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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Howard Hamilton and  
Patrick W. Thomas

Respondents.

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Docket Nos. 13-0365 &amp; 13-0366

**DECISION AND ORDER ON THE RECORD****Appearances:**

*Brian Hill, Esq. with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant (Animal and Plant Health Inspection Service, USDA).*

*Alicia A. Napier, Esq., for the Respondents (Howard Hamilton and Patrick Thomas).*

**Introduction**

This proceeding was instituted under the Horse Protection Act ("Act"), as amended (15 U.S.C. § 1821 *et seq.*), by a complaint filed on September 23, 2013, by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The Complaint alleged that Howard Hamilton and Patrick Thomas (jointly referred to as "Respondents") violated the Act by entering "Don't Tread On Me" in the 50<sup>th</sup> Annual Guntown Lion's Club Walking Horse Show and "A Magic Stroke" in the Parker's Crossroads Walking Horse Show, while the horses were sore.<sup>1</sup>

On June 2, 2016, I conducted a telephone conference with counsel in the above-captioned case. After due consideration of the position of the parties regarding the procedural status of this

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<sup>1</sup> With respect to the horse "A Magic Stroke," Patrick Thomas was also charged with showing or exhibiting the horse. See Part II, ¶ 3 of the Complaint.

case; including the fact that the Administrator's Complaint alleging two separate violations of the Horse Protection Act are based on incidents occurring on 6/22/12 and 7/21/12; the fact that there have been multiple withdrawals of counsel and continuances; and the fact that the Respondents have failed to show cause why a Decision and Order should not be entered on the record in this matter; an Order was issued on July 7, 2016 directing the parties to submit proposed pleadings setting forth their respective positions and evidence in support thereof for judicial review and findings on the record. Respondents complied with a filing submitted by Counsel on September 2, 2016, and Complainant complied with its filing submitted by Counsel on September 6, 2016.

The July 7, 2016 Order also directed the parties to engage in good faith settlement efforts to resolve this matter. It was my hope that after the exchange of pleadings setting forth their respective positions and evidence in support, it would give the parties a more realistic basis to resolve the issues in dispute by means of a settlement; yet, almost a year later that has not proven to be the case. Accordingly, it is time to move forward with the adjudication of this proceeding by means of this Decision and Order on the Record.

### **Pertinent Statutory Provisions**

Congress enacted the Horse Protection Act to end the cruel practice of deliberately soring Tennessee Walking Horses for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, usually by using chains or chemicals, "the intense pain which the horse suffers when placing his forefeet on the ground causes him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking Horse. H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.

Congress's reasons for prohibiting soring were twofold. First, soring inflicts great pain on the animals. Second, trainers who sore horses gain an unfair competitive advantage over trainers who rely on skill and patience. In 1976, Congress significantly strengthened the Horse Protection Act by amending it to make clear that intent to sore the horse is not a necessary element of a violation. *See Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

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. . . .

15 U.S.C. § 1821(3). The Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity 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).

The Horse Protection Act prohibits certain conduct, including:

**§ 1824. Unlawful acts**

The following conduct is prohibited:

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2). Violators of the Horse Protection Act are subject to civil and criminal sanctions. The Horse Protection Act provides for criminal penalties for “knowingly” violating the Horse Protection Act (15 U.S.C. § 1825(a)). This provision of the Horse Protection Act is not at issue in this proceeding. Civil sanctions include both civil penalties (15 U.S.C. § 1825(b)(1)) and disqualification for a specified period from “showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction.” (15 U.S.C. § 1825(c)). The maximum civil penalty for each violation is \$2,200 (15 U.S.C. § 1825(b)(1)).<sup>2</sup> In making the determination concerning the amount of the monetary penalty, the Secretary of Agriculture must

take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and

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<sup>2</sup> Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824. The maximum civil penalty for violations of the Horse Protection Act occurring after May 7, 2010, is \$2,200 (7 C.F.R. § 3.91(b)(2)(viii)).

such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

As to disqualification, the Horse Protection Act further provides, as follows:

**§ 1825. Violations and penalties**

**(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

In addition to any ... civil penalty authorized under this section, any person . . . who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

**Respondents Have Failed To Rebut the Statutory Presumption  
That “Don’t Tread On Me” Was Sore**

Respondents previously admitted to the entering of both horses and Patrick Thomas to the showing or exhibiting of “A Magic Stroke”; accordingly, only the Complaint allegations of “soreness” in the horses remain at issue.<sup>3</sup>

On June 22, 2012, at the 50<sup>th</sup> Annual Guntown Lion’s Club Walking Horse Show, Dr. Dussault examined “Don’t Tread On Me” and found “raised cords of tissue (scars) extending from the pocket area” up and going medial and lateral along its pasterns, according to his sworn affidavit. (CX- 2) In that same affidavit, Dr. Dussault further noted what he termed as a “prohibited

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<sup>3</sup> See Part I of Patrick Thomas’s answer on October 21, 2013 and Part I of Howard Hamilton’s answer on October 21, 2013.



substance” of some sort which was covering the scars, which he had to rub off in order to inspect the area. Ultimately, his determination was that the horse was not in compliance with the scar rule and the custodian of the horse (Howard Hamilton) was notified. (CX-1, 2) Don Fox of the USDA photographed the scars present on this horse, which are found as Exhibits 4 and 5.<sup>4</sup> In those photos what Dr. Dussault identified as scars are visible, as the cords that he discussed can be seen emanating upwards and outwards on the pastern, from top to bottom.

As Dr. Dussault attested to in his affidavit, he has been employed by the USDA since November of 1985 and had been inspecting horses for compliance with the Act since then, which would have given him approximately 26 years of experience interpreting the Act at the time of this event. (CX-2). In addition to his personal experience, the inspection procedures that Dr. Dussault used to inspect “Don’t Tread on Me” are based on over 40 years of Horse Protection Act enforcement. It is designed specifically to distinguish horses that are “sore” from those that are not, and not just a general examination of the welfare of the horse. Soring practices primarily occur by two means: mechanical and chemical.<sup>5</sup> Regardless of the method, these soring practices are generally confined to the pasterns of the horse’s feet, and the USDA inspection is tailored to

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<sup>4</sup> Digital photographs of Complainant’s originally submitted photographs were electronically sent to the Hearing Clerk on June 23, 2016, providing clearer views of both horses’ pasterns than the copied photos. Despite Respondents’ claims on page 6 of their Proposed Decision and Order that said digital photographs are “admittedly digitally enhanced”, no evidence exists for that claim. Respondents have misread the email in REX-29 to mean that the digital copy of CX-5 had “slight light adjustments” when in fact it was being pointed out that the two **printed** photos of CX-5 were the same photo, shown with different lighting, not that there was any manipulation of the digital photographs. (Respondents’ Responsive Evidence and Brief in Support Thereof, page 23)

<sup>5</sup> See *Zahnd v. USDA*, 479 F.3d 767, 768-69 (11th Cir. 2007) (“The purpose of [the pre-show] inspection is to determine whether the horse is sore, that is, whether a horse has been abused with chemical or mechanical devices and will feel pain when moving.”); Young, 54 Agric. Dec. 208, 209 (U.S.D.A. 1995) (“The Horse Protection Act . . . prohibits the practice of ‘soring’ the legs of a Tennessee walking horse through the use of chemical or mechanical devices.”).

detect evidence of soreness in that area.<sup>6</sup> Part and parcel of that inspection was a visual analysis as well as physical inspection, which he described in some detail.<sup>7</sup>

In rebuttal, Respondents rely in part on the affidavits of two Designated Qualified Persons (DQPs).<sup>8</sup> (REX-15, 16) In their affidavits, both DQPs (Mr. Butler and Mr. Riner) discuss a purported interaction they had with USDA Veterinary Medical Officer Dr. Hammel. Both assert that Dr. Hammel told them that the Veterinary Medical Officers (VMOs) had been instructed to enforce the “scar rule” as written, which they assert is different than prior practice. (REX-15, 16) Although the affidavits are deemed admitted for this proceeding; even assuming *arguendo* that the affidavits are accepted for the truth of the matters asserted therein, the statements are too attenuated from the facts and circumstances of the examination performed by Dr. Dussault on June 22, 2012 of “Don’t Tread On Me” at the 50<sup>th</sup> Annual Guntown Lion’s Club Walking Horse Show to be of probative value in rebutting Dr. Dussault’s findings of “raised cords of tissue (scars) extending from the pocket area” up and going medial and lateral along its pasterns, as described in his sworn affidavit. (CX- 2)

Respondents also attempt to rebut the findings contained in Dr. Dussault’s affidavit by

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<sup>6</sup> *Bobo v. USDA*, 52 F.3d 1406, 1409, 1412, 1415 (6th Cir. 1995); *Edwards*, 55 Agric. Dec. 892, 939 (U.S.D.A. 1996); *Bennett*, 55 Agric. Dec. 176, 180-81 (U.S.D.A. 1996).

<sup>7</sup> It must be noted that Dr. Dussault’s affidavit incorrectly identifies the horse as “Do Tread On Me.” (CX-2)

<sup>8</sup> A DQP is a person meeting the requirements of 9 C.F.R. § 11.7 who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purpose of enforcing the Horse Protection Act. *See* 9 C.F.R. § 11.1.

asserting that Dr. Dussault improperly inspected “Don’t Tread On Me.”<sup>9</sup> Much of Respondents’ theory rests on the idea that Dr. Dussault simply referred to his examination of the horse as a “palpation,” which they contend is inadequate to support a finding that the horse was “sore.”<sup>10</sup> *Black’s Veterinary Dictionary* has described palpation as “the method of examining the surface of the body, and the internal organs as to their size, position, shape, etc., by the method of feeling with the hand laid upon the skin gently manipulating the structures within reach.”<sup>11</sup> Thus, the use of the term palpation is sufficient, particularly when considered in the context of his affidavit as a whole and other corroborating evidence of record, to support Dr. Dussault’s findings.<sup>12</sup>

Likewise, the Respondents are incorrect in their assertion that “proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation” is a requirement for meeting the statutory definition of a scar rule violation.<sup>13</sup> In fact, that is only a requirement of the scar rule if it is found that the horse has “**uniformly** thickened epithelial tissue.” (emphasis added) Where an inspector believes that the bilateral scars on the pasterns are not uniformly thickened epithelial tissue, the horse will be adjudged sore without a further finding of aggravating circumstances.

Finally, Respondents argue that “Don’t Tread On Me” was not sore because it was inspected by their private veterinarians who found it to be without issue.<sup>14</sup> One of Respondents’

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<sup>9</sup> See Respondents’ Responsive Evidence and Brief in Support Thereof, page 9.

<sup>10</sup> See *id.* at 10.

<sup>11</sup> GEOFFREY WEST, *BLACK’S VETERINARY DICTIONARY* 555 (A & C Black, 15th ed. 1982).

<sup>12</sup> Mitchell Butler states in his affidavit, REX-18, page 2 of 3, that he “palpate[s] vertically and horizontally spreading the skin with my thumbs, as I was trained to do, to see if the skin can be smoothed out.”

<sup>13</sup> Respondents’ Responsive Evidence and Brief in Support Thereof, pages 9, 10.

<sup>14</sup> *Id.* at 11, 12.



veterinarians is Dr. John Bennett. The date of Dr. Bennett's examination was October 10, 2013, more than fifteen months after the date of Dr. Dussault's inspection and finding.<sup>15</sup> A second veterinarian, Dr. Richard Wilhelm, apparently also inspected the horse on October 10, 2013.<sup>16</sup> Both of these private veterinarians assert that the horse was not sore on the date of their examination, i.e. on October 10, 2013, more than fifteen months after the date of Dr. Dussault's examination. (REX-19, 20) Even assuming arguendo that the affidavits are accepted for the truth of the matters asserted therein, the statements are too attenuated from the facts and circumstances of the examination performed by Dr. Dussault on June 22, 2012 of "Don't Tread On Me" at the 50<sup>th</sup> Annual Guntown Lion's Club Walking Horse Show to be of probative value in rebutting Dr. Dussault's findings of "raised cords of tissue (scars) extending from the pocket area" up and going medial and lateral along its pasterns, as described in his sworn affidavit. (CX- 2)

For much the same reason, the opinion presented by Dr. Lee Butler arising from an examination which purportedly took place closer to two weeks after the show is insufficient to rebut Dr. Dussault's findings of "raised cords of tissue (scars) extending from the pocket area" up and going medial and lateral along its pasterns, as described in his sworn affidavit (CX-2) arising from his June 22, 2012 examination of "Don't Tread On Me." <sup>17</sup>

Furthermore, it is well settled that the contemporaneous examination of a USDA veterinarian should be given more weight than later examinations by private veterinarians.<sup>18</sup> As

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<sup>15</sup> REX-20.

<sup>16</sup> REX-19.

<sup>17</sup> REX-30. There are additional concerns with the reliability of his evidence as what is offered from him is an unsigned document, without accompanying photographs, including only a description of a finding.

<sup>18</sup> Thornton, 41 Agric. Dec. 870, 878-79, 890-94 (U.S.D.A. 1982).

the veterinarian on site of the 50<sup>th</sup> Annual Guntown Lion's Club Walking Horse Show conducting a contemporaneous exam, Dr. Dussault, with his quarter century of experience administering the Act, found "Don't Tread On Me" to be out of compliance with the scar rule. (CX-2) There is no contemporary evidence from a comparatively experienced veterinarian, with accompanying evidence to dispute his findings, although Respondents were on notice immediately that the horse had been adjudged sore.

**Respondents Have Failed To Rebut The Statutory Presumption  
That "A Magic Stroke" Was Sore**

Respondents previously admitted to the entering of both horses and Patrick Thomas to the showing or exhibiting of "A Magic Stroke"; accordingly, only the Complaint allegations of "soreness" in the horses remain at issue.<sup>19</sup>

On July 21, 2012, at the Parker's Crossroads Walking Horse Show, Dr. Baker examined "A Magic Stroke" and found "thickened ropes of hairless skin medial and lateral to the posterior midline" on both the left and right pastern of the horse. (CX-7) He also noted in his affidavit that the tissue in this area was "non-uniformly thickened and could not be flattened or smoothed out." (CX-7). Upon making this finding, Dr. Baker informed the custodian (Howard Hamilton) that the horse was not in compliance with the scar rule. (CX-6, 7) The findings are also bolstered by the photos of the horse's pasterns, taken by Robert Whiteley and marked as Complainant's Exhibit 9 (CX-9). These photos clearly show the thickened cords of hairless skin which Dr. Baker identified as scars.

Dr. Baker noted in his affidavit that he had been a VMO for the USDA since January of

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<sup>19</sup> See Part I of Patrick Thomas's answer on October 21, 2013 and Part I of Howard Hamilton's answer on October 21, 2013.

2002, some 10 years prior to his inspection of “A Magic Stroke.” (CX-7) Dr. Baker, per that affidavit, also noted that he first visually observed the horse, before then physically inspecting it. (CX-7) Much like any other USDA VMO, his inspection was designed specifically to distinguish horses that are “sore” from those that are not, and not just a general examination of the welfare of the horse. And as a licensed veterinarian, this training would have been augmented by his real world, practical and personal experience in examining animals of all types, and specifically horses. The physical inspection that ensued established quite conclusively his procedures and findings, as already stated.

Respondents maintain that because the horse was allowed to show after the opportunity for a pre-show inspection, it is a preclusion for finding the horse sore post-show, as this horse was by Dr. Baker.<sup>20</sup> Complainant responds to this argument by asserting that Respondents have conflated the findings of the DQP and that of the VMO. While DQPs do have a role in helping to promote the goals of the Act, a licensed veterinarian working specifically under the Act and aware of its enforcement provisions would add a level of expertise that DQPs do not possess.<sup>21</sup> Respondents’ argument that a negative inference should follow from a horse having the opportunity to be inspected pre-show, but only being called out in a post-show inspection is unpersuasive for the additional reason that an opportunity to be inspected pre-show does nothing to refute the findings

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<sup>20</sup> Respondents’ Responsive Evidence and Brief in Support Thereof, page 14.

<sup>21</sup> Routinely, DQP examinations are found to be less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to DQP examinations than to United States Department of Agriculture examinations. *Oppenheimer*, 54 Agric. 221, 269 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer); *Sparkman*, 50 Agric. Dec. 602, 610 (U.S.D.A. 1991) (Decision as to Sparkman and McCook); *Edwards*, 49 Agric. Dec. 188, 200 (U.S.D.A. 1990), *aff’d per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

of an actual post-show examination by Dr. Baker, a licensed veterinarian who has practiced with APHIS since 2002. (CX-7)

Respondents also assert as a defense that the Dr. Baker was unaware of the basics of palpation with respect to findings related to the scar rule at the time of the show he worked.<sup>22</sup> Respondents seek to offer a transcript of an earlier DQP event in rebuttal of the findings Dr. Baker recorded contemporaneously with respect to this event.<sup>23</sup> That transcript, at best, stands for nothing more than the proposition that there may be different ways that a skilled veterinarian may conduct palpation to determine compliance under the scar rule. Not only does the transcript fail to address a contemporaneous examination of the subject horse, as previously explained, as a general rule DQP examinations are found to be less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to DQP examinations than to United States Department of Agriculture examinations.<sup>24</sup>

Respondents again challenge Dr. Baker's findings by using the examinations of both Drs. Bennett and Wilhelm.<sup>25</sup> However, the evidence offered through these two witnesses on "A Magic Stroke" has the same weaknesses as it did for "Don't Tread On Me." Both examinations were made on October 10, 2013, nearly a full fifteen months after the show at which these horses were found sore by APHIS veterinarians. (REX-19, 20) Even assuming *arguendo* that the affidavits are accepted for the truth of the matters asserted therein, the statements are too attenuated from the

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<sup>22</sup> Respondent's Responsive Evidence and Brief in Support Thereof, page 24.

<sup>23</sup> See *supra* note 8.

<sup>24</sup> See *supra* note 21.

<sup>25</sup> See Respondents' Responsive Evidence and Brief in Support Thereof, pages 19-21.

facts and circumstances of the examination performed by Dr. Baker on July 21, 2012 of “A Magic Stroke” to be of probative value in rebutting Dr. Baker’s findings of “thickened ropes of hairless skin medial and lateral to the posterior midline” on both the left and right pastern of the horse, as well as the fact that the tissue in this area was “non-uniformly thickened and could not be flattened or smoothed out.” (CX-7) Upon making this finding, Dr. Baker informed the custodian (Howard Hamilton) that the horse was not in compliance with the scar rule. (CX-6, 7) Once again, Respondents had an opportunity to seek and receive an immediate and comprehensive examination of “A Magic Stroke”, being on notice that it had been adjudged as sore. Apparently, they chose to do so only after being served with a complaint more than fourteen months later.

#### **Findings of Fact**

1. Respondent Howard Hamilton is an individual who resides in Cedar Grove, Tennessee. (Compl. ¶ 1; Answer at 1)
2. Respondent Patrick W. Thomas is an individual who resides in Auburntown, Tennessee. (Compl. ¶ 2; Answer at 1)
3. On or about June 22, 2012, Respondents Howard Hamilton and Patrick Thomas entered for the purpose of showing or exhibiting the horse known as “Don’t Tread On Me,” entry number 106, class number 5, in the 50<sup>th</sup> Annual Guntown Lion’s Club Walking Horse Show in Guntown, MS. (Compl. ¶ 3; Answer at 1)
4. On or about July 21, 2012, Respondents Howard Hamilton and Patrick Thomas entered for the purpose of showing or exhibiting the horse known as “A Magic Stroke,” entry number 301, class number 22, in the Parker’s Crossroads Walking Horse Show in Parker’s Crossroads, TN. (Compl. ¶ 4; Answer at 1)



5. On or about July 21, 2012 Respondent Patrick Thomas showed or exhibited the horse known as “A Magic Stroke,” entry number 301, class number 22, in the Parker’s Crossroads Walking Horse Show in Parker’s Crossroads, TN. (Compl. ¶ 5; Answer at 1)

6. Dr. Clement Dussault examined the horse “Don’t Tread On Me” (incorrectly identified at times as “Do Tread On Me”) and determined it to be sore by reason of being out of compliance with the scar rule. (CX-2)

7. Dr. Jeffrey Baker examined the horse “A Magic Stroke” and determined it to be sore by reason of being out of compliance with the scar rule. (CX-7)

8. Dr. Dussault properly filled out and signed form 7077 which contained a drawing showing the location of the scars on “Don’t Tread On Me.” (CX-1) He also prepared an affidavit noting his examinations and findings pertinent to this horse. (CX-2).

9. Dr. Baker properly filled out and signed form 7077 which contained a drawing showing the location of the scars on “A Magic Stroke.” (CX-6) He also prepared an affidavit noting his examinations and findings pertinent to this horse. (CX-7)

### **Conclusions of Law**

Section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) prohibits “the entering for the purpose of showing or exhibiting in any horse show or horse exhibition any horse which is sore.” Section 5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)) similarly prohibits the “showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore.” Section 6(b)(1) of the Act, 15 U.S.C. § 1825(b)(1)) further provides that “[a]ny person who violates section 5 of this Act shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation.”<sup>26</sup>

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<sup>26</sup> In 1997 the Secretary of Agriculture adjusted the maximum civil penalty from \$2,000 to \$2,200 for each violation of section 5 of the Act (15 U.S.C. § 1824), in accordance with the Federal Civil Penalties Inflation

As a result of a rulemaking, 9 C.F.R. § 11.3 was promulgated which laid out the framework of the “scar rule.”<sup>27</sup> Under the auspices of the scar rule, “[h]orses subject to this rule that do not meet the following scar rule criteria shall be considered to be ‘sore’ and are subject to all prohibitions of section 5 of the Act.” Illustrative of the prohibitions, 9 C.F.R. § 11.3 states that:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair. (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or “pocket” may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture “shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.”

The Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a

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Adjustment Act of 1990, as amended (Pub. L. No. 101-410) as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134). *See* 28 U.S.C. § 2461 note, 7 C.F.R. § 3.91(b)(2)(vii).

<sup>27</sup> 44 Fed. Reg. 25172, April 27, 1979.

disqualification period. While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.<sup>28</sup>

Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant an exception from the usual practice of imposing the minimum disqualification period for violations of the Horse Protection Act, in addition to the assessment of a civil penalty. The facts and circumstances of this case have been examined and do not warrant an exception to this policy.

1. The Secretary has jurisdiction in this matter.
2. On June 22, 2012, Respondents Howard Hamilton and Patrick Thomas, in violation of section 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 “Don’t Tread On Me,” entry number 106, class number 5, in the 50<sup>th</sup> Annual Guntown Lion’s Club Walking Horse Show in Guntown, MS, while the horse was sore (9 C.F.R. § 11.3(b)).
3. On July 21, 2012, Respondents Howard Hamilton and Patrick Thomas, in violation of

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<sup>28</sup> Back, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010), *aff’d*, 445 F. App’x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005) (Decision as to Christopher Jerome Zahnd), *aff’d sub nom. Zahnd v. USDA*, 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1476 (U.S.D.A. 2005), *aff’d*, 217 F. App’x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 492 (U.S.D.A. 2005), *aff’d*, 198 F. App’x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 209 (U.S.D.A. 2002), *aff’d*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

section 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 “A Magic Stroke,” entry number 301, class number 22, in the Parker’s Crossroads Walking Horse Show in Parker’s Crossroads, TN, while the horse was sore (9 C.F.R. § 11.3(b)).

4. On July 21, 2012, Respondent Patrick Thomas, in violation of section 5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)), showed or exhibiting the horse known as “A Magic Stroke,” entry number 301, class number 22, in the Parker’s Crossroads Walking Horse Show in Parker’s Crossroads, TN, while the horse was sore (9 C.F.R. § 11.3(b)).
5. The record is insufficient to establish that the maximum penalty of \$4,400 per Respondent is appropriate in this case and is therefore modified to \$2,200 per Respondent accordingly.
6. The record is insufficient to establish that Respondents Howard Hamilton and Patrick Thomas should each be disqualified for two uninterrupted years 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, or horse sale or auction, directly or indirectly through any agent, employee, family member or other device; however, a period of disqualification of each Respondent for one year is supported and is hereby imposed accordingly.

### **ORDER**

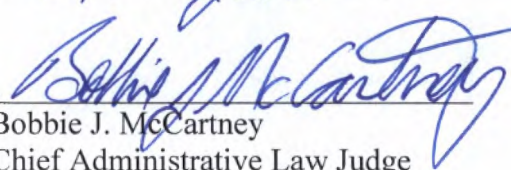
1. Respondent Howard Hamilton is assessed a civil penalty of \$2,200.
2. Respondent Patrick Thomas is assessed a civil penalty of \$2,200.
3. Respondents Howard Hamilton and Patrick Thomas are each disqualified for one

uninterrupted 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, or horse sale or auction, directly or indirectly through any agent, employee, family member or other device. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (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 shall be served by the Hearing Clerk upon each of the parties with courtesy copies provided via email where available.

Done at Washington, D.C.,  
this 29<sup>th</sup> day of June, 2017

  
Bobbie J. McCartney  
Chief Administrative Law Judge

Hearing Clerk's Office  
U.S. Department of Agriculture  
South Building, Room 1031  
1400 Independence Avenue, SW  
Washington, D.C. 20250-9203  
Tel: 202-720-4443  
Fax: 202-720-9776



**CERTIFICATE OF SERVICE**

Howard Hamilton, Respondent

Docket: 13-0365

Patrick Thomas, Respondent

Docket: 13-0366

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the DECISION AND ORDER ON THE RECORD AND HEARING CLERK'S LETTER, has been furnished and was served upon the following parties on June 30, 2017 by the following:

USDA (OGC) - Electronic Mail

Brian Hill, OGC

[Brian.Hill@ogc.usda.gov](mailto:Brian.Hill@ogc.usda.gov)

Joyce McFadden, OGC

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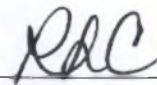
Cedar Grove, TN 38321

Patrick W. Thomas

301 Davenport Rd.

Auburntown, TN 37016

Respectfully Submitted,



Renee Leach-Carlos, Hearing Clerk  
USDA/Office of Administrative Law Judges  
Hearing Clerk's Office  
1400 Independence Ave., SW, Room 1031-S  
Washington, DC 20250-9203