

**In re: DAVID TRACY BRADSHAW.  
HPA Docket No. 99-0008.  
Decision and Order filed June 14, 2000.**

**Horse protection – Allowing entry – Ownership – Palpation reliable – Sixth amendment – Adverse inference – Civil penalty – Disqualification.**

The Judicial Officer affirmed the decision by Chief Administrative Law Judge James W. Hunt: (1) concluding that Respondent allowed the entry of a horse in a horse show, for the purpose of showing or exhibiting the horse, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); (2) assessing Respondent a \$2,000 civil penalty; and (3) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer held that digital palpation alone is a reliable method by which to determine if a horse is “sore,” as that word is defined in the Horse Protection Act. The Judicial Officer found *Young v. United States Dep’t of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), inapposite and rejected Respondent’s contention that the Chief ALJ erred by failing to follow the holding in *Young*. The Judicial Officer held documents comprising past recollection recorded, prepared while the events were fresh in the authors’ minds, are reliable, probative, and substantial evidence and the Chief ALJ did not err when he allowed the admission of these documents. The Judicial Officer held the Sixth Amendment right to confront witnesses is not applicable to administrative proceedings. Moreover, the Judicial Officer found that Complainant’s counsel’s objections to questions on cross-examination did not deprive Respondent of the right to confront witnesses against him. The Judicial Officer rejected Respondent’s contention that the Chief ALJ erred by drawing an inference against Respondent based upon Respondent’s failure to call as a witness the trainer of Respondent’s horse.

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.  
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] by filing a Complaint on March 4, 1999.

The Complaint alleges that on August 28, 1998, David Tracy Bradshaw [hereinafter Respondent] allowed the entry of a horse called “Favorite’s Fargo” as entry number 2016 in class number 25 at the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Favorite’s Fargo, while Favorite’s Fargo was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶¶ 2-3).

On April 1, 1999, Respondent filed an Answer denying the allegations in the Complaint. On December 8, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted a hearing in Fort Worth, Texas. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture,

represented Complainant. Kenneth A. Wright of the Law Offices of Rogers & Wright, Dallas, Texas, represented Respondent.

On February 16, 2000, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Points and Authorities in Support Thereof [hereinafter Complainant's Brief], and Respondent filed Respondent's Brief in Support of Motion for Dismissal [hereinafter Respondent's Brief].

On April 6, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by entering or allowing the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore, for the purpose of showing or exhibiting Favorite's Fargo; (2) assessed Respondent a \$2,000 civil penalty; and (3) disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 9).

On May 5, 2000, Respondent appealed to the Judicial Officer<sup>1</sup>; on May 22, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on May 23, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusion of Law, as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

**CHIEF ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Statement of the Case**

Respondent has owned and exhibited Tennessee Walking Horses for approximately 10 years. Prior to this proceeding, Respondent had never been charged with violating the Horse Protection Act and had never been "ticketed" by

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<sup>1</sup>Respondent filed his appeal petition pro se. Mr. Wright did not file a motion to withdraw as Respondent's counsel. I infer, based upon Respondent's filing his appeal petition pro se, Mr. Wright no longer represents Respondent and Respondent is pro se.

a Designated Qualified Person [hereinafter DQP] at a show sanctioned by the National Horse Show Commission. (Tr. 240-43.)

In July 1998, Respondent and John Feltner, Jr., a professional horse trainer, visited White Oak Stables where they observed the workout of a 2-year-old stallion called "Favorite's Fargo." John Feltner, Jr., was impressed with the horse and told Respondent "if you buy this horse, I'll train him for nothing, and I think we can go to the Celebration and do real well and sell him at a profit. And then, we'll split the profit." (Tr. 245-46, 267.)

Respondent agreed. John Feltner, Jr., took Favorite's Fargo to the stables belonging to his father, John Feltner, Sr., to train the horse. Respondent did not see the horse again for several weeks. Respondent said, at the time he bought Favorite's Fargo, the horse had never been shown or exhibited and was "green broke"; that is, Favorite's Fargo could be saddled and ridden but had not been trained to perform. Respondent said, Favorite's Fargo would "act up" when "you would ask him to start working. And generally, his reaction to that, when you first ask him to go on, as we call it, he would want to jump up, and he'll buck and sometimes he'll jump up and spin." But that "after the initial playing, he would go on and we will be able to ride him." (Tr. 248-49.) Respondent described Favorite's Fargo variously as "fractious and unruly," "nutty," and "crazy" (Tr. 251-54).

John Feltner, Sr., testified that he observed Favorite's Fargo while the horse was being trained by his son. He said Favorite's Fargo was talented but not broke and would react when his foot was lifted by leaning back or sitting down. He attributed the horse's behavior to genetics, saying that Favorite's Fargo came from a line of horses with a reputation for being unruly and not wanting "to work." (Tr. 202-03, 208.)

On August 28, 1998, about a month after buying the horse, Respondent entered Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, as entry number 2016 in class number 25 (Tr. 16). John Feltner, Sr., a spectator at the show, observed Favorite's Fargo in line waiting for a pre-show examination. He said Favorite's Fargo appeared "antsy" by rearing up and spinning around (Tr. 210-11). Respondent testified that Favorite's Fargo would not stand still and would "go around and go around" and knocked over a table and stepped on a cone in the inspection area (Tr. 251-52).

The examination, conducted behind a curtain, was not seen either by John Feltner, Sr., or by Respondent (Tr. 209, 221, 250-52). Favorite's Fargo was first examined by the show's DQP who excused Favorite's Fargo from being exhibited because the horse did not meet the rules of the National Horse Show Commission (Tr. 22-23). Favorite's Fargo was next examined by Sylvia Taylor, an Animal and Plant Health Inspection Service veterinary medical officer, who has examined approximately 400 horses for compliance with the Horse Protection Act (Tr. 139-41). After examining Favorite's Fargo, Dr. Taylor concluded that the horse was sore. Although Dr. Taylor testified that she did not remember her examination

of Favorite's Fargo, she said she had prepared an affidavit on the same day as her examination, while the examination was still fresh in her memory. (Tr. 145-50.) In her affidavit, Dr. Taylor states:

I palpated both front feet and found them consistently and repeatedly painful to palpation along the entire anterior aspect of each pastern. The horse would violently withdraw it's [sic] foot, tuck it's [sic] back feet underneath it's [sic] body, and clench it's [sic] abdominal muscles when the anterior pasterns were palpated.

CX 7 at 1.

Dr. Taylor testified that these reactions to palpation were signs of pain because they were consistent and repeatable whereas, if Favorite's Fargo were silly or unruly, his reactions to palpation would be random rather than consistent and repeatable. Dr. Taylor expressed the opinion that Favorite's Fargo had been sore by means of either chemicals or action devices or both chemicals and action devices and that Favorite's Fargo would have experienced pain if he had been exhibited. (Tr. 143-44, 151-52.)

Favorite's Fargo was then examined by Scott Price, an Animal and Plant Health Inspection Service veterinary medical officer, whose license to practice veterinary medicine has expired (Tr. 48, 79). Dr. Price testified that he did not remember his examination of Favorite's Fargo but that he had prepared an affidavit on the same day as his examination, while the examination was still fresh in his memory. (Tr. 55-56, 60-61.) In his affidavit, Dr. Price states:

I was the second federal veterinarian to examine this horse. The horse walked and turned around the cone without difficulty. I palpated both front feet and found them consistently and repeatedly painful to palpation along the entire anterior aspect of each pastern. The horse would violently withdraw it's [sic] foot, tuck it's [sic] back feet underneath it's [sic] body, and clench it's [sic] abdominal muscles when the anterior pasterns were palpated.

CX 8 at 1-2.

Dr. Price said these consistent and repetitive responses to palpation were abnormal and were signs of pain rather than signs of a silly horse. A silly horse, he said, "will withdraw its foot sometimes when you're applying pressure and sometimes when you're not applying pressure. Also, a silly horse will not give the same response on the same area each time you palpate it." (Tr. 54-55.) Dr. Price testified that when he examines a horse, he gives the benefit of the doubt to the horse's owner or trainer and that, of the approximately 10,000 horses he has examined, he has found less than 5 percent of the horses to be sore. Dr. Price

stated, in the case of Favorite's Fargo, his examination showed that the horse's pasterns were "extremely painful." (Tr. 50, 54-55, 59, 68-70, 132-33.) Drs. Price and Taylor then completed and signed that part of APHIS FORM 7077 containing the results of their examinations (CX 3).

John Feltner, Jr., the trainer of Favorite's Fargo, was present during Dr. Price's examination and Dr. Taylor's examination of Favorite's Fargo but did not testify at the hearing. Respondent testified he had no knowledge that Favorite's Fargo had been sore. Although Respondent was not present during Dr. Price's examination or Dr. Taylor's examination, he said Favorite's Fargo's reaction to palpation was not due to pain but due to the horse being fractious and unruly and not being calmed down for the examinations. Respondent said Favorite's Fargo was subsequently entered and exhibited at four or five other shows and, though he continued to act "nutty," he calmed down enough to pass examination. In the spring of 1999, Respondent had Favorite's Fargo gelded. (Tr. 245, 252-55, 258, 261-62.) John Feltner, Sr., who did the gelding, said it was done to "hopefully give [him] a change of attitude." (Tr. 212.)

## Law

Section 2(3) of the Horse Protection Act defines the term "sore," as follows:

### § 1821. Definitions

As used in this chapter unless the context otherwise requires:

....

- (3) 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).

Section 5(2) of the Horse Protection Act (15 U.S.C. § 1824(2)) prohibits not only the showing or exhibiting of a sore horse, but also prohibits entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore. Section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) prohibits an owner of a horse from allowing a horse which is sore to be entered in a horse show or horse exhibition.

Section 6(d)(5) of the Horse Protection Act creates a presumption that a horse that manifests abnormal, bilateral sensitivity is a horse which is sore, as follows:

**§ 1825. Violations and penalties**

....

**(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**

....

(5) 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.

15 U.S.C. § 1825(d)(5).

**Discussion**

Complainant contends that Dr. Price's examination and Dr. Taylor's examination of Favorite's Fargo establish that the horse was sore (Complainant's Brief at 2-12). Respondent moves to dismiss the Complaint on the grounds that Favorite's Fargo was not sore; that Favorite's Fargo's reactions to the examinations were due to the horse being fractious; that Dr. Price's and Dr. Taylor's affidavits are unreliable hearsay; that Dr. Price's and Dr. Taylor's affidavits were prepared in anticipation of litigation; that Dr. Price, being unlicensed, was not qualified to conduct an examination of Favorite's Fargo to determine whether the horse was sore; that Dr. Price was biased; that, as the United States Court of Appeals for the

Fifth Circuit ruled in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), palpation alone is not a reliable means of determining whether a horse is sore; that Favorite's Fargo did not manifest other signs of being sore; that there was no evidence that chemicals or action devices were used to sore Favorite's Fargo; that Respondent's witnesses were more reliable than Complainant's witnesses; and that Respondent had no knowledge that Favorite's Fargo was sore (Respondent's Brief).

Complainant, as the proponent of an order, has the burden of proof in this proceeding,<sup>2</sup> and the standard of proof by which this burden is met is the preponderance of the evidence standard.<sup>3</sup> Complainant may prove a horse is sore through palpation, which alone is a reliable method by which to determine that a horse is "sore," as that word is defined in the Horse Protection Act.<sup>4</sup> If, pursuant

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<sup>2</sup>See 5 U.S.C. § 556(d).

<sup>3</sup>See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (Table) (11<sup>th</sup> Cir. 1998), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11<sup>th</sup> Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6<sup>th</sup> Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8<sup>th</sup> Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6<sup>th</sup> Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6<sup>th</sup> Cir. 1994) (citation limited under 6<sup>th</sup> Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3<sup>d</sup> Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4<sup>th</sup> Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6<sup>th</sup> Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

<sup>4</sup>See *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50 (D.C. Cir. 1995) (stating the Court has no legitimate reason to reject digital palpation as a diagnostic technique, whether used alone or not), *cert. denied*, 516 U.S. 824 (1995); *In re Kim Bennett*, 55 Agric. Dec. 176, 236-37 (1996) (stating digital palpation is a highly reliable method by which to determine that a horse is sore within the meaning of the Horse Protection Act, without any other circumstances, such as gait dysfunction, swelling, heat, redness, etc.).

to section 6(d)(5) of the Horse Protection Act (15 U.S.C. § 1825(d)(5)), Complainant shows that a horse has abnormal, bilateral sensitivity in its forelimbs, the horse is presumed to be a horse which is sore. In proving a *prima facie* violation, Complainant does not have to establish the means by which the horse was sore and does not have to show that the horse's owner knew that the horse was sore.<sup>5</sup>

Dr. Price, even though not currently licensed to practice veterinary medicine, and Dr. Taylor are experienced veterinarians and their testimony was credible concerning their findings of pain responses when they examined Favorite's Fargo. Dr. Price's affidavit and Dr. Taylor's affidavit, recorded when their examinations were fresh in their minds, are probative and reliable documents. *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd in part & remanded*, 73 F.3d 312 (11<sup>th</sup> Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam*, 111 F.3d 897 (11<sup>th</sup> Cir. 1997). There is no evidence that either Dr. Price or Dr. Taylor were biased. Dr. Price said he gives a horse owner or trainer the benefit of the doubt and has found only a small percentage of the thousands of horses he has examined to be sore. Drs. Price and Taylor prepared their affidavits to document their findings as part of their duty as public servants to seek compliance with a congressionally enacted statute.

As for Respondent's contention that Favorite's Fargo was fractious and unruly, rather than sore, Drs. Price and Taylor testified credibly that in their experience they can distinguish the reaction of a silly or unruly horse from the reaction of a sore horse and that Favorite's Fargo's repeated and consistent responses to palpation were signs of pain. Finally, Respondent argues that its witnesses were more reliable than Drs. Price and Taylor. However, as lay persons, the testimony of Respondent and John Feltner, Sr., has less probative value than that of veterinarians Price and Taylor. Moreover, neither Respondent nor John Feltner, Sr., were present during Dr. Price's examination and Dr. Taylor's examination of Favorite's Fargo. The trainer, John Feltner, Jr., was present for the examinations but he was not called as a witness by Respondent which raises the inference that, had John Feltner, Jr., testified, his testimony would not have favored Respondent. *In re Dr. John Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979).

Complainant has proven by a preponderance of the evidence that Favorite's Fargo was sore when entered in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998. Even though Respondent may not have known the horse was sore, an owner is held strictly liable for allowing the entry of a horse which is sore in a horse show or horse exhibition. If the horse is entered when sore, the owner has violated the Horse Protection Act. *In re Eldon Stamper*, 42 Agric. Dec. at 44-49. Accordingly, Respondent violated

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<sup>5</sup>*In re Eldon Stamper*, 42 Agric. Dec. 20, 44-49 (1983), *aff'd*, 722 F.2d 1483 (9<sup>th</sup> Cir. 1984); *In re Bill Gray*, 41 Agric. Dec. 253, 254-55 (1982).

the Horse Protection Act by allowing the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore. Respondent's motion to dismiss the Complaint is therefore denied.

Complainant's proposed sanction of a \$2,000 civil penalty and a 1-year disqualification is the routine penalty for a first violation of the Horse Protection Act.<sup>6</sup>

### **Findings of Fact**

1. Respondent, David Tracy Bradshaw, is an individual whose mailing address is 1293 Russell Bend Road, Weatherford, Texas 76088.

2. On August 28, 1998, and at all times material to this proceeding, Respondent was the owner of a horse called "Favorite's Fargo." On August 28, 1998, Respondent allowed the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, as entry number 2016 in class number 25.

3. On August 28, 1998, Animal and Plant Health Inspection Service veterinary medical officers Dr. Sylvia Taylor and Dr. Scott Price independently examined Favorite's Fargo. Favorite's Fargo manifested bilateral pain when the veterinary medical officers palpated Favorite's Fargo's front pasterns.

### **Conclusion of Law**

Respondent, David Tracy Bradshaw, violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore, for the purpose of showing or exhibiting Favorite's Fargo.

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

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<sup>6</sup>*In re Jack Stepp*, 57 Agric. Dec. 297, 312 (1998), *aff'd* 188 F.3d 508 (Table), 1999 WL 646138 (6<sup>th</sup> Cir. 1999) (not to be cited as precedent under 6<sup>th</sup> Circuit Rule 206); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 890 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re Tracy Renee Hampton* (Decision as to Dennis Harold Jones), 53 Agric. Dec. 1357, 1390-91 (1994); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1240-41 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 317-18 (1993), *aff'd*, 28 F.3d 279 (3<sup>rd</sup> Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 283 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 248-50 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6<sup>th</sup> Cir. 1994) (citation limited under 6<sup>th</sup> Circuit Rule 24).

Respondent raises 10 issues in his May 3, 2000, letter to the Hearing Clerk [hereinafter Appeal Petition].

First, Respondent contends the Chief ALJ erroneously ignored the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), that digital palpation alone is not a reliable means of determining whether a horse is sore (Appeal Pet. ¶ 1).

The Court in *Young* held that digital palpation alone is not a reliable method by which to determine if a horse is sore. However, the holding in *Young* is based upon a number of factors that are not present in this proceeding. In *Young*, several "highly qualified expert witnesses" testified for the respondents that "soring could not be diagnosed through palpation alone." *Id.* at 731. Respondent, in this proceeding, did not introduce expert witness testimony to rebut Dr. Price's and Dr. Taylor's testimony that digital palpation is a reliable method by which to determine that a horse is sore.

The respondents in *Young* "offered a written protocol signed by a group of prominent veterinarians coming to the . . . conclusion" that "soring could not be diagnosed through palpation alone." *Id.* at 731. Respondent, in this proceeding, did not offer any such written protocol.

In *Young*, two private veterinarians and one off-duty DQP testified they examined the horse in question immediately after United States Department of Agriculture veterinary medical officers found the horse was sore. These private veterinarians and the off-duty DQP testified they did not find the horse to be sore. *Id.* at 731-32. The record in this proceeding does not contain any testimony regarding an examination of Favorite's Fargo immediately after Drs. Price and Taylor concluded their examinations.

In *Young*, the administrative law judge found the respondents' witnesses to be more credible than the complainant's witnesses. *Id.* at 732. In the instant proceeding, the Chief ALJ found Drs. Price and Taylor credible, found Respondent's and John Feltner, Sr.'s testimony to be of less probative value than Dr. Price's and Dr. Taylor's testimony, and inferred that, had John Feltner, Jr., testified, his testimony would not have favored Respondent.

Finally, in *Young*, the administrative law judge dismissed the complaint and the Judicial Officer reversed the administrative law judge. *Id.* at 732. In the instant proceeding, the Chief ALJ and the Judicial Officer agree that the record supports the conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Therefore, I find *Young* inapposite, and I find the Chief ALJ did not err when he failed to follow the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), that digital palpation alone is not a reliable means of determining whether a horse is sore.

Second, Respondent contends the Chief ALJ erroneously allowed evidence that Favorite's Fargo was sore based upon digital palpation without any evidence that

digital palpation is a reliable means by which to determine that a horse is sore (Appeal Pet. ¶ 1).

I disagree with Respondent's contention that the record contains no evidence that digital palpation is a reliable means by which to determine that a horse is sore. The record supports a finding that digital palpation is a reliable means by which to determine whether a horse is "sore," as that word is defined in the Horse Protection Act. Drs. Price and Taylor testified about the procedures they use to detect a sore horse. Both Dr. Price and Dr. Taylor testified that they were able to detect evidence of soring using digital palpation. (Tr. 50-55, 141-44.)

Further, the United States Department of Agriculture has long held that palpation is a highly reliable method of determining whether a horse is "sore," as that word is defined in the Horse Protection Act.<sup>7</sup> The United States Department of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their effort to enforce the Horse Protection Act.

Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act, as follows:

#### **§ 11.1 Definitions.**

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following

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<sup>7</sup>See, e.g., *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, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 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 Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 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* (Decision as to 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 sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 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 John Allan 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* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6<sup>th</sup> Cir. 1994) (citation limited under 6<sup>th</sup> Circuit Rule 24).

paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as “Webster’s.”

....

*Inspection* means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the [Horse Protection] Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, *palpating* and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

9 C.F.R. § 11.1 (emphasis added).

Respondent also contends “the genesis of this procedure [digital palpation] is something that is simply taught by the USDA, and not derived from any textbook or veterinary school.” (Appeal Pet. ¶ 1.)

I disagree with Respondent. The record establishes that digital palpation is a medically accepted diagnostic technique used to detect pain. Specifically, Dr. Taylor testified that digital palpation is a universal means to detect pain in animals, as follows:

BY MR. WRIGHT:

Q. Do you know of the existence of any publication concerning digital palpation in your capacity as a licensed practitioner of veterinary medicine?

....

THE WITNESS: Okay. I know that there are publications, including many of the textbooks that I used while in veterinary school, which definitely speak to the use of digital palpation as a means of determining pain in any kind of animal.

That is universal for all the species that veterinarians usually work with, at the very least.

BY MR. WRIGHT:

Q. And just so I understand your testimony, because we have had some confusion, is that concerning lameness or soreness?

A. It could be either one. Digital palpation is used, again, universally among species to determine pain, whether it results or is connected with lameness or whether it is any kind of, quote, soreness or not.

Your question appeared to be more general as to the entire field.

Tr. 183-84.

Therefore, I find the Chief ALJ did not err by allowing evidence that Favorite's Fargo was sore based upon Favorite's Fargo's reactions to digital palpation.

Third, Respondent, citing Tr. 88-89, contends "Dr. Price admitted that the USDA sanctions the soring of horses for the purpose of training . . . thus putting USDA in violation of the Horse Protection Act" (Appeal Pet. ¶ 1).

I disagree with Respondent's contentions that Dr. Price admitted the United States Department of Agriculture sanctions soring horses and that the United States Department of Agriculture violated the Horse Protection Act.

Dr. Price testified that in 1988 he attended a 3-day DQP training session in Lexington, Kentucky, at which horses were purposely sored (Tr. 88-90). Dr. Price testified that this training was not sponsored by the United States Department of Agriculture (Tr. 89). Dr. Price's attendance at a training session where sore horses were present does not establish that the United States Department of Agriculture sanctions soring horses or that the United States Department of Agriculture violated the Horse Protection Act. Moreover, Respondent's contentions that the United States Department of Agriculture sanctions soring horses and that the United States Department of Agriculture violated the Horse Protection Act are not relevant to this proceeding.

Fourth, Respondent contends the Chief ALJ erroneously admitted Dr. Price's affidavit (CX 8), Dr. Taylor's affidavit (CX 7), and APHIS FORM 7077 (CX 3) into evidence. Respondent contends that Drs. Price and Taylor had no recollection of their examinations of Favorite's Fargo and relied upon documents prepared in anticipation of litigation, which is unreliable hearsay.

Drs. Price and Taylor testified that, at the time of the hearing, they had no independent recollection of their examinations of Favorite's Fargo (Tr. 55-57, 144-47). Dr. Price's affidavit, Dr. Taylor's affidavit, and APHIS FORM 7077 (CX 3, CX 7, CX 8) are Dr. Price's and Dr. Taylor's past recorded recollections of their examinations of Favorite's Fargo. Dr. Price and Dr. Taylor testified that the documents comprising their recorded recollections were prepared while the events were fresh in their minds (Tr. 60-61, 148). The United States Department of

Agriculture has long held that past recollection recorded is reliable, probative, and substantial evidence and fulfills the requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witness' mind.<sup>8</sup> Affidavits and APHIS 7077 Forms, such as those prepared by Drs. Price and Taylor, are regularly made as to all of the horses, which are found to be sore and are kept in the ordinary course of the United States Department of Agriculture's business. There is no exclusionary rule applicable to proceedings conducted in accordance with the Rules of Practice which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Dr. Price's affidavit, Dr. Taylor's affidavit, and APHIS FORM 7077 (CX 3, CX 7, CX 8) were properly received as evidence. In fact, I would attach more weight to these affidavits and the APHIS FORM 7077, prepared on the day of the event, than to the testimony given 15 months after the event.

Respondent cites *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), as authority for the proposition that documents prepared in anticipation of litigation are unreliable hearsay (Appeal Pet. ¶ 2). The Court in *Young* states:

The VMO's testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. See *Palmer v. Hoffman*, 318 U.S. 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5<sup>th</sup> Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

53 F.3d at 730-31.

In *Young*, the Court found that the Summary of Alleged Violations form and affidavits at issue in the case had limited probative value, in part, because they were only prepared when violations of the Horse Protection Act were found, and, thus,

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<sup>8</sup>*In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 869 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 822 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), *appeal dismissed*, 38 F.3d 999 (8<sup>th</sup> Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 313 (1993), *aff'd*, 28 F.3d 279 (3<sup>d</sup> Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 289 (1993); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6<sup>th</sup> Cir. 1983).

were prepared in anticipation of litigation. However, the cases relied on by the court in *Young* are clearly distinguishable from the facts in *Young*. In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act which provided:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

318 U.S. at 111 n.1.

The Court held that the engineer's statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading" (318 U.S. at 114). Specifically, the Court held:

The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially

liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was “regular” and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a “business” or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a “regular course” of a business but also to any “regular course” of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

....

The several hundred years of history behind the Act (*Wigmore, supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But “regular course” of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

318 U.S. at 113-15.

In *Young*, there was no question about the admissibility of the affidavits and

Summary of Alleged Violations form under the Administrative Procedure Act (5 U.S.C. § 556(d)) and the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)). The documents were properly admitted. The only issue was whether the affidavits prepared by United States Department of Agriculture veterinary medical officers and the Summary of Alleged Violations form in question in *Young* were inherently unreliable and lacking in probative value. *Young v. United States Dep't of Agric.*, 53 F.3d at 730-32.

Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the United States Department of Agriculture, Animal and Plant Health Inspection Service, under the Horse Protection Act, is investigating suspected violations of the Horse Protection Act and litigating Horse Protection Act cases in those instances in which the agency believes it has *prima facie* evidence of a violation. As law enforcement officers, it is the duty of United States Department of Agriculture veterinary medical officers and inspectors to detect violations of the Horse Protection Act and to initiate the procedure for bringing disciplinary complaints against violators. Hence, litigating is “the inherent nature of the business in question” (318 U.S. at 115), and the preparation of the Summary of Alleged Violations forms and affidavits is the most important of the “methods systematically employed for the conduct of the business as a business.” (*Id.*)

This issue is of the utmost importance to the executive branch of the Federal Government. There are undoubtedly law enforcement officials throughout the Federal Government who, like the United States Department of Agriculture veterinary medical officers and inspectors, “prepare summary reports and affidavits only when administrative proceedings are anticipated.” (53 F.3d at 730.) Moreover, like United States Department of Agriculture veterinary medical officers and inspectors, there are undoubtedly law enforcement officers throughout the Federal Government who handle such a high volume of work that they could not possibly remember the details of a particular violation by the time they appear at an administrative hearing more than a year later, and who are, therefore, totally dependent on past records made while the events were fresh in their minds. Law enforcement in the United States would be severely hampered if all such records, made in contemplation of litigation by agencies whose business is to litigate, are to be regarded as inherently lacking in indicia of reliability.

*Stone*, also relied upon by the court in *Young*, is similar in nature to *Palmer v. Hoffman*. The issue in *Stone* was “whether the government violated the hearsay rule and the defendant’s right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession.” (604 F.2d at 924.) The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth “the activities of the office or agency.” (604 F.2d at 925.) The court held, however, that the affidavit “violates the hearsay rule and the

defendant's confrontation right" (604 F.2d at 924), as follows:

This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. *See, e.g., Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official records compiled in prison's "regular course of business"); *United States v. Newman*, 468 F.2d 791, 795-96 (5<sup>th</sup> Cir. 1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency's official records does not apply to Ford's personal statements prepared solely for purposes of this litigation. Ford's statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

604 F.2d at 925-26.

As stated in my discussion of *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman* was railroading, not litigating. That was not true in *Young*. Furthermore, here, again, we are not concerned with the admission of the United States Department of Agriculture veterinary medical officers' affidavits and APHIS FORM 7077 as business records, since they were properly admitted under the Administrative Procedure Act (5 U.S.C. § 556(d)) and the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)).

Moreover, even if the Federal Rules of Evidence were applicable to this proceeding (which they are not<sup>9</sup>), it appears that Dr. Price's affidavit, Dr. Taylor's affidavit, and APHIS FORM 7077 (CX 3, CX 7, CX8) would be admissible under Federal Rules of Evidence 803(5), 803(6), and 803(8)(C), which provide:

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

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<sup>9</sup>*In re Fred Hodgins*, 56 Agric. Dec. 1242, 1295 (1997), *appeal docketed*, No. 97-3899 (6<sup>th</sup> Cir. Aug. 12, 1997); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 407 (1994), *aff'd*, 48 F.3d 305 (8<sup>th</sup> Cir. 1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182, 1196 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1060, 1079 (1993), *aff'd*, 39 F.3d 670 (6<sup>th</sup> Cir. 1994).

(5) Recorded recollection.— A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.— A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

...

(8) Public records and reports.— Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(5), 803(6), 803(8)(C).

United States Department of Agriculture veterinary medical officer affidavits and APHIS 7077 Forms, such as those at issue in the instant proceeding, would be admissible under any of these exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is inarguably the case here. Drs. Price and Taylor have no vested interest in the outcome of this proceeding. They merely recorded, contemporaneously and impartially, the observations and conclusions of the activities they conducted in the performance of their duties to enforce the Horse Protection Act. Hence, there is no basis, in the

instant proceeding, for finding that Dr. Price's affidavit, Dr. Taylor's affidavit, or APHIS FORM 7077, which are past recollection recorded, are unreliable hearsay, as Respondent contends.

Fifth, Respondent, citing Tr. 100, 104, 109, 123, and 129, contends that Dr. Price repeatedly used his lack of recollection of his examination of Favorite's Fargo to avoid answering questions during cross-examination and to alternately embellish or minimize his testimony (Appeal Pet. ¶ 2).

I find nothing in the record to indicate that Dr. Price used his lack of recollection to avoid questions or to embellish or minimize his testimony.

Sixth, Respondent contends that Ms. Carroll's numerous objections during Mr. Wright's cross-examinations of Drs. Price and Taylor violate Respondent's right under the Sixth Amendment to the United States Constitution to confront his accusers (Appeal Pet. ¶ 2).

The Sixth Amendment to the United States Constitution provides, as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

This proceeding is not a criminal prosecution, but rather this proceeding is a disciplinary administrative proceeding conducted under the Horse Protection Act, in accordance with the Administrative Procedure Act, and the sanction imposed against Respondent in this proceeding is a civil penalty. It is well settled that the Sixth Amendment to the United States Constitution is only applicable to criminal proceedings and is not applicable to administrative proceedings.<sup>10</sup> Thus, I conclude

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<sup>10</sup>See *United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating that the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1<sup>st</sup> Cir.) (stating that deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 520 U.S. 1271 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7<sup>th</sup> Cir. 1993) (stating that deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6<sup>th</sup> Cir. 1991) (holding that the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *United States v. Schellong*, 717 F.2d 329, 336 (7<sup>th</sup> Cir. 1983) (holding that denaturalization proceedings are not criminal proceedings; therefore, there is no right to a jury trial under Article III of the United States Constitution or the Sixth Amendment), *cert. denied*, 465 U.S. 1007 (1984); *Schultz v. Wellman*, 717 F.2d 301, 307 (6<sup>th</sup> Cir. 1983) (holding that the Sixth Amendment does not apply to administrative

that Respondent's rights under the Sixth Amendment to the United States Constitution are not implicated in this administrative proceeding.

Moreover, even if I found that the Sixth Amendment to the United States Constitution was applicable to this proceeding (which I do not so find), I would reject Respondent's contention that Ms. Carroll's objections to questions posed to Drs. Price and Taylor on cross-examination deprived Respondent of the right to confront witnesses against him. Mr. Wright asked Dr. Price 276 questions on cross-examination and re-cross-examination (Tr. 70-131, 135-37), Ms. Carroll objected to 61 of those questions, and the Chief ALJ sustained 12 of Ms. Carroll's objections (Tr. 83-86, 89, 93, 95, 97, 120, 124, 130). Mr. Wright asked Dr. Taylor 164 questions on cross-examination (Tr. 152-86), Ms. Carroll objected to 22 of those questions, and the Chief ALJ sustained 3 of Ms. Carroll's objections (Tr.

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discharge proceedings conducted by the National Guard because such proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10<sup>th</sup> Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5<sup>th</sup> Cir.) (holding that there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384, 385 (9<sup>th</sup> Cir. 1968) (holding that the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9<sup>th</sup> Cir. 1960) (stating that the Sixth Amendment applies only to criminal proceedings and that Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (7<sup>th</sup> Cir. 1933) (rejecting the contention that proceedings under section 6(a) of the Grain Futures Act of September 21, 1922, are "essentially criminal" and holding that, since the proceedings are not criminal in nature, there is no right to a jury trial under Article III, § 2 of the United States Constitution), *cert. denied*, 291 U.S. 680 (1934); *Gee Wah Lee v. United States*, 25 F.2d 107 (5<sup>th</sup> Cir.) (per curiam) (concluding that the appeal of a deportation order by a United States commissioner is not a trial on a criminal charge covered by Article III, § 2 of the United States Constitution), *cert. denied*, 277 U.S. 608 (1928); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee under the Sixth Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding that the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1132 (1998) (concluding that the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act, as amended), *appeal docketed*, Nos. 99-2640, 99-2665 (8<sup>th</sup> Cir. June 1 and June 25, 1999); *In re Conrad Payne*, 57 Agric. Dec. 921, 931 (1998) (concluding that the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (Order Denying Pet. for Recons.) (concluding that Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B))).

175-76, 186). I find that the Chief ALJ correctly ruled on the objections raised by Ms. Carroll and that neither Ms. Carroll's objections nor the Chief ALJ's rulings on Ms. Carroll's objections deprived Respondent of the right to confront Drs. Price and Taylor.

Seventh, Respondent contends that "[t]he opinion evidence sponsored by the USDA lacks probative value, is conclusory, and constitutes speculation, conjecture, and is incompetent" (Appeal Pet. ¶ 2).

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) requires that each issue set forth in an appeal petition shall contain detailed citations to the record, statutes, regulations, or authorities relied upon in support of the issue. Respondent does not specifically identify the "opinion evidence" which he finds objectionable. Moreover, Respondent's Appeal Petition sets forth no basis for Respondent's contention that "[t]he opinion evidence sponsored by the USDA lacks probative value, is conclusory, and constitutes speculation, conjecture, and is incompetent." Therefore, I reject Respondent's objections to "USDA sponsored opinion evidence."

Eighth, Respondent contends that Dr. Price's affidavit and Dr. Taylor's affidavit are identical, proof that the affidavits were prepared in anticipation of litigation (Appeal Pet. ¶ 2). A review of Drs. Price's affidavit and Dr. Taylor's affidavit (CX 7, CX 8) reveals that they are not identical, as Respondent contends, but the affidavits are similar.

The question whether a document is prepared in anticipation of litigation is a factual matter to be determined from the nature of the document and the factual situation in the particular case. Courts generally focus on the motivation for the preparation of a document to determine whether that document was prepared in anticipation of litigation.<sup>11</sup> Respondent cites no authority for his view that proof that one document was prepared in anticipation of litigation is the existence of another identical document, and I cannot find any authority which supports Respondent's position. Therefore, I reject Respondent's contention that proof that a document was prepared in anticipation of litigation is the existence of an identical document.

Ninth, Respondent states that neither Dr. Price nor Dr. Taylor were compelled by subpoena to testify at the December 8, 1999, hearing, but instead both Dr. Price and Dr. Taylor testified "as a duty as USDA employees." (Appeal Pet. ¶ 2.)

The record establishes that Respondent's statement that Drs. Price and Taylor were not compelled by subpoena to testify at the hearing, is correct (Tr. 88, 157). However, Complainant's failure to subpoena Drs. Price and Taylor does not affect

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<sup>11</sup>See *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3<sup>d</sup> Cir. 1993); *United States v. Rockwell International*, 897 F.2d 1255, 1266 (3<sup>d</sup> Cir. 1990); *United States v. El Paso Co.*, 682 F.2d 530, 542 (5<sup>th</sup> Cir. 1982), *cert. denied*, 466 U.S. 944 (1984); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3<sup>d</sup> Cir. 1979).

their credibility or the weight I give their testimony. The Chief ALJ found that Drs. Price and Taylor were credible witnesses and that there is no evidence that either Dr. Price or Dr. Taylor was biased against Respondent (Initial Decision and Order at 7). I agree with the Chief ALJ. The fact that Drs. Price and Taylor were not compelled by subpoena to testify does not reduce their credibility or indicate that they were biased against Respondent.

Tenth, Respondent contends that the Chief ALJ's inference that if John Feltner, Jr., had testified, his testimony would not have favored Respondent, is error (Appeal Pet. ¶ 3).

I find the Chief ALJ's inference, that John Feltner, Jr.'s testimony would have been adverse to Respondent's position in this proceeding, is not error. A party's failure to produce a witness, when it would be natural for that party to produce that witness, if the facts known by the witness had been favorable, serves to indicate, as a natural inference, that the party fears to produce the witness. This fear is some evidence that the witness, if produced, would have exposed facts unfavorable to the party. This principle has been followed in many proceedings before the United States Department of Agriculture<sup>12</sup> and in many judicial proceedings.<sup>13</sup> "It is

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<sup>12</sup>*In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Terry Horton*, 50 Agric. Dec. 430, 450 (1991); *In re Modesto Mendicoa*, 48 Agric. Dec. 409, 420-22 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 224-25 (1989), *aff'd*, 891 F.2d 281 (3<sup>d</sup> Cir. 1989) (unpublished); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1611, 1612-13 (1988) (Order Denying Pet. for Recons.); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. 1216, 1229-30 (1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995, 1018-19 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234, 255-56 (1986); *In re James Grady*, 45 Agric. Dec. 66, 108-09 (1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1909-10 (1985); *In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2487-89 (1985) (Decision on Remand); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 256 n.4 (1985); *In re Dr. Duane O. Petty*, 43 Agric. Dec. 1406, 1425-28 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1509-10 (1983); *In re Mattes Livestock Auction, Market Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125 (7<sup>th</sup> Cir. 1983); *In re Eldon Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9<sup>th</sup> Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3<sup>d</sup> Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9<sup>th</sup> Cir. 1984) (unpublished) (not to be cited as precedent under 9<sup>th</sup> Circuit Rule 21); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Dr. John Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Zelma Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8<sup>th</sup> Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5<sup>th</sup> Cir. 1978); *In re C. D. Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8<sup>th</sup> Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9<sup>th</sup> Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5<sup>th</sup> Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Edward Whaley*, 35 Agric. Dec.

certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.” Lord Mansfield in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, EVIDENCE § 285 (3<sup>d</sup> ed. 1940).

Respondent contends that John Feltner, Jr., “was equally available to the [C]omplainant by subpoena, and [C]omplainant likewise chose not to present this evidence.” Therefore, the Chief ALJ’s inference that if John Feltner, Jr., had testified, his testimony would not have favored Respondent, is error. (Appeal Pet. ¶ 3.)

Section 6(d)(1) of the Horse Protection Act provides that the Secretary of Agriculture may require attendance by subpoena, as follows:

#### § 1825. Violations and penalties

....

##### (d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

(1) The Secretary may require by subpoena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding. Witnesses summoned before the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

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1519, 1522 (1976); *In re Ludwig Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff’d per curiam*, 510 F.2d 966 (4<sup>th</sup> Cir. 1975) (unpublished); *In re J. A. Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

<sup>13</sup>*United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9<sup>th</sup> Cir. 1998); *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10<sup>th</sup> Cir. 1996); *Borrer v. Herz*, 666 F.2d 569, 573-74 (C.C.P.A. 1981); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 9-10 (2<sup>d</sup> Cir. 1978); *Blow v. Compagnie Maritime Belge (Lloyd Royal) S.A. v. Old Dominion Stevedoring Corp.*, 395 F.2d 74, 79 (4<sup>th</sup> Cir. 1968); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8<sup>th</sup> Cir. 1965); *Cromling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3<sup>d</sup> Cir. 1963); *Hoffman v. Commissioner*, 298 F.2d 784, 788 (3<sup>d</sup> Cir. 1962); *Illinois Central R.R. Co. v. Staples*, 272 F.2d 829, 834-35 (8<sup>th</sup> Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7<sup>th</sup> Cir. 1950); *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632, 636 (4<sup>th</sup> Cir.), *cert. denied*, 338 U.S. 868 (1949); *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 42-43 (8<sup>th</sup> Cir. 1946); *Bowles v. Lentin*, 151 F.2d 615, 619 (7<sup>th</sup> Cir. 1945), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 256-57 (C.C.P.A. 1939).

15 U.S.C. § 1825(d)(1). Therefore, I agree with Respondent that John Feltner, Jr., was equally available to Respondent and Complainant by subpoena. However, *equal availability*, in the context of the inference relating to non-production of a witness, is not merely that a witness is subject to compulsory process, and thus available in a descriptive sense, but that the witness is of equal avail to both parties in the sense that the witness is not presumptively interested in the outcome.<sup>14</sup> John Feltner, Jr., by virtue of his position as the trainer of Favorite's Fargo and his relationship with Respondent, is presumptively interested in a disposition of this proceeding which favors Respondent. Therefore, while John Feltner, Jr., was subject to compulsory process by Respondent and Complainant, I do not find that he was *equally available* to Respondent and Complainant. I reject Respondent's contention that the Chief ALJ erred by drawing an inference that John Feltner, Jr.'s testimony would have been adverse to Respondent's position in this proceeding based upon Respondent's failure to call John Feltner, Jr., as a witness.

For the foregoing reasons, the following Order should be issued.

### **Order**

1. Respondent, David Tracy Bradshaw, is assessed a \$2,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0008.

2. Respondent is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and

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<sup>14</sup>See *Oxman v. WLS-TV*, 12 F.3d 652, 661 (7<sup>th</sup> Cir. 1993); *Littlefield v. McGuffey*, 954 F.2d 1337, 1346-47 (7<sup>th</sup> Cir. 1992); *Tyler v. White*, 811 F.2d 1204, 1207 (8<sup>th</sup> Cir. 1987); *Kean v. Commissioner*, 469 F.2d 1183, 1187-88 (9<sup>th</sup> Cir. 1972); *McClanahan v. United States*, 230 F.2d 919, 925-26 (5<sup>th</sup> Cir.), *cert. denied*, 352 U.S. 824 (1956); *Samish v. United States*, 223 F.2d 358, 365 (9<sup>th</sup> Cir.), *cert. denied*, 350 U.S. 897 (1955); *United States v. Beekman*, 155 F.2d 580, 584 (2<sup>d</sup> Cir. 1946).

from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of a horse to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up or inspection areas, or in any area where spectators are not allowed; and (d) financing the participation of any other person in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60<sup>th</sup> day after service of this Order on Respondent.

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