse being transported, in violation of 9 C.F.R. § 88.4(a)(3); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

5. On or about February 22, 2004, Respondent shipped 28 horses in commercial transportation from Minot, North Dakota, to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v) and (2) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

6. On or about February 23, 2004, Respondent shipped 22 horses in commercial transportation from Fairbury, Nebraska, to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) it did not list the name of auction/market, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (2) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

7.(a) On or about June 30, 2004, Respondent shipped 45 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter but did not apply a USDA back tag to each horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(2).

(b) On or about June 30, 2004, Respondent shipped 45 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) it did not indicate the color and sex of any of the listed horses, physical characteristics that could be used to identify the horses, in

violation of 9 C.F.R. § 88.4(a)(3)(v), and (2) it did not list the prefixes and numbers of the USDA back tags for any horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(c) On or about June 30, 2004, Respondent shipped 45 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter. Respondent failed to maintain a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, in violation of 9 C.F.R. § 88.4(f).

8. (a) On or about August 8, 2004, Respondent shipped 42 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the shipment included a horse, USDA back tag # USBG 7801, that had a pre-existing injury to its right front leg, but there was no indication that this horse had a pre-existing injury or other unusual condition that may have caused it to have special handling needs, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) On or about August 8, 2004, Respondent shipped 42 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter. One of the horses, USDA back tag # USBG 7828, had a pre-existing injury to its left rear hoof and another horse, USDA back tag # USBG 7801, had a pre-existing injury to its right front leg such that neither horse could bear weight on all four limbs, yet Respondent shipped them with the other horses. Respondent and/or his driver thus failed to handle the two (2) injured horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

(c) On or about August 8, 2004, Respondent shipped 42 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter. Respondent failed to maintain a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, in violation of 9 C.F.R. § 88.4(f).

9. On or about November 21, 2004, Respondent shipped 47 horses in commercial transportation from Fort Pierre, South Dakota, to Dallas Crown for slaughter. One horse in the shipment, a bay mare without a USDA back tag, did not want to stand during said transportation but

kept lying down, thereby causing it to be kicked and stepped on by the other horses in the shipment. By reason of the foregoing, this horse was in obvious physical distress, yet Respondent failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

10. On or about December 8, 2004, Respondent shipped 46 horses in commercial transportation from Sisseton, South Dakota, to Dallas Crown, Inc., in Kaufman, Texas (hereinafter referred to as Dallas Crown), for slaughter but did not properly fill out the required ownership certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

### **Conclusion**

By reason of the Findings of Fact set forth above, Respondent Jack Reinert violated the Commercial Transportation of Equines for Slaughter Act, 7 U.S.C. ' 1901 note. Therefore, the following Order is issued.

### **Order**

Respondent Jack Reinert is hereby assessed a civil penalty of forty eight thousand one hundred and fifty dollars (\$48,150.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

Respondent Jack Reinert shall indicate that payment is in reference

to A.Q. Docket No. 08-0125.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent Jack Reinert unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

Done at Washington, D.C.

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**ANIMAL WELFARE ACT**

**DEFAULT DECISIONS**

**In re: VANA M. STARK.**  
**AWA Docket No. 08-0096.**  
**Default Decision.**  
**February 9, 2009.**

**AWA – Default.**

Robert Ertman for APHIS.  
Respondent Pro se.  
*Default Order by Administrative Law Judge Peter M. Davenport.*

**DEFAULT DECISION AND ORDER**

This proceeding was instituted under the Animal Welfare Act (the “Act”), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations and standards (the “Regulations”) issued thereunder. (9 C.F.R. § 1.1 *et seq.*)

The Hearing Clerk sent a copy of the Complaint and the Rules of Practice governing proceedings under the Act, (7 C.F.R. § 1.130 *et seq.*) to the Respondent by certified mail, return receipt requested, on September 18, 2008. On September 19, 2008, the mailing was signed for at the address which the Respondent had provided.<sup>1</sup> The Respondent was informed in the accompanying letter of service that an Answer to

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<sup>1</sup> The Hearing Clerk had previously sent a copy of the Complaint and the Rules of Practice to the Respondent by certified mail on April 4, 2008. The mailing was returned as “unclaimed” and pursuant to the Rules, the Hearing Clerk re-mailed the complaint and the accompanying materials by ordinary mail to the same address. The Respondent failed to file an Answer within the prescribed time and a Motion for entry of judgment by default was filed. The Respondent responded to the Motion by letter, in which she stated that she had not received the Complaint as she was in jail at the time. Upon receiving her response, counsel for the Complainant withdrew his Motion and asked that she be re-served with a copy of the Complaint and the Rules of Practice.

the Complaint should be filed pursuant to the Rules of Practice and that a failure to answer any allegation in the Complaint would constitute an admission of that allegation. The Respondent failed to file an Answer within the time prescribed in the Rules of Practice; thus the material facts alleged in the Complaint, which are admitted by Respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rule of Practice, 7 C.F.R. § 1.139.

#### **FINDINGS OF FACT**

1. Respondent Vana M. Stark is an individual whose mailing address is Post Office Box 183, South Haven, Kansas 67140.
2. The Respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.
3. On or about March 16, 2006, May 4, 2006 and May 18, 2006, Respondent sold a total of 12 puppies for resale as pets while not licensed as a dealer under the Act.
4. The Respondent made a false written statement to the purchaser stating that she was exempt from the licensing requirement as not having more than three breeding females.

#### **CONCLUSIONS OF LAW**

The Secretary has jurisdiction in this matter.

2. The sale of each dog constitutes a willful violation of Section 4 of the Act (7 U.S.C. § 2134) and Section 2.1 of the regulations (9 C.F.R. § 2.1).

#### **ORDER**

1. The Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.
2. The Respondent is assessed a civil penalty of \$1,125.00. which

shall be paid by certified check or money order made payable to the Treasurer of the United States. Payment should be sent to:

Robert A. Ertman, Esquire  
Office of the General Counsel  
United States Department of Agriculture  
Room 2014, South Building  
Washington, D.C. 20250

3. The provisions of this Order shall become effective on the first day after this Decision becomes final. Pursuant to the Rules of practice, this Decision becomes final without further proceedings 35 days after service as provided in Sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. § 1.142 and 1.145.

Copies of this Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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**In re: GRANT WILLIAM OLY d/b/a TIGER ZONE.**  
**AWA Docket No. 08-0122.**  
**Default Decision.**  
**April 6, 2009.**

**AWA – Default.**

Bernadette R. Juarez for APHIS.  
Respondent Pro se.

*Default Decision by Administrative Law Judge Jill S. Clifton.*

### **Decision and Order by Reason of Default**

#### **Procedural History**

1. This proceeding was initiated under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (herein frequently the “Act”), by a Complaint filed on May 20, 2008. The Complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture (herein frequently “APHIS” or “Complainant”), was represented by Bernadette Juarez, Esq., (and is believed now to be represented by Colleen A. Carroll, Esq.), with the Marketing Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250-1417.

2. The Complaint alleged that Grant William Oly, an individual, doing business as Tiger Zone, a former Minnesota nonprofit corporation, the respondent (herein frequently “Respondent Oly” or “Respondent”) willfully violated the Act and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*) (herein frequently “Regulations” and “Standards”).

3. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139. The Hearing Clerk sent to Respondent Oly a copy of the Complaint (together with the Hearing Clerk’s notice letter dated May 21, 2008, and a copy of the Rules of Practice), by certified mail, return receipt requested. [*See Domestic Return Receipt for Article Number 7004 1160 0004 4087 8606.*] Although the United States Postal Service attempted to serve Respondent Oly with the Hearing Clerk’s mailing, the Postal Service returned the mailing to the Hearing Clerk on June 11, 2008, marked, “MR. OLY LOOKED AT RETURN ADDRESS ON THIS LETTER & REFUSED TO ACCEPT IT.” and “RETURNED TO SENDER” “REFUSED BY ADDRESSEE”.

4. On June 13, 2008, the Hearing Clerk served Respondent Oly, by regular mail, with a copy of the Complaint, notice letter, and Rules of Practice, in accordance with section 1.147(c)(1) of the Rules of Practice. 7 C.F.R. § 1.147(c)(1). [*See Memorandum to File, dated June 13, 2008.*] Respondent was informed that an answer should be filed within 20 days and that failure to answer would constitute an admission of the allegations and a waiver of the right to a hearing.

5. Respondent Oly failed to file an answer. The time for filing an answer expired on July 3, 2008.

6. The Complainant’s Motion for the issuance of a decision, filed December 8, 2008, is before me. The Hearing Clerk sent to Respondent Oly a copy of the Motion (together with proposed Decision and Order),

by certified mail, return receipt requested. [See Domestic Return Receipt for Article Number 7007 0710 0001 3860 2307.] Although the United States Postal Service attempted to serve Respondent Oly with the Hearing Clerk's mailing, it was marked "RETURNED TO SENDER, UNCLAIMED" and returned to the Hearing Clerk on January 8, 2009. The Motion (together with proposed Decision and Order) was mailed by regular mail on January 8, 2009, but that mailing was marked "RETURN TO SENDER" "REFUSED" "UNABLE TO FORWARD".

7. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Respondent Oly's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. See 7 C.F.R. §1.130 *et seq.*

#### **Findings of Fact and Conclusions**

8. The Secretary of Agriculture has jurisdiction.
9. Respondent Grant William Oly is an individual doing business as Tiger Zone, a former Minnesota nonprofit corporation, 30840 Ski Road, Red Wing, Minnesota 55066.
10. At all times material herein Respondent Oly was operating as an exhibitor and/or dealer as those terms are defined in the Act and the Regulations, and held Animal Welfare Act license number 41-C-0124.
11. On or about March 3, 2006, Animal Welfare Act license number 41-C-0124 expired because it was not renewed.
12. Respondent Oly has had ongoing and repeated issues with the safe handling of his tigers.
13. On or about March 10, 2002, one of Respondent Oly's tigers bit a young man and, in particular, severed a portion of the left index finger.
14. On or about July 17, 2002, one of Respondent Oly's tigers (T.J.) bit a young woman and, in particular, the left arm.

15. In 2002, one of Respondent Oly's tigers bit Respondent's assistant.
16. On or about March 22, 2003, one of Respondent Oly's tigers (Nakita), during public exhibition, bit a woman who was pregnant.
17. The tiger, described above in paragraph 16, was euthanized for rabies testing.
18. On or about November 11, 2003, Complainant and Respondent entered into a stipulation, described below in paragraph 25, to resolve alleged violations involving Respondent's failure to comply with handling regulations on or about March 22, 2003.
19. On or about April 27, 2005, Respondent Oly's tigers attacked and severely injured Respondent's assistant.
20. On or about May 4, 2005, Judge Thomas W. Bibus, Minnesota District Court, First Judicial District, issued an order in *State of Minnesota v. Grant William Oly*, TA-05-2878 (MN 2005), authorizing the State of Minnesota to seize "all seven (7) tigers located on" respondent's property based, in part, on:
  - On going and repeated safety [sic] problems with the physical barriers of the enclosures used to house the tigers.
  - Improper and inadequate training and protective procedures for those assisting in the care of the tigers, as evidence by several reported incidences of tiger bites occurring on [Respondent's] premises. The latest incident involved life-threatening injuries.

#### VIOLATIONS

21. On or about April 27, 2005, Respondent Oly willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, regarding the handling of tigers and, as a result, Respondent's tigers attacked and seriously injured one of Respondent's assistants. 9 C.F.R. § 2.40(b)(4).
22. On or about April 27, 2005, Respondent Oly willfully violated the handling regulations by failing to handle tigers as carefully as possible

in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, Respondent placed his tigers in a position that allowed an inadequately trained assistant to contact the tigers directly and, as a result, the tigers attacked and severely injured the assistant. 9 C.F.R. § 2.131(b)(1).

SIZE OF RESPONDENT'S BUSINESS, GRAVITY OF VIOLATIONS, COMPLIANCE HISTORY, LACK OF GOOD FAITH

23. At all times material herein, Respondent Oly operated a small business.

24. The gravity of Respondent Oly's violations is great; Respondent Oly's violations of the veterinary care and handling Regulations on or about April 27, 2005 resulted in Respondent's tigers attacking and severely injuring one of Respondent's assistants. After this attack, Respondent's animals were confiscated by the State of Minnesota.

25. Respondent Oly has a history of violations. On or about November 11, 2003, Complainant and Respondent entered into a stipulation, based on the findings in animal welfare investigation MN 03-033, and pursuant to 9 C.F.R. § 4.11, in which Respondent paid \$275 to resolve alleged violations involving Respondent's failure to comport with section 2.131(c)(1) of the handling regulations. Moreover, the conduct over the period described herein reveals Respondent's consistent disregard for, and unwillingness or inability to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. Accordingly, Respondent's ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

26. Under these circumstances, the remedies contained in the following Order for Respondent Oly's violations of the Animal Welfare Act on or about April 27, 2005 are reasonable and appropriate, including the \$3,025.00 civil penalty. The remedies are in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

**Order**

27. Animal Welfare Act license number 41-C-0124 is **revoked**, effective on the day after this Decision becomes final. [See paragraph 32 to determine the day on which this Decision and Order becomes final and effective.] Further, Respondent Oly's privilege to engage in activities that require an Animal Welfare Act license is **revoked**, effective on the day after this Decision becomes final.

28. Respondent Oly is permanently disqualified from becoming licensed under the Animal Welfare Act or from otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly, or through any corporate or other device or person, effective on the day after this Decision becomes final.

29. Under the Animal Welfare Act, revocations and permanent disqualifications are equally permanent.

30. Respondent Oly, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from:

    failing to establish and maintain programs of adequate veterinary care that includes adequate guidance to personnel involved in the care and use of animals regarding handling, and;

    failing to handle tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort.

Respondent Oly, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.

31. Respondent Oly is assessed a civil penalty in the amount of **\$3,025.00**, which he shall pay by certified check(s) or cashier's check(s) or money order(s), made payable to the order of "**Treasurer of the United States**," and forwarded within sixty (60) days from the effective date of this Decision and Order by a commercial delivery service, such as FedEx or UPS, to

    United States Department of Agriculture  
    Office of the General Counsel, Marketing Division

Grant William Oly d/b/a Tiger Zone  
68 Agric. Dec. 419

425

Attn.: Colleen A. Carroll, Esq.  
Room 2343 South Building, Stop 1417  
1400 Independence Avenue SW  
Washington, D.C. 20250-1417.

Respondent Oly shall include **AWA Docket No. 08-0122** on the certified check(s) or cashier's check(s) or money order(s).

### **Finality**

32. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

### **APPENDIX A**

**7 C.F.R.:**

#### **TITLE 7--AGRICULTURE**

#### **SUBTITLE A--OFFICE OF THE SECRETARY OF AGRICULTURE**

#### **PART 1--ADMINISTRATIVE REGULATIONS**

.....

#### **SUBPART H--RULES OF PRACTICE GOVERNING FORMAL**

#### **ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

## VARIOUS STATUTES

...

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such

briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any

right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

**FEDERAL CROP INSURANCE ACT**

**DEFAULT DECISION**

**In re: BRANDON RATTRAY.**  
**FCIA Docket No. 08-0178.**  
**Default Decision.**  
**January 29, 2009.**

**FCIA – Default.**

Kimberley E. Arrigo for APHIS.  
Respondent Pro se.  
*Default Decision by Administrative Law Judge Peter M. Davenport.*

**DEFAULT DECISION AND ORDER**

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the failure of Respondent, Brandon Rattray, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

It is further found that, pursuant to section 515(h)(3)(B) of the Act (7 U.S.C. § 1515(h)(3)(B)) and FCIC's regulations (7 C.F.R. part 400, subpart R), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

- (1) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);
- (2) The Agricultural Market Transition Act (7 U.S.C. § 7201 et seq.), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);

- (3) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 et seq.);
- (4) The Commodity Credit Corporation Charter Act (15 U.S.C. §§ 714 et seq.);
- (5) The Agricultural Adjustment Act of 1938 (7 U.S.C. §§ 1281 et seq.);
- (6) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 et seq.);
- (7) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 et seq.); and
- (8) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

Therefore, unless this decision is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified individual, you will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

It is further found that, pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. § 1515(h)(3)(A) and (4)), a civil fine of \$1,000 is imposed upon the Respondent. This civil fine shall be paid by cashier's check or money order or certified check, made payable to the order of the "**Federal Crop Insurance Corporation**" and sent to:

Federal Crop Insurance Corporation  
Attn: Kathy Santora, Collection Examiner  
Fiscal Operations Branch  
6501 Beacon Road, Room 271  
Kansas City, Missouri 64133

This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.  
Done at Washington, D.C.

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**PLANT QUARANTINE ACT**

**DEFAULT DECISIONS**

**In re: S. F. B. FARMS, INC. d/b/a R & E FLORAL EXPRESS,  
INC.**

**P.Q. Docket No. 08-0084.**

**Default Decision.**

**March 3, 2009.**

**PQ – Default.**

Krishna G. Ramaraju for APHIS.

Respondent Pro se.

*Default decision by Administrative Law Judge Peter M. Davenport.*

**DEFAULT DECISION AND ORDER**

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of cut flowers into the United States (7 C.F.R. §§ 319.74 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on March 20, 2008, alleging that respondent S.F.B. Farms, Inc., d/b/a R & E Floral Express violated the Act and regulations promulgated under the Acts (7 C.F.R. §§ 319.74 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about October 25, 2004, respondent imported into the United States seven bundles of flowers, weighing approximately seventy-four kilograms, DHL Airway Bill # 992-0401-5841, which were found to be infested with injurious plant pests. An Emergency Action Notification, APHIS PPQ Form 523 was issued to respondent, informing respondent that it had 24 (twenty-four) hours to destroy the cut flowers, ship them to a point outside the

United States, move them to an authorized site, and/or apply treatments, clean, or apply other safeguards to the cut flowers as prescribed in Form 523, and that respondent did not, within the twenty-fours prescribed in Form 523, perform any of the remedial measures listed on Form 523, in violation of 7 C.F.R. § 319.74-2(b).

On March 20, 2008, the Hearing Clerk's Office mailed a copy of the complaint to respondent by certified mail. On April 22, 2008, this letter was returned to the Hearing Clerk's Office marked "unclaimed." Pursuant to section 1.147(c)(1) of the Rules of Practice applicable to this proceeding, the complaint was resent by ordinary mail to the respondent on that date, and was thereby deemed to have been received by the Respondent on April 22, 2008.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Accordingly, Respondent had until May 12, 2008, to file an answer to the complaint. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. S.F.B. Farms, Inc., hereinafter referred to as Respondent, is a

business, incorporated under the laws of the State of Florida, with a mailing address of P.O. Box 522324, Miami, FL, 33152, and that at all times material herein did business under the name of R & E Floral Express, Inc..

2. Respondent's principal place of business is located at 7371 NW 35<sup>th</sup> Street, Miami, FL, 33122.

3. On or about October 15, 2004, at Miami International Airport, Florida, the Respondent imported into the United States seven bundles of flowers, weighing approximately seventy-four kilograms, DHL Airway Bill # 992-0401-5841, which were found to be infested with injurious plant pests. An Emergency Action Notification, APHIS PPQ Form 523 was issued to Respondent, informing Respondent that it had 24 (twenty-four) hours to destroy the cut flowers, ship them to a point outside the United States, move them to an authorized site, and/or apply treatments, clean, or apply other safeguards to the cut flowers as prescribed in Form 523. Respondent did not, within the twenty-fours prescribed in Form 523, perform any of the remedial measures listed on Form 523, in violation of 7 C.F.R. § 319.74-2(b).

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.

2. By reason of the Findings of Fact set forth above, the Respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 319.74 et seq).

### **Order**

Respondent S.F.B. Farms, Inc., d/b/a R & E Floral Express, Inc. is assessed a civil penalty of fifteen thousand dollars (\$15,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture

APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 08-0084.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Done at Washington, D.C.

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**Consent Decisions****Date Format [YY/MM/DD]****ANIMAL WELFARE ACT**

Northeast Nebraska Zoological Society, Inc., AWA-07-0109, 09/01/26.  
Hopeful Valley Ranch, Betty Evans, Kathy Murphy, Kerry Hurley, Bert  
D. Murphy, Nicki Evans, Dori Smidt, and Kayla Hurley, AWA-07-  
0113, 09/01/27.

Jeffrey Harrod, d/b/a Vanishing Species Wildlife, Inc., and;

Barbara Hartman-Harrod, d/b/a Vanishing Species Wildlife, Inc.,  
AWA-08-0136, 09/02/04.

Patti J. VanMeter and Greene Acres Exotics, Inc., AWA-07-0154,  
09/02/23.

Pamela Sims d/b/a Pam's Cockers and Schnauzers, AWA -09-0070,  
09/03/16.

Clayton and Laura Yoder, AWA-08-0072, 09/03/18.

Kathy Grigg, AWA-08-0130, 09/03/26.

Jean Hartley, AWA-08-0027, 09/04/02.

Wendy Laymon d/b/a Shadow Mountain Kennel, AWA-08-0089,  
09/04/03.

Kitty Kyrklund d/b/a Kittys K-9 Korner, AWA 08-0137, 09/04/21.

Christine Dobratz d/b/a Wolf Howl-O-Exotic Petting Zoo, AWA-08-  
0131, 09/04/24.

Melvin A. Yoder, Delmar R. Yoder, David Yoder d/b/a MDD Kennels,  
AWA-08-0079, 09/05/07.

Zoological Imports 2000, Inc., AWA-09-0085, 09/05/27.

Beverly Howser, Jonathan Howser and Heather Montavy, AWA-08-  
0169, 09/06/23.

**ANIMAL QUARANTINE ACT**

Amerjet International, Inc., AQ-09-0072, 09/05/08.

**FEDERAL CROP INSURANCE ACT**

Rodney Groenewold, FCIA-09-0036, 09/1/15.

James J. Potase, FCIA-08-0037, 09/1/16.

Ronald Wegner, FCIA-09-0113, 09/06/19.

Thomas Stanley, IV, FCIA-09-0123, 09/06/30.

Thomas Stanley, V, FCIA-09-0124, 09/06/30.

Thomas Fleming, FCIA-09-0126, 09/06/30.

Stacy Lee Langley, FCIA-09-0125, 09/06/30.

**FEDERAL MEAT INSPECTION ACT**

MGF, Inc. and Douglas Mariani, FMIA-09-0074, 09/03/25.

**HORSE PROTECTION ACT**

Sand Creek Farms, Inc.; Billy A. Gray; Waterfall Farms, Inc., a/k/a Waterfall Farms; William B. Johnson ; and Sandra T. Johnson, HPA-01-0030, 09/02/10.

**PLANT QUARANTINE ACT**

TNT USA d/b/a TNT International Express, PQ-08-0116, 09/1/12.

J.A. Flower Service, Inc., PQ-09-0063, 09/02/25.

Aerpostal Airlines, Inc., PQ-07-0018, 09/03/13.

M&N Aviation, Inc., PQ-09-0030, 09/04/21.

Amerjet International, Inc., PQ-09-0072, 09/05/08.