AGRICULTURE DECISIONS

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Pages 243 – 438

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2015

ANIMAL WELFARE ACT

COURT DECISIONS

DEPARTMENTAL DECISIONS

COMMODITY, PROMOTION, RESEARCH, AND INFORMATION ACT

COURT DECISIONS

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISIONS

--

MISCELLANEOUS ORDERS & DISMISSALS

AGRICULTURAL MARKETING AGREEMENT ACT

ANIMAL WELFARE ACT

HORSE PROTECTION ACT

ORGANIC FOODS PRODUCTION ACT

POULTRY PRODUCTS INSPECTION ACT

SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

--

DEFAULT DECISIONS

ANIMAL HEALTH PROTECTION ACT

ANIMAL WELFARE ACT

--

CONSENT DECISIONS

ANIMAL WELFARE ACT

FEDERAL CROP INSURANCE ACT

FEDERAL MEAT INSPECTION ACT

FOOD AND NUTRITION ACT

HORSE PROTECTION ACT

POULTRY PRODUCTS INSPECTION ACT

--

ANIMAL WELFARE ACT

COURT DECISIONS

KNAPP v. USDA.
No. 14-60002.
Court Decision.
Filed July 31, 2015.

AWA – Administrative procedure – Animals, purchase of – Animals, sale of – Breeding – Cease and desist – Civil penalty - Deference to Judicial Officer - Discretion, abuse of – Farm animals – Good faith – Hoofstock animals – Sanction policy – Sanctions.

[Cite as: 796 F.3d 445 (5th Cir. 2015)].

United States Court of Appeals,
Fifth Circuit.

OPINION

STEPHEN A. HIGGINSON, CIRCUIT JUDGE, DELIVERED THE OPINION OF THE COURT.

The United States Secretary of Agriculture ("Secretary") fined Bodie Knapp $395,900 after finding that he bought and sold regulated animals without a license, in violation of the Animal Welfare Act ("AWA") and implementing regulations. In his petition for review, Knapp argues that his activities were lawful, and that the Secretary abused its discretion in its choice of sanction. We GRANT in part and DENY in part the petition for review.

FACTS AND PROCEEDINGS

Bodie Knapp formerly operated a business in Mathis, Texas, that exhibited wild and exotic animals to the public. *See In re Knapp,* 64 Agric. Dec. 756, 757 (U.S.D.A. Jan. 4, 2005). Knapp possessed a license to exhibit these animals under the Animal Welfare Act. *Id.* In 2004, the Administrator of the Animal and Plant Health Inspection Service

("Administrator"), an agency within the U.S. Department of Agriculture ("Department"), filed two complaints against Knapp alleging that he had mishandled animals, failed to provide them with adequate veterinary care, and failed to keep required records relating to, but not limited to, the deaths of two tigers and two lions. *In re Coastal Bend Zoological Ass'n,* 65 Agric. Dec. 993, 994 (U.S.D.A.2006); *In re Knapp,* 64 Agric. Dec. at 757. In January 2005, after Knapp failed to timely respond to the allegations in one of the complaints, the Administrative Law Judge ("ALJ") entered a default decision revoking Knapp's license and ordering him to cease and desist from future violations of the AWA or the "[r]egulations and [s]tandards." *In re Knapp,* 64 Agric. Dec. at 773. The decision was affirmed by the Judicial Officer, who has final authority to issue decisions on behalf of the Secretary in formal adjudicatory proceedings. *See* 7 C.F.R. § 2.35(a); *In re Knapp,* AWA Docket No. 04–0029, 2005 WL 1283510, at *29 (U.S.D.A. May 31, 2005). The revocation of Knapp's license became effective on September 10, 2005, after the denial of Knapp's motion for reconsideration. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *4 (U.S.D.A. June 3, 2013). In August 2006, pursuant to the second complaint, another ALJ assessed a $5,000 penalty against Knapp and ordered him to cease and desist from further violations of the AWA or the "[r]egulations and [s]tandards." *In re Coastal Bend Zoological Ass'n,* 65 Agric. Dec. at 1019.

In 2009, the Administrator initiated the instant action against Knapp, alleging that after losing his AWA license, he continued to buy, sell, and transport hundreds of animals in violation of the AWA and regulations. The complaint alleges that Knapp "offered for sale, delivered for transportation, transported, sold, or negotiated the purchase or sale" of 429 animals in thirty separate transactions between November 2005 and September 25, 2010.[1] The ALJ held a hearing, at which Knapp was represented by counsel and called three witnesses and introduced evidence. *In re Knapp,* AWA Docket No. 09–0175, 2011 WL 4946791, at *1. The ALJ determined that eight of the thirty transactions violated the AWA and regulations, and he assessed Knapp a $15,000 penalty and ordered him to cease and desist from further violations. *Id.* at *8, 11. The

[1] Although the Administrator states in the complaint that the number of animals at issue is 419, the animals listed in the complaint total 429.

ALJ found that the Administrator "was not substantially justified" in challenging Knapp's other transactions, and that Knapp was therefore entitled to attorney's fees and expenses based on those allegations under the Equal Access to Justice Act. *Id.* at *8 (citing 5 U.S.C. § 504). The parties cross-appealed to the Judicial Officer.

The Judicial Officer found that Knapp violated the Animal Welfare Act, Department regulations, and the terms of his prior cease and desist orders by operating as an animal dealer without a license with respect to many of the animals listed in the complaint. *In re Knapp,* AWA Docket No. 09–175, 2013 WL 8213607, at *15–18. The Judicial Officer assessed Knapp a $42,800 penalty for buying or selling 214 animals without a license in violation of the AWA, 7 U.S.C. § 2134, and two regulatory provisions, 9 C.F.R. §§ 2.1(a) and 2.10(c). *Id.* at *8, 10. The Judicial Officer imposed an additional $353,100 penalty on the ground that each of these transactions constituted a knowing violation of the two prior cease and desist orders. *Id.* at *10. The Judicial Officer also ordered Knapp to "cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, [to] cease and desist from operating as a dealer without an Animal Welfare Act license." *Id.* at *19. Finally, the Judicial Officer found that the ALJ's determination regarding attorney's fees was premature. *Id.* at *12. On November 6, 2013, the Judicial Officer denied Knapp's amended petition for reconsideration. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8208439, at *13 (U.S.D.A. Nov. 6, 2013). Knapp filed a timely petition for review in this court on January 2, 2014. *See* 7 U.S.C. § 2149(c) (allowing 60 days after a final order to file a petition for review); 7 C.F.R. § 1.146(b).

STANDARD OF REVIEW

We have jurisdiction to review the Judicial Officer's decision under 7 U.S.C. § 2149(c). We may overturn that decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Allred's Produce v. U.S. Dep't of Agric.,* 178 F.3d 743, 746 (5th Cir.1999). The arbitrary and capricious standard is "highly deferential." *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp.,* 374 F.3d 362, 366 (5th Cir.2004) (internal quotation marks and citation omitted). "Arbitrary and capricious review focuses on whether an agency articulated a rational connection between the facts

found and the decision made, and '[i]t is well-established that an agency's action must be upheld if at all, on the basis articulated by the agency itself.' " *Id.* at 366–67 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–43, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). However, "we may 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " *Id.* at 367 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

The Judicial Officer's factual findings must be upheld as long as they are supported by substantial evidence. 5 U.S.C. § 706(2)(E); *ZooCats, Inc. v. U.S. Dep't of Agric.,* 417 Fed.Appx. 378, 381 (5th Cir.2011) (per curiam); *Brock v. U.S. Dep't of Agric.,* 335 Fed.Appx. 436, 437 (5th Cir.2009) (per curiam). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ellis v. Liberty Life Assurance Co. of Bos.,* 394 F.3d 262, 273 (5th Cir.2004) (internal quotation marks and citation omitted). In determining whether an administrative order is based on substantial evidence, we must consider "whatever in the record fairly detracts from [the] weight" of the evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Judicial Officer, in making factual findings, may substitute its judgment for that of the ALJ. *See* 5 U.S.C. § 557(b); *Robinson v. United States,* 718 F.2d 336, 338 (10th Cir.1983); *Mattes v. United States,* 721 F.2d 1125, 1129 (7th Cir.1983). However, "[i]n cases where the Secretary of an agency does not accept the findings of the ALJ, this court has an obligation to examine the evidence and findings of the [JO] more critically than it would if the [JO] and the ALJ were in agreement." *Young v. U.S. Dep't of Agric.,* 53 F.3d 728, 732 (5th Cir.1995) (second and third alterations in original) (internal quotation marks and citations omitted); *see also In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8208439, at *4 ("[T]he consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges ....").

We review the Judicial Officer's legal conclusions de novo, but with the appropriate level of deference to his interpretations of the AWA and

of Department regulations. *See Theodros v. Gonzales,* 490 F.3d 396, 400 (5th Cir.2007); *see also Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric.,* 692 F.3d 960, 966 (9th Cir.2012). We generally grant *Auer* deference to an agency's interpretation of its own ambiguous regulation, unless that interpretation is " 'plainly erroneous or inconsistent with the regulation,' " or "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' " *Christopher v. SmithKline Beecham Corp.,* –– U.S. ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (quoting *Auer v. Robbins,* 519 U.S. 452, 461–62, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)); *see also Decker v. Nw. Envtl. Def. Ctr.,* –– U.S. ——, 133 S.Ct. 1326, 1337, 185 L.Ed.2d 447 (2013). Because the Judicial Officer acts on behalf of the Secretary in AWA hearings, his decisions qualify for *Auer* deference. 7 C.F.R. § 2.35(a); *see Excel Corp. v. U.S. Dep't of Agric.,* 397 F.3d 1285, 1296 (10th Cir.2005) (deferring to the Judicial Officer's interpretation of a Department regulation intended to implement another statute administered by the Department).

To determine the appropriate level of deference to the Judicial Officer's interpretation of the AWA, we are guided by the two-step analysis set forth in *United States v. Mead Corp.,* 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)); *see also Perfectly Fresh Farms, Inc.*, 692 F.3d at 966 (framing the question of whether *Chevron* applies as a two-step analysis). With respect to the first requirement, Congress has authorized the Secretary to "make such investigations or inspections as he deems necessary to determine whether any dealer [or] exhibitor ... has violated" the AWA. 7 U.S.C. § 2146(a). After notice and an opportunity for a hearing, the Secretary may revoke licenses, assess civil penalties, and issue cease and desist orders against dealers or exhibitors who are found to have violated the AWA. *Id.* § 2149(a), (b). These provisions reflect Congress's intent to create a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie" pronouncements

entitled to *Chevron* deference. *Mead Corp.,* 533 U.S. at 230, 121 S.Ct. 2164. Indeed, the Supreme Court has recognized that "express congressional authorizations to engage in ... adjudication that produces ... rulings for which deference is claimed" is "a very good indicator of delegation meriting *Chevron* treatment." *Id.* at 229, 121 S.Ct. 2164 (citing cases).

With respect to the second requirement, the Judicial Officer promulgated its decision pursuant to formal procedures, as contemplated by Congress. Knapp received a hearing before the ALJ, at which his counsel presented evidence and cross-examined witnesses. *See* 7 C.F.R. §§ 1.131, 1.132 (providing that the ALJ's decision is to be "made in accordance with the provisions of 5 U.S.C. [§§] 556 and 557," which govern formal adjudication). The Judicial Officer, after reviewing the record of that hearing, issued a written opinion supported by reasoning. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607. In addition, the agency treats decisions by the Judicial Officer as precedential. *See In re GH Dairy,* AWA Docket No. 10–0283, 70 Agric. Dec. 508, at *15 (U.S.D.A. Oct. 5, 2011) ("[P]ertinent decisions by the Judicial Officer, if affirmed or unappealed, do have precedential authority in this proceeding...."); *In re Billy Gray,* 52 Agric. Dec. 1044, 1993 WL 308542, at *14 (U.S.D.A. July 23, 1993) ("The precedents of the Judicial Officer are required to be followed.").

In light of these considerations, we find that the Judicial Officer's decision was "promulgated in the exercise" of the authority that Congress delegated to the agency to make rulings carrying the force of law. *See Mead,* 533 U.S. at 227, 121 S.Ct. 2164. The Judicial Officer's interpretations of the AWA therefore qualify for *Chevron* deference. *Accord 907 Whitehead Street, Inc. v. Sec'y of U.S. Dep't of Agric.,* 701 F.3d 1345, 1350 (11th Cir.2012) (holding that the Judicial Officer's interpretation of the AWA was entitled to *Chevron* deference); *cf. Perfectly Fresh Farms, Inc.,* 692 F.3d at 967 (granting *Chevron* deference to statutory interpretations contained in the Judicial Officer's opinions applying the Perishable Agricultural Commodities Act); *Coosemans Specialties, Inc. v. Dep't of Agric.,* 482 F.3d 560, 564–65 (D.C.Cir.2007) (same); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.,* 468 F.3d 86, 95–96 (2d Cir.2006) (same). Where, as here, an agency's decision qualifies for *Chevron* deference, we will accept the

agency's reasonable construction of an ambiguous statute that the agency is charged with administering. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

Finally, we review the Judicial Officer's choice of sanction for abuse of discretion. *Am. Fruit Purveyors, Inc. v. United States,* 630 F.2d 370, 374 (5th Cir.1980) (per curiam). The sanction may be overturned only if it is "unwarranted in law or without justification in fact." *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 186, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (internal quotation marks and citations omitted).

DISCUSSION

The Animal Welfare Act intends, in part, "to assure the humane treatment of animals during transportation in commerce," and "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment." 7 U.S.C. § 2131(1)-(2). Among other provisions, the Act regulates "dealers" of animals. A "dealer" is defined, *inter alia,* as a "person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of ... any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet." *Id.* § 2132(f).[2] Under the AWA, a dealer must possess a valid license to (1) "sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal," or (2) "buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals." *Id.* § 2134. Similarly, Department regulations provide, in relevant part, that any person operating as a dealer "must have a valid license," unless the person qualifies for one of eight exceptions. 9 C.F.R. § 2.1(a)(1), (3). The regulations further provide that "[a]ny person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation." *Id.* § 2.10(c). "Animal," in turn, is defined as including "any

[2] Unless otherwise noted, the statutory and regulatory provisions cited have not been amended since the challenged transactions.

... warmblooded animal, which is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet," with several express exceptions. *Id.* § 1.1; *see also* 7 U.S.C. § 2132(g) (defining "animal" similarly as "any ... warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet," with several express exceptions). The Judicial Officer concluded that Knapp, while operating as a "dealer," purchased or sold 235 regulated animals without a license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c). *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *8. In his petition for review, Knapp argues that each of the challenged transactions is exempt from the licensing requirement for reasons discussed below.

I. PURCHASE OF ANIMALS

Knapp argues that he purchased animals only for his own personal use, and not for resale, and that these purchases were exempt from the licensing requirement. Department regulations exempt from the licensing requirement "[a]ny person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license." 9 C.F.R. § 2.1(a)(3)(viii). However, at the time of the challenged transactions, a Department publication titled "Animal Care Resource Guide, Dealer Inspection Guide" ("Guide") stated: "The following activities are **exempt** from licensing requirements: *Acquisition or buying of an animal not for resale* does **not** require a license." The ALJ, relying on the regulation, found that none of Knapp's purchases required a license and that therefore none of these purchases violated the AWA or regulations. *In re Knapp,* AWA Docket No. 09–0175, 2011 WL 4946791, at *8. The Judicial Officer reversed the ALJ's conclusion, finding that Knapp was not exempt under the regulation because he sold animals, in addition to purchasing them. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *8.

While the Guide could be read to exempt the act of purchasing for personal use, if the purchaser is selling only other animals, the regulation unambiguously applies the personal-use exemption only to "person[s]" who "do [ ] not sell or exhibit animals." 9 C.F.R. § 2.1(a)(3)(viii). No other regulatory or statutory provision contemplates the exemption

Knapp infers from the double negative in the Guide, and the regulation states that all dealers who are not expressly exempt must obtain a license. *Id.* § 2.1(a)(1). Because the regulation is a legislative rule having the "force and effect of law," *see Perez v. Mortg. Bankers Ass'n,* ––– U.S. –––, 135 S.Ct. 1199, 1203, 191 L.Ed.2d 186 (2015) (citation omitted), the Department may not adopt an inconsistent rule unless it proceeds through notice and comment. *See Clean Ocean Action v. York,* 57 F.3d 328, 333 (3d Cir.1995) ("An agency guideline or directive that conflicts with the plain meaning of a regulation is invalid."); *Mother Frances Hosp. of Tyler, Tex. v. Shalala,* 15 F.3d 423, 427 (5th Cir.1994) (holding that a policy articulated in an agency manual was invalid because it "impermissibly changed the meaning" of regulations promulgated through notice and comment), *cert. granted,* 514 U.S. 1011, 115 S.Ct. 1350, 131 L.Ed.2d 209 (1995), *vacated and remanded in light of Shalala v. Guernsey Mem'l Hosp.,* 514 U.S. 87, 99–102, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995) (finding that the manual provision was valid because it did not conflict with the regulation, while noting that "APA rulemaking would still be required if [the manual] adopted a new position inconsistent with any of the Secretary's existing regulations"); *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan,* 979 F.2d 227, 234 (D.C.Cir.1992) (noting that an agency could not alter a regulation without notice and comment, "unless such a change can be legitimately characterized as merely a permissible interpretation of the regulation, consistent with its language and original purpose"). Because the Guide would be invalid to the extent that it could be read to conflict with the regulation, Knapp's actions are governed by the plain meaning of the regulation. As a person who sold animals, Knapp does not qualify for the exemption for persons who only purchase animals for personal use and do not also sell animals. 9 C.F.R. § 2.1(a)(3)(viii). We therefore find that the Judicial Officer's interpretation of the regulation is correct, even without the benefit of *Auer* deference.

Knapp nevertheless argues that principles of fair notice preclude the Judicial Officer from penalizing him for conduct he perceives to be consistent with the Guide. We have held that the Secretary must "state with ascertainable certainty what is meant by the standards he has promulgated." *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n,* 528 F.2d 645, 649 (5th Cir.1976). "If a violation of a regulation subjects private parties to criminal or civil sanctions, a

regulation cannot be construed to mean what an agency intended but did not adequately express." *Id.; see also Gen. Elec. Co. v. U.S. EPA,* 53 F.3d 1324, 1329 (D.C.Cir.1995) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." (internal quotation marks and citation omitted)). Consistent with these principles, the Supreme Court has declined to grant *Auer* deference where the agency's interpretation creates "unfair surprise" by "impos [ing] potentially massive liability on [a party] for conduct that occurred well before that interpretation was announced." *Christopher,* 132 S.Ct. at 2167.

Knapp was not the victim of unfair surprise because the regulation, promulgated through notice and comment, clearly applies the purchase exemption only to persons who do not also sell animals. *See Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170–71, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) (finding that an interpretation codified through notice-and-comment rulemaking was "unlikely" to create "unfair surprise"); *Gen. Elec. Co.,* 53 F.3d at 1329 (asking "whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations"); *cf. Christopher,* 132 S.Ct. at 2167 (refusing to defer to the agency's interpretation in part because "[t]he statute and regulations do not provide clear notice"). In addition, the relevant version of the Guide states that " '[i]t does not add to, delete from, or change current regulatory requirements or standards—nor does it establish policy.' " *In re Schmidt,* AWA Docket No. 05–0019, 2007 WL 959715, at *27 (U.S.D.A. Mar. 26, 2007) (alteration in original) (quoting Animal Care Resource Guide, Dealer Inspection Guide 1.2.1.). Given the regulation's plain language and the Guide's disclaimer, Knapp had fair notice of his exposure to civil penalties based on his purchases of regulated animals.

II. FARM ANIMALS

Knapp next argues that the Judicial Officer erred in declining to classify several of the animals at issue as "farm animals," which are not subject to the licensing requirement. The licensing requirement attaches

to the purchase, sale, or transportation of "animal[s]" under certain circumstances. 7 U.S.C. § 2134. The term "animal" is defined, in relevant part, as:

> any ... warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes ... farm animals such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.

Id. § 2132(g). Department regulations repeat the statutory definition of "animal," and further define "farm animal" as

> any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals.

9 C.F.R. § 1.1. Pursuant to these definitions, the Judicial Officer dismissed the Administrator's charges against Knapp for purchasing or selling cattle, sheep, swine, goats, and llamas without a license. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *7. Although the Judicial Officer found the record unclear as to whether the species that Knapp purchased and sold were farm animals, he decided to "give Mr. Knapp the benefit of the doubt." *Id.* In his petition for review, Knapp argues that aoudad, alpaca, camels, and miniature donkeys are "farm animals," and that the Judicial Officer therefore erred in concluding that Knapp's transactions involving these animals violated the AWA.

The ALJ found that camels are not farm animals, and Knapp did not challenge that determination in his brief to the Judicial Officer. *In re Knapp,* AWA Docket No. 09–0175, 2011 WL 4946791, at *5. Knapp therefore waived his argument regarding camels. *See Kollman Ramos v. U.S. Dep't of Agric.,* 322 Fed.Appx. 814, 819 (11th Cir.2009) (holding that the petitioner waived arguments that were not properly raised before the Judicial Officer); *McConnell v. U.S. Dep't of Agric.,* 198 Fed.Appx. 417, 424–25 (6th Cir.2006) (same); *Excel Corp. v. U.S. Dep't of Agric.,* 397 F.3d 1285, 1296–97 (10th Cir.2005) (same). However, Knapp argued to the ALJ that aoudad, alpaca, and miniature donkeys are farm animals, and the ALJ agreed with respect to aoudad and alpaca. *In re Knapp,* AWA Docket No. 09–0175, 2011 WL 4946791, at *10. The ALJ found that aoudad "are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes." *Id.* The ALJ also found that an alpaca is a farm animal "which exists in significant numbers on farms in the United States and is raised for ... wool, food, work and breeding purposes." *Id.* The ALJ did not discuss whether miniature donkeys are farm animals because he found that Knapp's purchase of these donkeys did not violate the AWA under the exemption he identified for purchases for personal use. *Id.* at *8. However, the ALJ noted that "[t]he definition of farm animals found in the Regulations contains no limiting language as to size (regular or miniature)." *Id.* at *6.

The Judicial Officer did not discuss aoudad, alpaca, or miniature donkeys in the body of his opinion, but drew conclusions of law that Knapp's purchases or sales of twenty-one alpaca, two aoudad, and twenty-five miniature donkeys violated the AWA and regulations. *In re Knapp,* 2013 WL 8213607, at *15–17. We cannot reasonably discern the reason for the Judicial Officer's conclusion that aoudad, alpaca, and miniature donkeys are "animals" under the AWA and not farm animals. *See Pension Benefit Guar. Corp.,* 374 F.3d at 366; *see also* 5 U.S.C. § 557(c) ("All decisions ... shall include a statement of ... findings and conclusions, *and the reasons or basis therefor,* on all the material issues of fact, law, or discretion presented on the record...." (emphasis added)). While the Judicial Officer may substitute his judgment for that of the ALJ, the absence of any explanation precludes us from exercising judicial review. *See Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 50, 103 S.Ct. 2856 ("It is well-established that an agency's action must be upheld, if at

all, on the basis articulated by the agency itself.").[3] The appropriate remedy here is remand for the agency to better explain its decision. *See Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985) ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Norinsberg v. U.S. Dep't of Agric.,* 162 F.3d 1194, 1200 (D.C.Cir.1998) ("As we are unable to determine what, if any, standard the [Judicial Officer] applied, ... we must remand to Agriculture to articulate a standard we can review in an informed manner."); *Citizens State Bank of Marshfield, Mo. v. Fed. Deposit Ins. Corp.,* 718 F.2d 1440, 1444–45 (8th Cir.1983) (remanding to the agency to provide further explanation where the agency "failed to articulate sufficiently the reasons and basis for [its] order").

III. BREEDING PROGRAM

Knapp argues alternatively that "most of the animals he purchased were bought for use in his breeding program," and that these purchases did not require a license. He bases this argument on the AWA's definition of "animal" which, as noted, excludes "farm animals, such as, but not limited to ... livestock or poultry used or intended for use for ... breeding." 7 U.S.C. § 2132(g). While an animal's use for breeding is relevant to the determination of whether that animal is a farm animal, there is no separate categorical exception for all animals purchased for breeding purposes. Knapp's argument therefore lacks merit.

IV. HOOFSTOCK ANIMALS

Knapp argues that the Judicial Officer erred in holding that an exemption from the licensing requirement for "hoofstock," set forth in the Guide, is invalid. During the relevant time period, the Guide stated that "[a] license is **not** required for any person who sells ... 10 or fewer

[3] To the extent that the Judicial Officer concluded that the list of farm animals in 9 C.F.R. § 1.1 is exhaustive, that conclusion appears to conflict with the AWA's characterization of certain "poultry" as farm animals. 7 U.S.C. § 2132(g). In addition, the Judicial Officer did not consider that an aoudad may be a type of goat, as the ALJ found, and thus would be included among the farm animals listed in 9 C.F.R. § 1.1.

wild/exotic hoofstock in a 12–month period for regulated purposes." In March 2011, after the transactions at issue, the Guide was amended to remove that language. The ALJ accepted the pre–2011 exemption as a policy statement entitled to deference under *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). *See In re Knapp,* AWA Docket No. 09–0175, 2011 WL 4946791, at *7. The Judicial Officer noted that "neither the Animal Welfare Act nor the Regulations contain a '10–hoofstock per year' exemption," and he therefore declined to recognize such an exemption. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *7. However, the Judicial Officer assessed no fine for the sales of the twenty-one animals that the ALJ had classified as hoofstock because the Guide "unambiguously" provided for a hoofstock exemption at the time of Knapp's conduct. *Id.*

We agree with the Judicial Officer that the unambiguous hoofstock exemption is inconsistent with Department regulations. As noted above, a Department regulation requires dealers to have a valid license except under eight enumerated circumstances. 9 C.F.R. § 2.1(a)(1), (3). None of these exemptions covers the sale of hoofstock. *Id.* § 2.1(a)(3). At the very least, the Judicial Officer's conclusion is not "plainly erroneous or inconsistent with the regulation," and there is no reason to "suspect that [his] interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer,* 519 U.S. at 461–62, 117 S.Ct. 905 (internal quotation marks and citation omitted). That the Judicial Officer declined to assess a penalty for sales of hoofstock alleviates concerns about fair notice to Knapp. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 518, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (noting that where the FCC adopted a new policy in the course of an adjudication, "the agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action").

Knapp claims that in addition to relying on the Guide, he was told by a Department inspector that he did not need a license to deal in hoofstock. Knapp appears to be arguing that the agency is now estopped from denying the existence of a hoofstock exception. Our court has not decided whether equitable estoppel may lie against the government, but even if it does, "the burden that a petitioner must meet is very high."

Robertson–Dewar v. Holder, 646 F.3d 226, 230 (5th Cir.2011). We have held that

> the party seeking estoppel must establish five things: (1) affirmative misconduct by the government, (2) that the government was aware of the relevant facts and (3) intended its act or omission to be acted upon, (4) that the party seeking estoppel had no knowledge of the relevant facts and (5) reasonably relied on the government's conduct and as a result of his reliance, suffered substantial injury.

Id. at 299. Knapp claims only affirmative misconduct—an "affirmative misrepresentation," *Linkous v. United States,* 142 F.3d 271, 278 (5th Cir.1998)—and does not analyze or demonstrate the remaining four factors. Knapp therefore fails to carry the heavy burden of showing that he is entitled to equitable estoppel.

In his reply brief, Knapp argues that fifty-seven of the animals he sold were hoofstock, and that the Judicial Officer therefore erred in counting twenty-one hoofstock. The Judicial Officer categorized as hoofstock the same animals that the ALJ had treated as hoofstock—six addax, seven buffalo, two zebras, three nilgai, one blackbuck, one wildebeest, and one deer. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *7. Knapp does not identify which additional animals the Judicial Officer should have treated as hoofstock. He therefore waived his argument that the Judicial Officer under-calculated the number of hoofstock he sold. *See Cinel v. Connick,* 15 F.3d 1338, 1345 (5th Cir.1994) (noting that a party waives a claim by failing to adequately brief it).

V. INTENDED PURPOSE

Knapp argues that his sales of animals to Lolli Brothers Livestock Market ("Lolli Brothers") did not violate the AWA or regulations because he did not know the purchaser's intended purpose.[4] Knapp relies

[4] Although Knapp's petition for review raises this argument with respect to unnamed "auction houses," his brief to the Judicial Officer identifies Lolli Brothers as the relevant auction house.

on the Guide, which, at the relevant time, provided that a license is not required for "sales of animals through auctions where intended use is unknown." That provision is consistent with the AWA, which prohibits unlicensed dealers from selling animals to "another dealer or exhibitor" or "to any research facility or for exhibition or for use as a pet." 7 U.S.C. § 2134. The transaction's purpose is also relevant to the question of whether Knapp was operating as a "dealer," which is defined, *inter alia,* as a person who sells an animal "for research, teaching, exhibition, or use as a pet." *Id.* § 2132(f).

The Judicial Officer concluded that twelve animals sold to Lolli Brothers, in light of their "value" and "relative rarity," were "used, or intended to be used, for a regulated purpose," discernibly here, exhibition. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *12. With respect to those twelve animals—a kinkajou, five guanacos, and six camels—the Judicial Officer has articulated a "rational connection between the facts found and the decision made," and his decision therefore withstands review. *Pension Benefit Guar. Corp.,* 374 F.3d at 366. However, the Judicial Officer did not discuss the likely intended use of the twenty-two additional animals that Knapp sold to Lolli Brothers—one alpaca, one aoudad, two zebras, one wildebeest, two addax, seven buffalo, three nilgai, four chinchilla, and one axis deer. The Judicial Officer summarily concluded that these sales were unlawful, notwithstanding Knapp's argument that sales of animals to Lolli Brothers did not require a license because the purchasers' intentions were unknown.[5] *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *16–18. The basis for the Judicial Officer's rejection of Knapp's argument with respect to these twenty-two animals cannot "reasonably be discerned," *Pension Benefit Guar. Corp.,* 374 F.3d at 367, and we may not supply our own basis for the Judicial Officer's decision. *See SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947). As with the Judicial Officer's decision on farm animals, the appropriate remedy is to remand to the agency for further explanation.

VI. INDIVIDUAL SALES – CAMELS AND LEMURS

[5] The Judicial Officer assessed no penalties for the sales of the buffalo, wildebeest, zebras, addax, nilgai, and axis deer, all of which he categorized as hoofstock. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *7.

Knapp challenges the Judicial Officer's finding, in agreement with the ALJ, that two specific transactions violated the AWA. First, Knapp challenges the Judicial Officer's finding that his sale of a camel to Kimberly Finley in November 2005 violated the AWA. Although Knapp admitted at the hearing that he sold the camel to Finley, he disputes the Judicial Officer's finding that Finley was an exhibitor who intended to use the camel for exhibition. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *6. Because Knapp did not have a license, the AWA prohibited him from "sell[ing]" an "animal" to an "exhibitor" or for the purpose of "exhibition" while operating as a "dealer." 7 U.S.C. § 2134. An "exhibitor" is defined as "any person ... exhibiting any animals ... to the public for compensation," and "includes carnivals, circuses, and zoos." 7 U.S.C. § 2132(h).

The Judicial Officer based his determination on Finley's affidavit, which states that she is "an exhibitor of Exotic Animals" and that she "operate [s] a petting zoo, with pony and camel rides." *In re Knapp,* Docket No. 09–0175, 2013 WL 8213607, at *6. The Judicial Officer further relied on record evidence that Finley's spouse, Herschel Finley, possessed an exhibitor's license, suggesting that he intended to exhibit the camel. *Id.* Indeed, even Knapp acknowledged in testimony that the camel "could still continue to do rides" after its sale to Finley.

On appeal, Knapp argues that Finley's affidavit does not adequately support the Judicial Officer's factual findings because the affidavit is hearsay and was contradicted by Knapp's own testimony. Hearsay is not categorically excluded from formal adjudicatory proceedings. *See* 5 U.S.C. § 556(d) ("Any oral or documentary evidence may be received...."). We have held that "in determining whether hearsay can constitute substantial evidence [in an administrative proceeding,] we must look to those factors which assure underlying reliability and probative value." *Young v. U.S. Dep't of Agric.,* 53 F.3d 728, 730 (5th Cir.1995) (internal quotation marks and citations omitted). Knapp identifies no reason to doubt the veracity of Finley's sworn statements. While Knapp argues that Finley's statements are belied by his testimony that Finley was not a licensee, Finley could have purchased the camel for exhibition without a license, even though such a purchase may have been unlawful. In light of Finley's affidavit and her husband's exhibitor

license, a "reasonable mind" could find that Finley purchased the camel for exhibition, and that Knapp's sale was therefore unlawful. *See Ellis,* 394 F.3d at 273.

Knapp further challenges the Judicial Officer's finding, in agreement with the ALJ, that he sold two lemurs to the Texas Zoo in violation of the AWA. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *6. Knapp argues that he donated the lemurs to the Texas Zoo and did not sell them. The difference is relevant because a "dealer" is one who transacts in regulated animals "for compensation or profit." 7 U.S.C. § 2132(f). The Judicial Officer appears to have found that Knapp received compensation in the form of two zebras. The following evidence supports that conclusion. A letter from the Executive Director of the Texas Zoo states that Knapp provided the lemurs and two macaws to the zoo in exchange for two zebras. On a Department form reflecting the transaction, the box for "exchange or transfer" was checked, and not the box for "donation."[6] Indeed, Knapp testified that he received two zebras from the Texas Zoo after he gave the zoo the two lemurs, although he claimed that the transaction was not an exchange. Considering the record as a whole, there is substantial evidence to support the Judicial Officer's finding that Knapp sold the lemurs in exchange for two zebras.

VII. CALCULATION OF ANIMALS

Knapp challenges the Judicial Officer's calculation of 235 as the number of animals that Knapp bought or sold in violation of the AWA and regulations. We agree that the Judicial Officer made a small mathematical error, but the error actually benefitted Knapp. Based on the Judicial Officer's substantive findings, he should have calculated 236 violations and assessed penalties for 215 of these violations. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *15–18. Instead, he calculated 235 violations and assessed penalties for 214 of these. *Id.* at *9. We therefore reject Knapp's argument that the Judicial Officer erred in over-calculating the number of violations.

[6] Although this form appears to be missing from the record on appeal, the form was received as evidence at the hearing, and Knapp acknowledged in testimony that the box labelled "exchange or transfer" was checked.

VIII. SIZE OF FINE FOR VIOLATION OF STATUTE AND REGULATIONS

Knapp challenges the Judicial Officer's imposition of a $42,800 penalty for operating as a dealer without a license. The Judicial Officer assessed a $200 penalty for each of 214 violations of the AWA and regulations, not counting the penalty for violations of the cease and desist orders. *Id.* at *10 & n. 22. As noted, we review the Judicial Officer's choice of sanction for abuse of discretion, *Am. Fruit Purveyors, Inc.,* 630 F.2d at 374, and we may overturn that sanction only if it is "unwarranted in law or without justification in fact." *Butz,* 411 U.S. at 186, 93 S.Ct. 1455. We will not review the total sanction imposed in light of our remand to the agency for further explanation of its decision regarding alpaca, aoudad, miniature donkeys, and twenty-two of the animals sold to Lolli Brothers. However, we may consider whether the Judicial Officer abused its discretion in imposing a penalty of $200 for each of the remaining transactions, given that we uphold the Judicial Officer's finding that these transactions were unlawful.

First, Knapp argues that the Judicial Officer impermissibly treated the statutory maximum penalty as mandatory. However, as we will explain, the penalty of $200 per violation is below the statutory maximum. Before June 18, 2008, the AWA authorized the Secretary to assess a civil penalty of up to $2,500 for each violation of the AWA and regulations. 7 U.S.C. § 2149(b) (2005) ("Any dealer ... that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation."). As of June 2005, before the first of Knapp's challenged transactions, the Secretary had increased that figure to $3,750 per violation under the Federal Civil Penalties Inflation Adjustment Act.[7] *See* 70 Fed.Reg. 29573, 29577 (May 24, 2005) (codified at 7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended § 2149(b) to provide for a maximum civil penalty of

[7] The Federal Civil Penalties Inflation Adjustment Act of 1990 requires the heads of agencies, by regulation, to adjust civil monetary penalties every four years to reflect inflation. *See* Pub.L. No. 101–410, 104 Stat. 890 (codified at 28 U.S.C. § 2461 Note); *see also* Richard J. McKinney, Ass't Law Librarian, Fed. Res. Bd., The Authority of Statutes Placed in Section Notes of the United States Code (May 26, 2011).

$10,000 for each violation of the AWA and regulations. Pub.L. No. 110–246, § 14214, 122 Stat. 1651, 2228 (2008) (codified at 7 U.S.C. § 2149); *see also* 7 C.F.R. § 3.91(b)(2)(ii) (2015) (restating the $10,000 maximum penalty). The Judicial Officer correctly concluded that Knapp could be assessed a penalty of up to $3,750 for each of the 38 violations he committed before June 18, 2008, and a penalty of up to $10,000 for each of the 176 violations he committed after June 18, 2008, not counting the violations involving sales of hoofstock. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8208439, at *8 & n. 20. At all relevant times, therefore, the maximum penalty exceeded the imposed penalty of $200 per violation.

Second, Knapp argues that the Judicial Officer erred in concluding that he did not act in good faith. The AWA requires the Secretary, in selecting a penalty, to "give due consideration" to various factors, including "the person's good faith." 7 U.S.C. § 2149(b). The Judicial Officer concluded that Knapp lacked good faith because his conduct during a five-year period "reveal[ed] a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations." *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *9. The Judicial Officer did not abuse his discretion in finding a lack of good faith, particularly in light of Knapp's previous violations of the AWA and regulations. *See In re Mitchell,* AWA Docket No. 09–0084, 2010 WL 5295429, at *7 (U.S.D.A. Dec. 21, 2010) ("Mr. Mitchell has a history of previous violations and this fact demonstrates an absence of good faith."); *see also Horton v. U.S. Dep't of Agric.,* 559 Fed.Appx. 527, 535 (6th Cir.2014) ("[B]ad faith ... can also be found where a petitioner receives notice of his violations yet continues to operate without a license."); *Cox v. U.S. Dep't of Agric.,* 925 F.2d 1102, 1107 (8th Cir.1991) (upholding the Judicial Officer's finding of a lack of good faith based on a previous AWA violation and a failure to learn facts that would have alerted petitioners to an additional AWA violation).[8]

[8] The Judicial Officer separately found that Knapp's violations of the AWA and regulations were "willful." *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *11. However, neither the AWA nor the regulations require a showing of willfulness for the imposition of a civil monetary penalty. *See Horton,* 559 Fed.Appx. at 531 ("[T]he plain language of the statute lacks a willfulness requirement, and Petitioner clearly violated the AWA by conducting business without a license, regardless of willfulness or knowledge."); *Hickey v. Dep't of Agric.,* 878 F.2d 385, 1989 WL 71462, at *2 (9th Cir. June 26, 1989) (unpublished opinion) (noting that "7 U.S.C. § 2149(b) provides for

Third, Knapp argues that the Judicial Officer erred in refusing to consider factors other than those listed in § 2149(b)—"the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." Knapp's argument rests on a mistaken premise. The Judicial Officer did not consider only the factors identified in § 2149(b), but also noted the Department's sanction policy and the "remedial purposes" of the AWA. *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *10. To the extent that Knapp challenges the Judicial Officer's refusal to consider his financial circumstances, the Judicial Officer did not abuse his discretion in that regard. Neither the statute nor the regulations require consideration of financial status, and the Judicial Officer's decision is consistent with Department precedent. *See In re Everhart,* 56 Agric. Dec. 1400, at *9 & n. 12 (U.S.D.A. Oct. 2, 1997) (listing cases).

Finally, Knapp argues that the statutory section on penalties, titled "Violations by licensees," does not apply to him because he does not have a license. 7 U.S.C. § 2149(b). However, "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.,* 331 U.S. 519, 528–29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). The statutory text plainly applies to non-licensees who violate the AWA or regulations: sanctions may be imposed against "*[a]ny* dealer ... that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder." 7 U.S.C. § 2149(b) (emphasis added). The chapter and corresponding regulations, in turn, generally prohibit dealers from buying and selling animals without a license. Section 2149's penalty provisions therefore apply to Knapp, notwithstanding that section's title. Hence, the Judicial Officer did not abuse his discretion in assessing a $200 penalty for each violation that is not the subject of our remand.

IX. SIZE OF FINE FOR VIOLATIONS OF CEASE AND DESIST ORDERS

Knapp also challenges the Judicial Officer's imposition of a $353,100

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penalties in the case of any violation, willful or not, with 'due consideration to ... the person's good faith, and the history of previous violations' "(alteration in original)).

penalty for knowingly disobeying two prior cease and desist orders. Again, while we will not review the total sanction, we will consider challenges to the Judicial Officer's decision to impose a penalty of $1,650 for each of the violations not involving aoudad, alpaca, miniature donkeys, or the unexamined sales to Lolli Brothers.

First, Knapp challenges the Judicial Officer's legal conclusion that the statute requires a penalty of $1,650 for each knowing failure to obey the cease and desist orders. The AWA provides, "Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense...." 7 U.S.C. § 2149(b). Before the transactions at issue, and pursuant to the mandate in the Federal Civil Penalties Inflation Adjustment Act, the Secretary adjusted that penalty to $1,650. *See* 70 Fed.Reg. 29573, 29577 (May 24, 2005) (codified at 7 C.F.R. § 3.91(b)(2)(ii)). Relying on the word "shall" in the AWA, the Judicial Officer concluded that the Act "leaves no room for discretion regarding the assessment of a civil penalty for a knowing failure to obey a cease and desist order." *In re Knapp,* AWA Docket No. 09–0175, 2013 WL 8213607, at *10. Because the Judicial Officer's interpretation of the AWA is entitled to *Chevron* deference, we consider, first, whether the statute is ambiguous, and, second, whether the Judicial Officer's interpretation is reasonable. *Chevron, U.S.A., Inc.,* 467 U.S. at 843, 104 S.Ct. 2778. The word "shall" in statutory language defining agency authority often contemplates permission, not obligation. *See, e.g., Heckler v. Chaney,* 470 U.S. 821, 835, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (finding precatory a statutory provision stating that violators "shall be imprisoned ... or fined," and listing other statutes that use "shall" to convey executive discretion). However, we do not focus on the word "shall" in isolation, but rather "follow the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs v. Winn,* 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (alteration in original) (internal quotation marks and citation omitted). The penalty provision regarding knowing violations of cease and desist orders may be contrasted with other language in the same statutory section, which provides that violators of the statute or regulations "*may* be assessed a civil penalty by the Secretary of not more than $10,000." 7 U.S.C. § 2149(b) (emphasis added). The contrast suggests a deliberate choice by Congress to make

one penalty precatory and the other mandatory. *See Gozlon–Peretz v. United States,* 498 U.S. 395, 404, 111 S.Ct. 840, 112 L.Ed.2d 919 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (internal quotation marks omitted)). The statute is at most silent on the question of whether Congress intended to allow executive discretion to impose lighter penalties for violations of cease and desist orders, and the Judicial Officer's contrary interpretation has ample basis to be reasonable. Indeed, that interpretation is consistent with Department regulations, which state: "Civil penalty for a violation of the Animal Welfare Act ... *has a maximum* of $10,000, and knowing failure to obey a cease and desist order *has* a civil penalty of $1,650." 7 C.F.R. § 3.91(b)(2)(ii) (emphasis added). We defer to the Secretary's reasonable interpretation of the AWA to require a penalty of $1,650 per violation, and we conclude that Knapp's challenge lacks merit.

Second, Knapp argues that the Judicial Officer committed "malfeasance" in imposing a total penalty of $395,900 in light of the Secretary's lower requested penalty.[9] The Secretary has held that "[t]he administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry." *See In re S.S. Farms Linn Cnty., Inc.,* 50 Agric. Dec. 476, 497 (U.S.D.A.1991). However, that recommendation is not dispositive. *See id.* (noting that the recommendation should be given "appropriate weight"). The Judicial Officer's penalty follows necessarily from his interpretation of the statute, to which we defer.

Finally, Knapp challenges the Judicial Officer's factual finding that his violations of the cease and desist orders were "knowing." Knapp points to testimony by himself and his wife that they allegedly relied on misinformation from a lawyer in failing to pay the $5,000 fine imposed after a previous violation of the AWA. However, the penalty at issue was

[9] In its brief to the ALJ, the Administrator requested a penalty of $75,000 for Knapp's violations of the AWA and regulations and a penalty of $33,000 for Knapp's violations of the cease and desist orders.

not based on Knapp's failure to pay the fine, but rather on his continued violations of the AWA and regulations, which in turn violated the cease and desist orders. Elsewhere in his brief, Knapp argues that he reasonably relied on the Guide in determining that his conduct was lawful, thus suggesting an argument that his violations of the cease and desist orders could not have been knowing. However, it is a "deeply-rooted common law principle ... that ignorance of the law provides no defense to its violation." *United States v. Wilson,* 133 F.3d 251, 261 (4th Cir.1997). "This maxim is so strongly embedded in our legal system that 'unless the text of a statute *dictates* a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.' " *United States v. Ho,* 311 F.3d 589, 605 (5th Cir.2002) (quoting *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)); *see also United States v. Int'l Minerals & Chem. Corp.,* 402 U.S. 558, 559, 563, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) (holding that the phrase "knowingly violates [applicable regulations]" required knowledge of the facts that constituted the violation, but not knowledge of the regulations); *Wilson,* 133 F.3d at 262 ("[W]e cannot conclude that Congress intended to require the defendant to know that his conduct was illegal when it stated that 'Any person who *knowingly* violates [provisions of the Clean Water Act] ... shall be punished.' "). Knapp does not identify, and we have not found, any language in the statute, regulations, or legislative history that displaces the well-established principle that ignorance of the law is no defense. The determination that Knapp's violations were "knowing" requires only that Knapp knew the facts that constituted the unlawful conduct. *See Ho*, 311 F.3d at 605. Substantial evidence in the record supports that conclusion with respect to the transactions not subject to remand: Knapp knew the existence of the cease and desist order, and he knew he was purchasing and selling the animals at issue without a license. The Judicial Officer therefore did not err in concluding that these violations were "knowing."

X. SELECTIVE ENFORCEMENT

Knapp argues that he was the target of selective enforcement, in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *See United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). He claims that "a

multitude of people" engaged in activities similar to Knapp's conduct, but were not subject to enforcement proceedings. To successfully bring a selective enforcement claim, Knapp must show that the agency's enforcement "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Allred's Produce,* 178 F.3d at 748 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)); *see also Bryan v. City of Madison,* 213 F.3d 267, 277 (5th Cir.2000) (holding that a selective enforcement claim requires the plaintiff to "prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right"). Knapp has not alleged or demonstrated that the Administrator based her enforcement decisions on an arbitrary classification or an otherwise improper consideration. That not all violators are prosecuted does not alone establish a constitutional violation. *See Allred's Produce,* 178 F.3d at 748 ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." (quoting *Oyler*, 368 U.S. at 456, 82 S.Ct. 501)). Knapp's selective enforcement claim therefore lacks merit.

XI. DUE PROCESS

Knapp argues that the Judicial Officer is biased in favor of the Department, and that the adjudication therefore violated the Due Process Clause of the Fifth Amendment.[10] "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). However, an agency's "dual role[ ] of investigating and adjudicating disputes and complaints" does not alone demonstrate unconstitutional bias. *Baran v. Port of Beaumont Navigation Dist. of Jefferson Cnty. Tex.*, 57 F.3d 436, 446 (5th Cir.1995). Rather, "[a]dministrative officers are presumed objective and capable of judging a particular controversy fairly on the basis of its own circumstances." *Menard v. FAA,* 548 F.3d 353, 361 (5th Cir.2008) (alteration in original) (internal citations and quotation marks omitted). "[W]e have held that we will not infer bias when no evidence is presented to indicate that a

[10] While Knapp also relies on the Fourteenth Amendment, we consider his claim in the context of the Fifth Amendment, which applies to the federal government. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 241–42, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

hearing officer's mind was irrevocably closed." *Baran,* 57 F.3d at 446.

As support for his allegation of bias, Knapp highlights the Judicial Officer's employment with the Department, his decision to impose a penalty far greater than did the ALJ, and his suggestion that the Administrator refer for criminal prosecution any future violation by Knapp. The Judicial Officer's employment relationship with the Department does not suffice to demonstrate bias. *See Baran,* 57 F.3d at 446. Nor may we infer that the Judicial Officer has prejudged the case based on the size of the penalty imposed or the suggestion of criminal prosecution. Both the penalty and criminal prosecution are authorized by statute, *see* 7 U.S.C. § 2149(d), and the Judicial Officer has previously recommended criminal prosecution for future violations of repeat infringers. *See In re Mitchell*, AWA Docket No. 09–0084, 2010 WL 5295429, at *15. Knapp therefore has not demonstrated a due process violation.

CONCLUSION

While most of Knapp's contentions lack merit, we find that the Judicial Officer did not sufficiently explain his reasons for treating aoudad, alpaca, and miniature donkeys as "animals," and not "farm animals." Nor did he sufficiently explain his conclusion that twenty-two of the sales to Lolli Brothers had a regulated purpose. We therefore GRANT in part and DENY in part the petition for review and REMAND to the agency to set out more fully the facts and reasons bearing on these two decisions.

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LORSCH v. UNITED STATES.
Case No. CV-14-2202 AJW.
Court Decision.
Filed October 29, 2015.

AWA – Animal Welfare Act, enforcement of – Discretionary function – Inspection – Intentional tort – Investigation – Law enforcement – Leave to amend – License, suspension of – Subject matter jurisdiction.

[Cite as: Not Reported in F. Supp. 3d, 2015 WL 6673464 (C.D. Cal. 2015].

United States District Court,
C.D. California, Western Division.

MEMORANDUM OF DECISION REGARDING DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

ANDREW J. WISTRICH, UNITED STATES MAGISTRATE JUDGE, DELIVERED THE OPINION OF THE COURT.

I. PROCEEDINGS

Plaintiff filed a complaint against defendants United States of America and the United States Department of Agriculture ("USDA") pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"). The complaint alleges claims for negligence, abuse of process, malicious prosecution, intentional infliction of emotional distress ("IIED"), and negligent infliction of emotional distress ("NIED"). [Docket No. 1].

Defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, for summary judgment. Plaintiff filed opposition to the motion, and defendants filed a reply. [Docket Nos. 26, 30, 31]. After considering the moving and opposing papers and the arguments made by counsel during the hearing on the motion, the Court granted defendants' motion in an order dated March 31, 2015. [*See* Docket Nos. 33, 36]. This memorandum of decision describes the basis for that ruling.

ANIMAL WELFARE ACT

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A complaint may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008). "Subject matter jurisdiction must exist as of the time the action is commenced." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

Subject matter jurisdiction may be challenged in two ways. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Safe Air*, 373 F.3d at 1039. In a factual attack, the challenger disputes the truth of the allegations that facially demonstrate the existence of federal jurisdiction. *Safe Air*, 373 F.3d at 1039. The essential difference between the two is that, unlike a facial attack, a factual attack "relie[s] on extrinsic evidence and [does] not assert lack of subject matter jurisdiction solely on the basis of the pleadings." *Safe Air*, 373 F.3d at 1039 (quoting *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003)).

In evaluating a factual attack under Rule 12(b)(1), the court is not limited to reviewing the allegations in the pleadings, *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987), and the allegations of the complaint are not presumed to be true. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The court may rely on affidavits or other extrinsic evidence properly before the court without converting the motion into one for summary judgment. *See Warren v. Fox Family Worldwide, Inc*., 328 F.3d 1136, 1139 (9th Cir. 2003); *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989), *cert. denied*, 493 U.S. 993 (1989). The party opposing the motion must present affidavits or other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter

jurisdiction. *Ass'n of Am. Med. Coll.*, 217 F.3d at 778; *St. Clair*, 880 F.2d at 201. The district court does not abuse its discretion by relying upon this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes to determine whether subject matter jurisdiction exists. *Ass'n of Am. Med. Coll.*, 217 F.3d at 778; *St. Clair*, 880 F.2d at 201.

When, however, a jurisdictional motion involves factual issues which also go to the merits, the trial court should employ the standard applicable to a motion for summary judgment. *Trentacosta*, 813 F.2d at 1558 (quoting *Augustine*, 704 F.2d at 1077); *Capitol Indus.-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir. 1982) ("The principle underlying the rule is that the tenor of Rule 56 suggests that summary judgment thereunder deals with the merits of an action and not with matters of abatement."). "Under this standard, the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Trentacosta*, 813 F.2d at 1558 (internal citation and quotation marks omitted).

The parties agree that this motion is governed by Rule 12(b)(1) rather than by Rule 56. [Transcript of September 29, 2014 Hearing ("Transcript") 4, 28]. *See Greene v. United States*, 207 F. Supp. 2d 1113, 1118 (E.D. Cal. 2002) (concluding that since the "[d]iscretionary function exception to the FTCA involves the subject matter jurisdiction of the court," the "most appropriate procedural vehicle to drive the court's decision is Rule 12(b)(1)—especially in that the underlying facts related to assertion of the discretionary function exception are not essentially in dispute")(citing *Reed v. U.S. Dep't of the Interior*, 231 F.3d 501, 504 (9th Cir. 2000); *Vickers v. United States*, 228 F.3d 944, 949 (9th Cir. 2000)).

B. Allegations of the Complaint

During the summer of 2003, Wildlife Waystation ("WWS") founder and Director of Animal Care Martine Colette ("Colette") requested that defendants reinspect the WWS facility so that the suspension of her Animal Welfare Act ("AWA") exhibitor's license pursuant to a 2002 consent decision in a prior administrative action against WWS and Colette could be lifted. [Complaint 7]. Defendants conducted an

inspection of WWS from August 19 through 21, 2003 (the "August 2003 inspection"). The August 2003 inspection was conducted by Kathleen Garland ("Garland"), Jeanne Lorang ("Lorang"), and two others. Garland and Lorang were employees of the Animal and Plant Health Inspection Service ("APHIS"), a USDA agency. Garland was employed by APHIS as a supervisory Veterinary Medical Officer ("VMO"), and Lorang was employed by APHIS as an Animal Care Inspector ("ACI"). [Complaint 4, 9-10]. Plaintiff alleges that Garland, Lorang, and another APHIS employee, Laurie Gage ("Gage"), a VMO, "were either investigative officers or law enforcement officers, or both, employed by USDA." [Complaint 9]. In the section of the complaint identifying the parties, the following USDA employees are also named as defendants: Lupe Aguilar ("Aguilar"), an investigator employed by the UDSA's Investigative and Enforcement Service; Colleen Carroll ("Carroll"), an attorney working for the USDA; and Robert M. Gibbens ("Gibbens"), Director, Western Region, of APHIS. [Complaint 4-5]. The complaint alleges no facts that specifically identify or involve Aguilar, Carroll, or Gibbens.[1]

After the August 2003 inspection was completed, plaintiff participated by phone in an exit interview. [Complaint 9]. WWS, Colette, and plaintiff assumed that the August 2003 inspection was in response to Colette's request for reinspection. They were unaware that defendants had filed a new administrative enforcement action against WWS and Colette on or about August 15, 2003 (the "2003 Action"), and that the August 2003 inspection was "in aid of [defendants'] newly-filed, but undisclosed and unserved complaint" in the 2003 Action. [Complaint 6-10]. Defendants served the complaint in the 2003 Action on August 23, 2003. Plaintiff was not named as a respondent in that complaint. [Complaint 10].

On or about September 16, 2003, plaintiff spoke to Garland and Lorang by phone. [Complaint 10]. Shortly thereafter, plaintiff was named as a respondent in an amended complaint filed in the 2003 Action. [Complaint 11]. Plaintiff alleges that he was named as a respondent in the 2003 Action "without probable cause, with malice, and with the

[1] The complaint alleges that some acts or omissions were undertaken by the "EMPLOYEES," which the complaint defines as "all **or** some" of the named defendants and never defines with more specificity. [Complaint 5 (emphasis added)].

intent to harm [his] reputation and finances and to cause him grief and anguish by knowingly bringing false charges against him." [Complaint 12]. Plaintiff alleges that "the investigative law enforcement officers negligently failed to meet the applicable ordinary duty of care with regard to conducting an investigation of Plaintiff ... [and] negligently failed to meet the applicable special duty of care with regard to conducting an investigation of Plaintiff by failing to follow the USDA guidelines for conducting investigations." [Complaint 12]. Plaintiff eventually was dismissed from the 2003 Action. [Complaint 13].

Plaintiff also alleges that defendants improperly named him as a respondent in another administrative action brought against WWS around August 2007 (the "2007 Action"). [Complaint 13]. Plaintiff alleges that naming him as a respondent in the 2007 Action was improper for the same reasons that naming him in the 2003 Action was improper. [Complaint 13-14]. Plaintiff was dismissed from the 2007 Action "on the eve of trial." [Complaint 15]. Plaintiff alleges that defendants caused him financial, professional, reputational, and emotional harm by naming him in the 2003 Action and 2007 Action (collectively, the "enforcement actions") and by prosecuting the enforcement actions against him until their dismissal. [Complaint 14-16].

C. The Parties' Contentions

Defendants contend that the court lacks subject matter jurisdiction over plaintiff's complaint under the FTCA's discretionary function exception and its intentional torts exception. [Defendants' Motion to Dismiss or for Summary Judgment ("Defs' Mot.") 1-2]. Defendants argue that the FTCA's discretionary function exception applies because the APHIS inspections and investigations which led to plaintiff's being named a respondent in the enforcement actions were within the discretion delegated to the USDA and APHIS under the AWA. [Defs' Mot. 12]. Defendants contend that the intentional torts exception applies because none of the USDA employees who allegedly took part in the inspections or investigation of WWS described in the complaint were empowered to execute searches, seize evidence, or make arrests for violations of federal law, and therefore those defendants are not "investigative or law enforcement officers" within the meaning of the FTCA. [Defs' Mot. 8].

Plaintiff responds that the FTCA's discretionary function exception does not apply because, in his view, the decision to name him as a respondent in the administrative actions was made pursuant to the requirements of the AWA, the discretionary function exception does not apply to the commission of intentional torts, and "[d]efendants' failure to investigate Plaintiff prior to bringing an action against him vitiates any contention that defendants were acting in their discretion." [Plaintiff's Opposition ("Pl's Opp.") 14, 11]. Plaintiff also contends that the FTCA's intentional torts exception does not apply because "Defendants are APHIS officials who are empowered to perform a wide variety of searches and even seize and destroy animals." [Pl's Opp. 18].

II. DISCRETIONARY FUNCTION EXCEPTION, 28 U.S.C § 2680(a)

The FTCA was enacted "primarily to remove the sovereign immunity of the United States from suits in tort." *Levin v. United States*, ––– U.S. – –––, 133 S. Ct. 1224, 1228 (2013) (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)). The FTCA gives federal district courts exclusive jurisdiction over claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1).

The FTCA also contains enumerated exceptions that serve as limitations on the waiver of sovereign immunity. *Levin*, 133 S. Ct. at 1228. As part of the limited waiver of sovereign immunity, the discretionary function exception to the FTCA precludes the imposition of liability for conduct "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The application of this exception involves a two-step inquiry. *See United States v. Gaubert*, 499 U.S. 315, 323-324 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

First, the act or conduct at issue must be discretionary in nature, in that it "involves an element of judgment or choice." *Berkovitz*, 486 U.S.

at 536 (citing *Dalehite v. United States*, 346 U.S. 15, 34 (1953)). The essential element of judgment or choice is absent "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow ... [because] the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536. "[I]f the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." *Berkovitz*, 486 U.S. at 536.

Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. Congress designed the discretionary function exception to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz*, 486 U.S. at 536-537 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). "The discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 537. It is the nature of the conduct, not the status of the actor, that governs the applicability of this exception. *Varig Airlines*, 467 U.S. at 813. "[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Gaubert*, 499 U.S. at 324.

The government bears the burden of proving the applicability of the discretionary function exception. *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008); *Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1028 (C.D. Cal. 2010). The government can meet its initial burden in one of two ways. *See Dichter-Mad*, 707 F. Supp. 2d at 1029. First, "the government may show that a statute, regulation or policy confers discretion on the government actor; this gives rise to a 'strong presumption' that the alleged harmful act was guided by policy judgment." *Dichter-Mad*, 707 F. Supp. 2d at 1029 (citing *Gaubert*, 499 U.S. at 324). If the applicable statute or regulation does not give the employee discretion, no presumption attaches that the alleged harmful act was guided by a policy judgment. *Dichter-Mad*, 707

F. Supp. 2d at 1027 (citing *Gaubert*, 499 U.S. at 323-325). Second, the government "may show that the actor's course of action was 'of the kind' that is 'susceptible to policy analysis.' " *Dichter-Mad*, 707 F. Supp. 2d at 1029 (quoting Gaubert, 499 U.S. at 322-325); *see also GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1178 (9th Cir. 2002) ("[T]he question is not whether policy factors necessary for a finding of immunity were in fact taken into consideration, but merely whether such a decision is susceptible to policy analysis."). Either of these showings satisfies the government's burden of proving the applicability of the discretionary function exception. *Dichter-Mad*, 707 F. Supp. 2d at 1029 (citing *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996)). "[T]he question of *whether* the government was negligent is irrelevant to the applicability of the discretionary function exception, [and] the question of *how* the government is alleged to have been negligent is critical." *Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005) (citation omitted).

Whether a challenged action falls within the discretionary function exception requires a particularized analysis of the specific agency action challenged. *GATX/Airlog*, 286 F.3d at 1174. Thus, before turning to Gaubert and Berkovitz's two-step inquiry, the court must first identify plaintiff's "specific allegations of agency wrongdoing." *Berkovitz*, 486 U.S. at 540. To identify the particular agency conduct that the plaintiff challenges, the court looks to the allegations of the plaintiff's complaint. *See Whisnant*, 400 F.3d at 1185.

Plaintiff alleges that he was named as a respondent in the 2003 Action after a telephone conversation with Lorang and Garland. [Complaint 10]. Plaintiff alleges that he became upset by the inspectors' "arbitrary actions," "demanded that [they] treat [WWS] fairly," and "was critical of the USDA investigators and inspectors." [Complaint 11]. "Within days of being telephonically criticized by Plaintiff, the investigating law enforcement officers and the Employees for the USDA caused the [2003 Action] to be amended by naming Plaintiff as a defendant to each and every claim made against WWS by the USDA without regard for Lorsch's personal participation in, or percipient knowledge of, the conduct giving rise to the claims asserted in the" 2003 Action. [Complaint 5, 11]. Plaintiff alleges that "the investigative law enforcement officers" (that is, Lorang, Garland, and Gage) "did not

perform any additional inspections or obtain additional documents," and none of the investigative reports prepared up to that point attributed any facts or wrongdoing to plaintiff. [Complaint 11; see Pl's Opp. 4]. As a result, plaintiff alleges that Lorang, Garland, and Gage negligently investigated plaintiff and also negligently failed to follow the USDA guidelines for conducting investigations. [Complaint 12]. Plaintiff alleges that the same wrongful conduct that occurred in the 2003 Action (failure to investigate, prosecution without probable cause, etc.) caused him to be named as a respondent in the 2007 Action. [Complaint 14-15].

Defendants have met their burden to prove that the discretionary function exception applies. The government may submit evidence of a statute, regulation, or policy that confers discretion on the government actor. *Dichter-Mad*, 707 F. Supp. 2d at 1029. "The federal government regulates the treatment of animals through the [AWA], which sets standards for the treatment of certain animals that are bred for sale, exhibited to the public, used in biomedical research, or transported commercially." *Puppies 'N Love, v. City of Phoenix*, —— F. Supp. 2d —— –, 2015 WL 4532586, at *1 (D. Ariz. July 27, 2015) (citing U.S.C. §§ 2131-2159). Through the AWA, Congress has given authority to the Secretary of Agriculture ("Secretary") to perform certain animal welfare functions and to promulgate rules and regulations to effectuate the purposes of the AWA. *See* 7 U.S.C. §§ 2131 *et seq.*

The Secretary has delegated the responsibility for implementing the AWA to the Under Secretary for Marketing and Regulatory Programs, 7 C.F.R. § 2.22(a)(2)(vi), who has delegated these responsibilities to the Administrator of APHIS, 7 C.F.R. § 2.80(a)(6). [Defs' Mot., Exhibit ("Ex.") 1, Declaration of Bernadette Juarez ("Juarez Decl."), at 20]. The APHIS Administrator has delegated authority to: (1) the Deputy Administrator of Animal Care to establish acceptable standards of humane care and treatment for regulated animals and to monitor and achieve compliance through inspections, enforcement, education, and cooperative efforts under the AWA, 7 C.F.R. §§ 371.7, 371.11(b); and (2) the Deputy Administrator of Marketing and Regulatory Programs Business Services ("MRPBS") to direct and coordinate investigations related to APHIS program laws and regulations, to coordinate enforcement of program laws and regulations with the Office of the General Counsel, and to support and enforce APHIS program activities,

7 C.F.R. § 371.5(b)(7), (8) and 371.11(b). [Juarez Decl. 20-21]. Within APHIS and MRPBS, the Investigative and Enforcement Service ("IES") is responsible for enforcing, and investigating alleged violations of, the AWA insofar as it relates to animal issues under APHIS's jurisdiction. [Juarez Decl. 7].

The language of the AWA and the AWA regulations demonstrates that decisions pertaining to enforcing and investigating alleged violations of the AWA or the AWA regulations are discretionary in nature. Specifically, "[t]he Secretary shall make such investigations or inspections *as he deems necessary* to determine whether any dealer, exhibitor ... has violated or is violating any provision of this chapter or any regulation or standard issued thereunder ...." 7 U.S.C. § 2146(a) (emphasis added). The AWA regulations also require licensees under the AWA to allow APHIS officials to inspect their facilities and records, and to perform certain specific investigatory duties "*as the APHIS officials consider necessary* to enforce the provisions of the [AWA] ...." 9 C.F.R. § 2.126(a) (emphasis added). If the Secretary determines that a licensee is in violation of any of the AWA's provisions, the Secretary "*may* suspend ... or revoke such license," "*may* ... assess[ ] a civil penalty,"and "*may also* make an order that such person shall cease and desist from continuing such violation." 7 U.S.C. § 2149(a)-(b) (emphasis added). Criminal penalties against licensees also *may* be brought by attorneys of USDA with the consent of the Attorney General. 7 U.S.C. § 2149(d) ("Prosecution of such violations shall ... be brought initially before United States magistrate judges ... and, with the consent of the Attorney General, *may* be conducted ... by attorneys of the United States Department of Agriculture.") (emphasis added).

The enforcement provisions of the AWA are not mandatory rules that dictate the circumstances under which a licensee or the licensee's agent must or must not be prosecuted. *Cf. Dichter-Mad*, 707 F. Supp. 2d at 1035 (holding that the decision whether to investigate and bring enforcement proceedings by SEC employees was discretionary because the relevant statute "repeatedly uses permissive language rather than mandatory language"). Rather, the decision by the Secretary or those authorized to act on the Secretary's behalf to bring civil or criminal charges, or to suspend or revoke a license, for violations of the AWA or the AWA regulations is a discretionary one. Thus, the first *Berkovitz*

prong is met because the decision to prosecute plaintiff involved an "element of judgment or choice." *See Berkovitz*, 486 U.S. at 536.

The second *s* prong is also met because the judgment involved in defendants' decision to file enforcement actions against plaintiff is of the kind that the discretionary function exception was designed to shield. Because the AWA regulations give APHIS employees discretion, "the very existence of the regulation[s] creates a **strong presumption** that a discretionary act authorized by the regulation[s] involves consideration of the same policies which led to the promulgation of the regulations." *Dichter-Mad*, 707 F. Supp. 2d at 1027 (emphasis in original). Congress's stated policy in enacting the AWA was to ensure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment, to assure the humane treatment of animals during transport in commerce, and to protect the owners of animals from the theft of their animals by preventing the sale or use of animals that have been stolen. 7 U.S.C. § 2131. The second *Berkovitz* prong is satisfied because those statutory and regulatory provisions create a "strong presumption" that in inspecting and investigating WWS and in prosecuting the enforcement actions against plaintiff, the USDA employees identified in the complaint acted to promote the "same policies" that underlie the AWA and the AWA regulations. *Dichter-Mad*, 707 F. Supp. 2d at 1027.

Even if the court credits as true plaintiff's allegations that no meaningful investigation occurred, and that no policy considerations were actually weighed, the second *Berkovitz* prong is satisfied because the decision to prosecute the enforcement actions against plaintiff is a decision "of the kind" that is "susceptible to policy analysis." *Dichter-Mad*, 707 F. Supp. 2d at 1029. "The decision whether or not to prosecute an individual is a discretionary function for which the United States is immune from liability." *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983) (holding that the discretionary function exception shielded the decision to indict the plaintiff for failing to file tax returns), *abrogated on other grounds by Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994) (citing *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967)); *see also General Dynamics Corp. v. United States*, 139 F.3d 1280, 1282, 1286 (9th Cir. 1998) (stating that "prosecutorial discretion is covered" under the discretionary function

exception, and holding that the discretionary function exception barred the plaintiff's FTCA negligence action against a federal agency whose negligently prepared report caused the plaintiff's errant prosecution for fraud) (citing *Wright*, 719 F.2d at 1025; *Gray v. Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983) ("Prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception.")(footnote omitted)). Therefore, defendants have met their initial burden to prove the applicability of the discretionary function exception.

Since the government satisfied its initial burden, the burden shifts to plaintiff to present sufficient evidence to withstand dismissal for lack of jurisdiction. *Blackburn*, 100 F.3d at 1436. In line with the two-step inquiry articulated in *Gaubert* and *Berkovitz*, plaintiff may meet his burden by showing either "(1) that there are mandatory rules prescribing the actor's course of action, or (2) that the actor's course of action was not 'of the kind' that is 'susceptible to policy analysis.' " *Dichter-Mad*, 707 F. Supp. 2d at 1029 (quoting *Gaubert*, 499 U.S. at 322-325).

Plaintiff has not pointed to any mandatory rules prescribing the conduct of defendants' employees in this case. Plaintiff contends, however, that defendants are "estopped from contending that they were exercising their discretion in bringing Plaintiff into the enforcement action since they previously have contended that bringing Plaintiff into the action was pursuant to the prescribed requirements of the AWA." [Pl's Opp. 14].

Plaintiff's estoppel argument is conclusory. He does not identify the "prescribed requirements" on which he contends defendants previously relied or the estoppel theory (such as judicial estoppel or collateral estoppel) on which his argument rests. Since plaintiff has not pointed to any factual or legal circumstances creating an estoppel, his estoppel argument is insufficient to meet his burden to overcome the strong presumption that the conduct of defendants' employees in filing and prosecuting the enforcement actions was discretionary rather than mandatory.

Plaintiff also contends that the discretionary function exception is inapplicable because defendants' employees "complete[ly] failed" to investigate him and therefore failed to "actually exercise" discretion before prosecuting him, and because the administrative law judge found that the case against plaintiff was "entirely baseless and unjustified." [Pl's Opp. 12-14]. Plaintiff's evidence fails to support those assertions.

In the August 4, 2008 initial administrative decision dismissing the 2003 Action as to both plaintiff and Colette, the Administrative Law Judge ("ALJ") found, among other things, that: (1) the APHIS officials who inspected WWS in August 2003 and September 2003 "completed an extremely thorough investigation"; (2) plaintiff had offered "no evidence" that APHIS selectively enforced the AWA against him in violation of his constitutional rights, and "the very nature of enforcement of remedial statutes by government agencies requires an agency to frequently choose who to enforce against in order to best effectuate the statute's remedial purposes"; and (3) although APHIS did not "literally follow each step" of the inspection protocols in its "inspection guides" during the August 2003 and September 2003 investigations, no prejudice resulted because the "guides do not indicate that each of their procedures was mandatory—they were intended for use as 'guides.' " [Declaration of Robert Lorsch in Opposition to Motion to Dismiss ("Lorsch Decl."), Ex. A at 48-51].

The government appealed that decision. The ALJ who presided over the administrative appeal characterized the first ALJ's decision as "thorough and well-reasoned," agreed with "most, but not all" of the first ALJ's findings, and declined to consider any issues not raised by the government on appeal, including the first ALJ's findings concerning the methodology and quality of APHIS's investigation and the absence of evidence of selective enforcement. [*See* Lorsch Decl., Ex. B at 75-76]. The second ALJ found that plaintiff "served at various times as 'best friend' and advocate" for WWS and that there was "no dispute" that plaintiff "actively participated in certain aspects of" WWS's operations by performing a variety of activities on its behalf, including contributing financially to WWS, acting as its representative, advocate and agent in dealings with federal, state and local governments, and participating in fund-raising efforts. [Lorsch Decl., Ex. B at 71, 78, 90-91]. The second ALJ concluded, however, that those activities did not violate the AWA

or demonstrate that plaintiff "operated" WWS so as expose him to liability as an "exhibitor" under the AWA. [Lorsch Decl., Ex. B at 79].

The second ALJ also concluded that the actions of WWS could not be imputed to plaintiff as a matter of law, and that plaintiff's conduct during the September 2003 exit interview, while "clearly impolite," did not rise to the level of "abuse" of APHIS officials in violation of the AWA regulations. [Lorsch Decl., Ex. B at 78-81, 95]. Accordingly, on appeal, the second ALJ dismissed the 2003 Action as to plaintiff. [Lorsch Decl., Ex. B at 95-96].

Nothing in the administrative decisions attached to plaintiff's declaration establishes or plausibly suggests that the decision to prosecute the enforcement actions against plaintiff was "entirely baseless and unjustified," as plaintiff contends. Nor does the record support plaintiff's contention that there was a "complete failure" to investigate him such that the decision to prosecute him involved no discretion and was arbitrary. Even if defendants' employees were negligent in some respect in the manner in which they investigated plaintiff, mere negligence in performing a discretionary function does not preclude application of the discretionary function exception. *See General Dynamics Corp.*, 139 F.3d at 1282, 1286 (holding that the discretionary function exception barred the plaintiff's FTCA action against a federal agency who negligently prepared an audit report presented to prosecutors because the prosecutors were not prevented "from gathering further information before they proceeded," "were not required to prosecute," and "were not forced to do so," so the plaintiff's "harm actually flow[ed] from" the prosecutors' exercise of discretion); *Sabow v. United States*, 93 F.3d 1445, 1452-1453 (9th Cir. 1996) (affirming the dismissal of FTCA claims arising out of government investigators' allegedly negligent failure to follow agency investigative procedures under the discretionary function exception where agency manuals contained "suggestive guidelines" rather than "mandatory directives" for conducting investigations); *see generally Gasho*, 39 F.3d at 1435 ("That the conduct of the [government] agents may be tortious or motivated by something other than law enforcement is beside the point, as governmental immunity is preserved 'whether or not the discretion involved be abused.' ") (quoting *Johnson v. United States*, 949 F.2d 332, 340 (10th Cir. 1991)).

For all of the reasons described above, the discretionary function exception bars this action.

III. INTENTIONAL TORTS EXCEPTION, 28 U.S.C. § 2860(h)

The intentional torts exception provides that the FTCA's waiver of sovereign immunity shall not apply to any claim "arising out of" certain intentional torts. *See* 28 U.S.C. § 2680(h). However, the intentional torts exception contains a "proviso" stating that the waiver of sovereign immunity "shall apply" to any claim "arising out of" malicious prosecution, abuse of process, and certain other intentional torts committed by an "investigative or law enforcement officers of the United States Government[.]" 28 U.S.C. § 2680(h); *Millbrook v. United States*, – — U.S. ——, 133 S. Ct. 1441, 1444 (2013) ("The FTCA waives the United States' sovereign immunity for certain intentional torts committed by law enforcement officers."); *Tekle v. United States*, 511 F.3d 839, 851 (9th Cir. 2007) ("The FTCA provides an exception to the United States' liability for certain torts, including assault, battery, and false arrest. When such a tort is committed by a federal law enforcement officer, however, liability is restored.) (citing 28 U.S.C. § 2680(h)).

For purposes of this "law enforcement proviso," *Millbrook*, 133 S. Ct. at 1443, the term "investigative or law enforcement officer" means "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). The waiver of sovereign immunity effected by section 2680(h) "extends to acts or omissions of [investigative or] law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." *Millbrook*, 133 S. Ct. at 1446.[2]

The court is permitted to review allegations of the complaint and evidence regarding the job duties and job descriptions of the federal employees in question to determine if they are "investigative or law enforcement officer[s]" under section 2680(h). *See, e.g.*, *Arnsberg v.*

[2] It is undisputed that the acts or omissions of defendants as alleged in the complaint occurred during the course of their employment.

United States, 757 F.2d 971, 978 n.5 (9th Cir. 1985) (noting that United States magistrate judges are empowered by statute to make arrests and therefore could be considered " 'investigative or law enforcement officers' for purposes of section 2680(h) when actually apprehending a suspect")(citing 18 U.S.C. § 3041); *Gonzales v. United States*, 2013 WL 942363, at *5 (C.D. Cal. Mar. 11, 2013) (reviewing the job description of Immigration and Customs Enforcement ("ICE") Detention Officers on the ICE website to determine whether they qualified as "law enforcement officers" under section 2680(h), but granting the defendant's motion to dismiss on the alternative ground that the complaint alleged no facts suggesting that any detention officer or other "law enforcement officer" committed an intentional tort); *Sims v. United States*, 2008 WL 4813827, at *5 (E.D. Cal. Oct. 29, 2008) (holding that "immigration officers" are "investigative or law enforcement officers" under section 2680(h) because they are empowered by statute "to make arrests, execute warrants and make warrantless searches," but that attorneys working for ICE are not given those powers and therefore "are not such officers" under section 2680(h)).

In support of their motion, defendants presented the Juarez Declaration and the declaration of Charlene Buckner ("Buckner Decl.") and attached to those declarations written job descriptions for the positions held by Lorang, Gage, Garland, Gibbens, Aguilar, and Carroll. Plaintiff objects that those job descriptions lack foundation because the job requirements of APHIS's VMOs and ACIs are dictated by federal regulations rather than by the agency's job postings, and because the job descriptions are vague as to the time period to which they apply. [Plaintiff's Request for Evidentiary Ruling re Juarez Decl. ("Pl's Obj. re Juarez Decl.") 18; Plaintiff's Request for Evidentiary Ruling re Buckner Decl. ("Pl's Obj. re Buckner Decl.") at 8]. Plaintiff also objects to the declarations of Juarez and Buckner in their entirety on the grounds that they are not based on personal knowledge and consist merely of inadmissible hearsay. [Pl's Obj. re Juarez Decl. 6-7; Pl's Obj. re Buckner Decl. 5-6].

Defendants respond that plaintiff's objections lack merit. They argue that Juarez has personal knowledge of the APHIS activities at issue because she "advised upon and for a time, helped to administer" those activities. Defendants also argue that Buckner's declaration "simply

authenticates attorney Carroll's job description." [Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss ("Defs' Reply") at 1 n.1].

The Juarez and Buckner declarations are based on personal knowledge. "Personal knowledge can be inferred from a declarant's position within a company or business." *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (citing *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990)). Juarez has been employed with the USDA for over eleven years, during which she represented the Administrator of APHIS in administrative enforcement actions under the AWA and supervised APHIS personnel who were conducting inspections and investigations authorized under the AWA. [Juarez Decl. 2]. That is sufficient to show Juarez's personal knowledge of the facts presented in her declaration.

Although Buckner does not directly supervise attorneys, including Carroll, she is the Director of Administration and Resource Management of the USDA's Office of General Counsel ("OGC"). In that capacity, Buckner is responsible for coordinating paperwork for personnel actions within the OGC. [Buckner Decl. 2]. The Court can reasonably infer that Buckner's position within the OGC gives her personal knowledge of what each position within the OGC would entail. For these reasons, plaintiff's objections are overruled, and his request to strike the Juarez and Buckner declarations and the attached job descriptions is denied.

The complaint alleges that Lorang, Garland, and Gage were investigative or law enforcement officers and acted within the scope of their employment during their inspections of WWS. The complaint further alleges that the AWA and the AWA regulations permitted "badged employees of the USDA" who were conducting inspections to, among other things, enter all areas where regulated animals are housed, all other animal areas, and the offices of the licensee; to examine and copy the licensee's records; to take pictures of the facility, property, or animals; and to interview personnel or interested persons. [Complaint 4-5, 9]. The complaint also alleges that "[t]he inspectors and investigators went through the entire [WWS] facility. The searches were warrantless. The investigators and inspectors frequently took pictures and regularly

took with them copies of the WWS records. All of the inspections were intrusive and long-lasting." [Complaint 10]. In his opposition to defendants' motion to dismiss, plaintiff contends that Lorang, Garland, and Gage are "APHIS officials who are empowered to perform a wide variety of searches and even seize and destroy animals," and that APHIS officials "ha[ve] a great deal of authority to conduct unannounced and non-consensual searches (for days at a time, as here) and can even seize animals as part of the search." [Pl's Opp. 18-19].

Defendants contend that Lorang, Garland, and Gage are not investigative or law enforcement officers because they have no authority to execute searches or seize evidence, but rather are only authorized to "conduct initial and ongoing licensing and subsequent compliance inspections or investigations on behalf of APHIS, to report their findings to their supervisors, and/or to assist or participate in administrative enforcement proceedings as warranted by the findings of the inspections or investigations." [Defs' Reply 2].

Lorang, Garland, and Gage are the only employees alleged to be investigative or law enforcement officers under section 2680. [Complaint 9]. Therefore, their duties and authority as APHIS officials (Lorang as an ACI, and Garland and Gage as VMOs) are the only ones relevant to determining whether or not the "law enforcement proviso" applies.

The AWA regulations state that each exhibitor under the AWA "shall furnish to any APHIS official any information concerning the business of the ... exhibitor ... which the APHIS official may request in connection with the enforcement of the provisions of the [AWA], the regulations and the standards in this subchapter" within a "reasonable time and as may be specified in the request for information." 9 C.F.R. § 2.125. Additionally, each exhibitor "shall, during business hours, allow APHIS officials":

> (1) To enter its place of business;
>
> (2) To examine records required to be kept by the [AWA] and the regulations in this part;
>
> (3) To make copies of the records;

> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the [AWA], the regulations and the standards in this subchapter; and
>
> (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

9 C.F.R. § 2.126(a). The AWA regulations do not, however, delegate to "APHIS officials" authority to search for animals that are reported missing. Instead, exhibitors "shall allow ... *police or officers of other law enforcement agencies with general law enforcement authority* ... to enter his or her place of business" for the purpose of seeking animals that have been reported missing. 9 C.F.R. § 2.128 (emphasis added). Similarly, the AWA regulations authorize an APHIS official to confiscate an animal only if, among other things, the APHIS official "contacts *a local police or other law officer* to accompany him to the premises ...." 9 C.F.R. § 2.129(b)(emphasis added). It may reasonably be inferred from the text of these regulations that APHIS officials themselves are not "police or officers of other law enforcement agencies with general law enforcement authority," nor are they "local police or other law officer[s]." *See Employers Ins. of Wausau v. United States*, 815 F. Supp. 255, 256-257 (N.D. Ill. 1993) (holding that a statutory provision that permitted the Environmental Protection Agency ("EPA") to "require" the United States Attorney General to "secure relief" to abate certain imminent hazards "tended to confirm" that EPA officials did not have such law enforcement power on their own).

The written job descriptions for VMOs and ACIs provide additional details about their job duties and authority, and nothing in those job descriptions supports the conclusion that they are investigative or law enforcement officers within the meaning of section 2680(h). As VMOs working in APHIS's Animal Care Program, Gage's and Garland's job descriptions include industry and inspector education, evaluation of regulations and policies, inspection of problematic facilities, liaison with industry and with other regulatory agencies at both the regional and national levels, and consultation on enforcement actions related to this area of expertise. [Juarez Decl. Attachment 3; Defs' Mot. 34].

As an ACI working in APHIS's Animal Care Program, Lorang has authority that includes formally documenting compliance and noncompliance with the AWA and monitoring corrective action. [Juarez Decl. Attachment 4; Defs' Mot. 40]. ACI inspections include observing animals for signs of poor health, abuse, or inadequate care; examining the adequacy of the facility in a number of respects, including size, design, construction, and sanitation; gathering information on the animals' diets and inspecting food preparation facilities; examining facility records; and assessing the adequacy of veterinary care. [Juarez Decl. Attachment 4; Defs' Mot. 40-41].

When they have reason to believe a licensee is potentially in violation of the AWA, Animal Care Program employees, including VMOs and ACIs, may submit a request for investigation to IES, which may conduct its own investigation and make an enforcement recommendation. [Juarez Decl. 9-10]. Lorang, Garland, and Gage are not employees of the IES division, but rather of the Animal Care Program.

Nothing in the record suggests that VMOs and ACIs are investigative or law enforcement officers under section 2680(h). They do not have the authority to seize evidence or to make arrests for violations of Federal law. Moreover, they are not authorized to execute "searches." The only evidence to the contrary plaintiff identifies is the definition of "search inspections" in the Exhibitor Inspection Guide, which defines the word "search" as an "investigation to determine if a regulated activity is being conducted by an unlicensed person." [Pl's Opp. 20]. However, as defendants point out, the Exhibitor Inspection Guide also states that it "does not supersede the Animal Welfare Act, the Animal Welfare Act Regulations and Standards, Animal Care policies, standard procedures, or the inspector's professional judgment." [Defs' Reply 2]. Further, an administrative investigation that requires a governmental agency to make fact-finding determinations in the discharge of its statutory duties does not warrant the applicability of § 2680(h). *See Wausau*, 815 F. Supp. at 257 ("Surely the mere need for an agency to learn the facts necessary to exercise the statutory responsibilities with which that agency is charged cannot serve as a litmus test for labeling its personnel 'investigative officers' ...."); *see also EEOC v. First Nat'l Bank of Jackson*, 614 F.2d 1004, 1007-1008 (5th Cir. 1980) (holding that agents of the Equal

Employment Opportunity Commission were not law enforcement or investigative officers, even though they were statutorily empowered to "at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices ...."). Accordingly, the AWA, AWA regulations, and the job descriptions indicate that VMOs and ACIs in APHIS's Animal Care Program are not investigative or law enforcement officers.

No court has decided whether VMOs or ACIs in APHIS's Animal Care Program can be considered investigative or law enforcement officers within the meaning of section 2680(h). However, case law cited by the parties involving APHIS inspections in the context of a Fourth Amendment search support the conclusion that APHIS officials are not "investigative or law enforcement officers." The Seventh Circuit has held that a warrantless APHIS inspection pursuant to the AWA does not violate the Fourth Amendment because it fits within the exception to the warrant requirement for inspections of "closely regulated" industries. *Lesser v. Epsy*, 34 F.3d 1301, 1306 (7th Cir. 1994).

Even if Lorang, Garland, or Gage could be considered an investigative or law enforcement officer within the meaning of section 2680(h), the law enforcement proviso would not confer subject matter jurisdiction over this action because application of the discretionary function exception "trumps" application of the intentional torts exception. The Ninth Circuit has concluded that claims covered by the law enforcement proviso are barred if they are based on the performance of discretionary functions within the meaning of section 2680(a). *See Gasho*, 39 F.3d at 1435-1436 (holding that the intentional tort remedy provided by the FTCA's law enforcement proviso did not apply to conduct that the government had shown was exempt from liability under the "Customs exception" in section 2680(c) or the discretionary function exception in section 2680(h)) (citing *Wright v. United States*, 719 F.2d 1032, 1035-1036 (9th Cir. 1983) (holding that the law enforcement proviso in section 2680(h) applied because the government failed to demonstrate that the conduct at issue was not excepted from liability under section 2680(c), which would have barred the claim); *Gray v. Bell*, 712 F.2d 490, 507–508 (D.C. Cir. 1983) (holding that the plaintiff could not pursue an intentional tort claim under the law enforcement proviso in

section 2680(h) for tortious conduct that was protected by the "discretionary function" exception in section 2680(a)), *cert. denied*, 465 U.S. 1100 (1984)). Since an intentional tort committed by an "investigative or law enforcement" officer cannot be the basis for an FTCA claim against the United States if the officer's conduct involved a discretionary function, section 2680(a) exempts defendants from liability for malicious prosecution or abuse of process even if Lorang, Garland, or Gage were investigative or law enforcement officers.

Because plaintiff's IIED and NIED claims "arise out of" the same facts as his malicious prosecution and abuse of process claims, those claims are also barred. *See* 28 U.S.C. § 2680(h). "In determining whether a claim arises out of one of the enumerated torts" in section 2680(h), courts "look beyond a plaintiff's classification of the cause of action to examine whether the conduct upon which the claim is based constitutes one of the torts listed in § 2680(h). [Courts] focus [their] § 2680(h) inquiry on whether conduct that constitutes an enumerated tort is 'essential' to a plaintiff's claim." *Sabow*, 93 F.3d at 1456(citing *Mt. Homes, Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990); *Thomas-Lazear v. Fed. Bureau of Investigation*, 851 F.2d 1202, 1207 (9th Cir. 1988)).

In this case, all of plaintiff's alleged harm stems from the decisions to commence and prosecute the enforcement actions against him until their termination. [*See* Complaint 14-16, 18-15; Transcript 13-14]. Therefore, plaintiff's IIED claims and NIED claims are barred for the same reasons as his malicious prosecution and abuse of process claims. *See Mt. Homes*, 912 F.2d at 356 (holding that the plaintiff alleged conduct that falls within the excepted tort of misrepresentation because "the essential element of Mt. Homes' claim is that [the government] gave it inaccurate information"); *Snow-Erlin v. United States*, 470 F.3d 804, 808 (9th Cir. 2006) ("If the gravamen of Plaintiff's complaint is a claim for an excluded tort under § 2680(h), then the claim is barred.").

IV. CONCLUSION

For the reasons described above, the Court lacks subject matter jurisdiction over this action.

The remaining issue is whether to allow plaintiff leave to amend. Plaintiff contends that he should be allowed to amend his complaint so that he may undertake discovery "to define more clearly the scope of" APHIS employees' authority to search, seize, and arrest within the meaning of section 2680(h). [Pl's Opp. 9]. Plaintiff argues that allowing him to amend in this manner is appropriate because there is authority for the proposition that section "2680(h) trumps [section] 2680(a). In other words, if you have an [investigative or law enforcement officer] conduct an intentional tort[ ], the discretionary function [exception] does not protect him." [Transcript 23-24].

For the reasons described above, under Ninth Circuit law, the law enforcement proviso in section 2680(h) does not "trump" application of the discretionary function exception in section 2680(a). Instead, application of the discretionary function exception means that the law enforcement proviso does not confer subject matter jurisdiction over plaintiff's claims, irrespective of whether the APHIS employees in this case are investigative or law enforcement officers. Therefore, allowing plaintiff to amend his complaint would be futile. *See Reddy v. Litton Indus., Inc*., 912 F.2d 291, 296 (9th Cir. 1990) ('It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile.'); *see also Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) ('Leave to amend may be denied if a court determines that 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.' ')(quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co*., 806 F.2d 1393, 1401 (9th Cir. 1986)).

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: LANCELOT KOLLMAN RAMOS, a/k/a LANCELOT RAMOS and LANCELOT KOLLMAN, an individual.
Docket No. 13-0342.
Decision and Order.
Filed July 14, 2015.

AWA.

Colleen Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER

I. INTRODUCTION

This Decision and Order is entered upon a hearing regarding a complaint filed by the Administrator of the Animal Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant") against Lancelot Kollman Ramos, also known as Lancelot Ramos and Lancelot Kollman ("Respondent"), alleging violations of the Animal Welfare Act, 7 U.S.C. §§2131 *et seq*. ("AWA"; "the Act").

The AWA authorizes USDA through APHIS to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. § 2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7 U.S.C. § 2151. The Act and regulations fall within the enforcement authority of APHIS, which is also tasked to issue and renew licenses under the AWA.

This Decision and Order[1] is based upon the pleadings, documentary evidence, testamentary evidence, and arguments of the parties. The record in this proceeding is now closed, and the matter is ripe for adjudication.

II. ISSUE

The primary issue in controversy is whether Complainant has demonstrated that Respondent violated the Act and should be subject to civil money penalties and an Order to cease and desist engaging in conduct that violates the Act and its implementing regulations.

III. PROCEDURAL HISTORY

On September 10, 2013, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ") for USDA. On September 26, 2013, Respondent filed a timely answer.

In his answer, Respondent raised defenses of laches and selective prosecution. Because this action is not based in equity, but rather represents a disciplinary administrative action, there is little basis for laches to attach to the claim.

With respect to the defense of selective prosecution, governmental authorities have a broad range on discretion in enforcing the law. *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996). However, government enforcement discretion is still subject to constitutional restrictions, such as discrimination based on race, religion, or any other arbitrary classification. *Id.* at 464. To prevail in a defense of selective prosecution, the Respondent must show:

> (1) defendants have been singled out while other similarly situated violators were left untouched, and (2) that the government selected defendants for prosecution

[1] In this Decision and Order, documents submitted by Complainant shall be denoted as "CX-#"; documents submitted by Respondent shall be denoted as "RX-#"; and references to the hearing transcript shall be denoted as "Tr. at -#".

> "invidious[ly] or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights."

United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 984-85 (E.D. Va. 1997) (quoting *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich.)).

Respondent has not referred to any "protected group" in a similar situation which would not have been prosecuted by Complainant. Respondent did allege that the animal that is the subject of much of the instant adjudication died while in custody of a party that was not prosecuted by APHIS. However, Respondent provided no evidence that demonstrates that he was similarly situated to another party. Consequently, I am unable to conclude that Respondent was treated differently. Therefore, Respondent has not provided a basis for a claim of selective prosecution.

A hearing commenced in the instant matter on September 24, 2014, through audio-visual connection. Counsel for Complainant appeared at an audio-visual site in Washington, DC; counsel for Respondent and Respondent appeared at an audio-visual site in Palmetto, FL; and witnesses appeared at both sites. I presided over the hearing from a third audio-visual site. I admitted to the record Complainant's exhibits CX-1 through CX-22; CX 25 through CX-53; and Respondent's exhibits RX-1 through RX-17[2]. The parties entered into stipulations of fact, which were stated at the hearing, and filed in a document on September 30, 3014, hereafter referred to as "ALJX-1"[3]. Complainant's and Respondent's exhibit and witness lists are hereby identified as ALJX-2 and ALJX-3, respectively, and entered into the record.

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[2] Respondent's exhibits were realigned so that all submissions referring to Dr. Schotman's reports appear at RX-7 to comport with Respondent's intention. *See* Tr. at 118-125.

[3] The transcript erroneously identifies "ALJX-1" as Complainant's list of exhibits. Tr. at 9.

On October 13, 2014, the hearing transcript was filed with the Hearing Clerk for OALJ. Both parties' post-hearing briefs were filed on February 11, 2015.

On June 26, 2015, I instructed counsel for the parties to consult and compare Respondent's evidence, and send to me the documents that both had relied upon at the hearing. An expanded version of Respondent's exhibit RX-7 had been used at the hearing by the parties, but was not in my possession. That document was sent to me and is hereby made part of the record.

IV. SUMMARY OF THE EVIDENCE

A. Admissions

In his Answer filed on September 26, 2013, Respondent admitted that his AWA license had been revoked upon default in a previous matter.

B. Stipulations

The parties stipulated that on or about November 5, 2009, Respondent had transported, sold, or negotiated the sale of certain animals described at ALJX-1. The documentary evidence identified by counsel that supports the stipulation is found at CS-5; CX-10 through 17; CX-19-20.

C. Documentary Evidence

The exhibits admitted to the record are described in the exhibit lists that both parties filed, ALJX-2 and ALJX-3. In addition, Respondent filed duplicate copies of exhibits RX-1 through RX-12. On September 19, 2014, Respondent filed supplemental exhibits, RX-13 through RX-17[4], which is hereby identified as "ALJX-4" and is hereby admitted to the record.

D. Summary of the Testamentary Evidence

[4] Respondent designates RX-17 as "All Exhibits listed by Complainant." The originally identified RX-13 was identically designated. Since neither constitutes actual exhibits submitted by Respondent, I have not duplicated Complainant's exhibits.

Respondent Lancelot Kollman Ramos has worked as a circus performer and animal trainer his entire life. Tr. at 341. Respondent cared for his family's elephants and for numerous other elephants owned by several circuses and other individuals. Tr. at 348-349. In 2004, Respondent acquired Ned the elephant from William Woodcock, who was retiring from the circus. Tr. at 347. Mr. Kollman was aware of rumors that something was wrong with Ned, and he was aware that the animal was thin, but he did not know that it had any health problems. Tr. at 347. Respondent thought no one wanted Ned because he was castrated and could not be used for breeding. Tr. at 349. Respondent felt confident that he could care for Ned with the help of his veterinarian, Dr. Schotman, who had cared for Ned in the past. Tr. at 350.

After taking possession of the elephant, Mr. Kollman fed it with the diet that elephants he had worked with in the past liked to eat, but he gradually introduced grain into Ned's diet. Tr. at 353-355. One week after Ned ate grain, the animal developed lumps on his stomach and refused to drink water. Tr. at 355. Respondent consulted Dr. Schotman, who administered worm medicine. *Id.* Ned continued to refuse water, and Mr. Woodcock recommended feeding him muck from Respondent's pond. Tr. at 356. Although the advice made no sense to Respondent, he followed it, and Ned's appetite returned and he began to drink water again. Tr. at 357.

When Ned first moved to Respondent's property, he did well. Tr. at 357. Ned had been on concrete in the past, but he soon experienced recurring bouts of refusing to drink and eating dirt out of his pen. Tr. at 360. Respondent treated Ned's food with cilium to encourage the evacuation of the sand and dirt that Ned ate. Tr. at 361. Mr. Kollman described a "constant battle of eating the dirt, feeding him, trying to keep weight on him." Tr. at 362. Respondent consulted elephant veterinarians and experts across the country and abroad, but none were familiar with Ned's symptoms. Tr. at 362-363.

Dr. Schotman was involved in trying to determine the cause of Ned's problems and made several recommendations for dietary changes. Tr. at 364. Ned's symptoms did not respond to beet pulp, hay, bran, corn, cracked corn, horse feed, or senior horse feed. *Id.*. Ned was given the Mazuri brand of elephant feed, which contains twenty-four percent

protein, but then developed bumps on the outside of his stomach that burst and became open wounds. Tr. at 365. Dr. Schotman conducted tests of Ned's blood, stool, and urine, and Ned was tested for tuberculosis. *Id.* Eventually Dr. Schotman speculated that Ned had ulcers, and he prescribed 100 tablets daily of Tagament, which had no effect. Tr. at 366.

When Dr. Gaj visited Respondent in January, 2008, he observed that Ned looked thin, and Mr. Kollman told the doctor about Ned's problems. Tr. at 368-369. Dr. Gaj suggested consulting with Dr. Schotman, which was what Respondent had been doing. Tr. at 369. Mr. Kollman's regular inspector, Carol Porter, had not remarked on Ned's weight, although Mr. Koller told her of his issues. Tr. at 369-370.

In April, 2008, Respondent was given the opportunity for a job with an elephant in Bangor, Maine, and he thought that more exercise and a change of scenery would help Ned. Tr. at 367. Respondent was not concerned about transporting Ned because he thought he might improve with some stimulation, and he noticed that Ned appeared to have improved. Tr. at 367-368. Respondent did not believe it was necessary to weigh Ned, because he was able to gauge whether Ned lost or gained weight by visual inspection. Tr. at 372-373.

Respondent addressed Complainant's concerns about his tigers, explaining that one had clawed another on the bottom of the foot while they had been playing with a ball on the day before the inspection in October, 2008. Tr. at 379. Respondent separated the wounded animal from the others, as was the standard recommendation from Dr. Schotman. Tr. at 380. Respondent had called the doctor, but had not heard from him by the time the inspector arrived Tr. at 380-381.

Respondent explained that he had noticed a problem in the captive lion population, where lions develop wobbling, drooling, and other unusual symptoms. Tr. at 384. He was given two lions that developed the symptoms as they aged, and Dr. Schotman has been unable to diagnose a cause for the symptoms, or to develop an effective treatment. Tr. at 385. They had tried various diets and vitamins, but the lions eventually had to be euthanized. Tr. at 386.

Mr. Koller acquired two capuchin monkeys from a retired organ grinder, who gave them to him for his daughter shortly before the USDA inspection in October 2008. Tr. at 386. The USDA inspector informed him that he needed a written program of enrichment for the monkeys, and Dr. Schotman provided a plan at Mr. Kollman's request. Tr. at 387.

Thomas B. Schotman has worked as a clinical veterinarian for thirty-three years and has treated over a hundred different species of animals, including domestic pets, elephants, tigers, lions, bears and reptiles. Tr. at 400. Dr. Schotman first began treating elephants when he lived near Circus World, Florida and was asked to come to the facility to look at their horses. Tr. at 400-401. Elephants require mostly routine veterinary care, like parasite control and vaccinations, and by the end of the 1980s Dr. Schotman was caring for forty-five privately owned elephants in their winter quarters in Florida, including Mr. Kollman's. Tr. at 402-403. Dr. Schotman knew Ned since his birth, and saw him frequently after he was purchased by Mr. Woodcock. Tr. at 404-405. Ned did not have any apparent health issues that Dr. Schotman observed, and had normal physical examinations and was on a routine deworming and vaccination program. Tr. at 405-406. The doctor had observed no problems with the animal's nutrition, and he assessed Ned's body score as a four or five on a scale of nine. Tr. at 406-407.

At some point, Ned began eating dirt, which is characteristic of elephants with upset stomachs. Tr. at 407-408. Ned developed a chronic condition of not eating or drinking for a day or two and then eating only roughage, despite treatments introduced by Mr. Kollman. Tr. at 409. The elephant ate a lot of hay, and it appeared as though grain would induce a setback. Tr. at 410. The elephant may have experienced pain or discomfort, and the veterinarian treated the animal with non-steroid anti-inflammatory medication. *Id.* Dr. Schotman and Mr. Kollman discussed Ned's diet many times, and the veterinarian recommended a diet that included palliative grain and access to roughage at all times. Tr. at 411. Dr. Schotman noted Ned's symptoms and his treatment in his records. Tr. at 412-413; RX-7; CX-22. The doctor and Mr. Kollman tried a variety of diets and medications. Tr. at 413. At times, the veterinarian concluded that Ned had gained some weight and fecal tests were clear for parasites. Tr. at 417.

The doctor believed that Mr. Kollman took good care of his animals, and Respondent often called the doctor or another veterinarian to discuss problems. Tr. at 403. Dr. Schotman did not keep records of every telephone conversation that he had with Mr. Kollman, but he did communicate with him by phone frequently. Tr. at 404. Although blood work and examinations did not provide a cause for Ned's problem, Dr. Schotman discussed it with other veterinarians, who agreed that ulcers could have caused the condition. Tr. at 419. Dr. Schotman prescribed a product used for horses with ulcers, but that had no effect on the elephant's condition. Tr. at 420.

In January, 2008, Dr. Schotman was made aware that USDA's regional veterinarian, Dr. Gaj, had concerns about Ned's eating problems. Tr. at 422. Dr. Schotman sent a letter to Dr. Gaj to describe his treatment. Tr. at 422-423. The doctors spoke several times, but Dr. Schotman recalled talking more generally about tuberculosis. *Id.* Dr. Schotman continued to document Ned's ongoing diet problems later in 2008. Tr. at 424-425. Based on his examination in March 2008, he believed that Ned was healthy enough to travel to Bangor, Maine and to work in a show. Tr. at 429. Dr. Schotman concluded from his examination of Ned in September 2008 that Ned was fit to travel to Columbus, Georgia for a show. Tt. at 430. Dr. Schotman believed that the animal had gained weight, blood and fecal tests were normal, and it had not eaten dirt for some time. Tr. at 431. Dr. Schotman thought that Ned was improving. *Id.*

Dr. Schotman explained that he kept no record of an elephant's weight because it is an ordeal that involves finding a scale large enough. Tr. at 432. In his opinion, the actual weight is not as important as being aware of the animal's body condition and weight gain or loss. *Id.* He assigns a body score based on the muscle mass, visibility of bones and size. Tr. at 433. The doctor was not concerned about Ned's general health because Mr. Kollman worked hard to set in place a good plan of nutrition. Tr. at 435.

Dr. Schotman noted on a report dated November 7, 2008 that he had spoken about Ned with Dr. Schmidt, a veterinarian for the Ringling Brothers. Tr. at 438-439. Dr. Schmidt and his associate Dr. Weidener had concluded that Ned had some kind of ulcerative disease that could not be

firmly diagnosed. Tr. at 439. Dr. Schotman disagreed that only a minimal amount of diagnostic tests had been undertaken, explaining that no test could have been given to see the inside of the animal's stomach. Tr. at 440. An endoscopy would have put an elephant at risk as it would require general anesthesia, and an especially long scope. Tr. at 475. Ultrasound was not developed at that time to penetrate the thick hide of an elephant. Tr. at 477. Dr. Schotman agreed with Dr. Porter than an expert needed to be consulted, and Dr. Schotman believed that he had consulted experts. Tr. at 441. Dr. Schotman agreed that the quantity of food that Ned was eating would not be sufficient for a normal elephant, but Ned had periods of refusing to eat regardless of the quality or quantity of food offered. Tr. at 443-444.

At some point, Dr. Schotman agreed with Dr. Gaj that Ned should not be exhibited, as he had lost weight and was in a weak condition, but when he saw Ned on September 10, 2008, he believed the animal was well enough to travel. Tr. at 468-469; RX-7, at 44(a). Dr. Schotman reviewed pictures of Ned and testified that the animal's condition had appeared better when he examined the elephant some time previous to each photograph. Tr. at 483-485. The veterinarian denied that low mineral scores on Ned's tests indicated malnutrition. Tr. at 488-489. Dr. Schotman distinguished between malnutrition due to inadequate diet, and the disease resulting from the animal's inability to process food that he was offered. Tr. at 489.

Dr. Schotman was aware that Ned was confiscated by USDA and moved to a facility in Tennessee, where he died six months later. Tr. at 445. A post-mortem of the animal identified severe chronic ulceration of the bowel, which was consistent with the animal's symptoms. Tr. at 446. The scar tissue would have inhibited Ned's ability to absorb nutrients. Tr. at 490.

Dr. Schotman was familiar with Respondent's lions, which appeared to have cerebellar syndrome which caused ataxia. Tr. at 426. The doctor observed that other lions around the world were experiencing this problem, which he attributed to genetics. Tr. at 427. Dr. Schotman believed that Mr. Kollman's lions came from a breeder in Texas, and he postulated that the condition was caused by inbreeding. Tr. at 428.

On October 27, 2008, Dr. Schotman noted that Respondent had telephoned to report that one of his tigers had a bite wound on her forepaw that was draining and swelling. Tr. at 449-450; 459. The doctor prescribed an antibiotic and directed that she be brought to the veterinary hospital if she showed no improvement in five to seven days. Tr. at 450. Dr. Schotman prepared an environmental enrichment plan for capuchin monkeys that Mr. Kollman owned, and he discussed their diet and management with Respondent. Tr. at 451. He recalled examining them and testing them in September, 2008, and found them to be normal. *Id.* He did not know when Mr. Kollman first acquired them. Tr. at 455.

Dr. Susanne Brunkhorst is a veterinarian who has worked as a Veterinary Medical Officer ("VMO") for APHIS .in the state of Tennessee for more than ten years. Tr. at 28. Before joining APHIS, Dr. Brunkhorst worked in her own veterinary practice for thirteen years. Tr. at 29. As part of her regular duties as VMO, on September 11, 2009, Dr. Brunkhorst inspected the Alternative Livestock Auction in Cookeville, Tennessee, which is an animal auction that sells exotic animals. Tr. at 30. On the morning of her inspection, Dr. Brunkhorst received a phone call that notified her that lions and tigers were at the auction site. Tr. at 32-33. After checking in with the auction management, she went to find the lions and tigers and observed them in a trailer parked in an area designated for livestock trailers. Tr. at 34.

The trailer had an opening in the center that was blocked by panels tied with twine, and she saw people standing next to those panels looking in the trailer and taking photographs of two lions and four tigers inside enclosures that were inside the trailer. Tr. at 35. The enclosures looked like large rolling metal cages. Tr. at 35-36. The onlookers denied any relationship to the animals, so Dr. Brunkhorst waited to see if anyone associated with the animals would arrive. Tr. at 36. Another licensee whom the inspector knew arrived and agreed to find the animals' owner. *Id.* After Respondent arrived at the scene, Dr. Brunkhorst conducted "a travel inspection," which involved reviewing Respondent's records, inspecting the trailer, and taking pictures of the trailer and contents. Tr. at 37; CX-51.

Upon her inspection, Dr. Brunkhorst concluded that the trailer's ventilation was not sufficient for the animals during transport because the

only ventilation provided was by opening the doors, which presented the risk of exposing the animals to noxious fumes and other environmental hazards. Tr. at 38. Dr. Brunkhorst prepared an inspection report that charged Respondent with violations of the Act and regulations. Tr. at 40; CX-26.

Dr. Brunkhorst was familiar with horse trailers that allow air to come in while the trailers are being driven, and she acknowledged that fumes and other environmental components could enter those trailers. Tr. at 44-45. Dr. Brunkhorst described the doors on Respondent's trailer as spanning the entire height of the trailer and the opening being approximately one to one and one-half feet. She observed two doors that were on the sides of the trailer, with one door towards the front of the trailer and one door towards the back of the trailer. Tr. at 47. Dr. Brunkhorst observed only one of the side doors open at the time of her inspection. Tr. at 49. Those doors were also open when the trailer was moved. Tr. at 50. Dr. Brunkhorst found no problem with the enclosures that contained the animals. Tr. at 48.

Jeffrey Kirlin enjoys taking photographs at events, and he has photographed "audiences at concerts, local galas, [and] political events" and made the photos available through social media. Tr. at 52-53. Mr. Kirlin attended the Royal Hanneford Circus in April, 2008 and took photographs of behind the scenes at the circus over the course of several days, including photographs of an elephant that he later learned was called "Ned". Tr. at 55. Mr. Kirlin talked to the elephant's owner about taking the pictures and later provided pictures of the elephant to USDA employee Jim Finn, who also drafted Mr. Kirlin's affidavit in January 2009. Tr. at 56-57; CX-38. Mr. Kirlin recognized a photograph of Mr. Kollman as the individual with whom he spoke at the circus and as the elephant's owner. Tr. at 60.

James Finn has worked as an investigator with USDA APHIS for thirty-six years. Tr. at 76. He is assigned to the New England geographic area, and in the ordinary course of his business assignments, had reason to look into the exhibition of Ned the elephant. *Id.* As part of his investigation, Mr. Finn interviewed Mr. Serge Landkas, who was involved in the exhibition of Ned. *Id.* Mr. Landkas recalled exhibiting Ned at an event in Georgia on September 13 and 14, 2008, under

contract with Respondent, and recalled that Ned gave five performances and gave elephant rides. Tr. at 77.

Dr. Gregory Gaj is a supervisory animal care specialist for USDA APHIS. Tr. at 81. He has been in this position for twelve years and is responsible for supervising inspectors who conduct animal welfare inspections in Florida, Georgia, Mississippi and Puerto Rico. Tr. at 82. Before he became a supervisor, Dr. Gaj was a field VMO for APHIS in the State of Arkansas for over eleven years. Tr. at 83. Dr. Gaj also practiced veterinary medicine in private practice at Companion Animal Medicine and Emergency Medicine in Fort Worth and Arlington, Texas. Tr. at 83-84.

During 2008 and 2009, Dr. Gaj supervised Carol Porter, who was the animal care inspector for APHIS assigned to inspect Respondent's facility and animals. Tr. At 84. Dr. Gaj recalled accompanying Ms. Porter on inspections of Respondent's facilities on at least two occasions, the first of which occurred on January 10th, 2008. *Id.* During that inspection, the doctor observed that the elephant identified as Ned appeared thin and he discussed the issue with Respondent. Tr. at 85. The doctor told Respondent that he should try to get a baseline weight for Ned at a truck weight facility so that Respondent could assess the animal's weight changes. Tr. at 86-87. Respondent told Dr. Gaj that he visually assessed Ned's weight. Tr. at 87.

Dr. Gaj attended another inspection in October, 2008, after APHIS received a complaint about Ned's condition, and afterwards he contacted Respondent's attending veterinarian, Dr. Schotman, to share his concerns about Ned's weight. Tr. at 85-87. Dr. Schotman revealed that, to his knowledge, Respondent had not taken Ned to be weighed. Tr. at 87. Dr. Gaj believed that the animal had lost significant weight since the previous inspection, and he observed "sunken head, sunken areas around the whole body which indicated a loss of muscle mass. That the skin seemed to be hanging off of Ned, his ribs were prominent. His hips were very prominent, backbone very prominent." Tr. at 88-89. The difference in the animal's appearance between inspections was apparent in photographs, and Ned seemed subdued and lethargic to Dr. Gaj. Tr. at 89; 101-102.

In his conversation with Dr. Schotman, Dr. Gaj asked questions about diagnostics and treatment for Ned and was advised that routine blood work and fecal studies had been performed. Tr. at 90. In Dr. Gaj's opinion, no attempt had been made to determine the cause of Ned's weight loss. *Id.* Dr. Schotman confirmed that the elephant's weight had been assessed only visually. Tr. at 91. Dr. Schotman also advised that Ned had been exhibited, and that he had provided a health certificate in prior months to Respondent. *Id.*

Dr. Gaj believed that Ned should not have been exhibited and explained: "When you have an animal that is extremely emaciated, that is exhibiting signs of severe weight loss, any stress could be incurred by traveling, by working the elephant, they would be more susceptible to additional problems if they are subjected to exercise and excessive exercise, working, travel." Tr. at 92. At the second inspection in October 2008, Ms. Porter drafted an inspection report with input from Dr. Gaj that documented his observations and concerns about Ned's condition. Tr. at 92-94; CX-44.

Dr. Gaj testified that Ms. Porter spoke with Mr. Kollman about Ned's diet, and Mr. Kollman told Ms. Porter that he was feeding Ned about fifteen pounds of pellet ration, also known by its brand name, Mazuri. Tr. at 99. Dr. Gaj asked Respondent to demonstrate how much he was feeding the animal, and Respondent used scoops to show the amount of feed. Tr. at 100. When asked to weigh the feed, Respondent used a bathroom scale that showed that the pellets scooped by Respondent weighed closer to eleven pounds than fifteen. *Id.* Respondent also reported leaving timothy hay for Ned to eat in whatever amount he wished, and feeding it different vegetables. Tr. at 100-101. Respondent disclosed that Ned was eating a lot of sand and dirt, but Dr. Gaj did not discuss that with Dr. Schotman. Tr. at 101. Dr. Gaj could not determine why Ned had lost weight. Tr. at 158.

Dr. Gaj recalled that when he and Ms. Porter met Respondent at his home to review the results of their October 29, 2008 inspection, Respondent appeared agitated and upset with other USDA employees. Tr. at 113-114; CX-44. Dr. Gaj advised that he would not discuss Respondent's other cases, and eventually Mr. Kollman focused on their inspection. Tr. at 114. During his discussion, Respondent made

statements about killing every animal on his property, which Ms. Porter reported in a memorandum to her supervisors. Tr. at 114; CX-47. However, Dr. Gaj did not consider Respondent abusive to him or to Ms. Porter. Tr. at 152-153.

Dr. Gaj acknowledged that he reported no non-compliant items after his inspection of Respondent's enterprise in January 2008, including no issues regarding Ned. Tr. at 117; RX-8. Dr. Gaj received a document dated January 14, 2008 from Dr. Schotman that reported that the veterinarian had observed that in the previous two years Ned began to eat dirt and exhibited symptoms of colic and anorexia. Tr. at 122; RX-7 page 53. Dr. Schotman reported that Ned then developed "protein bumps" on his abdomen when he ate grains, "which would precipitate more episodes of colic and anorexia." Tr. at 126-127; RX-7. Dr. Gaj denied that Dr. Schotman's reports put him on notice in January 2008 that Ned had medical problems because "he's admitted that it was an enigma. He's admitted that this is just his thought that it might be the cause. I do agree that he did mention now about the protein bumps. But, not necessarily that Ned's condition and the severe weight loss is necessarily related to this." Tr. at 128. Dr. Gaj admitted that, as of Dr. Schotman's report of January 14, 2008, he was aware that Ned periodically lost weight and ate dirt. Tr. at 129.

Dr. Gaj was aware that Ned was confiscated from Respondent and sent to the Elephant Sanctuary in Tennessee, but he was not involved in the confiscation. Tr. at 139. The doctor also knew that Ned died there and that a necropsy was performed, but he did not remember if he ever saw the necropsy results. Tr. at 139-140.

Dr. Gaj and Ms. Porter inspected other animals at Respondent's facility in October 2008, including lions, tigers, and capuchin monkeys. Tr. at 94-95. Dr. Gaj noticed that a tiger appeared lame on the right front paw (CX-45; Tr. at 95-96) and observed a juvenile lion that appeared to have a stumbling gait, known as "ataxia." Tr. at 95-96; CX-45. Dr. Gaj recalled that Respondent told him that he had unsuccessfully tried to contact the attending veterinarian about the tiger, but he did not mention asking the veterinarian about the lion. Tr. at 96-97. Respondent told Dr. Gaj and Ms. Porter that he had not consulted his veterinarian immediately about the condition of the tiger but had contacted him at

some point. Tr. at 159; 151. Dr. Gaj did not confirm with Dr. Schotman whether Respondent consulted him about the lion or tiger. Tr. at 159.

Dr. Gaj testified that Respondent did not have a sufficient environmental enhancement plan for the non-human primates on the premises: the capuchins. Tr. at 98. The inspector observed that the animals had environmental enhancements, but there was no formal enhancement program in place. Tr. at 159. Dr. Gaj testified that his concern "was purely a lack of documentation for a program" for animals that Respondent had recently acquired. *Id.*

Dr. Genevieve Dumonceaux is a veterinarian who has been employed at the Palm Beach Zoo for three and a half years. Tr. at 171. She graduated from veterinary school in 1988 and has since worked primarily in zoos and has consulted nationally and internationally on issues involving elephants. Tr. at 171-172. Dr. Dumonceaux's "experience with elephants ranges from a single elephant in a zoo to up to a herd of up to nine animals at one time in a larger zoo facility." Tr. at 172-173.

The doctor examined Ned in early November 2008, at Respondent's facility somewhere near Brandon, Florid, at the request of APHIS personnel. Tr. at 173-174. Her examination was primarily visual, and she observed that the animal appeared very thin and emaciated, with a calm and quiet demeanor. Tr. at 175. Ned had some scars visible over the face, the head, at the point of the shoulders, hips, and lower rear legs. Tr. at 175. Ned had a very sunken body, and his backbone, front legs, skull and face, tail bones, and shoulder bones were prominent and visible. Tr. at 176. In the doctor's opinion, Ned's condition was not normal for a twenty-year old elephant, which is considered fairly young. Tr. at 176. Ned was underweight and appeared to lack normal musculature development. Tr. at 177. Dr. Dumonceaux assigned Ned a body condition score of "3" on a scale of 1 to 11, which is considered "emaciated" on that scale. Tr. at 182-183. She testified that she would have recommended that Ned not perform until his condition improved. Tr. at 177-178. The doctor was familiar with elephants that were used to give rides and the equipment used for that purpose. Tr. at 178. Ned's spine was prominent, and there was little musculature to support the equipment. Tr. at 179. The doctor's findings were summarized in an affidavit that she signed. Tr. at 181-182; CX-42.

Dr. Dumonceaux would have started treatment of the animal's emaciation by trying to diagnose a cause for the condition, by collecting blood for a complete blood count and a serum chemistry evaluation, collecting urine for a urinalysis and feces for a parasite exam. Tr. at 186. She would have recommended a diet of hay available to him at all time and freely available water. Tr. at 186-187. She did not recall knowing Ned's diet. Tr. at 187. The doctor had observed some abnormality in Ned's feces that she would have investigated, and she saw evidence of some separation on the heels of his back feet and some pad separation and smoothness that she considered "less than ideal." Tr. at 189.

Dr. Dumonceaux did not observe Ned for a long time out of the trailer that was used to transport him to a new facility, but she administered some medication to protect him during the ride because she had some concerns about his ability to travel. Tr. at 184-185; 190. The doctor was concerned about the distance of the original destination for Ned, and his destination was changed to a closer place. Tr. at 190. She also recommended frequent rest stops to allow the animal to relax.

Dr. Dumonceaux did not see Ned again, and she did not speak with Respondent or his veterinarian, Dr. Schotman. Tr. at 191; 193. She did not review the animal's treatment records. Tr. at 192.

Dr. Denise Sofranko has worked with the USDA, APHIS Animal Care Service since 1988 and has been the agency's field specialist for elephants since 2003. Tr. at 198-199. She accompanied inspectors for APHIS during two inspections of Respondent's facility, and at the first visit in 2004, Dr. Sofranko observed the elephant Ned and found that he was in good physical shape. Tr. at 201. She next saw Ned on November 7, 2008, when she accompanied inspector Carol Porter to Respondent's facility to inspect the elephant at the request of APHIS's regional office and observed that Ned was emaciated and appeared lethargic. Tr. at 202. Dr. Sofranko spoke with Mr. Kollman, who became agitated and questioned Dr. Sofranko's presence. Tr. at 203; CX-35. Dr. Sofranko did not recall exactly what Respondent said other than that he yelled at her, used profanity, and called her names. Tr. at 204-205. Respondent did not approach her or Ms. Porter, but all were in close proximity. Tr. at 206. Dr. Sofranko moved away from Respondent in order to better see the

elephant, and Respondent continued to speak loudly to Ms. Porter. Tr. at 207.

Dr. Sofranko did not recall seeing any food in Ned's enclosure during her visit in November, 2008, but she saw a little Mazuri in a food storage bin that was not immediately available to the elephant. Tr. at 208-210. The witness viewed photographs taken at the inspection and confirmed that they were consistent with her observations of Ned at that time. Tr. at 211; CX-49. She acknowledged that hay appeared in the photograph, but she did not recall seeing it upon her arrival. Tr. at 211. Dr. Sofranko was aware that Ms. Porter drafted an inspection report, but the doctor did not consult with Ms. Porter about the report. Tr. 212-213; CX-48. Ms. Porter also prepared a second report and a notice of confiscation that she delivered to Respondent. Tr. at 213.

Ned was weighed on November 7, 2008, but Dr. Sofranko did not know whether he was weighed twice. Tr. at 215. She was present when Ned was weighed after USDA removed him from Respondent's facility and she saw the certificate of his weight at that time. Tr. at 216-217; CX-50. Dr. Sofranko did not recall Ned's weight at first, explaining that it was derived by subtracting the weight of the empty truck from the weight of the truck with the elephant in it, which she believed yielded 7,260 pounds. Tr. at 217-218. To her recollection, Respondent did not have a record of Ned's weight, but he offered to immediately take him to be weighed when Ms. Porter asked him about Ned's weight on November 7, 2008. Tr. at 219.

USDA concluded that the Elephant Sanctuary was an appropriate place for Ned because APHIS personnel wanted to minimize his time in transit. Tr. at 220. Dr. Sofranko followed the trailer to the sanctuary and was present when he was unloaded. Tr. at 222-223. She stayed to make sure that Ned was comfortable. Tr. at 223. Dr. Sofranko had no conversations with Ned's veterinarian, and she did not arrange for his treating records to be sent to the sanctuary. *Id.* She did not communicate with the sanctuary about Ned's well-being after she left him there, but was aware that he had died and that a necropsy had been performed. Tr. at 224-225. The doctor did not recall the exact results of the necropsy, although she believed that the results were given to her by Dr. Brunkhorst, who is the inspector for the sanctuary. Tr. at 225. Dr.

Sanfranko testified that any information about Ned's condition would have been verbally communicated to her, and she did not recall any specific reports about Ned having difficulty eating. *Id.* She did not know if Ned was weighed during his time at the sanctuary and could not say whether he had gained or lost weight while there. Tr. at 226.

Brian Franzen is licensed by the USDA to exhibit exotic animals, and he currently owns three elephants. Tr. at 297. Mr. Franzen has known Respondent for twenty-five years and was familiar with Respondent's elephant Ned. Tr. at 298. He knew Ned when the elephant was owned by Mr. Woodcock, and he noticed that Ned was tall, but had not "filled out." *Id.* In Mr. Franzen's opinion a large bull elephant such as Ned should have been husky and not lanky. Tr. at 298-299. Mr. Franzen was aware that Ned had trouble putting weight on even before Mr. Kollman owned him and that all of his owners had tried different kinds of food in efforts to put weight on the animal. Tr. at 299. Mr. Franzen had visited Respondent's property and saw Ned and observed hay, grain, and water available for the animal. Tr. at 300.

Respondent discussed Ned's condition many times with Mr. Franzen and other elephant owners. Tr. at 300-301. Respondent spoke with Mr. Franzen's veterinarian, Dr. Mark Wilson, as well as veterinarians Dr. Schotman and Dr. Dennis Schmidt. Tr. at 301. Mr. Franzen and others discussed worming techniques, and Mr. Franzen brought hay from Wisconsin because it is of better quality than hay from Florida. Tr. at 302. Ned was not interested in the hay, though Mr. Franzen's elephants were enthusiastic about it. *Id.* In Mr. Franzen's opinion, Respondent was very committed to Ned and actively tried to solve the animal's weight problem. Tr. at 302-303. Everyone in the elephant industry was concerned about Ned and discussed what could have been done for the animal. Tr. at 304-305.

Mr. Franzen did not know exactly what Respondent fed the elephant, but every time Mr. Franzen visited he saw that hay, grain, fruits, and vegetables were available for Ned. Tr. at 309. Mr. Franzen was aware that Ned was eating dirt, and he testified that his own elephants often eat dirt. Tr. at 309-310. Mr. Franzen did not think that Ned needed to be weighed because an elephant's weight can vary greatly, and the process of taking them to be weighed creates safety and liability issues. Tr. at

306-307. He explained that "unless you have your own scale right in your yard, [it] is very difficult. You've got to go to a truck stop or somewhere, you have to keep the public away, which is very difficult." Tr. at 307.

Mr. Franzen acknowledged that Ned looked "visibly unappealing," which "might have a negative effect to the public," but he explained that elephants benefit from the stimulation and variety of travel. Tr. at 313. He denied that transporting elephants is stressful to them and cited to a study completed by a team of veterinarians who measured the effects of travel on elephants' health. Tr. at 314-315.

Terry Frisco has been an elephant trainer for over thirty years and has known Respondent for twenty years. Tr. at 322. He knew Ned well and was aware that the elephant had trouble keeping weight on. Tr. at 323. Mr. Frisco lives close to Respondent and visited him frequently. Tr. at 335. Mr. Frisco was familiar with Respondent's care for Ned, and he knew that Mr. Kollman had traveled far to get hay for the animal. Tr. at 323. Mr. Frisco thought that it was ill advised of Respondent to acquire Ned because of how thin he was, and he advised Respondent to give Ned a variety of different foods. Tr. at 324. Respondent tried many things to keep Ned from eating dirt, which was the animal's habit before Respondent acquired it. Tr. at 325.

Mr. Frisco talked with Dr. Schotman about Ned's weight and they speculated whether Ned had eaten something that was stuck in his intestines, or if he had ulcers. Tr. at 326. It is hard to find X-ray equipment for an elephant that size. Tr. at 327. Dr. Schotman was the veterinarian for Mr. Frisco's elephants for more than twenty years, and Mr. Frisco considered Dr. Schotman a well-qualified veterinarian experienced with elephants. Tr. at 328. Other vets consult Dr. Schotman, and elephant owners consult him even when they have other vets. Tr. at 329.

Before Ned was confiscated, Respondent called Mr. Frisco frequently to express concern about Ned's health and weight. Tr. at 336. Mr. Frisco did not know Ned's weight, but he observed that elephants that do not feel well can lose weight by not drinking water. *Id.*

V. DISCUSSION

A. Non-Interference with APHIS Employees [9 C.F.R. § 2.4]

In a memorandum dated November 18, 2008, ACI Carol Porter summarized the events of November 7, 2008, when APHIS conducted an inspection of Respondent's facility prior to issuing a notice to confiscate Respondent's elephant. CX-18. Ms. Porter reported that Mr. Kollman became "agitated" about the inspection and became "verbally abusive" regarding Dr. Sofranko's presence on his property. *Id.* Dr. Sofranko testified that Respondent used profanities and was hostile to her. Tr. at 204-205. Respondent admitted that he was upset and "probably owe[d Dr. Sofranko] an apology." Tr. at 376.

The record establishes that Respondent was rude and upset when dealing with APHIS inspectors. However, Respondent's reaction is just one matter addressed in Dr. Porter's November 18, 2008 memorandum, and the record fails to establish that Ms. Porter or Dr. Sofranko were intimidated by Mr. Kollman when he objected to being told he was starving his elephant. CX-18. APHIS employees remained on the facility and interacted with Mr. Kollman and returned later to serve a notice to confiscate the elephant and again to carry out the confiscation. Dr. Sofranko recalled the incident but was unable to say with any certainty that she reported the incident to supervisors (*see* Tr. at 229, where Dr. Sofranko testified that she "believed" she reported the incident and "would have" reported it to her supervisor). In her affidavit, Dr. Sofranko describes Mr. Kollman as angry, but also described ignoring him. CX-35.

I find that Complainant has failed to establish a violation of 9 C.F.R. § 2.4 by a preponderance of the evidence. In a case where an individual similarly interacted heatedly with inspectors, the Judicial Officer for the USDA upheld the Administrative Law Judge's determination of no violation of 9 C.F.R. § 2.4. The Judicial Officer found that rudeness alone did not constitute abuse without concomitant reports and other indicia by inspectors consistent with being abused. *See Colette*, 68 Agric. Dec. 768 (U.S.D.A. 2009).

B. Requirement to be Licensed [9 C.F.R. § 2.1(a)]

Prohibition Against Buying, Selling, Transporting, Exhibiting or Delivering for Transportation during Period of License Suspension or Revocation [9 C.F.R. § 2.10(c)]

The stipulated facts, together with CX-1 through CX-12; CX-15 through CX-21; RX-13; RX-14, and the Respondent's testimony, establish that Respondent was a licensed exhibitor under the AWA until October 19, 2009, when the revocation of his license No. 58-C-0816 became effective. The evidence further demonstrates that after that date, Respondent sold and transported animals subject to the Act. I give little weight to the evidence establishing that APHIS gave other individuals time to dispose of animals before their license revocation became effective. Respondent did not have a similar agreement with APHIS. Accordingly, the alleged violations of the Act and regulations for activities involving the sale and transportation of animals without a license have been established.

C. Handling of Animals[5] [9 C.F.R. § 2.131(b)(1)]

Complainant has alleged that Respondent failed to handle the elephant Ned as carefully as possible when he exhibited Ned while the animal was visibly emaciated and in compromised health. I credit Mr. Kollman's explanation that he thought that the elephant would benefit from a change of scene when he brought the animal to Maine in April 2008. *See* CX-38; 39. In her inspection report from October 29, 2008, Carol Porter observed that although Ned was thin at her previous inspection of January 10, 2007, he "was under veterinary treatment . . . and was improving." CX-44. However, despite Dr. Schotman approving Ned for travel in September 2008, the record demonstrates that the animal's condition had deteriorated substantially. CX-52; CX-45. In October 2008, Ms. Porter believed that Ned should not be exhibited or allowed to travel. CX-44.

[5] Respondent was also charged with failing to feed Ned an adequate diet in violation of 9 C.F.R. § 2.131(b)(1). However, the Complaint specifically charges Respondent with a violation of feeding regulations, and I find it appropriate to consolidate my discussions of allegations regarding feeding.

Ms. Porter's conclusion is bolstered by Dr. Dumonceaux's opinions regarding the elephant's emaciated condition in November 2008 (CX-42). The photographic evidence supports the doctor's conclusion that the elephant's condition was poor (CX-49) and had worsened over time. CX-52. I reject the testimony that the animal was merely "visually unappealing" and conclude that, even before the inspection in October 2008, Respondent should have realized that Ned was in poor condition and that using him to give rides and perform in a circus was bad judgment. The animal had experienced recurring symptoms of eating dirt, refusing to eat or drink, and obvious loss of weight; it should have been apparent that past exhibition of Ned had not enhanced the animal's condition. Although Dr. Schotman noted on October 2, 2008 that Ned had gained weight (CX-22 at 2; RX- 7), there is little of record with which to compare weight gain. The photographic evidence from later in October 2008, is contrary to the doctor's conclusions. *See* CX-52.

I find that by exhibiting Ned the elephant at an event in Georgia in September 2008, Respondent failed to handle an animal as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort in violation of the regulations.

The record does not sufficiently establish that the elephant's shelter at Respondent's facility was inadequate. In a memorandum dated October 31, 2008, Ms. Porter reported that she had observed Ned "trembling" on October 29, 2008 and that Mr. Kollman believed it was because Ned was cold. CX-46. However, the inspection of January 2008 did not cite Respondent with violations of Ned's housing, and Ms. Porter's November 2008 inspection reports did not specifically address his housing. CX-43; CX-48.

I conclude from the totality of the evidence that Dr. Porter's allegation of a violation of 9 C.F.R. § 1.131(b)(1) in her inspection reports of November 7, 2008 referred to the exhibition of the elephant. *See* CX-43; CX-48. In addition, Ms. Porter's memorandum of November 18, 2008 focused on lack of documentation of the animal's weight changes and the circumstances surrounding the confiscation. CX-18. Moreover, the Complaint does not specifically refer to a violation due to the animal's temperature. The preponderance of the evidence does not

demonstrate that Respondent failed to handle an animal properly because of Ned's housing.

D. Veterinary Care [9 C.F.R. § 2.40(b)(2)]

I find that the record clearly establishes that Respondent attempted to provide Ned the elephant with adequate veterinary care. The attending veterinarian, Dr. Schotman, credibly testified that he was aware of the chronic problem involving the elephant's weight and eating disorder and that various treatments were given to resolve the problem. Dr. Schotman's clinical records document that Ned was given deworming, antibiotics, banamine for pain, peptobismol, mineral oil, electrolytes, and other measures to address symptoms. RX-7. Dr. Gaj conceded that Dr. Schotman was qualified to serve as attending veterinarian and that his treatment of the elephant appeared "reasonable at the time." Tr. at 132.

Although Complainant's witnesses asserted that additional diagnostic measures could have been taken to assess Ned's condition and find a cure, Dr. Gaj did not suggest a specific test. The diagnostic tools that Dr. Dumonceaux recommended (blood count, serum chemistry evaluation, urine and fecal analysis) were the tests that Dr. Schotman had conducted. Tr. at 186. Dr. Dumonceaux's recommended diagnostic tests and diet were consistent with how Ned was treated and fed. I accord substantial weight to Dr. Schotman's explanation, corroborated by elephant expert Mr. Frisco, that no scan or other kind of test was available to make a definite diagnosis. Dr. Schotman's conclusion, bolstered by Dr. Schmidt and Dr. Weidner, that the animal suffered from some kind of ulcerative condition of the intestines proved correct, as necropsy revealed.

The preponderance of the evidence demonstrates that Respondent sought the opinion of other elephant experts and veterinarians about the cause of Ned's chronic digestive problem. Dr. Schotman consulted elephant veterinarians Drs. Schmidt and Weidner, who suspected that ulcers caused Ned's problems. Tr. at 439. Neither Inspector Portman nor Dr. Gaj provided specific suggestions to treat Ned's condition other than to demand that the animal be weighed. Dr. Gaj believed that a baseline weight would have been helpful in assessing Ned's progress. Mr. Kollman, Mr. Franzen, and Dr. Schotman testified that an elephant's weight changes could be visually determined. Ms. Porter also was able

to visually make an assessment of the elephant's weight, since Dr. Gaj testified that at the time of her inspection in January, 2008, she believed the animal had gained weight. Tr. at 143. Dr. Gaj also made observations about Ned's weight from physical inspection alone. Tr. at 86; 88.

Although the inconvenience of weighing Ned is insufficient reason to ignore the instructions of Ms. Porter and Dr. Gaj, I find that the record fails to demonstrate how Ned would have benefited from being weighed. The animal was finally weighed on November 7, 2008, when it was confiscated. CX-50. The weighing of the animal did not improve its health, as demonstrated by the statements of a veterinarian who examined Ned on December 26, 2008 at the Elephant Sanctuary and assigned him a body score of "2," "indicating an emaciated animal." CX-40. Mr. Kollman and Dr. Schotman clearly and demonstrably were concerned about Ned's weight and chronic eating problem. The most compelling evidence that weighing the elephant had no impact on its condition is the fact that it died after being confiscated from Respondent.

The preponderance of the evidence does not establish that Respondent failed to provide adequate veterinary care to Ned in violation of 9 C.F.R. § 2.40(a)(1).

Respondent has also been charged with failing to provide adequate care to a tiger that had injured its left front paw. Inspectors observed the animal's injury, and the credible evidence establishes that Dr. Schotman was aware of the tiger's injury. RX-7. The evidence on this issue is in equipoise and does not establish a violation.

Respondent has further been charged with failing to provide adequate care to a lion with an uncoordinated gait. Dr. Gaj testified that lions with similar symptoms could have been treated if the condition was due to a Vitamin A deficiency. Tr. at 151. However, Dr. Schotman credibly testified that he believed the condition was congenital and ultimately untreatable. Tr. at 427. The evidence is in equipoise and insufficient to establish that Respondent failed to provide adequate veterinary care to his lions.

E. Environmental Enrichment Plan [9 C.F.R. §§ 2.100(a) and 3.81]

The evidence is uncontroverted that Respondent did not have an environmental enrichment plan in place for two capuchin monkeys. Although Dr. Gaj and Dr. Schotman agreed that the monkeys were provided with psychological enrichment, Mr. Kollman did not have a plan as required by the regulations. Respondent was in violation of this regulatory mandate.

F. Diet [9 C.F.R. § 3.129]

The record is replete with references to the elephant's chronic digestive problems and the efforts to find a palatable diet that would encourage the elephant's growth. The testimony of elephant experts familiar with Ned, as well as the testimony and treatment records of the animal's treating veterinarian, makes it clear that Respondent tried many different approaches to meet Ned's nutritional needs.

Dr. Gaj testified that Ned appeared very thin from his visual inspection of the elephant in January 2008, and he believed that Mr. Kollman should have weighed the elephant. Tr. at 141. He testified that the amount of elephant pellet that Ned was being fed constituted a maintenance diet, which was not sufficient given the elephant's apparent emaciation. Tr. at 136. Dr. Gaj did not contact Dr. Schotman and advise that he believed that the animal's diet was insufficient. Tr. at 230. Dr. Gaj could not explain Ms. Porter's rationale for charging Respondent with a violation of regulations pertaining to the animal's diet, but he noted that the amount of feed that Respondent reported was more than was actually found upon inspection. Dr. Gaj could not say whether the difference in the amount of feed would have improved the diet and speculated that perhaps "a nutritionist or, you know, a veterinarian that's, practicing veterinarian that's experienced with elephants might be able totell you that, but I'm not in a position to be able to tell you that." Tr. at 233.

I give little weight to Dr. Gaj's suggestion that a nutritionist may have helped sort out the animal's diet. The record fails to demonstrate that the doctor made that suggestion to Respondent or Dr. Schotman at any time. Moreover, Dr. Gaj also speculated that an elephant specialist may have given dietary advice. I credit Dr. Schotman's testimony about his

experience with elephants and his discussion with other veterinarians familiar with elephants, and I find that Respondent did consult elephant specialists. Dr. Schotman had not recommended that Mr. Kollman consult a nutritionist, and he doubted that a change in diet would have benefited the animal given the amount of lesions present in the elephant's intestines. Tr. at 488-489.

I credit the evidence that inspectors did not find an abundance of food for Ned upon their inspection in October 2008. However, there is other equally credible evidence from Dr. Schotman and elephant trainers Franzen and Frisco that supports Respondent's contention that he kept a fresh supply of food for the animal. In addition, the record clearly establishes that both Ms. Porter and Dr. Gaj were made aware that Mazuri elephant feed caused the elephant to produce "protein bumps," thereby supporting Respondent's decision to provide Ned with less of that type of sustenance. Tr. at 382. This particular evidence is in equipoise.

The documentary and testamentary evidence establishes that some of the traditional feed for elephants exacerbated Ned's symptoms. Respondent gradually introduced certain foods to the animal to avoid onset of symptoms. It is clear that the animal suffered from some chronic gastric condition that existed before its acquisition by Respondent and that continued beyond its confiscation by USDA. The record fails to disclose what Ned was fed at the Tennessee Elephant Sanctuary, but he died soon after his relocation to that facility. I conclude that Ned's diet was not the cause of his failure to thrive.

Respondent's efforts to care for the elephant are entirely credible. I accord substantial weight to his testimony:

> Well, it's a little bit of a sentimental situation, because I don't think that, how can you, how can you explain this feeling, when an animal makes you feel as tall as the Empire State Building? How did the, this being around this animal and taking care of them, they even, and doing this totally as washing him, just the privilege to be around him, is, is like an honor. You know? He's, this

> animal was basically like, you could say a religious god to me.

Tr. at 374-375.

The preponderance of evidence fails to establish that Ned's diet was inadequate due to Respondent's actions.

G. Mode of Transportation [9 C.F.R. § 2.100(a)]

The Complaint cites to 9 C.F.R. § 3.81, which requires environment enhancement to promote psychological well-being of nonhuman primates, rather than to 9 C.F.R. § 3.138, which addresses the cargo space of the primary conveyance used to transport live animals. Because the Complaint provides a rationale for the allegation, Respondent had notice of the condition being charged as non-compliant and, in fact, defended the charge at the hearing. Accordingly, the Complaint is hereby amended to conform to the evidence.

Dr. Brunkhorst believed that the trailer that Respondent used to transport felids in Tennessee did not provide enough ventilation unless doors were open, in which case the animals did not have sufficient protection. She was concerned that the animals would be exposed to road debris when the trailer was in motion. Respondent acknowledged that the under half of the doors on the trailer were kept open while traveling and when stationery. Tr. at 341. Respondent has used similar trailers to transport animals "hundreds, even thousands" of times. Tr. at 342.

I accord equal weight to the testimony of Dr. Brunkhorst and Mr. Kollman. Dr. Brunkhorst explained her concerns for the wellbeing of the animals during transport in Respondent's vehicle. Respondent explained that he had transported animals numerous times without being charged with a violation of the Act or regulations. The inspections of record of Respondent's facilities did not disclose a violation of transportation regulations. I find that the evidence is in equipoise and fails to establish a violation of 9 C.F.R. § 3.138.

H. Sanctions

Since July 2014, Bernadette Juarez has been the Director for the Animal and Plant Health Inspection Service, Investigative and Enforcement Services. Tr. at 499. From 2009 to 2014, she served as the Deputy Director for Investigative and Enforcement Services, and from 2002 to 2009, she was an attorney in USDA's Office of the General Counsel. *Id.* Ms. Juarez considered four factors mandated by the AWA in making a recommendation for penalties under the statute. Tr. at 505. She considered the size of Respondent's business to be "small" and observed that her conclusion was supported by prior determinations of the Judicial Officer. Tr. at 506. I credit her opinion on this issue.

She considered the gravity of the violations, some of which she believed were "grave" (verbal abuse of inspector, Tr. at 508; failure to handle animals as carefully as possible, Tr. at 510; some of which she believed were "serious" (environmental enhancement plan for capuchin monkey, Tr. at 507; unlicensed transfer of animals, Tr. at 510; the type of vehicle used to haul animals, Tr. at 519); and some in which she reached factual conclusions from the evidence while failing to assign a "value of gravity" to her conclusions.

I place little weight on most of Ms. Juarez's testimony regarding the gravity of the violations. Her recommendations are grounded in her personal assessment of the weight of the evidence.[6] Ms. Juarez's opinions ranged from whether the evidence on the whole showed that an elephant and lion had been provided proper veterinary treatment (Tr. at 232-234) to whether the elephant was given proper nutrition (Tr. at 516-517). She is not a veterinary medicine expert, and her testimony is often not well supported by the testimony of the witnesses who hold degrees in veterinary medicine. For instance, the record does not demonstrate that Complainant's veterinary inspectors had recommended a consultation with a nutritionist, but Ms. Juarez concludes that Respondent's failure to do so demonstrates failure to provide adequate veterinary care. Most of the testimony about the need for a nutritionist was speculative and adduced on cross-examination at the hearing.

[6] One example of her fact finding: "I do acknowledge that Mr. Ramos worked with Dr. Schotman to try to provide the care that he believed was appropriate for Ned. I balanced that with the facts of the case and the prior history that we have here." Tr. at 523.

Ms. Juarez made conclusions of fact and law about whether the evidence substantiated the allegation that Respondent had not provided veterinary care for an injury to a tiger's paw. *See* Tr. at 506-507. In addition, rather than referring to the observations that veterinary medical inspector whom Dr. Brunkhorst relied upon when citing Respondent with violations of animal transport conveyances, Ms. Juarez provided her own grounds for finding Respondent in violation of that regulation. Tr. at 518-519.

I, to some degree, credit Ms. Juarez's testimony about the significance of Respondent's prior history of violations. I take official notice of a consent decision and order in AWA Docket Number 99-0041; in *Ramos*, No. 99-0041, 59 Agric. Dec. 296 (U.S.D.A. 2000) (Consent Decision and Order) (CX-53); and of the rulings in other actions involving APHIS and Respondent. CX-1; CX-2; CX-3; CX-4; CX-8; CX-32. I decline to accord substantial weight to the administrative enforcement action that resulted from a default decision wherein the substantive allegations were not litigated. Tr. at 520. I also find merit in Ms. Juarez's opinion regarding Respondent's lack of good faith, considering his transportation and sale of animals after his license was revoked.

Ms. Juarez testified that in each instance where Respondent violated a cease and desist order, the statute requires the assessment of an additional penalty of one-thousand, six-hundred and fifty dollars ($1,650.00). Tr. at 524. She recommended the imposition of a cease and desist order and civil money penalty. Tr. at 529-560. Ms. Juarez declined to propose a specific amount for the penalty.

Respondent argued for mitigation of sanctions in this matter, noting that he and Dr. Schotman had treated the elephant for ulcers, which was ultimately determined to be the cause of its death. Tr. at 378. He regretted his behavior towards Dr. Sofranko but explained that he was "destroyed" when USDA confiscated Ned. Tr. at 377.

I find that the record supports the imposition of a civil money penalty in the amount of $5,000.00 for the willful failure to handle an animal as carefully as possible, relative to Ned's exhibition in September 2008. I

further find that the imposition of an additional penalty of $1,650.00 for violation of a previous cease and desist order is appropriate.

In making my assessment of penalties, I have considered that Respondent has suffered the loss of his animal, although the value of an ailing animal is difficult to ascertain. It is clear from the record that APHIS sought to shield Ned from further exhibition while in a deteriorated state, but it is not at all certain that some action short of confiscation could not have guaranteed that outcome. Certainly, the removal of the animal from Respondent did not assure its improved health and longevity, as it died at its new home.

VI. FINDINGS OF FACT

1. Respondent did not interfere with, threaten, abuse (verbally), or harass an APHIS official in violation of 9 C.F.R. § 2.4.

2. Petitioner's AWA license 58-C-0816 was revoked when default judgment was entered against him in an enforcement action initiated by APHIS and inadequately defended by Petitioner.

3. From October 19, 2009 through on or about November 8, 2009, Respondent operated as a dealer in violation of section 2134 of the Act (7 U.C.C. § 2134) and sections 2.1(a) and 2.10(c) of the Regulations with respect to transporting and selling twenty-six tigers, one liger, two camels, two llamas, and two zebras for use in exhibition, because his AWA license had been revoked.

4. On or about September 13 and 14, 2008, Respondent violated § 2.131(b)(1) when he exhibited the elephant Ned while the animal was in poor physical condition and health, as demonstrated by recurring bouts of symptoms of gastric distress.

5. Respondent did not violate the Act or regulations by failing to use appropriate methods to prevent, control, diagnose, and treat diseases and injuries or by failing to have available emergency, weekend, and holiday care with respect to the elephant Ned, pursuant to 9 C.F.R. § 2.40(b)(2).

6. Respondent did not violate the Act or Regulations by failing to use appropriate methods to prevent, control, diagnose, and treat diseases and injuries or by failing to have available emergency, weekend, and holiday care with respect to a lion, pursuant to 9 C.F.R. § 2.40(b)(2).

7. Respondent did not violate the Act or regulations by failing to provide wholesome, palatable food of sufficient quantity and nutritive value, pursuant to 9 C.F.R. § 3.129.

8. Respondent did not fail to comply with standards for the humane transportation of animals because of the configuration of the vehicle used to convey animals in violation of 9 C.F.R. § 2.100(a) or 9 C.F.R. § 3.138.

9. Respondent failed to timely provide a written plan of environment enhancement to promote the psychological wellbeing of non-human primates in violation of 9 C.F.R. § 3.81.

10. Respondent knowingly failed to obey a cease and desist order when he exhibited an animal that was in poor condition, thereby violating regulations regarding careful handling of animals.

VI. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.

2. Respondent willfully violated the AWA.

3. Respondent's failure to obey a cease and desist order merits the imposition of a penalty of $1,650.00.

4. Respondent's willful failure to handle an animal as carefully as possible in September, 2008, warrants the imposition of a civil money penalty of $5,000.00.

ORDER

Lancelot Kollman Ramos, also known as Lancelot Ramos and Lancelot Kollman, Respondent, and his agents, employees, successors and assigns, directly or indirectly through any individual, corporate or

other device is hereby ORDERED to cease and desist from further violations of the Act and controlling regulations.

Lancelot Kollman Ramos, also known as Lancelot Ramos and Lancelot Kollman, Respondent, shall pay a civil money penalty of six-thousand, six-hundred and fifty dollars ($6,650.00). Within thirty (30) days from the effective date of this Order, Respondent shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

This Decision and Order shall be effective thirty-five (35) days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

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COMMODITY PROMOTION, RESEARCH, AND INFORMATION ACT

COURT DECISIONS

RESOLUTE FOREST PRODUCTS, INC. v. USDA.
Civil Action No. 14-2103 (JEB).
Court Decision.
Filed September 9, 2015.

CPRIA – Administrative procedure – Checkoff orders – *De minimis*, definition of – Discretion of Secretary – Marketing programs – Notice and comment – Orders, exemption from – Proposed rulemaking – Referendum – Remand – Softwood-lumber industry – Softwood Lumber Checkoff Program – Summary judgment.

[Cite as: 130 F. Supp. 3d 81 (D.D.C. 2015)].

United States District Court,
District of Columbia.

MEMORANDUM OPINION

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

"Out of timber so crooked as that from which man is made, nothing entirely straight can be carved." So said Immanuel Kant about humanity; so claims Plaintiff Resolute Forest Products about the lawfulness of compulsory marketing programs developed by private parties and overseen by the U.S. Department of Agriculture.

In 2010 and 2011, Agricultural Marketing Service (AMS), housed within the USDA, assisted members of the softwood-lumber industry in establishing a budding Softwood Lumber Checkoff Order. Checkoff orders are rooted in our nation's history of government support for commodity producers who seek the benefits of collective marketing and promotion. These orders rake in mandatory assessments from all manufacturers and importers of a given commodity. The Commodity Promotion, Research and Information Act (the CPRIA), 7 U.S.C. §§ 7411–7425, empowers many industries—including the softwood-lumber

industry—to work with the USDA to plant the seeds for the cultivation of such collective-marketing programs through the development and issuance of these orders.

In the case of the Softwood Lumber Checkoff Order, however, Resolute believes the rulemaking process was rotten to the core. In a nutshell, it is unhappy with the manner in which assessments have been determined. After protesting the Order before an administrative law judge and appealing that judge's denial, it brought suit before this tribunal. Resolute's Complaint lumbers on at length about problems with the agency's procedures, seemingly having an ax to grind with every step in the promulgation of the Checkoff Order. It raises numerous objections to the notice-and-comment rulemaking process, the agency's deference to the industry's Blue Ribbon Commission that put forward the Order, and the referendum AMS held to obtain industry approval. Plaintiff's claims ultimately branch out into four constitutional challenges to the CPRIA and six allegations of violations of the Administrative Procedure Act. As to the latter category, Plaintiff assails the AMS for mistakes made during the rulemaking process, some of which stem from misstatements in the Federal Register and opaque explanations for its seemingly questionable actions. Both sides have now moved for summary judgment.

Much timber has been felled to produce the administrative record that grew out of the ALJ's adjudication, including hearing logs, Resolute's administrative appeal, and the parties' briefs before this Court. Given that the parties at times camouflage the issues with unclear briefing, the Court was repeatedly forced to leaf through the administrative record itself to find answers. Having now done so, the Court concludes that Plaintiff has generally barked up the wrong tree. Resolute's wooden understanding of the agency's obligations largely does not mesh with the broad discretion the USDA is granted to construct a permissible checkoff order.

Defendants—and not Plaintiff—are therefore entitled to summary judgment on nearly every APA count. Yet on one issue Resolute hits the nail on the head. Defendants fall short of providing an adequate explanation for the threshold chosen to exempt certain smaller industry players from the Order. While it often goes against the grain to remand

without vacatur, in this instance that remedy is appropriate, so as not to prematurely uproot an ongoing checkoff order. On one APA count alone, then, the Court will deny Defendants' Motion for Summary Judgment and remand to the USDA. Such an outcome also obviates the need to rule on the constitutional questions, which must lie dormant for another season.

I. BACKGROUND

Puns aside, given the complexities of the administrative process—and the often picayune nature of Plaintiff's grievances—a contextual overview is necessary first. The Court thus begins by briefly introducing the parties to this lawsuit and then moves on to a longer explanation of the CPRIA and the process through which the Softwood Lumber Checkoff Order was developed and implemented. Caution, fair reader, for into the administrative-lawmaking thicket we go.

A. Parties

Plaintiff Resolute Forest Products, Inc., is an American company incorporated under the laws of Delaware, with significant investments in the production of Canadian softwood lumber, paper, and other forest products. *See* Compl., ¶ 18. Its principal place of business is in Canada, where the majority of its sawmills are located. *See id.* Plaintiff imports softwood lumber into the United States and is thus subject to assessment under the Softwood Lumber Checkoff Order. *See* Def. MTD/MSJ at 2.

Defendants include the United States Department of Agriculture and its Secretary, Tom Vilsack, who is sued in his official capacity. *See* Compl., ¶ 20. The Secretary is charged with administering checkoff orders under the CPRIA. *See* 7 U.S.C. §§ 7411–25. Most of the Secretary's functions under the CPRIA have been delegated to the Under Secretary of Agriculture for Marketing and Regulatory Programs and then further "sub-delegated" to the Administrator of the Agricultural Marketing Service, which administers, among other things, marketing orders. *See* Def. MTD/MSJ at 5. For readability, the Court will here reference the Secretary, the USDA, and AMS interchangeably.

B. The CPRIA and the Softwood Lumber Checkoff Program

Congress has long regulated the promotion and sale of agricultural commodities by enabling the federal government to coordinate with industries to advance such promotional efforts. *See Avocados Plus, Inc., v. Veneman,* 370 F.3d 1243, 1245 (D.C.Cir.2004). For most agricultural commodities, limited product differentiation means that if one producer promotes its commodity product, all producers are likely to benefit, creating free-rider problems. *See* William Connor Eldridge, *United States v. United Foods: United We Stand, Divided We Fall—Arguing the Constitutionality of Commodity Checkoff Programs,* 56 Ark. L.Rev. 147, 159 (2003). The CPRIA thus authorizes the Secretary of Agriculture to establish "checkoff" programs, which impose on domestic manufacturers and foreign importers of an agricultural commodity a mandatory assessment on the sale of that commodity.

Marketing programs funded by these checkoff orders can be famously effective, producing well-known classics of American advertising such as "Beef, it's what's for dinner" and "Milk, it does a body good." *See* Compl., ¶ 2. Among the agricultural commodities covered under the CPRIA are "products of forestry," *see* 7 U.S.C. § 7412(1)(D), including softwood lumber, a term the USDA uses to refer to certain " 'lumber and products' manufactured from 'one of the botanical groups of trees that have needle-like or scale-like leaves, or conifers.' " Def. MTD/MSJ at 1. Softwood lumber is used in the United States primarily in residential home construction. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed.Reg. 46,185, 46,186 (Aug. 2, 2011).

After facing one of the "worst markets in history" in the late aughts, in 2010 members of the softwood-lumber industry sought to benefit from such a campaign. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 75 Fed.Reg. 61,002, 61,005 (Oct. 1, 2010). The CPRIA authorizes the Secretary to issue an order in response to requests by associations representing producers of a particular commodity. *See* 7 U.S.C. § 7413(a)(1)(C). Industry participation is critical: each checkoff order *must* also establish an industry group that will carry out the program. *See id.* § 7414(b)(1). In this case, it was the Blue Ribbon Commission (BRC), composed of 21 softwood-lumber chief-executive officers and business leaders, which

submitted the proposed Softwood Lumber Checkoff Order to AMS. *See* Pl. Opp./MSJ at 6; 75 Fed.Reg. at 61,005. AMS modified this proposed Order, then determined it was "consistent with and would effectuate the purposes" of the CPRIA. *See id.* at 61,016. Announcing its intention to implement the Checkoff Order, AMS published a notice of proposed rulemaking in the Federal Register. *See id.* at 61,002. The proposed Order announced an initial assessment rate of $0.35 per thousand board feet of softwood lumber shipped within or imported into the United States. *See id.*

At the core of the dispute between the parties is the fact that the Order does not apply to *all* softwood-lumber manufacturers and importers. Under the CPRIA, the Secretary is authorized "to exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order." 7 U.S.C. § 7415(a)(1). To this end, AMS stated that the proposed Order would exempt from assessment all entities that domestically ship or import less than 15 million board feet per fiscal year. *See* 75 Fed.Reg. at 61,002. As we will see, whether the 15 million-board-feet exemption was a "de minimis quantity" under the CPRIA is central to the resolution of the dispute.

Following the well-worn notice-and-comment-rulemaking playbook, AMS invited interested parties to submit comments on the proposed Order. *See id.* at 61,016. In a contemporaneous press release, AMS stated that "[i]f a majority of those commenting favored USDA moving forward" with the proposed Order, "a referendum would need to be held," and a majority of the voters by both number and volume would need to support the program in order for AMS to implement it. *See* USDA Seeks Comments on Establishing New Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, AMS 189–10 (Oct. 1, 2010) (Administrative Record, AR2105). In response, AMS received 55 comments in total, the majority of which it deemed supportive of the proposed Order. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed.Reg. 22,757, 22,770 (Apr. 22, 2011). Trees were not spared during this process, as AMS responded in great detail to these various comments. *See id.* at 22,770–75. Resolute, nevertheless, argues that AMS's actions related to the notice-and-comment process were in violation of the APA, *see* Compl., ¶¶ 41–53, as discussed in more detail

below.

Finding the industry largely in favor of the proposed Order, AMS then announced a referendum among all producers who would be assessed under it. *See* 7 U.S.C. § 7417(a)(1) ("For the purpose of ascertaining whether the persons to be covered by an order favor the order going into effect, the order may provide for the Secretary to conduct an initial referendum among persons to be subject to an assessment...."). AMS announced the procedures and timing of the referendum in the Federal Register, and it noted that every non-exempt softwood-lumber domestic manufacturer or importer was eligible to vote. *See* 76 Fed.Reg. at 22,775. Resolute contests the manner in which AMS conducted the referendum, including its determination of which producers and importers were eligible. *See* Compl., ¶¶ 69–74.

AMS received a total of 173 completed ballots from the referendum, 159 of which it deemed valid. *See* Administrative Law Hearing, Witness Testimony of Sonia Jimenez, Director of the Promotion and Economics Division of the Fruit and Vegetable Program of the AMS at 319 (Jan. 28, 2013) (AR3316) [hereinafter "Testimony of Sonia Jimenez"]. Of those 159 ballots returned, 107 favored the Order, *see id.,* constituting 67 percent of those voting in the referendum and "80 percent of the volume represented in the referendum." 76 Fed.Reg. at 46,185. The results of the referendum encouraged AMS to move forward with the Order, although not without protest from Resolute. AMS published the final Order in the Federal Register in August of 2011. *See id.* at 46,185–46,202.

In response to AMS's implementation of the Order, Resolute filed a petition with the USDA in accordance with the CPRIA on October 28, 2011. *See* Compl., ¶ 81; 7 U.S.C. § 7418(a)(1)(A) ("A person subject to an order ... may file with the Secretary a petition ... stating that the order ... is not established in accordance with law; ..."). Based on its 2010–calendar–year sales, Plaintiff imported less than 15 million board feet during 2010 and was thus ineligible to vote in the referendum. *See In Re: Resolute Forest Products Petitioner,* No. 120040, 2014 WL 1993757, at *5–6 (U.S.D.A. Apr. 30, 2014). Resolute later began to import more than 15 million board feet per year, however, and has been paying assessments on imports above that threshold since January 2012. *See* Pl. Rep. at 7. Resolute ultimately amended its protest, including a litany of

constitutional challenges to the CPRIA, and these claims are mirrored in the counts it brings before this Court. *See* First Amended Petition to Terminate or Amend USDA's Softwood Marketing Order (June 22, 2012) (AR0236).

Plaintiff's first two adjudicative bites at the apple met with little success. Administrative Law Judge Jill S. Clifton conducted a four-day hearing on Resolute's petition from January 2831, 2013, at the USDA in Washington, D.C. *See* Compl., ¶ 89. Judge Clifton denied Resolute's petition, affirming both the Softwood Lumber Checkoff Order and the CPRIA. *See In re: Resolute,* 2014 WL 1993757, at *12. Undeterred, Plaintiff then filed a timely appeal to the USDA Judicial Officer on June 12, 2014. *See* Compl., ¶ 118. Judicial Officer William G. Jenson denied Resolute's appeal in a decision dated November 26, 2014. *See In re: Resolute Forest Products, Petitioner,* No. 12–0040, 2014 WL 7534275 (U.S.D.A. Nov. 26, 2014).

Plaintiff now brings its case before this Court, seeking review of the denial of its petition, as the CPRIA allows. *See* 7 U.S.C. § 7418(b)(1) ("The district court of the United States ... shall have jurisdiction to review the final ruling on the petition...."). Among its constitutional claims are that the CPRIA unconstitutionally delegates executive and legislative authority to private parties and violates the due-process rights of producers and importers. As touched on above, Plaintiff also alleges APA violations in nearly every action taken by AMS in the development and application of the Checkoff Order. In response, Defendants have now filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. Plaintiff responded by filing a Cross–Motion for Summary Judgment.

II. LEGAL STANDARD

In the typical case, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Holcomb v. Powell,* 433 F.3d 889, 895 (D.C.Cir.2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Liberty Lobby,* 477 U.S. at 248,

106 S.Ct. 2505; *Holcomb,* 433 F.3d at 895. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb,* 433 F.3d at 895.

Although styled Motions for Summary Judgment, the pleadings in this case more accurately seek the Court's review of an administrative decision. Challenges under the CPRIA proceed under the Administrative Procedure Act's familiar "arbitrary and capricious" standard of review. *See* 7 U.S.C. § 7418(b)(1); 5 U.S.C. § 706(2)(A). Because of the limited role federal courts play in reviewing such administrative decisions, the typical Rule 56 summary-judgment standard does not apply to the parties' dueling motions on Resolute's APA claims. *See Sierra Club v. Mainella,* 459 F.Supp.2d 76, 89–90 (D.D.C.2006). Instead, in APA cases, "the function of the district court is to determine whether or not ... the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *See Bloch v. Powell,* 227 F.Supp.2d 25, 31 (D.D.C.2002) (citing *Richards v. INS,* 554 F.2d 1173, 1177 (D.C.Cir.1977)).

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "narrow" standard of review—which appropriately encourages courts to defer to the agency's expertise, *see Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)—an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). "In reviewing agency action under that standard, a court is not to substitute its judgment for that of the agency," *GameFly, Inc. v. Postal Regulatory Comm'n,* 704 F.3d 145, 148 (D.C.Cir.2013) (citation and internal quotation marks omitted), nor to "disturb the decision of an agency that has examine[d] the relevant data and articulate [d] ... a

rational connection between the facts found and the choice made." *Americans for Safe Access v. DEA,* 706 F.3d 438, 449 (D.C.Cir.2013) (internal quotation marks and citation omitted). On the other hand, where the agency has not provided a reasonable explanation for its actions, "[t]he reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm,* 463 U.S. at 43, 103 S.Ct. 2856 (1983) (citation and internal quotation marks omitted). A court should nevertheless "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (quoting *Bowman Transp. Inc. v. Arkansas–Best Freight System,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

III. ANALYSIS

The Court begins, as it must, with standing. Once satisfied of this jurisdictional prerequisite, it next considers Plaintiff's APA claims. Determining that Resolute prevails on one, the Court thereafter assesses the proper remedy. It concludes with a brief discussion of the fate of the constitutional questions raised herein.

A. Standing

As a threshold matter, Resolute must establish standing to pursue its claims, which Defendants argue it cannot do. Article III of the United States Constitution limits the jurisdiction of the federal courts to resolving "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. A party's standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To maintain standing, a plaintiff must, at a constitutional minimum, meet the following criteria. First, it "must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical...." *Id.* (citations and internal quotation marks omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id.*

(alterations in original) (citation and internal quotation marks omitted). Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Id.* at 561, 112 S.Ct. 2130 (citation omitted). A "deficiency on any one of the three prongs suffices to defeat standing." *U.S. Ecology, Inc. v. U.S. Dept. of Interior,* 231 F.3d 20, 24 (D.C.Cir.2000). In addition, "a plaintiff must demonstrate standing for each claim he seeks to press...." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). In the present case, Resolute brings four causes of action alleging violations of the Constitution (Counts I–IV), as well as six claims that the USDA violated the Administrative Procedure Act (Counts V–X).

For all its causes of action, Resolute's injury-in-fact is straightforward: it has been paying assessments under the Order, which it claims is unlawful, since January 2012—at this point, for over three and a half years. *See* Pl. Rep. at 7. Plaintiff's redressability threshold is similarly satisfied, since a judgment voiding the Order would alleviate Plaintiff's alleged injury. Defendants, however, raise two central challenges to Plaintiff's satisfaction of the causation factor. First, AMS contends that because the referendum was technically optional—the Secretary was not required to conduct it before implementing the order—it cannot be said to have caused Plaintiff's injury. To similar effect, Defendants relatedly maintain that because the Secretary has discretion to cancel the Checkoff Order at any time, Resolute cannot show that the operation of the *referendum* "caused" its injury. Second, Defendants assert that because Resolute cannot show that the alleged improprieties in the notice-and-comment and referendum procedures "caused" the referendum to be approved, it does not have standing to challenge it. The Court addresses each of these arguments in turn.

1. <u>The Secretary's Discretion</u>

USDA's primary challenge to Resolute's standing focuses on the discretion the CPRIA grants the Secretary both to call a referendum and to decide whether to implement a checkoff order. The Secretary may either hold an initial, optional referendum before implementing a proposed order, *see* § 7417(a)(1), or else implement a required referendum within three years of the first assessments collected under an

order. *See id.* § 7417(b)(1)–(2). The Secretary also retains the discretion to suspend or terminate an order *at any time* under section 7421(a), and USDA contends that he is also not required to authorize a checkoff order—even when it is approved by a referendum. *See* Def. Opp./Rep. at 4. Since the Secretary can terminate an Order at any time—the relief Resolute seeks—Defendants maintain that Resolute cannot show that the referendum procedures, as opposed to the Secretary's discretion, caused its injury. *See id.* at 3–4.

Plaintiff initially contests whether the Secretary can *in practice* ignore a referendum approving an order, but even if he could, the Court is not persuaded that this freedom defeats Plaintiff's standing. This is because, at bottom, the statutory scheme clearly indicates that Congress required the Secretary to obtain industry approval sooner or later. While he has multiple options under the statute as to *when* to conduct the referendum, he *must* eventually hold one and obtain industry approval.

For example, he can implement an order without seeking approval via referendum. If he takes this approach, however, he must conduct a referendum "not later than 3 years after assessments first begin under the order." 7 U.S.C. § 7417(b)(2). Alternatively, he can bypass the required (b)(2) referendum if he conducts an "[o]ptional referendum" under § 7417(a)(1)—the choice the Secretary made here. The CPRIA makes clear, however, that the Secretary must not continue an order that has been disfavored through a referendum. *See id.* § 7421(a) (The "Secretary shall suspend or terminate an order ... if the Secretary determines that the order ... is not favored by persons voting in a referendum...."). The combined effect of sections 7417 and 7421 is that the Secretary must within three years conduct a referendum and obtain industry approval. If he does not, he must terminate any order that has already been implemented. Given this, if the referendum in question were unlawful, the Secretary's ability to maintain the Order in the absence of industry approval altogether would be abbreviated at best. Resolute has been paying assessments since January 2012, *see* Pl. Rep. at 7, and more than three years has passed since then, so the Secretary would have to have obtained industry approval via referendum by now. For this reason, the Court is persuaded that Plaintiff has standing to challenge the referendum and Checkoff Order.

2. But-for Causation of the Referendum

Defendants' second standing argument is that Resolute cannot demonstrate that, but for the alleged misdeeds of USDA, the referendum participants would have rejected the Order. They claim that Plaintiff has not shown how establishing an incorrect exemption threshold, using an incorrect period to determine eligibility to vote, implementing incorrect procedures during the referendum, permitting the spread of misinformation regarding the terms of the Order, and/or excluding voters from the referendum led to a materially different outcome. *See* Def. MTD/MSJ at 23, 25, 27, 28. According to Defendants, Resolute's failure to state directly that these defects are the "but for" cause of the referendum's result means that Resolute cannot show that the USDA's actions caused its injury. *See* Def. Opp./Rep. at 7. Plaintiff responds that it need not "overcome the impossible task of proving a referendum on remand would produce a different result." Pl. Rep. at 5. It points to 7 U.S.C. § 7418(a), which grants any person subject to an order issued under the CPRIA the right to file a petition with the Secretary stating that an order is not established in accordance with law. *See id.* at 5. And section 7418(b)(1) of the CPRIA grants the district court jurisdiction to review the final ruling on such petitions.

Here, *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89 (D.C.Cir.2002), is instructive. In that case, the D.C. Circuit held that "[a] plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Id.* at 94. The court reasoned that, otherwise, section 553 of the APA requiring notice-and-comment rulemaking would be "a dead letter," since it would be practically impossible for a plaintiff to show that had she been given the opportunity to submit a comment, a substantively different outcome would have occurred. *See id.* at 95.

Although Plaintiff has not provided evidence that "the results of the referendum would have disfavored the Order if the voters allegedly excluded from participation had been permitted to vote or if a different exemption threshold had been used," Def. Opp./Rep. at 7, neither the case law of this Circuit nor the statutory scheme suggest such evidence is required for standing. Were this not the case, section 7418(b)(1) would

similarly be "a dead letter," as few plaintiffs would be able to show that an unlawfully administered referendum would have yielded a different outcome in the absence of the unlawful behavior. As stated above, Congress clearly desired industry approval of mandatory checkoff orders, and it installed the referendum procedure as a means to ensure it. It is enough that Resolute alleges that the implemented order—and the referendum conducted to approve it—were "not established in accordance with law." *See* 7 U.S.C. § 7418(a)(1)(A).

B. APA Claims

With this initial brush-clearing exercise completed, the Court now gets to the core of Plaintiff's complaints. There is some discontinuity between the six counts Plaintiff lays out in its Complaint and the six issues it raises in its Motion for Summary Judgment. In essence, Resolute's objections to the Order manifest in what are effectively two categories of alleged violations of the APA: in the first are four claims that AMS acted improperly under the CPRIA, and in the second are two claims in which Resolute contests AMS's interpretation of the Act. The Court follows suit, first separately resolving the four procedural challenges to the rulemaking process, then independently considering Resolute's two interpretive challenges to the terms of the statute itself.

1. Notice–and–Comment Procedures

The parties first scuffle over whether AMS's decision to conduct the referendum was reached in improper fashion. Resolute identifies three alleged problems in particular: first, AMS improperly treated notice-and-comment proceedings as a mechanistic vote of commenters instead of substantively engaging with the comments; second, AMS gave too much weight to comments submitted by the Blue Ribbon Commission and affiliated individuals; and third, AMS was complicit in the BRC's "misinformation campaign." *See* Pl. Opp./MSJ at 33–37. These claims are barely tenable.

First, Resolute charges that AMS unlawfully and mechanistically used notice-and-comment rulemaking "to determine a majority for or against a proposed rule," *id.* at 34, instead of substantively engaging with these comments as required by the APA. To this end, it points to an

official press release in which AMS announced that "[i]f the majority of those commenting favored USDA moving forward with a softwood lumber program, prior to final implementation, a referendum would need to be held...." USDA Seeks Comments on Establishing New Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, AMS 189–10 (Oct. 1, 2010) (AR2105). In contrast, the notice in the Federal Register—which also invited comments as part of the notice-and-comment rulemaking—did not reference the need for a majority of comments to be favorable. *See* 75 Fed.Reg. at 61,002–16.

AMS received a total of 55 comments—52 non-duplicative—concerning the proposed Order, and in a subsequent notice, it provided analysis. It deemed 41 supportive of the proposed Order, seven opposed, three not to have taken a position, and one entirely unrelated. *See* 76 Fed.Reg. at 22,770. Of the 41 supportive comments, AMS designated 27 as supporting the proposed Order without changes and 14 as supporting it with recommended changes. *Id.* In typical notice-and-comment fashion, AMS provided lengthy analysis and consideration of all of these comments. *See id.* at 22,770–75.

Given the agency's substantive consideration of the comments it received, it could hardly be said to have treated notice-and-comment rulemaking as "a vote," as Plaintiff contends. *See* Pl. Opp./MSJ at 33. In addition, Defendants rightly note that government press releases are " 'Executive Branch communications that express federal policy but lack the force of law' and thus 'are merely precatory.' " Def. Opp./Rep. at 19 (quoting *Barclays Bank v. Franchise Tax Bd.,* 512 U.S. 298, 330, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994)); *see also CropLife Am. v. E.P.A.,* 329 F.3d 876, 883 (D.C.Cir.2003) (concluding that for press release to be subject to judicial review, it must bind private parties or agency itself with force of law). Neither the agency's formal notice statement, *see* 75 Fed.Reg. at 61,002–16, nor its analysis of the comments, *see* 76 Fed.Reg. at 22,757–84, in any way announce, suggest, or imply that it treated notice-and-comment rulemaking as a straight up-down "vote." Since both the case law and the agency's practice contravene Plaintiff's stance, the Court concludes that Defendants acted neither arbitrarily nor capriciously in this regard.

Notwithstanding its protest that AMS treated notice and comment as

"a vote," Plaintiff also takes issue with the way the Service handled comments from "members of the proponent group" (*i.e.,* the Blue Ribbon Commission), including failing to recognize that some members of the BRC submitted multiple comments under different guises. *See* Pl. Opp./MSJ at 35. Resolute also objects to "USDA officials treat[ing] conditional comments ... as 'neutral' or supporting, notwithstanding that the changes demanded to the proposed rule generally were not made in the final rule...." *Id.* Neither challenge holds water.

To begin, the APA does not require the agency to incorporate every suggestion made during notice and comment into the final rule. Such an exacting obligation would grind the federal government to a halt. "[I]t is settled that 'the agency [is not required] to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking.' " *Pub. Citizen, Inc. v. F.A.A.,* 988 F.2d 186, 197 (D.C.Cir.1993) (quoting *Automotive Parts & Accessories Ass'n v. Boyd,* 407 F.2d 330, 338 (D.C.Cir.1968)) (alterations in original). "The agency need only state the main reasons for its decision and indicate that it has considered the most important objections." *Simpson v. Young,* 854 F.2d 1429, 1435 (D.C.Cir.1988). Nor is it the Court's job to second-guess an agency's determination: "We do not weigh the evidence; we merely examine the record to see if there is evidence, which if accepted by the Secretary, supports the determination of the agency." *Nat'l Soft Drink Ass'n v. Block,* 721 F.2d 1348, 1354 (D.C.Cir.1983). How BRC members submitted their comments, moreover, seems of little moment. At the end of the day, many reams of paper were used as the agency compiled the administrative record, and AMS's published analysis of the comments it received was lengthy and substantial, including its analysis of "Comments Opposed." *See* 76 Fed.Reg. at 22,773–74. Given this, the Court is more than satisfied that AMS adequately fulfilled its statutory obligation.

Finally, Resolute also raises alleged "misinformation" disseminated by the Blue Ribbon Commission, which it insinuates AMS was "complicit" in propagating. *See* Pl. Opp./MSJ at 3637. This misinformation, it complains, was "false, misleading, and contrary to law." *Id.* Defendants retort that such allegations—given longstanding precedents—fail to state a claim upon which relief can be granted. *See* Def. Opp./Rep. at 28. They cite to *United States v. Rock Royal Co-*

operative, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), which first established the principle that even if proponents of a marketing order make "widespread public misrepresentations" in connection with the pre-issuance referendum, this alone is not a sufficient basis for relief for parties aggrieved by the Order. *See id.* at 556, 59 S.Ct. 993. Instead, "the validity of the Act and the provisions of the Order must be assumed," absent "evidence that any [voter] misunderstood" what the Order entailed. *See id.* at 558, 59 S.Ct. 993.

Here, AMS mailed to each eligible voter a packet including: "(1) a ballot; (2) voting instructions; (3) a description of applicable terms and definitions; (4) a postage-paid, return-addressed envelope; and (5) a summary of the program." Letter from AMS to Softwood Lumber Domestic Manufacturers and Importers (May 16, 2011) (AR2267). Although Resolute provides evidence of misstatements before the referendum took place, *see* Pl. Opp./MSJ at 36, it provides no evidence that they made their way into the official voter packet, or that they in any way led to a material misunderstanding by voters. As the Judicial Officer who rejected Resolute's administrative appeal noted, "Resolute does not cite any provision of the Administrative Procedure Act that requires an agency conducting a rulemaking proceeding to refute misleading statements by proponents or opponents of the rulemaking proceeding." *In Re: Resolute,* 2014 WL 7534275, at *13. In light of the presumption established by *Rock Royal,* and without evidence that such misstatements materially misled voters, Resolute's claim that AMS acted improperly here fails.

2. Number of Eligible Referendum Voters

Resolute's second objection is that the agency publicly misrepresented the number of voters eligible to participate in the referendum. Plaintiff is particularly concerned that AMS twice published in the Federal Register that " 'about 363 domestic manufacturers and 103 importers would pay assessments under the Order', and thus were eligible to vote,"—466 voters in total. *See* Pl. Opp./MSJ at 28 (quoting 76 Fed.Reg. at 22,757, 22,767 and 76 Fed.Reg. at 46,185, 46,190). Despite these public pronouncements, Resolute later learned—only after resorting to a FOIA request to obtain the information—that, in fact, AMS had "privately determined there were only 311 companies eligible to vote

in the referendum." *Id.* (citing Letter from Valerie L. Emmer–Scott, USDA FOIA Officer, to Elliot J. Feldman (July 27, 2011) (AR0999–1004)). This discrepancy, Resolute argues, ***95** is substantial, since the difference "represents almost the total number of all of the valid ballots AMS received in the referendum"—107. *See* Pl. Opp./MSJ at 29. Although Plaintiff does not expressly say so in its briefs, the Court presumes Resolute to suggest that some sort of impropriety is afoot in leaving out over 100 of the announced eligible voters.

Though the Court agrees that this discrepancy in estimates is awkward, ultimately the agency's actions do not rise to the level of an APA violation, as will be explained. Resolute does identify lamentable mistakes that do not paint the agency in a favorable light, and Defendants compound this poor image by not clearly fessing up to the mistake. Defendants are not clear anywhere in their briefing about exactly how these differing figures came to be—instead, they hide the ball by stating simply that "AMS explained why its prediction ... did not match the number ... found eligible to vote in the referendum." Def. Opp./Rep. 27. Resolute is understandably upset by the agency's evasion here, a frustration shared by the Court.

As explained below, the different figures appear to be the result of transposing numbers relating to a different statute—*i.e.,* the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*—which requires federal agencies to estimate the impact of any proposed rule on small businesses. Given the complex regulatory environment that modern federal agencies must navigate, it is understandable that such mistakes can and will happen. But Defendants should be forthright in admitting them, rather than forcing the Court to sift through the lengthy administrative record to figure it out. This is especially so considering that the function of judicial review under the APA is to ensure that agencies can provide reasoned explanations for their rulemaking actions, a task made more difficult by a briefing strategy that obscures the agency's reasoning. *See E. Alabama Med. Ctr. v. Shalala*, 925 F.Supp. 27, 32 (D.D.C.1996) ("The agency must supply a reasoned basis for its action, supported by substantial evidence on the record ....") (citing *State Farm*, 463 U.S. at 42, 103 S.Ct. 2856).

In light of the opacity of Defendants' explanation, the Court

independently consulted the excerpted pages of the administrative record provided in the Joint Appendix. Based on the testimony of Sonia Jimenez—then-director of the Promotion and Economics Division of the Fruit and Vegetable Program of AMS—at the Administrative Hearing, AMS arrived at the estimate of 363 domestic manufacturers and 103 importers by calculating the number of manufacturers and importers who sold less than *25 million* board feet per year. *See* Testimony of Sonia Jimenez at 342–45 (AR3339–42). This higher board-feet-per-year rate—25 million as opposed to the 15 million in the Order—was chosen because a business manufacturing or importing "25 million feet [per year] would approximately be considered a small business" for purposes of the RFA. *See id.* at 342–43 (AR3339–40); *see also* Regulatory Flexibility Act, 5 U.S.C. § 602(a)(1) (describing agency reporting requirements for rules that are "likely to have a significant economic impact on a substantial number of small entities"). After AMS calculated the number of small businesses who manufacture or import 25 million board feet per year or less, it seems the Service mistakenly used this figure to estimate the number of domestic manufacturers and importers that would *not* be exempted under the Order. *See* Testimony of Sonia Jimenez at 343–45 (AR3340–42).

Although mistakes alone do not rise to the level of an APA violation, the Court is nonetheless troubled that AMS used *both* the wrong threshold—25 million board feet per year as opposed to 15 million—and *also transposed the number of companies *not exempted* with the number of companies *exempted.* Despite this, the Court is satisfied that such mistakes did not affect the referendum because AMS fixed the error before it became material. Shortly before the referendum was conducted, "AMS made certain inquiries ... from which it concluded that a total of 311 domestic manufacturers and importers would be eligible to vote in the referendum." Def. Opp./Rep. at 27.

Defendants' briefs, unfortunately, never directly identify how AMS ultimately arrived at the 311 total either. Clearly explaining the source of the error—and how the correct total was ultimately obtained—is especially important because only with the complete factual picture can the Court determine whether AMS has a reasoned basis for its actions. *See Shalala,* 925 F.Supp. at 32. Instead, the Court was once more forced to make sense of the abbreviated portions of the administrative record

excerpted in the Joint Appendix. Based on those excerpts provided, the agency seems to have determined the number of eligible voters by consulting with the industry's trade publication Random Lengths,[1] eight of the grading agencies that inspect softwood lumber for compliance with industry standards, and the BRC, making "calls to determine which of those people were eligible to vote, and by Customs data for 2010." Testimony of Sonia Jimenez at 326 (AR3323).

When all is said and done, the Court does not believe this difference rises to the level of being either arbitrary or capricious, given its ultimately inconsequential nature. In other words, the Court, is satisfied—just as the Judicial Officer was—that the disparity between the estimate published in the Federal Register and the actual number of ballots sent out does not establish that AMS excluded any eligible voters from participation in the referendum, and Plaintiff has provided no evidence to the contrary. Although Defendants were not forthright in the source of the error or in how the correct number was obtained, they nevertheless clear the relatively low bar established by the APA.

3. Referendum Procedures

Among the myriad charges Resolute levels at Defendants is that "AMS did not conduct the ... referendum in accordance with fundamental standards generally accepted by professional survey research methodologists." Pl. Opp./ MSJ at 37. Plaintiff yet again raises some genuinely dismaying problems with AMS's conduct during the referendum, but once more, these charges do not rise to the level of an APA violation. The CPRIA clearly states that "[a] referendum conducted under this section shall be conducted in the manner determined by the Secretary to be appropriate." 7 U.S.C. § 7417(g)(1). Given the broad discretion Congress granted the Secretary, *cf. Freeman v. Hygeia Dairy Co.,* 326 F.2d 271, 273 (5th Cir.1964) ("[T]he details of a [similar

[1] In the transcript of Jimenez's testimony at 326 (AR3323), she is reported to have said "random months," rather than "Random Lengths," but this has been corrected in the excerpt provided in the Judicial Officer's decision as "Random Lengths." *See In Re: Resolute*, 2014 WL 7534275, at *11. Random Lengths is the trade publication for the softwood-lumber industry. *See* http://www.randomlengths.com/ (last visited Sept. 8, 2015). Given the correction in the ALJ's ruling, the Court assumes this was merely a transcription error.

checkoff order] referendum, and the manner in which it is conducted, must be left exclusively in the hands of the Secretary."), Resolute fails to identify clearly how he has fallen short of this standard.

Instead, in a novel gambit, it points to *other* regulatory requirements it alleges Defendants unlawfully neglected to comply with and contends that such omissions constitute violations of the APA. Like a square peg in a round hole, Resolute's arguments here do not quite fit. Among them is that AMS's conduct in overseeing the referendum did not comply with purportedly mandatory USDA departmental regulations, one of which establishes rules related to "the collection of information and recordkeeping requirements imposed by USDA agencies on individuals...." USDA Departmental Regulation No. 3410–001 (Information Collection Activities—Collection of Information from the Public, May 6, 2009) at 1 (AR1138). Yet Resolute does not plainly connect the dots as to how AMS fell short of DR 3410–001 and what consequences should follow under the APA or the CPRIA. Instead, it simply raises incidental issues such as the fact that "USDA did not have the ballots [for eligible voters in Québec] translated into French, which is the official language of Québec." Pl. Opp./ MSJ at 41. This would hardly pose an inconvenience to companies that actively participate in U.S. markets by importing millions of feet of softwood lumber per year, and Resolute does not even identify just how this is an action required under DR 3410–001, let alone one whose omission warrants vacating the entire Checkoff Order.

Though the parties never spell it out clearly, to the Court's best understanding, DR 3410001 appears to have been promulgated in furtherance of the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521. The PRA "requires agencies to provide detailed justification and supporting explanations of how the information will be collected and why the information collection is essential to an agency's mission." DR3410–001 at 12 (AR1149). AMS's conduct here, however, was aimed at satisfying the CPRIA's referendum requirement—not to initiate a "set of questions or recordkeeping requirements ... used by Federal agencies to collect information for statistical purposes...." *Id.* Even if the Secretary did somehow violate DR 3410–001 in conducting the referendum—a picture that Resolute has not colored in with sufficient detail—Resolute also does not elucidate why such violations are so material as to render

the entire Checkoff Order void, rather than simply making the USDA susceptible to whatever sanctions may arise under DR 3410–001 or the PRA. *See, e.g., id.* at 5 (AR1142) ("Failure to meet such obligations places the Department at risk of incurring a paperwork violation.").

In a similar vein, Plaintiff argues that AMS was subject to Office of Management and Budget guidelines "as to the manner in which it collects information through a referendum." Pl. Opp./MSJ at 39. In particular, Resolute argues that this means that Defendants are required to turn over the list of eligible voters to whom AMS sent ballots during the referendum. *See* Compl., ¶ 190–91. Defendants disagree, and so does the Court. Resolute states that OMB guidelines apply without articulating why. In contrast, Defendants clearly identify that "OMB Standards apply by their terms to 'statistical survey[s],' i.e., to 'census[es],' 'sample[s] of ... target population[s],' or other 'data collection[s] whose purposes include the description, estimation, or analysis of the characteristics of groups, organizations, segments, activities, or geographic areas.' " Def. Opp./Rep. at 26 (quoting Office of Management Budget Standards and Guidelines for Statistical Surveys 35 (Sept.2006) (AR1206)) (alterations in original). The Court does not understand the purpose of a referendum conducted in furtherance of the CPRIA to be one of "description, estimation, or analysis of the characteristics of" the softwood-lumber industry. *See id.* Neither did the judicial officer reviewing the administrative law judge's denial of Resolute's claims. *See In Re: Resolute*, 2014 WL 7534275, at *15 ("The Softwood Lumber Order initial referendum was not a census ... [, and] Office of Management and Budget Guidelines related to data collection are not relevant to [it]....").
AMS's purpose was to conduct an anonymous thumbs-up, thumbs-down vote on the proposed Checkoff Order. Given the broad discretion the Secretary has to conduct this referendum, as discussed at length above, Resolute's argument here crumbles.

4. Representative Period for Referendum Voter Eligibility

Next among Resolute's complaints is that the Department acted unlawfully in determining the "representative period" for referendum voter eligibility. *See* Pl. Opp./MSJ at 3132. It challenges the Secretary's use of the "representative period" of January 1–December 31, 2010, to determine eligibility for participation in the referendum. Plaintiff argues

that because the "representative period" specified—calendar year 2010—was the "worst year of softwood lumber production and importation in, perhaps, 30 years, ... [it] therefore was not a 'representative period' as required by" the CPRIA. *See id.* at 32 (quoting 7 U.S.C. § 7417(a)(1)).

The agency is once more squarely in the right. The CPRIA could not be clearer in delegating broad discretion to the Secretary: "a representative period [as] determined by the Secretary." 7 U.S.C. § 7417(a)(1). The Secretary's explanation for this selection—that "January 1–December 31, 2010, was the most recent calendar year preceding the pre-issuance referendum"—is manifestly reasonable. *See* Def. Opp./Rep. at 24. Although 2010 in retrospect was a peculiar year for the industry, as Plaintiff itself acknowledges, "such uncertainty may always exist in programs spanning years...." Pl. Opp./MSJ at 33. Under APA review, the Court's role is not to second-guess an agency when it has provided a reasonable explanation, *see State Farm,* 463 U.S. at 43, 103 S.Ct. 2856, and so Resolute's argument fails on this count as well.

5. Certifying Approval of the Referendum

In addition to the aforementioned four APA challenges, Resolute also raises two issues with AMS's actions that involve its interpretation of the CPRIA. Both challenge the Secretary's interpretation of potentially ambiguous statutory terms. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear[,] ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *City of Arlington, Tex. v. FCC,* ––– U.S. ––––, 133 S.Ct. 1863, 1868, ––– L.Ed.2d –––– (2013) (quoting *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778.

Plaintiff's first interpretive challenge is that AMS did not comply

with any of the CPRIA's permitted pathways to obtain industry approval of an order. The statute instructs:

> An order may provide for its approval in a referendum—
> (1) by a majority of those persons voting;
> (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or
> (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.

7 U.S.C. § 7417(e). In reading the three statutory options together, the Court understands option (e)(1) to require a simple numerical majority of those responding in the referendum. In contrast, option (e)(2) appears to enable a numerical minority to approve an order if its controls a majority share of the volume of the commodity. Option (e)(1) thus gives comparatively more power to the referendum's smaller and more numerous manufacturers and importers, while option (e)(2) gives comparatively more power to the largest market participants. Option (e)(3) appears to incorporate aspects of each: both a numerical majority and a majority of the commodity volume must approve the referendum, ensuring that neither numerous small players nor a few large players could approve an Order over the objection of the others. Since the CPRIA potentially applies to checkoff orders for various different agricultural commodities, it makes sense that Congress would grant the Secretary discretion to use different approval thresholds depending on the size and number of market participants of a given commodity.

In announcing the proposed Order, AMS stated that "[a] majority of entities by both number and volume would have to support the program for it to be implemented." 75 Fed.Reg. at 61,013. It later gave notice of the proposed referendum by stating that "[t]he program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber *represented in the referendum."* 76 Fed.Reg. at 22,757 (emphasis added). Resolute contends that this means that AMS effectively selected option (e)(3), and it objects to this choice because "a majority of the volume of *the agricultural commodity,"* 7 U.S.C. § 7417(e)(3), is

meaningfully different from "a majority of the volume of softwood lumber *represented in the referendum,"* the language used in the Federal Register. *See* Pl. Opp./MSJ at 30–31 (emphasis added).

Defendants appear to agree that AMS selected option (e)(3), but argue that because the CPRIA is "silent" on the issue of the definition of "volume of the agricultural commodity," as used in both sections 7417(e)(2) and (e)(3), ambiguity in the meaning of this phrase provides the Secretary with discretion to choose any definition of "volume" that is "based on a permissible construction of the statute." Def. Opp./Rep. at 31. Since "persons voting" need not be "everyone in the United States who produces or imports the commodity to which the Checkoff Order pertains"—but only those who will be assessed under a proposed order—Defendants argue that it is permissible to interpret "volume" in sections 7417(e)(2) and (e)(3) to be "the volume of the commodity *represented in the referendum.*" *Id.* at 31 (emphasis added).

The Court agrees that sufficient ambiguity exists in the meaning of the term "volume" to satisfy *Chevron* step one and entitle the agency to deference at *Chevron* step two. On its face, the term "volume" in sections 7417(e)(2) and (e)(3) does not obviously refer to either the total volume of all manufacturers and importers in the marketplace or merely the volume of those participating in the referendum. And in light of *Chevron* deference due to an agency's construction of an ambiguous statutory term, the Court shares Defendants' view that this is a permissible one, both for the reason just stated, and for another.

Under this reading of section 7417(e), Plaintiff's proposed interpretation of option (e)(3) would set an almost impossibly high floor to achieve approval via referendum, rendering it a nonstarter. This is because the portion of the market volume produced or imported by exempted entities would function as a "no" vote, since these entities could not vote in the referendum. If Plaintiff is right, the exempted volume would become part of the denominator for calculating majority passage under a referendum, but could never be part of the numerator.

One example suffices to demonstrate this problem. If 25 percent of the total volume of softwood lumber were exempted from a proposed order, the approval percentage by volume among entities participating in

the referendum would have to increase substantially. Indeed, approval from entities representing more than *two-thirds* of the volume in the referendum (50 percent of the total volume, but 67 percent of the volume participating in the referendum) would be required to achieve majority approval by total volume. This interpretation seems dubious, as it is unlikely that Congress would desire to effectively give unwitting veto power to those not even assessed under the order or participating in the referendum. It would be bizarre that a majority of voters by number and by volume could approve the referendum but still have the Order rejected. Instead, option (e)(3) appears to incorporate both the protection for numerous small market participants in (e)(1) and the protection for a few large market participants in (e)(2), something Plaintiff's interpretation would thwart by watering down the larger market participants' share of the volume in the referendum.

Given Defendants' eminently reasonable interpretation, this construction of the CPRIA more than satisfies the *Chevron* step-two deference due the agency, and the Court believes AMS acted permissibly by establishing majority approval on the basis of both number and volume of participants *in the referendum.*

6. 15 Million–Board–Feet Exemption

Given the laundry list of issues Plaintiff has raised with the Checkoff Order, it might appear that its claims founder entirely. Yet on one final issue, Resolute's challenge is more formidable. This is Plaintiff's argument that AMS violated the CPRIA by failing to choose an exemption threshold—in this case, the 15 million-board-feet-per-year exemption—that was "de minimis." *See* Pl. Opp./MSJ at 25. The CPRIA permits the Secretary to "exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order." 7 U.S.C. § 7415(a)(1). Resolute notes that AMS has stated that it does not know the quantity of the commodity *exempted* from the order, *see* Testimony of Sonia Jimenez at 421, 503 (AR3418, AR3500); the total quantity of the agricultural commodity *in existence, see id.* at 420–21 (AR3417–18); or the *number* of companies excluded. *See id.* at 376–77 (AR3373–74). On this basis, Resolute contends that AMS does not and cannot know whether the quantity it exempted was a "de minimis quantity." *See* Pl. Opp./MSJ at 25.

Defendants respond that the agency has stayed within the bounds of its statutory authority by selecting an alternative basis for determining the meaning of a "de minimis quantity." The Secretary asserts that the CPRIA is "silent" as to the definition of the term "de minimis" and thus its meaning is "ambiguous," so he is entitled to choose any permissible definition. *See* Def. Opp./Rep. at 22. Defendants also promote a broader understanding of a reasonable "de minimis quantity" on the basis that the term is preceded by the word "any." According to them, "any" implies that the term "de minimis quantity" clearly may have more than one acceptable definition. *See id.* at 22–23. While the Court agrees with Defendants' position up to this point, their argument is rather facile; the question is not whether "de minimis quantity" might permissibly vary from checkoff order to checkoff order – which it almost surely must. Rather, the question is whether 15 million board feet per year is one such permissible interpretation.

In answer to *this* question, the Court believes that Defendants are either hiding the ball or else are ill informed—neither of which is particularly encouraging for an entity that acts with the force of law. As stated, Defendants claim that it is "impossible for us to know the total volume of softwood lumber," *id.* at 23 (quoting Testimony of Sonia Jimenez at 421 (AR3418)) (internal quotation marks omitted), rendering it equally impossible to calculate a "de minimis quantity" of the total volume in the marketplace. The Court is skeptical that obtaining such information is "impossible," in part because this seems highly unlikely for an industry that is both well regulated and substantial in size. *See, e.g.,* 76 Fed.Reg. 22,758–59 (providing figures for the total U.S. softwood-lumber market in tens of billions of board feet per year for the calendar years 2003 through 2009).

Establishing the proper exemption threshold almost surely *required* knowledge of the total volume of softwood lumber. Defendants justified the 15–million–board–feet exemption on the ground that it would generate sufficient revenue among the remaining manufacturers and importers who would be assessed, an outcome that apparently would be in doubt with an exemption threshold of 20 or 30 million. *See* 75 Fed.Reg. at 61,013. How could the BRC and AMS make these comparative calculations unless they knew enough about the entire

quantity of softwood lumber manufactured or imported so as to divide that total into non-exempted and exempted portions? Either the BRC, AMS, or both must have had at least *some* working estimate of the total volume of softwood lumber.

At least two documents in the Joint Appendix submitted by the parties suggest such figures were obtainable or had been obtained. First, the BRC—in a pamphlet advocating for approval in the referendum—provided data as to why the 15 million-board-feet exemption was neither "too low" nor "too high." *See* 20 Myths and Facts About the Softwood Lumber Checkoff, Blue Ribbon Commission for Check-off at 3 [hereinafter "20 Myths"] (AR0929). Presumably, the BRC could only have made this assessment if it had data on the entire industry's production of softwood lumber in a given year. The BRC noted that an exemption for the first 100 million board feet per year would have eliminated "a total of 18.45 billion feet, and only 58% of shipments would participate in the check-off...." *Id.* Similarly, it observed that an exemption for the first 15 million board feet per year would exempt roughly 11% of annual production and "allow the check-off to capture about 90% of production." *Id.*

Second, AMS's proposed rule establishing the Checkoff Order included an estimate that "[o]f the 595 domestic manufacturers, ... about 232, or 39 percent, ship less than 15 million board feet per year and will thus be exempt from paying assessments under the Order." 76 Fed.Reg. at 46,190. It further estimated that "[o]f the 883 importers ... 780, or 88 percent, import less than 15 million board feet per year and will also be exempt from paying assessments." *Id.* It then calculated that "if $17.5 million were collected in assessments ($0.35 per thousand board feet assessment rate with 50 billion board feet assessed), 25 percent, or about $4 million, will be paid by importers and 75 percent, or about $13 million, will be paid by domestic manufacturers." *Id.* If AMS could estimate the total revenue generated from the non-exempted softwood lumber, and if it knew how much more would be exempted by the 15–million threshold, then how could it *not* know the total quantity manufactured or imported? It is simply not plausible that it is "impossible to know" the total volume of softwood lumber when the chosen exemption threshold was determined on the basis of data that almost surely required knowledge of it. This impossibility claim was

made by only one agency representative—Sonia Jimenez, a department head of the Fruit and Vegetable division of AMS—so it is not even clear whether this view was widely shared by others in AMS or by the BRC.

Even if Defendants are being forthright, and obtaining this information truly is "impossible," they still must provide a reasoned explanation for their interpretation of "de minimis quantity" as being 15 million board feet per year—a quantity sufficient to build approximately 1,000 homes. *See In Re: Resolute*, 2014 WL 1993757, at *6. They propose an entirely different calculus: given Congress's assumed desire for checkoff programs to run successfully, and in light of the agency's broad interpretive leeway to fulfill this ambition, "de minimis quantity" may refer to any quantity that would " '*generate sufficient income* to support an effective promotion program for softwood lumber.' " Def. Opp./Rep. at 23 (quoting 75 Fed.Reg. at 61,013). AMS argues that other contemplated exemption thresholds—such as 20 million or 30 million board feet per year—would not have generated adequate revenue to support the checkoff program, since many more companies would have been exempted from paying assessments under the Order. *See id.* at 23; 75 Fed.Reg. at 61,013. Defendants contend that since "Congress would have favored an effective promotion program for softwood lumber," Def. Opp./Rep. at 23 (internal quotation marks omitted), if 15 million was an exemption threshold that would achieve an effective checkoff order, then this is "based on a permissible construction" of the statute. *Id.*

Defendants' argument is dubious for several reasons. First, their interpretation renders "de minimis" superfluous in the context of the statute. If Congress had really wanted to ensure that the Secretary had the means to effectuate an effective checkoff order at all costs, it could have just granted the Secretary carte blanche to issue *any* exemption threshold he wanted. Since Congress did not—and instead capped permissible exemptions only at "de minimis" quantities—it clearly did not intend the Secretary have such unfettered discretion. Second, while the phrase "de minimis quantity of an agricultural commodity," 7 U.S.C. § 7415(a)(1), is ambiguous with respect to precisely what quantity may reasonably be considered "de minimis," the term "de minimis" is not itself *entirely* ambiguous. "The inquiry here begins 'where all such inquiries must begin: with the language of the statute itself.' " *Loving v. IRS,* 917 F.Supp.2d 67, 74 (D.D.C.2013), *aff'd,* 742 F.3d 1013 (D.C.Cir.2014)

(quoting *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S,* ——U.S. ——, 132 S.Ct. 1670, 1680, 182 L.Ed.2d 678 (2012)) (internal citation and quotations omitted). A leading dictionary defines the term "de minimis" to mean "[o]f little importance; insignificant." *See* American Heritage Dictionary (5th ed.2011). So an exemption quantity chosen that is very large would not be "of little importance" or "insignificant." Further, the "de minimis quantity" in question is the "de minimis quantity *of an agricultural commodity,*" 7 U.S.C. § 7415(a)(1) (emphasis added)—not the quantity of *revenue generated.* In other words, what the CPRIA permits is exemptions of quantities of an agricultural commodity that are of numerically "little importance" or "insignificant" in themselves. While Defendants are correct that precisely what quantity may be considered "de minimis" is ambiguous and therefore left to agency discretion to determine, the structure of the sentence makes clear that whatever quantity the agency chooses, it must justify this on the basis that the *quantity* is of little importance or is insignificant.

Given the definitions of "de minimis" provided above, Defendants' interpretive stance strains credulity. In theory, the Defendants' interpretation would permit an exemption high enough to exempt all but the industry's largest players (say, the top 3% of companies by volume), if assessments from those entities alone could generate sufficient revenue for a marketing program. Coupled with an assessment rate high enough to generate sufficient revenue, this exemption threshold would be permitted under Defendants' proposed meaning of "de minimis quantity." Yet it would clearly contravene any plain meaning of "de minimis" if it could exempt nearly the entirety of the quantity of the agricultural commodity.[2]

At bottom, the Court does not believe the explanation provided in the agency's briefs for its interpretation of "de minimis quantity" is a "permissible interpretation" as required by *Chevron*. *See Chevron,* 467 U.S. at 843, 104 S.Ct. 2778 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the

[2] Since only those assessed under a proposed checkoff order are entitled to vote in a referendum, it is questionable whether the hypothetical entities would approve an assessment levied only at them. Nevertheless, from the standpoint of interpreting "de minimis quantity," this is irrelevant.

agency's answer is based on a permissible construction of the statute."). Although the Court does not find merit with Resolute's many other APA claims, on this one count it has the better of the argument.

C. Remand Without Vacatur

The question, then, is how next to proceed. "Given the deficienc[y] ..., the Court must determine the proper remedy: to remand with vacatur, to remand without vacatur, or to vacate with no remand." *Conservation Law Found. v. Pritzker,* 37 F.Supp.3d 254, 270 (D.D.C.2014). Ordinarily, "[w]hen a Court identifies an infirmity in a rule, vacatur and remand is the 'normal' remedy." *Sec. Indus. & Fin. Markets Ass'n v. United States Commodity Futures Trading Comm'n,* 67 F.Supp.3d 373, 434 (D.D.C.2014) (citing *Allina Health Servs. v. Sebelius,* 746 F.3d 1102, 1110 (D.C.Cir.2014)). In the decades since *Chevron* and *State Farm* deference have been articulated, however, this Circuit has recognized that in certain instances, "an inadequately supported rule ... need not necessarily be vacated." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150 (D.C.Cir.1993); *see also Pritzker,* 37 F.Supp.3d at 271. "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal,* 988 F.2d at 150–51 (citation and internal quotation marks omitted). "Moreover, remand without vacatur is appropriate where 'there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand.' " *Nat'l Parks Conservation Ass'n v. Jewell,* 62 F.Supp.3d 7, 20 (D.D.C.2014) (quoting *Allied–Signal,* 988 F.2d at 151).

Such a possibility seems likely here for several reasons. First, as discussed above, the CPRIA is an unusual statute in that industry representatives—in this case, the Blue Ribbon Commission—participate in a substantial capacity in developing and promulgating a proposed checkoff order. *See* 75 Fed.Reg. at 61,002 ("The proposal was submitted to USDA by the Blue Ribbon Commission (BRC), a committee of 21 chief executive officers and heads of businesses...."); 7 U.S.C. § 7413(b)(1)(B)(i) ("A proposed order with respect to an agricultural commodity may be ... submitted to the Secretary by ... an association of

producers of the agricultural commodity; ...”). While the USDA is still responsible for “determin[ing] that a proposed order is consistent with and will effectuate the purpose of this subchapter,” *id.* § 7413(b)(2), it is understandable that the Secretary may not be as familiar with the details of every step in the analytical process along the way. This is particularly so in this case, where Resolute has launched a full frontal assault against the CPRIA and the Checkoff Order on both constitutional and APA grounds. Given the ten counts Resolute brought in its Complaint, Defendants’ 38–page Opposition to Plaintiff’s Cross–Motion for Summary Judgment was admirable in its concision considering the many issues that it had to address. Indeed, Defendants devoted only two paragraphs to oppose summary judgment on the issue of the “de minimis quantity” interpretation.

Whether remand without vacatur is appropriate turns on “the extent of doubt whether the agency chose correctly....” *Allied–Signal,* 988 F.2d at 150. While the Court finds Defendants’ “impossibility” defense unsatisfactory and its proposed interpretation of “de minimis quantity” as any that “would generate sufficient income to support an effective promotion program” not permissible on the basis of the explanation so far provided, *see* Def. Opp./Rep. at 23, the Court suspects other rationales not briefed may turn up a better—and certainly permissible—account of “de minimis quantity.”

The Court independently identified information included in the Joint Appendix that seems to point the way toward at least one plausible account of the Secretary’s implementation of “de minimis quantity” in the Checkoff Order. In the Blue Ribbon Commission’s “20 Myths” pamphlet circulated to softwood-lumber manufacturers and importers ahead of the referendum, the BRC explained that the 15 million-board-feet-per-year exemption was “*de minimis* as far as free riders is concerned.” 20 Myths at 3 (AR0929) (emphasis added). The Court speculates that this means that this level of exemption would not exempt so many producers that those remaining—who would *not* be exempted—would perceive the others to be free riding by receiving the benefits without having to pay for them. After all, the free-rider problem is largely what spurred the creation of government-operated (and thus compulsory) checkoff programs in the first place. *See supra* Section I.B. The BRC also noted that this exemption threshold “relieves the

administrative burden from 200 of the smallest companies." 20 Myths at 3 (AR0929). Such an explanation—if true and substantiated by the record—seems far more likely to satisfy *Chevron* step-two review than that provided by the agency in its trim briefs here.

The second consideration in determining whether to remand without vacatur is "the disruptive consequences of an interim change that may itself be changed." *Allied–Signal,* 988 F.2d at 150–51; *see also Pritzker,* 37 F.Supp.3d at 270–71. This factor also weighs in favor of remand without vacatur here. As the entire Background section above indicates, the checkoff program was not developed hastily; to the contrary, it took years between the time of the first discussions about a checkoff program in 2008 and the ultimate Order implemented after a majority of voters approved it in the 2011 referendum. "[C]ases that involve fee collection or payment distribution," moreover, are particularly appropriate for remand without vacatur. *See* Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings,* 80 N.Y.U. L.Rev. 278, 298 (2005). This is especially true in the case of "agency collection of fees," including those involving the Department of Agriculture. *See id.; see also Milk Train, Inc. v. Veneman,* 310 F.3d 747, 756 (D.C.Cir.2002) (remanding without vacatur the Secretary's implementation of a subsidy program for milk producers), *Sugar Cane Growers Cooperative of Florida v. Veneman,* 289 F.3d 89, 98 (D.C.Cir.2002) (remanding without vacatur the Secretary's implementation of a payment-in-kind program for sugar crop).

Here, non-exempted manufacturers and importers have been paying assessments since 2012, and that money has presumably been spent on "research, promotion, consumer education and industry information" in order to "strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States." 76 Fed.Reg. at 46,185. Prematurely vacating the Checkoff Order would effectively nullify these efforts and raise questions about whether all participants who paid into it deserve the remedy Resolute here seeks: "restitution for all spent funds collected from Plaintiff through assessments." Pl. Opp./MSJ at 47. While this may ultimately be the appropriate remedy, the Court thinks it prudent not to vacate the Order due to a failure to provide a sufficient explanation of a chosen interpretation of a statutory

term, particularly where alternative explanatory accounts seem likely to exist elsewhere in the administrative record, and where the threshold was not determined by the agency alone.

D. Constitutional Claims

Having navigated Resolute's throng of APA claims, its constitutional claims remain. These include allegations that the CPRIA unconstitutionally delegates executive authority to referendum participants, that the USDA's application of the CPRIA does the same, that the USDA also unconstitutionally delegates legislative authority to referendum participants, and that it violates the Due Process rights of producers and importers (Counts I–IV). In light of the Court's decision to remand to the agency for further explanation of its decision to implement a 15 million-board-feet-per-year exemption threshold, however, the Court need not address these constitutional questions here. Pursuant to the principle of constitutional avoidance, a court shall "resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue." *U.S. v. Wells Fargo Bank,* 485 U.S. 351, 354, 108 S.Ct. 1179, 99 L.Ed.2d 368 (1988); *see also Heller v. Dist. of Columbia,* 670 F.3d 1244, 1250 (D.C.Cir.2011) (same). Resolute's constitutional claims must await another day.

IV. CONCLUSION

Because most portions of the Checkoff Order and the accompanying rulemaking process clearly satisfy APA review, the Court will grant Defendants' Motion for Summary Judgment in part (as to Counts VI–X) and deny it in part (as to Count V). Count V will be remanded without vacatur to the Department of Agriculture for a reasoned and coherent treatment of the decision to select a 15 million-board-feet-per-year exemption as the "de minimis quantity" exemption in accordance with 7 U.S.C. § 7415(a)(1). Finally, because the Court remands the case with questions outstanding as to whether the Checkoff Order passes muster under APA review, it declines at this time to render judgment on Plaintiff's constitutional claims. A separate Order will so state.

ORDER

As set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART;

2. Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART;

3. Judgment is entered in favor of Defendants on Counts VI–X; and

4. The case is REMANDED WITHOUT VACATUR to the USDA on Count V.

IT IS SO ORDERED.

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: JUSTIN R. JENNE, d/b/a JUSTIN JENNE STABLES and JUSTIN JENNE STABLES AT FRAZIER AND FRAZIER FARMS.
Docket No. 13-0080.
Decision and Order.
Filed July 17, 2015.

HPA – Civil penalty – Horses, examination of – Sanctions – Sore – Soreness, statutory presumption of – Tennessee Walking Horses.

Sharlene A. Deskins, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

On November 14, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], initiated this administrative disciplinary proceeding against Justin R. Jenne, d/b/a Justin Jenne Stables and Justin Jenne Stables at Frazier and Frazier Farms, by filing a complaint. The Administrator alleges Mr. Jenne entered a horse known as "Jose's Flamingo Dancer" as entry number 107, class number 16, on April 16, 2009, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in violation of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act].[1]

On February 11, 2013, Mr. Jenne filed an answer in which Mr. Jenne: (1) admitted that, on April 16, 2009, he entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity

[1] Compl. ¶ IV(10) at 2-3.

Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer;[2] and (2) denied that Jose's Flamingo Dancer was sore when he entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 16, 2009.[3]

Administrative Law Judge Janice K. Bullard [ALJ] conducted a hearing on March 11, 2014, by an audio-visual connection between Washington, DC, and Nashville, Tennessee.[4] Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Jenne appeared pro se.[5]

Mr. Jenne and two witnesses called by the Administrator testified at the hearing. The Administrator introduced ten (10) exhibits which the ALJ received into evidence at the March 11, 2014, hearing.[6] Mr. Jenne did not introduce any exhibits at the March 11, 2014, hearing; however, the ALJ held the record open to enable Mr. Jenne to submit a statement by Dr. Stephen L. Mullins, a veterinarian who examined Jose's Flamingo Dancer on April 17, 2009. Mr. Jenne submitted Dr. Mullins' statement on March 28, 2014, and the ALJ admitted the statement to the record.[7]

On July 29, 2014, after the Administrator filed Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof [Post Hearing Brief],[8] the ALJ issued a Decision and Order in which the ALJ: (1) concluded Mr. Jenne entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show on April 16, 2009, in Harrodsburg,

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2 Answer of Justin R. Jenne, Individually and Doing Business as Justin Jenne Stables [Answer] ¶¶ 5, 10 at 1.

3 Answer ¶ 10 at 1-2.

4 References to the transcript of the March 11, 2014, hearing are designated as "Tr." and the page number.

5 Prior to the March 11, 2014, hearing, Dudley W. Taylor, Taylor & Knight, Knoxville, Tennessee, represented Mr. Jenne, but, in a conference call with the ALJ and Ms. Deskins on March 6, 2014, Mr. Taylor withdrew his representation of Mr. Jenne.

6 The Administrator's exhibits are designated as "CX" and the exhibit number.

7 Mr. Jenne's exhibit is designated as "RX 1."

8 Mr. Jenne had an opportunity to file a post hearing brief, but did not avail himself of that opportunity.

Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in willful violation of the Horse Protection Act; (2) assessed Mr. Jenne a $2,200 civil penalty; and (3) disqualified Mr. Jenne for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[9]

On September 8, 2014, Mr. Jenne filed a timely appeal of the ALJ's Decision and Order[10] and a petition to reopen the hearing to take additional evidence.[11] On October 30, 2014, the Administrator filed a response to Mr. Jenne's Appeal Petition, a response to Mr. Jenne's Petition to Reopen Hearing, and an appeal petition.[12]

Mr. Jenne failed to file a response to the Administrator's Appeal Petition, and, on June 18, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record that was before the ALJ, I agree with the ALJ's conclusion that Mr. Jenne violated the Horse Protection Act and the sanction imposed on Mr. Jenne by the ALJ.

DECISION

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

[9] ALJ's Decision and Order at 15-17.
[10] Appeal to Judicial Officer [Appeal Pet.].
[11] Petition to Re-Open Hearing for Submission of Additional Evidence [Pet. to Reopen Hr'g].
[12] Complainant's Opposition to the Appeal to the Judicial Officer and Petition to Re-open Hearing for Submission of the Additional Evidence and Complainant's Appeal Petition [Appeal Pet.].

Horse. H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.

Congress' 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 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.[13] *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 . . . .

[13] The Horse Protection Act also 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.

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. 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).[14] 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 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).

[14] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture 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 in April 2009 was $2,200. 7 C.F.R. § 3.91(b)(2)(viii) (2009).

Jose's Flamingo Dancer Manifested Abnormal Bilateral Sensitivity

On April 16, 2009, Mr. Jenne, who, at all times material to this proceeding, was the trainer of Jose's Flamingo Dancer, presented Jose's Flamingo Dancer to Ricky McCammon, a Designated Qualified Person [DQP],[15] for inspection at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky (Tr. at 73-74; CX 2-CX 3). Mr. McCammon found Jose's Flamingo Dancer unilaterally sore (Tr. at 32-33; CX 4-CX 5) and then asked another DQP, Les Acree, to examine the horse. Mr. Acree also found Jose's Flamingo Dancer unilaterally sore (CX 7 at 1). Peter Kirsten, DVM, an Animal and Plant Health Inspection Service [APHIS] supervisory animal care specialist, conducted a pre-show examination of Jose's Flamingo Dancer after the DQPs' examinations and found Jose's Flamingo Dancer reacted to palpation on both forelimbs (Tr. at 36-37).[16] Dr. Kirsten described his inspection of Jose's Flamingo Dancer, as follows:

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[15] 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. 9 C.F.R. § 11.1.

[16] 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 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). Mr. Jenne did not call the DQPs who examined Jose's Flamingo Dancer as witnesses or introduce any reports of the results of the DQPs' examinations of Jose's Flamingo Dancer. On the other hand, the Administrator called Dr. Kirsten as a witness. Dr. Kirsten testified extensively regarding his examination of Jose's Flamingo Dancer and his finding that Jose's Flamingo Dancer was bilaterally sore (Tr. at 26-67). In addition, the Administrator introduced Dr. Kirsten's affidavit, which Dr. Kirsten prepared the day after his examination of Jose's Flamingo Dancer and which describes Dr. Kirsten's examination of Jose's Flamingo Dancer and the basis for his finding Jose's Flamingo Dancer bilaterally sore (CX 7). Further still, the Administrator introduced Dr. Kirsten's written report documenting his finding that Jose's Flamingo Dancer was bilaterally sore, an audio-visual recording of Dr. Kirsten's examination of Jose's Flamingo Dancer, and a thermography report of Jose's Flamingo Dancer (CX 6, CX 16A-CX 16B). After reviewing the record, I find no basis for deviating from my usual practice of according

> When I palpated the left pastern on the lateral aspect by the coronary band the horse reacted with a strong leg withdrawal. When I palpated the left pastern on the medial aspect about 2" proximal to the coronary band, anterior to the medial, the horse reacted with a strong leg withdrawal. When I palpated the right pastern, medial aspect, about 2" proximal to the coronary band there was a very strong leg withdrawal and when I palpated the lateral aspect of the right pastern about 2" proximal to the coronary band there was a strong leg withdrawal. All of these reactions previously described were consistent and repeatable. . . . I told [Mr. Jenne] we were going to prepare a government case for a two foot sore horse.

CX 7 at 1. Dr. Kirsten stated, in his professional opinion, Jose's Flamingo Dancer was sored by a person using chemical and/or physical means and Jose's Flamingo Dancer could reasonably be expected to experience pain while moving (CX 7 at 1).

Pursuant to 15 U.S.C. § 1825(d), Jose's Flamingo Dancer must be presumed to be sore based upon Dr. Kirsten's finding that Jose's Flamingo Dancer manifested abnormal sensitivity in both of her forelimbs. Once the statutory presumption is established, the burden of persuasion shifts to the respondent to provide proof that the horse was not sore or that soreness was due to natural causes. The ALJ found that Mr. Jenne failed to present sufficient evidence to rebut the statutory presumption that Jose's Flamingo Dancer was sore when Mr. Jenne entered her in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 16, 2009.

Mr. Jenne's Appeal Petition

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less credence to the DQP examinations and findings than to the United States Department of Agriculture examination and findings in this proceeding. I accord Dr. Kirsten's examination of, and findings regarding, Jose's Flamingo Dancer more credence than the DQPs' examinations of, and findings regarding, Jose's Flamingo Dancer.

Mr. Jenne raises two issues in his Appeal Petition. First, Mr. Jenne assigns error to the ALJ's determination that Mr. Jenne did not rebut the statutory presumption that Jose's Flamingo Dancer was sore. Mr. Jenne contends Dr. Kirsten's testimony was not credible. Further, Mr. Jenne submits his testimony that Jose's Flamingo Dancer was not sore rebuts the statutory presumption that Jose's Flamingo Dancer was sore, especially when his testimony is coupled with the results of Dr. Mullins' April 17, 2009, examination of Jose's Flamingo Dancer (Mr. Jenne's Appeal Pet. ¶¶ 4-7 at 2).

Dr. Kirsten states in an affidavit prepared on April 17, 2009, the day after he examined Jose's Flamingo Dancer, that, during his examination, Mr. Jenne yelled at him (Dr. Kirsten) regarding the manner in which Dr. Kirsten was conducting his examination of Jose's Flamingo Dancer. Based on the audio-visual recording of Dr. Kirsten's examination of Jose's Flamingo Dancer (CX 16A), the ALJ found Dr. Kirsten had mistaken recall about Mr. Jenne's yelling during Dr. Kirsten's examination, and the ALJ held she was unable to entirely credit Dr. Kirsten's testimony (ALJ's Decision and Order at 11).[17] However, the ALJ found "Dr. Kirsten's credibility regarding his examination findings is not tainted, as he took contemporaneous notes about the examination results, and based his conclusions upon those notes." (ALJ's Decision and Order at 11).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[18] The Administrative Procedure Act provides that, on appeal from

[17] I also reviewed the audio-visual recording of Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer and found no evidence that Mr. Jenne yelled at Dr. Kirsten during the examination.

[18] *See also* Perry, 72 Agric. Dec. 635, 646 (U.S.D.A. 2013) (Decision as to Perry and Perry's Wilderness Ranch & Zoo, Inc..); KOAM Produce, Inc., 65 Agric. Dec. 1470, 1474 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider); S. Minn. Beet Sugar Coop., 64 Agric. Dec. 580, 605 (U.S.D.A. 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy, 61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon, 60 Agric. Dec. 527, 560 (U.S.D.A. 2001) (Decision as to Jerry W. Graves and Kathy Graves), *appeal dismissed sub nom.* Graves v.

an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard

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United States Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1271-72 (U.S.D.A. 1995), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom.* Heimann v. Department of Agric., 522 U.S. 951 (1997).

> the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[19]

I have examined the record and find no basis to reverse the ALJ's determination that Dr. Kirsten's credibility regarding his examination

[19] Perry, 72 Agric. Dec. 635, 647 (U.S.D.A. 2013) (Decision as to Perry and Perry's Wilderness Ranch & Zoo, Inc..); KOAM Produce, Inc., 65 Agric. Dec. 1470, 1476 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider); Bond, 65 Agric. Dec. 1175, 1183 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider); G&T Terminal Packing Co., 64 Agric. Dec. 1839, 1852 (U.S.D.A. 2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006), *cert. denied*, 552 U.S. 814 (2007); S. Minn. Beet Sugar Coop., 64 Agric. Dec. 580, 608 (U.S.D.A. 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy, 61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon, 60 Agric. Dec. 527, 561-62 (U.S.D.A. 2001) (Decision as to Jerry W. Graves and Kathy Graves), *appeal dismissed sub nom*. Graves v. U.S. Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Sunland Packing House Co., 58 Agric. Dec. 543, 602 (U.S.D.A. 1999); Zimmerman, 57 Agric. Dec. 1038, 1055-56 (U.S.D.A. 1998); Goetz, 56 Agric. Dec. 1470, 1510 (U.S.D.A. 1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); Saulsbury Enters., 56 Agric. Dec. 82, 89 (U.S.D.A. 1997) (Order Den. Pet. for Recons.); Andershock's Fruitland, Inc., 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); White, 47 Agric. Dec. 229, 279 (U.S.D.A. 1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); King Meat Packing Co., 40 Agric. Dec. 552, 553 (U.S.D.A. 1981); Thornton, 38 Agric. Dec. 1425, 1426 (U.S.D.A. 1979) (Remand Order); Unionville Sales Co., 38 Agric. Dec. 1207, 1208-09 (U.S.D.A. 1979) (Remand Order); Beech, 37 Agric. Dec. 869, 871-72 (U.S.D.A. 1978); Nat'l Beef Packing Co., 36 Agric. Dec. 1722, 1736 (U.S.D.A. 1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); Whaley, 35 Agric. Dec. 1519, 1521 (U.S.D.A. 1976); Davis, 35 Agric. Dec. 538, 539 (U.S.D.A. 1976); Am. Commodity Brokers, Inc., 32 Agric. Dec. 1765, 1772 (U.S.D.A. 1973); Dishmon, 31 Agric. Dec. 1002, 1004 (U.S.D.A. 1972); Sy B. Gaiber & Co., 31 Agric. Dec. 474, 497-98 (U.S.D.A. 1972); Romoff, 31 Agric. Dec. 158, 172 (U.S.D.A. 1972).

findings is not tainted. Therefore, I reject Mr. Jenne's contention that the ALJ's credibility determination regarding Dr. Kirsten, is error.

As for Mr. Jenne's evidence that Jose's Flamingo Dancer was not sore when Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009, Mr. Jenne testified that, while Jose's Flamingo Dancer was "moving around" in response to palpation, she was doing so "more out of fear than anything else." (Tr. at 75). Mr. Jenne explained, at the time of the April 16, 2009, Spring Jubilee Charity Horse Show, Jose's Flamingo Dancer was only three years old, had never been off the farm, and had never been inspected for compliance with the Horse Protection Act. Mr. Jenne further testified that, in his opinion, Dr. Kirsten's inspection was very aggressive. Based upon Jose's Flamingo Dancer's reactions to Dr. Kirsten's inspection, including Jose's Flamingo Dancer's facial expressions, Mr. Jenne concluded Jose's Flamingo Dancer "was basically scared to death by Dr. Kirsten's inspection." (Tr. at 75).

The ALJ accorded full weight to Mr. Jenne's testimony and found reasonable his conclusion that Jose's Flamingo Dancer reacted to being physically manipulated in an unaccustomed manner by strangers in a strange place. However, the ALJ also found Mr. Jenne's conclusions about the cause of Jose's Flamingo Dancer's reactions speculative and not entitled to great weight (ALJ's Decision and Order at 13). I agree with the ALJ. The presumption of soreness must be rebutted by more proof than speculation about other natural causes for the reaction, even when the evidence proffered to rebut the presumption consists of a reasoned medical opinion by a licensed veterinarian with experience in an equine practice.[20] Therefore, I reject Mr. Jenne's contention that his testimony that Jose's Flamingo Dancer was not sore is sufficient to rebut the presumption that Jose's Flamingo Dancer was sore at the time Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009.

Mr. Jenne also contends that, when coupled with the results of Dr. Mullins' examination of Jose's Flamingo Dancer, Mr. Jenne's testimony

[20] Lacy, 66 Agric. Dec. 488 (U.S.D.A. 2007), *aff'd*, 278 Fed. App'x 616 (6th Cir. 2008).

that Jose's Flamingo Dancer was not sore is sufficient to rebut the presumption that Jose's Flamingo Dancer was sore at the time Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009.

Mr. Jenne did not call Dr. Mullins as a witness but testified that Dr. Mullins examined Jose's Flamingo Dancer the day after the Spring Jubilee Charity Horse Show (Tr. at 79). Dr. Mullins had prepared a statement regarding his April 17, 2009 examination of Jose's Flamingo Dancer; however, Mr. Jenne failed to offer the statement into evidence at the March 11, 2014 hearing. The ALJ held the record open to receive Dr. Mullins' statement (Tr. at 89-90, 186-87), and on March 28, 2014, Mr. Jenne submitted Dr. Mullins's statement, which the ALJ admitted to the record (RX 1). Dr. Mullins's statement describes his qualifications to conduct an examination to determine whether a horse is sore and the results of his April 17, 2009, examination of Jose's Flamingo Dancer, as follows:

> To Whom It May Concern:
>
> On Friday, April 17, 2009, at 7 AM CST, I was asked and did examine a filly named Joses [sic] Flamingo Dancer for trainer Justin Jenne. The filly was owned by David Mullis. I was asked to do a HPA examination of the horse.
>
> I am very familiar with HPA inspections and was the President of the largest Horse Industry Organization (USDA HPA inspection organization) for 3 years. I am a 1980 graduate of Auburn University School of Veterinary Medicine and have predominately been in Equine Practice.
>
> The filly in question had been failed HPA inspections the previous night and I can in no way evaluate how the filly was the night before. However, on the day I examined her (less than 16 hours later), there was no indication that there was anything wrong with the filly and she definitely passed all HPA guidelines. The fillies [sic] appearance was very good. She led and turned very good and upon palpation of the fore pastern area she was

> unresponsive. The filly gave me no indication that she was "sore" or that she had been "sore".
>
> Sincerely,
>
> Dr. Stephen L. Mullins

RX 1. The ALJ credited Dr. Mullins' examination findings, and I have no basis upon which to disagree with the ALJ's credibility determination. However, Dr. Kirsten conducted his examination of Jose's Flamingo Dancer at approximately 8:40 p.m., on April 16, 2009, and Dr. Mullins conducted his examination at approximately 7:00 a.m., on April 17, 2009. As Dr. Mullins noted, he could not evaluate the condition of Jose's Flamingo Dancer at the Spring Jubilee Charity Horse Show on April 16, 2009, and I conclude Dr. Mullins's findings add little probative weight regarding that issue.[21]

Therefore, even when I couple Mr. Jenne's testimony with Dr. Mullins's examination findings, I do not find Mr. Jenne's evidence sufficient to rebut the presumption that Jose's Flamingo Dancer was sore at the time Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009.

Second, as an alternative to concluding that Mr. Jenne rebutted the statutory presumption that Jose's Flamingo Dancer was sore, Mr. Jenne requests that I reduce the $2,200 civil penalty assessed by the ALJ and reduce the one year period of disqualification imposed by the ALJ. In support of this request, Mr. Jenne asserts he has no history of previous violations of the Horse Protection Act and he is unable to pay the civil penalty assessed by the ALJ (Mr. Jenne's Appeal Pet. ¶ 9 at 3).

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824. However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note),

[21] *See* Thomas, 55 Agric. Dec. 800, 815 (U.S.D.A. 1996) (stating a horse may be found sore at one examination, but found not sore at a later examination, even when both examinations are conducted during the same horse show).

the Secretary of Agriculture adjusted 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 by increasing the maximum civil penalty from $2,000 to $2,200. 7 C.F.R. § 3.91(b)(2)(viii) (2009). The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than one year for a first violation of the Horse Protection Act and not less than five years for any subsequent violation of the Horse Protection Act (15 U.S.C. § 1825(c)).

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

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

The 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 extent and gravity of Mr. Jenne's violation of the Horse Protection Act are great. Dr. Kirsten found palpation of Jose's Flamingo Dancer's forelimbs elicited consistent, repeatable pain responses and concluded Jose's Flamingo Dancer was sore (CX 7 at 1).

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[22] I have assessed less than the maximum civil penalty in cases in which the violator established an inability to pay the civil penalty.[23] However, I have consistently held the burden is on the respondent to come forward with evidence establishing an inability to pay the civil penalty if the civil penalty is assessed,[24] and Mr. Jenne failed to present any evidence of his inability to pay a civil penalty at the March 11, 2014 hearing.

On September 8, 2014, Mr. Jenne filed a Petition to Reopen Hearing in which Mr. Jenne requests that the hearing be reopened to allow the introduction of evidence that Mr. Jenne is unable to pay a civil penalty and has no history of previous violations of the Horse Protection Act. On July 16, 2015, I denied Mr. Jenne's Petition to Reopen Hearing because Mr. Jenne could have adduced evidence of his inability to pay a civil penalty and his Horse Protection Act compliance history at the March 11, 2014 hearing. As Mr. Jenne failed to present any evidence indicating an inability to pay a civil penalty, I reject Mr. Jenne's contention that he is not able to pay a $2,200 civil penalty.

The Administrator, an administrative official charged with responsibility for achieving the congressional purpose of the Horse Protection Act, recommends assessment of the maximum civil penalty (Administrator's Post Hr'g Br. at 12). Based on the factors that are

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[22] Back, 69 Agric. Dec. 448, 463 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1504 (U.S.D.A. 2005) (Decision as to Zahnd), *aff'd sub nom.* Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1475 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 208 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

[23] *See* Clark, 59 Agric. Dec. 701, 711 (U.S.D.A. 2000) (Decision as to Coleman) (wherein, based upon the respondent's evidence that she was unable to pay the $2,000 civil penalty assessed by the administrative law judge, the Judicial Officer assessed the respondent a $1 civil penalty).

[24] *Id.*; Stepp, 57 Agric. Dec. 297, 318 (U.S.D.A. 1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (U.S.D.A. 1999); Oppenheimer, 54 Agric. Dec. 221, 321 (U.S.D.A. 1995) (Decision as to Oppenheimer); Armstrong, 53 Agric. Dec. 1301, 1324 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Burks, 53 Agric. Dec. 322, 346 (U.S.D.A. 1994).

required to be considered when determining the amount of the civil penalty to be assessed, I do not find a maximum civil penalty in this case to be inappropriate. Therefore, I assess Mr. Jenne the $2,200 civil penalty recommended by the Administrator.

The Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than one year for the first violation of the Horse Protection Act and for a period of not less than five years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish the purpose of the Horse Protection Act is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[25]

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 disqualification period.

The record contains no evidence that Mr. Jenne violated the Horse Protection Act prior to the violation that I conclude Mr. Jenne committed on April 16, 2009. 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 I have held that

[25] *See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

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.[26]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record does not lead me to conclude that an exception from the usual practice of imposing the minimum disqualification period for Mr. Jenne's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

The Administrator's Appeal Petition

The Administrator raises four issues in the Administrator's Appeal Petition.

First, the Administrator contends the ALJ erroneously expressed skepticism about the reliability of palpation as a method to determine whether a horse is sore (Administrator's Appeal Pet. ¶ II(A) at 4-5).

[26] 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 Zahnd), *aff'd sub nom*. Zahnd v. Sec'y of Agric., 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).

The ALJ states she is skeptical about the reliability of palpation as a method to determine whether a horse is sore (ALJ's Decision and Order at 12). The ALJ's doubt about the reliability of digital palpation does not conform to the Secretary of Agriculture's long-held position that digital palpation is a highly reliable method to determine whether a horse is sore:

> The Secretary of Agriculture's policy has been that digital palpation alone is a highly reliable method to determine whether a horse is "sore," as defined in the Horse Protection Act. The Secretary 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 efforts 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. . . . .

I disagree with the Chief ALJ's finding that scarring, chemical odor, and hair loss are the three most common indicia of the use of mechanical or chemical soring devices or mechanical and chemical soring devices. Instead, based upon my experience with Horse Protection Act cases, I find that the most common indicium of the use of mechanical or chemical soring devices or both mechanical and chemical soring devices is a horse's repeatable, consistent reactions to digital palpation on both of the horse's forelimbs.

Beltz, 64 Agric. Dec. 1487, 1511-12 (U.S.D.A. 2005) (Decision as to Zahnd), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007) (footnote omitted).[27] However, despite personal doubt about the

[27] *See also* Bowtie Stables, LLC, 62 Agric. Dec. 580, 608-09 (U.S.D.A. 2003); Reinhart, 59 Agric. Dec. 721, 751 (U.S.D.A. 2000), *aff'd per curiam*, 39 Fed. Appx. 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); Gray, 55 Agric. Dec. 853, 878 (U.S.D.A. 1996) (Decision as to Cole); Thomas, 55 Agric. Dec. 800, 836 (U.S.D.A. 1996); Bennett, 55 Agric. Dec. 176, 180-81, 236-37 (U.S.D.A. 1996); Oppenheimer, 54

reliability of digital palpation, the ALJ adhered to the Secretary of Agriculture's policy, as follows:

> Despite my doubts, it is clear that the legal precedent demonstrates that for purposes of the HPA, Jose's Flamingo Dancer must be presumed to have been sore based upon the findings of a USDA VMO Kirsten's palpation.

ALJ's Decision and Order at 12-13. Thus, the ALJ followed the Secretary of Agriculture's policy regarding the reliability of palpation as a method to determine whether a horse is "sore" as that term is defined in the Horse Protection Act. While I do not adopt the ALJ's discussion of the ALJ's skepticism in this Decision and Order, I reject the Administrator's contention that the ALJ's discussion of her personal view of the reliability of digital palpation as a means to determine whether a horse is sore, is error.

Second, the Administrator contends the ALJ erroneously found that horses who wear chains of any weight may exhibit reactions to palpation (Administrator's Appeal Pet. ¶ II(B) at 6-7).

The ALJ states "[i]t is axiomatic that horses who are permitted to wear chains of any weight during training may exhibit reactions to the

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Agric. Dec. 221, 309 (U.S.D.A. 1995) (Decision as to Oppenheimer); Armstrong, 53 Agric. Dec. 1301, 1319 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Tuck (Decision as to Tuck), 53 Agric. Dec. 261, 292 (U.S.D.A. 1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); Bobo, 53 Agric. Dec. 176, 201 (U.S.D.A. 1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); Kelly, 52 Agric. Dec. 1278, 1292 (U.S.D.A. 1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); Sims, 52 Agric. Dec. 1243, 1259-60 (U.S.D.A. 1993) (Decision as to Sims); Jordan, 52 Agric. Dec. 1214, 1232-33 (U.S.D.A. 1993) (Decision as to Crawford), *aff'd sub nom.* Crawford v. U.S. Dep't of Agric., 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); Watlington, 52 Agric. Dec. 1172, 1191 (U.S.D.A. 1993); Crowe, 52 Agric. Dec. 1132, 1151 (U.S.D.A. 1993); Gray, 52 Agric. Dec. 1044, 1072-73 (U.S.D.A. 1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); Callaway, 52 Agric. Dec. 272, 287 (U.S.D.A. 1993); Brinkley, 52 Agric. Dec. 252, 266 (U.S.D.A. 1993) (Decision as to Brown); Holt, 52 Agric. Dec. 233, 246 (U.S.D.A. 1993) (Decision as to Richard Polch and Merrie Polch), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

exertion of enough pressure to blanch the thumb, as Dr. Kirsten required." (ALJ's Decision and Order at 12). In support of the contention that the ALJ's statement is error, the Administrator quotes from a final rulemaking document published by APHIS which states the best evidence available to APHIS indicates that chains weighing 6 ounces or less are not likely to sore horses, as follows:

> One commenter stated that the reduction in chain weight from 10 ounces to 6 ounces has led to deeper soring of horses' pasterns, to enable the lighter chains to produce the desired, gait-enhancing, irritation. Another commenter recommended a 3-ounce limit on chain weight, but included no evidence to support that recommendation.
>
> We are making no changes to the regulations based on these comments. As we stated in our July 28 interim rule, we agree that the use of any action device on a pastern that is already sore will heighten the horse's discomfort. However, the best evidence available to us—including a study by Auburn University (discussed in our April 26 interim rule), as well as a Department study conducted at the National Veterinary Services Laboratories in Ames, Iowa in 1975—indicates that while chains and other action devices weighing more than 6 ounces can sore horses, those weighing 6 ounces or less are not likely to sore horses.

54 Fed. Reg. 7174, 7177 (Feb. 17, 1989).

As an initial matter, the conclusions described in the above-quoted final rulemaking document do not directly relate to the axiom referenced by the ALJ. APHIS' conclusions relate to the likelihood of horses being made "sore" as that term is defined in the Horse Protection Act; the axiom referenced by the ALJ relates to the possibility of any reaction to palpation. I find the axiom referenced by the ALJ, whether accurate or not, is not relevant to this proceeding, and I do not adopt that axiom in this Decision and Order.

Third, the Administrator contends the ALJ erroneously found the failure to videotape DQP McCammon's examination of Jose's Flamingo Dancer casts doubt on Dr. Kirsten's examination of Jose's Flamingo Dancer (Administrator's Appeal Pet. ¶ II(C) at 7-8).

Prior to Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer, two DQPs, Mr. McCammon and Mr. Acree, examined Jose's Flamingo Dancer. Mr. Acree's examination of Jose's Flamingo Dancer was videotaped; Mr. McCammon's examination of Jose's Flamingo Dancer was not videotaped.

The ALJ did not find the failure to videotape Mr. McCammon's examination of Jose's Flamingo Dancer casts doubt on Dr. Kirsten's examination of Jose's Flamingo Dancer, as the Administrator contends. Instead, the ALJ states the failure to videotape Mr. McCammon's examination of Jose's Flamingo Dancer "casts suspicion upon the audio-visual evidence and Dr. Kirsten's conclusions about the DQP findings." (ALJ's Decision and Order at 12). Therefore, I find the Administrator's assignment of error has no merit.

Fourth, the Administrator contends the ALJ erroneously concluded that Dr. Kirsten did little more than guess as to the cause of Jose's Flamingo Dancer's soreness (Administrator's Appeal Pet. ¶ II(D) at 8-9).

The ALJ states Dr. Kirsten did little more than hazard a guess about the cause of Jose's Flamingo Dancer's soreness, as follows:

> Further, Dr. Kirsten did little more than hazard a guess about the cause of the animal's soreness, testifying that it was made sore by either mechanical or chemical means. Tr. at 53. In my experience, such speculative opinions by experts without reliable scientific proof would be accorded little probative weight, if found admissible at all.

ALJ's Decision and Order at 12.

Dr. Kirsten is a veterinarian who received his degree in veterinary medicine from Michigan State University in 1975 (Tr. at 27).

Dr. Kirsten practiced veterinary medicine for thirteen (13) years prior to being hired by APHIS as a veterinary medical officer (Tr. at 28). Prior to Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer, APHIS promoted Dr. Kirsten to "supervisory animal care specialist" (Tr. at 28). Thus, at the time Dr. Kirsten identified the cause of the painful areas he located on Jose's Flamingo Dancer's forelimbs, he had been a veterinarian for thirty-four (34) years and had worked for APHIS as a veterinary medical officer and supervisory animal care specialist for twenty-one (21) years. Dr. Kirsten prepared an affidavit on April 17, 2009, the day after he examined Jose's Flamingo Dancer to determine whether she was sore. Dr. Kirsten states in that affidavit, as follows:

> It is my professional opinion that this horse was sored by a person by chemical and/or physical means and could reasonably be expected to experience pain while moving.

CX 7 at 1. Similarly, Dr. Kirsten testified that, based upon his examination of Jose's Flamingo Dancer, he concluded Jose's Flamingo Dancer had been sored by mechanical or chemical means (Tr. at 53). I find no evidence in the record indicating that Dr. Kirsten did little more than hazard a guess about the cause of Jose's Flamingo Dancer's soreness. Instead, I find Dr. Kirsten's determination of the cause of Jose's Flamingo Dancer's soreness is, as he states in his affidavit, a "professional opinion" formed in light of Dr. Kirsten's experience and qualifications as a veterinarian, an APHIS veterinary medical officer, and an APHIS supervisory animal care specialist and based on his examination of Jose's Flamingo Dancer on April 16, 2009. Therefore, I do not adopt the ALJ's finding that Dr. Kirsten did little more than hazard a guess about the cause of Jose's Flamingo Dancer's soreness.

FINDINGS OF FACT

1. Mr. Jenne is a resident of Tennessee.

2. Mr. Jenne owns and operates Justin Jenne Stables, also known as Justin Jenne Stables at Frazier and Frazier Farms.

3. At all times material to this proceeding, Mr. Jenne was the trainer of Jose's Flamingo Dancer.

4. On April 16, 2009, Mr. Jenne entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer.

5. On April 16, 2009, Mr. Jenne presented Jose's Flamingo Dancer for inspection at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, after training the horse for more than one year.

6. On April 16, 2009, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, two DQPs, Mr. McCammon and Mr. Acree, examined Jose's Flamingo Dancer and each found Jose's Flamingo Dancer unilaterally sore.

7. Dr. Kirsten, an APHIS supervisory animal care specialist, inspected horses participating in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 16, 2009, for compliance with the Horse Protection Act.

8. On April 16, 2009, Dr. Kirsten conducted a pre-show examination of Jose's Flamingo Dancer at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, and found Jose's Flamingo Dancer manifested abnormal bilateral sensitivity in response to his palpation of her forelimbs. Dr. Kirsten found that Jose's Flamingo Dancer's reactions to his palpation of her forelimbs were consistent and repeatable.

9. Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer was videotaped.

10. Based upon his April 16, 2009, examination of Jose's Flamingo Dancer, Dr. Kirsten concluded Jose's Flamingo Dancer was "sore" within the meaning of the Horse Protection Act.

CONCLUSIONS OF LAW

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On the basis of the evidence in the record, I conclude Jose's Flamingo Dancer was "sore," as that term is defined in the Horse Protection Act, when entered on April 16, 2009, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.

3. On April 16, 2009, Mr. Jenne entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in violation of 15 U.S.C. § 1824(2)(B).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Jenne is assessed a $2,200 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:

USDA APHIS General
P.O. Box 979043
St. Louis, Missouri
63197-9000

Mr. Jenne's payment of the civil penalty shall be forwarded to, and received by, APHIS within six months after service of this Order on Mr. Jenne. Mr. Jenne shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 13-0080.

2. Mr. Jenne is disqualified for a period of one uninterrupted year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or device, and from managing, judging, 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 horses 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 areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Mr. Jenne shall become effective on the day after the period of disqualification imposed on Mr. Jenne in *Jenne*, No. 13-0308, 2015 WL 1776433 (U.S.D.A. Apr. 13, 2015), concludes.

Right to Judicial Review

Mr. Jenne has the right to obtain judicial review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. Jenne resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Jenne must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.[28]

The date of the Order in this Decision and Order is July 17, 2015.

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[28] 15 U.S.C. § 1825(b)(2), (c).

ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISIONS

In re: PAUL A. ROSBERG, d/b/a ROSBERG FARM.
Docket No. 12-0216.
Decision and Order.
Filed August 20, 2015.

OFPA – Administrative procedure – Appeal to Judicial Officer – Service – Summary judgment.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

The Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], instituted this proceeding by filing a complaint on January 31, 2012. The Administrator instituted the proceeding under the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522) [Organic Foods Production Act]; the National Organic Program regulations (7 C.F.R. pt. 205) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges:(1) on November 15, 2006, Paul A. Rosberg applied to OneCert for organic certification under the Regulations while still certified by the Organic Crop Improvement Association and failed to declare on his application to OneCert that he was previously certified by the Organic Crop Improvement Association and failed to provide OneCert with copies of previous noncompliance

letters from the Organic Crop Improvement Association or a description of how his noncompliance was resolved, in willful violation of 7 C.F.R. § 205.401; (2) on August 28, 2007, Mr. Rosberg applied to International Certification Services, Inc., for organic certification under the Regulations and failed to declare on his application to International Certification Services, Inc., that he was previously certified by the Organic Crop Improvement Association, failed to declare his application for organic certification with OneCert, failed to declare his denial of organic certification by OneCert, and failed to provide International Certification Services, Inc., with copies of previous noncompliance letters or a description of how his noncompliance was resolved, in willful violation of 7 C.F.R. § 205.401; and (3) on September 10, 2007, Mr. Rosberg applied to the Ohio Ecological Food and Farm Association for organic certification under the Regulations and failed to declare on his application to the Ohio Ecological Food and Farm Association that he was previously certified by the Organic Crop Improvement Association, failed to declare his application for organic certification with OneCert and International Certification Services, Inc., failed to declare his denial of organic certification by OneCert and International Certification Services, Inc., and failed to provide the Ohio Ecological Food and Farm Association with copies of previous noncompliance letters or a description of how his noncompliance was resolved, in willful violation of 7 C.F.R. § 205.401.[1]

On May 9, 2012, Mr. Rosberg filed an answer generally denying the allegations of the Complaint.[2]

On January 30, 2014, the Administrator filed Complainant's Motion for Summary Judgment [Motion for Summary Judgment]. The Hearing Clerk attempted to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment by certified mail at [redacted]. The United States Postal Service returned the mailing to the Hearing Clerk

[1] Compl. ¶ II(1)-(3) at 3-4.
[2] Partial Answer.

marked "unclaimed."[3]On March 5, 2014, the Hearing Clerk remailed the Administrator's Motion for Summary Judgment by regular mail to Mr. Rosberg at the same address in Wausa, Nebraska, in an attempt to serve Mr. Rosberg in accordance with 7 C.F.R. § 1.147(c)(1).[4]

On May 28, 2014, Administrative Law Judge Janice K. Bullard [ALJ] filed a Decision and Order on Summary Judgment. On May 30, 2014, the ALJ vacated the Decision and Order on Summary Judgment[5] and issued an Amended Decision and Order on Summary Judgment in which the ALJ found Mr. Rosberg failed to respond to the Administrator's Motion for Summary Judgment and granted the Administrator's Motion for Summary Judgment.[6]

On August 14, 2014, Mr. Rosberg appealed the ALJ's Amended Decision and Order on Summary Judgment to the Judicial Officer.[7] On August 28, 2014, the Administrator filed Complainant's Response to Appellant's Appeal of Amended Decision and Order on Summary Judgment, and on September 2, 2014, Mr. Rosberg filed a supplement to his August 14, 2014, appeal petition.[8] On appeal, Mr. Rosberg requested that I vacate the ALJ's Amended Decision and Order on Summary Judgment because the Hearing Clerk failed to serve him with the Administrator's Motion for Summary Judgment at his last known residence in [redacted], as required by 7 C.F.R. § 1.147(c)(1). Mr. Rosberg asserted he informed the Hearing Clerk of his [redacted], residence in a letter dated February 26, 2014, a copy of which letter Mr. Rosberg attached to his Supplement to Appeal Petition.

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[3] U.S. Postal Service Product and Tracking Information for [redacted] 7197.

[4] Mem. to the File issued by Jamaal Clayburn, Legal Assistant, Office of the Hearing Clerk, on March 5, 2014.

[5] Order Vacating Decision and Order Issued on May 28, 2014.

[6] Am. Decision and Order on Summ. J. at 2, 11.

[7] Motion for Recons.: Obj. for Decision Without Hr'g or Notice of Hr'g.

[8] Supplemental Motion for Recons.: Obj. for Decision Without Hr'g or Notice of Hr'g [Supplement to Appeal Pet.].

I found Mr. Rosberg informed the Hearing Clerk of his [redacted], residence and found the Hearing Clerk failed to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment in accordance with 7 C.F.R. § 1.147(c)(1). Accordingly, I vacated the ALJ's Amended Decision and Order on Summary Judgment and remanded the proceeding to the ALJ to provide Mr. Rosberg an opportunity to respond to the Administrator's Motion for Summary Judgment.[9]

On October 30, 2014, the ALJ issued an Order on Remand directing the Hearing Clerk to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment and directing Mr. Rosberg to respond to the Administrator's Motion for Summary Judgment within thirty (30) days after receipt of the Administrator's Motion for Summary Judgment.

On December 2, 2014, Jason Ravnsborg entered an appearance on behalf of Mr. Rosberg and requested an extension of time within which to file a response to the Administrator's Motion for Summary Judgment. The ALJ granted the December 2, 2014 Motion for Extension of Time and a subsequent motion for extension of time, and, on February 13, 2015, Mr. Ravnsborg filed a timely response to the Administrator's Motion for Summary Judgment.[10]

On February 18, 2015, Mr. Rosberg himself moved for an extension of time to respond to the Administrator's Motion for Summary Judgment and requested that the ALJ recuse herself. On February 20, 2015, the ALJ denied the Motion for recusal and the Motion for Extension of Time, but allowed additional time for Mr. Rosberg to file documents, notwithstanding that Mr. Rosberg had filed his February 18, 2015 Motion directly, despite the entry of an appearance by Mr. Ravnsborg as counsel for Mr. Rosberg.[11]

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[9] Rosberg, 73 Agric. Dec. 570 (U.S.D.A. 2014) (Remand Order).
[10] Resp't's Answer to Complainant's Motion for Summ. J.
[11] ALJ's Order Den. Mot. for Recusal; Den. Mot. for Extension to File an Answer; and Granting Mot. for Extension of Time to File Submissions.

On March 13, 2015, Mr. Rosberg filed documents. On March 19, 2015, Mr. Rosberg requested that the ALJ reconsider the ALJ's February 20, 2015 Order. On March 26, 2015, the Administrator filed a reply to Mr. Rosberg's February 13, 2015 Response to the Administrator's Motion for Summary Judgment.[12] On March 30, 2015, Mr. Ravnsborg filed a motion to withdraw as counsel for Mr. Rosberg. On April 7, 2015, Mr. Rosberg moved to dismiss the case or, in the alternative, to indefinitely continue the case,[13] and on April 13, 2015, Mr. Rosberg filed a request for summary judgment.

On April 28, 2015, the ALJ issued an order granting Mr. Ravnsborg's motion to withdraw as counsel for Mr. Rosberg, denying Mr. Rosberg's request for reconsideration of the ALJ's February 20, 2015, Order, and denying Mr. Rosberg's motion to dismiss or, in the alternative, to indefinitely continue the proceeding.[14] On April 28, 2015, the ALJ also issued a Decision on Remand in which the ALJ: (1) concluded there are no genuine issues of material fact presented in this proceeding and entry of summary judgment in favor of the Administrator is appropriate; (2) concluded Mr. Rosberg willfully violated 7 C.F.R. § 205.401 as alleged in the Complaint; (3) ordered Mr. Rosberg to cease and desist from violating the Regulations; (4) revoked Mr. Rosberg's organic certification under the Regulations for a period of five years; and (5) disqualified Mr. Rosberg from being eligible to be certified as an organic operation under the Organic Foods Production Act for a period of five years.[15]

On May 21, 2015, Mr. Rosberg filed a request that the ALJ reconsider the ALJ's Decision and Order on Remand and the ALJ's April 28, 2015, Order.[16] On June 8, 2015, Mr. Rosberg filed a notice of appeal. On

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[12] Complainant's Response to Resp't's Answer to Complainant's Mot. for Summ. J.
[13] Mot. for Case Dismissal or Indefinate [sic] Continuance.
[14] Order Granting Counsel's Mot. to Withdraw as Counsel; Den. Resp't's Req. for Recons. of My Order of February 20, 2015; and Den. Resp't's Mot. to Dismiss or Indefinite Continuance [ALJ's April 28, 2015, Order].
[15] ALJ's Decision and Order on Remand at 13-14.
[16] Mr. Rosberg's Motion for Recons. of Two Orders.

June 9, 2015, the ALJ issued an Order Denying Reconsideration. On July 13, 2015, Mr. Rosberg appealed the ALJ's Decision and Order on Remand to the Judicial Officer [Appeal Petition]. On July 30, 2015, the Administrator filed Complainant's Response to Appellant's Appeal of Decision and Order on Remand, and on July 31, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Mr. Rosberg's June 8, 2015 Notice of Appeal

The Rules of Practice set forth requirements for an appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be

> filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a).

Mr. Rosberg's June 8, 2015 Notice of Appeal reads in its entirety, as follows:

> UNITED STATES DEPARTMENT OF AGRICULTURE
> BEFORE THE SECRETARY OF AGRICULTURE
> Docket No 12-0216
>
> In re:
> Paul A Rosberg doing business as
> Rosberg Farm
>
> Respondent. Notice of Appeal
>
> I Paul A Rosberg appeals [sic] any and all orders of Janice K Bullard. I wish to hold my appeal until my motion to reconsideration [sic] has been ruled on. So under duress I made out this Notice of Appeal in fear that the clerk has not filled [sic] my motion for reconsider [sic] that was to be decided by this byest [sic] Admistrative [sic] Law Judge.
>
> Respectivally [sic] submitted
> Paul A Rosberg

Notice of Appeal. Mr. Rosberg's Notice of Appeal does not remotely conform to the requirements of an appeal petition set forth in 7 C.F.R. § 1.145(a). Therefore, I find Mr. Rosberg's Notice of Appeal is not an appeal petition. Instead, I find Mr. Rosberg's Notice of Appeal is a request that I extend the time for filing an appeal petition until a

reasonable time after the ALJ rules on Mr. Rosberg's May 21, 2015 Motion for Reconsideration of Two Orders.

On June 9, 2015, the ALJ ruled on Mr. Rosberg's May 21, 2015 Motion for Reconsideration of Two Orders,[17] and, on June 15, 2015, the Hearing Clerk served Mr. Rosberg with the ALJ's Order Denying Reconsideration.[18] As Mr. Rosberg requested that I extend the time for filing an appeal petition until a reasonable time after the ALJ ruled on Mr. Rosberg's Motion for Reconsideration of Two Orders and filed his Appeal Petition within 30 days after the Hearing Clerk served him with the ALJ's ruling, I find Mr. Rosberg's Appeal Petition timely filed.

Mr. Rosberg's July 13, 2015, Appeal Petition

The ALJ found the Administrator properly supported the Administrator's Motion for Summary Judgment and that Mr. Rosberg failed to show there is a genuine issue for trial (ALJ's Decision and Order on Remand at 1, 5, 12). On appeal, Mr. Rosberg contends sworn statements of two witnesses, which he submitted in this proceeding, set forth specific facts showing a genuine issue for trial; therefore, the ALJ's Decision and Order on Remand granting the Administrator's Motion for Summary Judgment is error (Appeal Pet. at 1).

One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.[19] If the moving party supports its motion for summary judgment, the burden shifts to the nonmoving party, who may not rest upon mere allegations, denials, speculation, or conjecture to defeat summary judgment but must, instead, resist the motion for summary judgment by setting forth specific

[17] ALJ's Order Den. Recons.
[18] United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9853 1819.
[19] Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Sheets v. Butera, 389 F.3d 772, 776 (8th Cir. 2004); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

facts, in affidavits, deposition transcripts, exhibits, or other evidence, that raise a genuine issue for trial.[20]

Mr. Rosberg failed to identify the sworn statements upon which he bases his appeal; however, the record relied upon by the ALJ[21] contains copies of four sworn statements submitted by Mr. Rosberg.

First, Mr. Rosberg attached to his Partial Answer and included in his March 13, 2015 document submission copies of an affidavit subscribed and sworn by Mr. Rosberg on June 21, 2005, more than one year prior to the date of Mr. Rosberg's November 15, 2006, August 28, 2007, and September 10, 2007, applications for organic certification, which are the subject of this proceeding. Mr. Rosberg's June 21, 2005 affidavit does not set forth specific facts showing a genuine issue for trial as Mr. Rosberg completed the affidavit prior to his applications for organic certification which are the subject of this proceeding.

Second, Mr. Rosberg attached to his Partial Answer a copy of an affidavit subscribed and sworn by Mr. Rosberg on April 6, 2010. Mr. Rosberg's April 6, 2010 affidavit contains a general denial that he violated the Regulations, conjecture that the Complaint is the work of Sam Welsch and Evert Lundquist, and allegations that persons tasked with determining whether Mr. Rosberg met the requirements for organic certification failed to act timely, failed to properly interpret his responses to their questions, lied, and were generally incompetent. Mr. Rosberg's general denial of the allegations in the Complaint, conjecture regarding the identity of persons whose work resulted in the issuance of the Complaint, and allegations regarding the honesty and ability of those

[20] Gannon Int'l, Ltd. v. Blocker, 684 F.3d 785, 794 (8th Cir. 2012) (stating speculation and conjecture are insufficient to defeat a motion for summary judgment); Doe v. U.S. Dep't of Veterans Affairs, 519 F.3d 456, 461 (8th Cir. 2008) (stating a nonmoving party's allegations or speculation, unsupported by specific facts or evidence, are insufficient to withstand a motion for summary judgment); Scherr Construction Co. v. Greater Huron Development Corp., 700 F.2d 463, 465 (8th Cir. 1983) (stating a party opposing a motion for summary judgment may not rest on allegations in the pleadings but must set forth specific facts that raise a genuine issue for trial).

[21] The ALJ admitted to the record the attachments to Mr. Rosberg's Partial Answer, filed May 9, 2012, and all of the documents filed by Mr. Rosberg on March 13, 2015 (ALJ's Decision and Order on Remand at 5).

tasked with determining whether he met the requirements for organic certification are not specific facts showing a genuine issue for trial.[22]

Third, Mr. Rosberg attached to his Partial Answer a copy of an affidavit subscribed and sworn by Kelly Rosberg on April 6, 2010. Ms. Rosberg's April 6, 2010 affidavit merely states an examination of Mr. Rosberg's affidavit will result in the realization that Mr. Rosberg did not violate the Regulations. On its face, Ms. Rosberg's affidavit does not set forth specific facts, but rather, speculation regarding the effect Mr. Rosberg's affidavit will have on persons examining that affidavit.

Fourth, Mr. Rosberg included in his March 13, 2015 document submission, a copy of an undated letter addressed to the National Organic Program signed and sworn by Mr. Rosberg. The letter requests that the National Organic Program provide Mr. Rosberg with documents that are described in that undated letter, but the letter does not set forth specific facts showing a genuine issue for trial.

Based upon a careful consideration of the record, I find that no change or modification of the ALJ's April 28, 2015 Decision and Order on Remand is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (i) *Decision of the judicial officer on appeal*. . . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

[22] *See supra* note 20.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 28, 2015 Decision and Order on Remand is adopted as the final order in this proceeding.

Right to Judicial Review

Mr. Rosberg has the right to obtain judicial review of this Decision and Order in the United States district court for the district in which Mr. Rosberg is located.[1]

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In re: KRIEGEL, INC. and LAURANCE KRIEGEL.
Docket Nos. 15-0050; 15-0051.
Decision and Order.
Filed October 29, 2015.

OFPA - Administrative procedure – Appeals and review – Decision maker – Double jeopardy – Organic certification.

Buren W. Kidd, Esq. for Complainant.
Laurance Kriegel, pro se, for Respondents.
Initial Decision and Order by Acting Chief Administrative Law Judge Janice K. Bullard.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

The Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], instituted this

[1] 7 U.S.C. § 6520(b).

proceeding by filing an Order to Show Cause on January 8, 2015. The Administrator instituted the proceeding under the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522) [Organic Foods Production Act]; the National Organic Program regulations (7 C.F.R. pt. 205) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator: (1) alleged Kriegel, Inc., and Laurance Kriegel [Respondents] were not eligible to be certified under the Organic Foods Production Act and the Regulations because Respondents failed to update their organic system plan, pursuant to 7 C.F.R. § 205.201(a), and failed to provide information necessary to determine their compliance with previously identified areas of noncompliance with the Regulations, pursuant to 7 C.F.R. § 205.401(d);[1] and (2) directed Respondents to show cause why their application for organic certification under the Regulations should not be denied. On February 19, 2015, Respondents filed a Response to Order to Show Cause.

On April 24, 2015, Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] filed an Order Directing the Parties to Submit Evidence in which the Chief ALJ directed that, no later than June 26, 2015, each party file with the Hearing Clerk: (1) documentary evidence the Chief ALJ should consider; (2) a written argument stating the party's position in this proceeding; and (3) a proposed decision which addresses the party's contentions. On June 25, 2015, the Administrator filed documentary evidence[2] and proposed findings of fact, proposed

[1] Order to Show Cause ¶ II at 3. The Administrator also alleged that, on March 31, 2014, the Texas Department of Agriculture found Respondents are not eligible to be certified because Respondents failed to resolve outstanding areas of noncompliance or come into full compliance with the Regulations, pursuant to 7 C.F.R. § 205.402(a)(3) (Order to Show Cause ¶ III at 3). Subsequent to filing the Order to Show Cause, the Administrator stated he inadvertently included this allegation in the Order to Show Cause, would not present evidence to prove this allegation, and would not present arguments in support of this allegation (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Br. in Support Thereof at 1 n.1).

[2] The Administrator identified the filed documents as "CX 1-CX 19."

conclusions of law, a proposed order, and a brief in support of the Administrator's proposed findings of fact, proposed conclusions of law, and proposed order.[3] Respondents failed to respond to the Chief ALJ's April 24, 2015, Order Directing the Parties to Submit Evidence.

On August 26, 2015, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) concluded the Texas Department of Agriculture properly found Respondents were not eligible to be certified under the Organic Foods Production Act and the Regulations because Respondents failed to provide the information necessary to determine their eligibility for organic certification, pursuant to 7 C.F.R. § 205.201(a); (2) concluded the Texas Department of Agriculture properly found Respondents were not eligible to be certified under the Organic Foods Production Act and the Regulations because Respondents failed to provide documentation with their application for organic certification that verified their compliance with 7 C.F.R. §§ 205.103, .200, .203, .205-.206, and .406, pursuant to 7 C.F.R. § 205.401(d); (3) concluded the Administrator properly upheld the determinations of the Texas Department of Agriculture that Respondents were not eligible for organic certification under the Organic Foods Production Act and the Regulations; and (4) denied Respondents' applications and request for organic certification under the Organic Foods Production Act and the Regulations.[4]

On September 11, 2015, Respondents filed a Notice of Appeal [Appeal Petition]. The Hearing Clerk served the Administrator with the Respondents' Appeal Petition on September 11, 2015, and, pursuant to the Rules of Practice, the Administrator was required to file with the Hearing Clerk a response to the Respondents' Appeal Petition no later than October 1, 2015.[5]

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[3] Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Br. in Support Thereof.

[4] Chief ALJ's Decision and Order at 7.

[5] *See* 7 C.F.R. § 1.145(b).

On October 22, 2015, the Administrator filed Complainant's Response to Appellants' Notice of Appeal. The Hearing Clerk included the Administrator's late-filed response to the Respondents' Appeal Petition in the record. I have not considered the Administrator's response to the Respondents' Appeal Petition because the response was late-filed, and the Administrator's late-filed response forms no part of the basis for this Decision and Order. On October 23, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Kriegel, Inc., and Mr. Kriegel's Appeal Petition

Respondents raise eight issues in their Appeal Petition.

First, Respondents assert they have "not used any chemicals for many years" (Appeal Pet. ¶ I at 2).

The Administrator did not allege that Respondents used chemicals (Order to Show Cause), and Respondents' use of chemicals is not at issue in this proceeding. Moreover, even if I were to find that Respondents have "not used any chemicals for many years," as Respondents assert, that finding would not alter my disposition of this proceeding. Therefore, I conclude Respondents' assertion that they have "not used any chemicals for many years" is not relevant to this proceeding.

Second, Respondents assert they accurately completed all forms necessary for organic certification; therefore, Respondents qualify for organic certification (Appeal Pet. ¶ II at 2).

The Chief ALJ found the unrefuted evidence establishes Respondents have not complied with the Regulations requiring Respondents to submit

complete applications and an organic system plan to their certifying agent, the Texas Department of Agriculture.[6]

The Judicial Officer is not bound by the Chief ALJ's factual determinations. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

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[6] Chief ALJ's Decision and Order at 4-5.

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

The consistent practice of the Judicial Officer is to give great weight to the findings by administrative law judges.[7] The Judicial Officer has reversed an administrative law judge's findings of fact where: (1) documentary evidence or inferences to be drawn from the facts are involved;[8] (2) the record is sufficiently strong to compel a reversal as to

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[7] JSG Trading Corp., 57 Agric. Dec. 640, 687-90 (U.S.D.A. 1998) (Decision as to JSG Trading Corp., Gloria and Tony Enters., d/b/a G&T Enters., and Anthony Gentile), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand* 58 Agric. Dec. 1041 (U.S.D.A. 1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); Goetz, 56 Agric. Dec. 1470, 1510 (U.S.D.A. 1997); Hodgins, 56 Agric. Dec. 1242, 1364-65 (U.S.D.A. 1997), *remanded*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000) (citation limited under 6th Circuit Rule 28(g)), *printed in* 59 Agric. Dec. 534 (U.S.D.A. 2000), *final decision on remand*, 60 Agric. Dec. 73 (U.S.D.A. 2001), *aff'd* 33 F. App'x 784 (6th Cir. 2002); Saulsbury Enters., 56 Agric. Dec. 82, 89 (U.S.D.A. 1997) (Order Den. Pet. for Recons.); Andershock's Fruitland, Inc., 55 Agric. Dec. 1204, 1229 (U.S.D.A. 1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998), *reprinted in* 57 Agric. Dec. 1458 (U.S.D.A. 1998).

[8] Upton, 44 Agric. Dec. 1936, 1942 (U.S.D.A. 1985); Petty, 43 Agric. Dec. 1406, 1421 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); Aldovin Dairy, Inc., 42 Agric. Dec. 1791, 1797-98 (U.S.D.A. 1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); Farrow, 42 Agric. Dec. 1397, 1405 (U.S.D.A. 1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); King Meat Co., 40 Agric. Dec. 1468, 1500-01 (U.S.D.A. 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*

the facts;[9] or (3) an administrative law judge's findings of fact are hopelessly incredible.[10] The Chief ALJ's findings of fact are fully supported by the documentary evidence, and I find nothing in the record compelling reversal of the Chief ALJ's findings of fact. Respondents' request that I reverse the Chief ALJ's findings of fact is based upon Respondents' unsupported assertion that they accurately completed all forms necessary for organic certification. I decline to reverse the Chief ALJ's findings of fact based upon Respondents' unsupported assertion of fact.

Third, Respondents assert the Chief ALJ's references to CX 1-CX 8, CX 13-CX 15, and CX 17-CX 19 in the Chief ALJ's August 26, 2015, Decision and Order are references to "unpublished unlawful rules" (Appeal Pet. ¶ II at 2).

On April 24, 2015, the Chief ALJ filed an Order Directing the Parties to Submit Evidence in which the Chief ALJ directed that each party file with the Hearing Clerk documentary evidence the Chief ALJ should consider. On June 25, 2015, in response to the Chief ALJ's order, the Administrator filed documentary evidence which the Administrator identified as "CX 1-CX 19." A plain reading of the Chief ALJ's August 26, 2015 Decision and Order reveals that the Chief ALJ's references to CX 1-CX 8, CX 13-CX 15, and CX 17-CX 19 are references to the documentary evidence the Administrator filed with the Hearing Clerk on June 25, 2015, and are not references to "unpublished unlawful rules," as Respondents assert. Therefore, I reject Respondents' assertion that the Chief ALJ referenced "unpublished unlawful rules" in the Chief ALJ's Decision and Order.

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remand, 42 Agric. Dec. 726 (U.S.D.A. 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 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[9] Stamper, 42 Agric. Dec. 20, 30 (U.S.D.A. 1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (U.S.D.A. 1992).

[10] Fairbank v. Hardin, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); Ennes, 45 Agric. Dec. 540, 548 (U.S.D.A. 1986).

Fourth, Respondents contend this proceeding constitutes a second prosecution for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States (Appeal Pet. ¶ III at 2).

The Double Jeopardy Clause provides that no person will "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. CONST. amend. V. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense.[11]

This proceeding is an administrative proceeding brought under the Organic Foods Production Act and the Regulations to determine whether Respondents' applications for organic certification under the Organic Foods Production Act should be denied; it is not a "prosecution" within the meaning of the Double Jeopardy Clause.[12] The Administrator does not seek to punish Respondents. Instead, the Administrator seeks to determine whether Respondents' applications for organic certification under the Organic Foods Production Act should be denied. Therefore, I reject Respondents' contention that this proceeding constitutes a second prosecution for an offense in violation of the Double Jeopardy Clause of

[11] Monge v. California, 524 U.S. 721, 727-28 (1998); United States v. Dixon, 509 U.S. 688, 696 (1993); Ohio v. Johnson, 467 U.S. 493, 499-500 (1984); Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-07 (1984); Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Illinois v. Vitale, 447 U.S. 410, 415-16 (1980); United States v. Dinitz, 424 U.S. 600, 606 (1976); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[12] *See* United States v. Bizzell, 921 F.2d 263, 266 (10th Cir. 1990) (stating administrative proceedings where defendants were debarred from Housing and Urban Development programs were not "prosecutions" within the meaning of the Double Jeopardy Clause); Greenly, 72 Agric. Dec. 586, 592 (U.S.D.A. 2013) (stating an administrative proceeding to determine whether a person is fit to be licensed under the Animal Welfare Act is not a "prosecution" within the meaning of the Double Jeopardy Clause), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); KDLO Enters., Inc., 70 Agric. Dec. 1098, 1105 (U.S.D.A. 2011) (holding "jeopardy" within the meaning of the Double Jeopardy Clause does not attach to a disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930); Horton, 50 Agric. Dec. 430, 440 (U.S.D.A. 1991) (stating double jeopardy is not applicable to administrative proceedings for the assessment of a civil monetary penalty); McDaniel, 45 Agric. Dec. 2255, 2264 (U.S.D.A. 1986) (stating an administrative proceeding to assess a civil monetary penalty is civil in nature and not subject to the Double Jeopardy Clause).

the Fifth Amendment to the Constitution of the United States and conclude the Double Jeopardy Clause cannot be interposed to bar this proceeding.

Fifth, Respondents contend the Chief ALJ has established that her motive is to be an unconstitutional decision maker (Appeal Pet. ¶ III at 2).

Respondents cite no basis for their contention that the Chief ALJ established that her motive is to be an unconstitutional decision maker, and I cannot locate anything in the record that supports Respondents' contention that the Chief ALJ established that her motive is to be an unconstitutional decision maker. A review of the record reveals that the Chief ALJ conducted this proceeding in accordance with the Administrative Procedure Act and the Rules of Practice and provided the parties with due process in accordance with the Fifth Amendment to the Constitution of the United States.

Sixth, Respondents contend the Texas Department of Agriculture has established that it is an unconstitutional decision maker (Appeal Pet. ¶ III at 2).

Respondents cite no basis for their contention that the Texas Department of Agriculture established that it is an unconstitutional decision maker, and I cannot locate anything in the record that supports Respondents' contention that the Texas Department of Agriculture established that it is an unconstitutional decision maker. Moreover, I cannot locate any authority indicating an extant constitutional impediment to the Secretary of Agriculture's accreditation of the Texas Department of Agriculture as a certifying agent, pursuant to 7 U.S.C. § 6514(a) and 7 C.F.R. § 205.500(a), or to the Texas Department of Agriculture's performing the functions of a certifying agent pursuant to the Organic Foods Production Act and the Regulations.

Seventh, Respondents contend "Federal Rules" require the Texas Department of Agriculture to respond, and, as the Texas Department of

Agriculture failed to respond, the Chief ALJ's denial of Respondents' request for organic certification, is error (Appeal Pet. Conclusion at 3). I infer, based upon the Respondents' Appeal Petition, Respondents contend the Texas Department of Agriculture was required by the Rules of Practice to respond to the Administrator's Order to Show Cause.

A plain reading of the Order to Show Cause reveals the Administrator instituted this proceeding against Kriegel, Inc., and Laurance Kriegel and not against the Texas Department of Agriculture. The Rules of Practice provide that the party against whom a proceeding is instituted, referred to in the Rules of Practice as a respondent,[13] may file a response to a complaint.[14] *See* 7 C.F.R. § 1.136(a). As the Texas Department of Agriculture is not a party respondent in this proceeding, the Texas Department of Agriculture has no standing to file a response to the Administrator's Order to Show Cause and no consequence follows from the Texas Department of Agriculture's failure to file a response to the Administrator's Order to Show Cause. Therefore, I reject Respondents' assertions that the Texas Department of Agriculture is required to respond and that the Chief ALJ's denial of Respondents' request for organic certification is error.

Eighth, Respondents contend the Chief ALJ's denial of their applications for organic certification violates their constitutional right to the pursuit of happiness (Appeal Pet. Conclusion at 3).

The Declaration of Independence states that all men are endowed by their creator with certain unalienable rights and among these unalienable rights is the right to the pursuit of happiness;[15] however, neither the Constitution of the United States nor its amendments guarantee a generalized right to the pursuit of happiness. Therefore, I reject Respondents' contention that the Chief ALJ's denial of their applications

[13] The Rules of Practice define the term "respondent," as follows: "*Respondent* means the party proceeded against." 7 C.F.R. § 1.132 (*Respondent*).
[14] The Rules of Practice define the term "complaint" to include an order to show cause, as follows: "*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted." 7 C.F.R. § 1.132 (*Complaint*).
[15] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

for organic certification violates a constitutional right to the pursuit of happiness.

Based upon a careful consideration of the record, I find no change or modification of the Chief ALJ's August 26, 2015 Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (i) *Decision of the judicial officer on appeal*. . . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The Chief ALJ's August 26, 2015, Decision and Order is adopted as the final order in this proceeding.

Right to Judicial Review

Respondents have the right to obtain judicial review of this Decision and Order in the United States district court for the district in which Respondents are located.[16]

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[16] 7 U.S.C. § 6520(b).

In re: ERNEST MILLER, d/b/a STONEY-M FARM.
Docket No. 14-0067.
Decision and Order.
Filed August 3, 2015.

OFPA.

Buren Kidd, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Acting Administrative Law Judge.

DECISION AND ORDER

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Ernest Miller, d/b/a Stoney-M Farm ("Respondent"), alleging violations of the Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. §§ 6501-6522, and regulations implementing the OFPA and the National Organic Program (NOP), set forth at 7 C.F.R. § 205.1 – 205.699.

I. ISSUES

1. Whether Respondent willfully violated OFPA and the NOP Regulations, and if so;

2. Whether sanctions should be issued, and if so, the nature of those sanctions.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

On February 10, 2014, Complainant filed a complaint against Respondent alleging violations of the OFPA. On March 10, 2014, Respondent filed a general denial of the allegations. On August 14, 2014, Complainant filed a request to set a hearing date.

Following a telephone conference with counsel and Mr. Miller on January 20, 2015, I issued a pre-hearing order setting deadlines for exchanging evidence and filing witness and exhibit lists with the Office of the Hearing Clerk. I scheduled a hearing for the date agreed by counsel and Respondent. On that same day, counsel for Complainant filed a motion for summary judgment. On March 18, 2015, I denied the Motion for Summary Judgment.

The parties exchanged evidence and filed lists of witnesses and exhibits. The hearing was held on April 28, 2015. Mr. Miller participated by telephone. Counsel for Complainant and Complainant's witnesses appeared in the hearing room for the Office of Administrative Law Judges in Washington, DC. I admitted to the record Complainant's exhibits numbered CX-1 through CX-5. I admitted to the record Respondent's exhibits numbered RX-1 through RX-3. I concluded that written closing argument was not necessary in this matter. The transcript of the hearing was received on May 19, 2015.

This Decision and Order is based upon the pleadings and arguments of the parties and the documentary and testamentary evidence. The record is now closed, and the matter is ripe for adjudication.[1]

B. Statutory and Regulatory Authority

The Act allows persons to seek and obtain organic certification from certifying agents accredited by the Secretary of USDA to certify crops, livestock, wild crops, products, and handling operations as compliant with the National Organic Standards set forth at 7 C.F.R. part 205.

[1] In this Decision and Order, references to Complainant's evidence shall be denoted as "CX-#"; references to Respondent's evidence shall be denoted as "RX-#", and references to the transcript shall be denoted as "Tr. #."

Regulations were issued to implement the Act and ensure consumers that products labeled as "organic" meet the standards promulgated under the Act.

Procedures for non-compliance with the Act and NOP Regulations are set forth at 7 C.F.R. § 205.662. The Act provides that the Secretary may find operators who violate the purposes of the organic certification period ineligible to participate in the program for a period of up to five years from the date of violation. 7 U.S.C. § 6519 (c)(1)(C).

C. Summary of the Evidence

1. Documentary Evidence

CX-1 through CX-5

RX-1 through RX-3

2. Testamentary Evidence

In April 2013, Allan Benjamin was employed as a contract Certification Coordinator for Quality Certification Services (QCS), which is a company accredited by the USDA National Organic Program to certify participants in the program. Tr. 11. Mr. Benjamin was trained by the International Organic Inspector's Association (IOIA) and has worked for a variety of certifiers in the Missouri Department of Agriculture Program, OCIA. Tr. 11-12.

On April 18, 2013, Respondent reported to QCS that a potentially non-organic material had been applied to some of his certified organic acres. Tr. 12. Mr. Miller later provided an invoice that identified the product and the location where it was used. Tr. 12-13. Mr. Benjamin concluded that the product was prohibited by the NOP, as it contained the prohibited materials urea and ammonium nitrate, "UAN." Tr. 13. QCS prepared a Notice of Non-Compliance with the NOP regulations

and proposed suspension of the affected acreage from the NOP. Tr. 14; CX-1; CX-2.

Matthew Michael is the Director of the Compliance and Enforcement Division for USDA's Agricultural Market Service, NOP. Tr. 20. His staff investigates complaints alleging violations of the Organic Food Production Act and the NOP Regulations and cooperates with other federal and state agencies to enforce the program. Tr. 21. Mr. Michael explained that enforcement of the NOP assures consumers that organic products meet a consistent standard and shows them that products that do not meet the standard will not be sold. Tr. 25. Enforcement also prevents non-compliant producers from gaining an unfair competitive advantage by profiting from using less expensive methods than organic farming. Tr. 26.

Mr. Miller's case began with a letter from Mr. Miller reporting the use of a prohibited additive, UAN, in his fertilizer. Tr. 21; 26-27. Participants in the NOP are required to self-report any non-compliant actions they take. Tr. 33. Mr. Miller again admitted using the substance in his appeals letters. Tr. 22; CX-2; CX-4. On July 12, 2013, the Administrator of AMS denied Mr. Miller's appeal of USDA's April 24, 2013 determination of non-compliance and proposed suspension of Respondent's organic certification. CX-5; CX-1. Mr. Michael testified that NOP recommended that Respondent's land be suspended from participation in the NOP for three years because his use of the prohibited product was serious and because Mr. Miller has continued to use the adulterated land to grow hay and sell it as organically grown. Tr. 27-28. He explained that by doing so, Respondent realized an unfair competitive advantage and also put buyers at risk of non-compliance with the program if those buyers used the hay in their organic production. Tr. 28. Mr. Michael was not aware how long it would take the non-compliant product to dissipate or otherwise be removed from the soil. Tr. 34.

Respondent Ernest Miller testified that he operates a small family farm that has been in the family for three generations. Tr. 37. He became involved in organic farming because he could not expand his acreage,

which is framed by an urban area with lots of commercial activity and because he liked the concept of organic farming. Tr. 38. Respondent started organically faming a small section of the farm and expanded to have approximately 100 hundred acres certified. Tr. 38.

Mr. Miller used the UAN product because it is a nitrogen and nutrient stabilizer that has been shown to help prevent nutrients from leeching our or evaporating, as it adheres to the organic matter in the soil. Tr. 39. Mr. Miller explained that the product helped reduce the odor of manure, which was important to him because of the proximity of houses to his farm. Tr. 38-39. Mr. Miller believed the product was all natural, as it is derived from calcium and coal, with UAN added to activate it. Tr. 39. He purchased an application of the product for his non-organic fields but learned as it was being spread that it had been applied inadvertently to thirty acres of his organic land. Tr. 40. He estimated that the percentage of actual product in a tanker load of manure was .0003, or a very small amount. Tr. As soon as it happened, Mr. Miller immediately called QCS to report it. Tr. 40.

D. Discussion

The unrefuted evidence establishes that Respondent used and sold a product that was grown on soil which had been treated by a substance prohibited by NOP. I credit Mr. Miller's testimony that he did not intentionally apply the prohibited product to his organic acreage, and that the amount of the substance was small. However, the Act and Regulations strictly prohibit certain substances, and no allowances are made for the mistaken use of such substances, no matter how minimal. Accordingly, Complainant has established Respondent's violation of the NOP.

USDA has proposed that Respondent be suspending from using the land affected by the prohibited substance for three years. The evidence demonstrates that Respondent continued to use the land after being advised of the proposed suspension because he was under the impression that he could continue to use the land while appeals were pending. I

credit Mr. Miller's explanation that he used the land to grow hay to help neighboring Amish farmers and not to gain a market advantage. I also accept his testimony that he did not use the affected land to grow corn because of concerns about its use by the corn buyer.

Although Mr. Michael considered Respondent's continued use of the land when determining the proposed sanction, he also credibly testified that the initial use of the substance warranted the imposition of the sanction. Mr. Michael explained that Respondent shall remain a certified organic producer, but product grown on the affected thirty acres may not be sold or labeled organic.

I accord weight to NOP's position and conclude that Complainant has established that the appropriate sanction in this matter is the suspension of the affected land for three years. I note that Complainant has not sought the imposition of a civil money penalty and has not sought to prohibit Respondent from otherwise participating in the NOP.

III. FINDINGS OF FACT

1. Respondent Ernest Miller, doing business as Stoney-M Farm, was at all times material hereto engaged in business as a certified organic operator and was certified to participate in the National Organic Program (NOP).

2. On March 23, 2013, Respondent applied a prohibited substance, UAN, to thirty acres of that portion of his farm certified as organic.

3. Respondent timely reported his use of the substance to his certification organization, Quality Certification Services (QCS).

4. QCS recommended the suspension of the affected thirty acres from participation in the NOP for three years.

5. Respondent appealed that recommendation to USDA's Agriculture Marketing Service (AMS).

6. AMS denied the appeal and upheld the suspension of Respondent's acreage.

IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Respondent violated 7 C.F.R. §§ 205.105 and 205.202(b) by using a prohibited substance.

3. The recommended suspension from use of the affected acreage did not affect Respondent's organic certification; therefore, that suspension was not stayed.

ORDER

Respondent Ernest Miller's organic certification with respect to the thirty acres of his land that was subject to the application of a prohibited substance is hereby suspended for a period not to exceed three years.

The effective date of the suspension shall be the date of receipt by Respondent of this Decision or Order.

Pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Initiated by the Secretary, this Decision and Order shall become final and effective without further proceedings thirty-five (35) days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service. 7 C.F.R. §§ 1.139 and 1.145.

Copies of this Decision and Order shall be sent to the parties by the Hearing Clerk.

The Hearing Clerk shall file the attached exhibits hard copies with the official record; the exhibits are already included in the electronic version of the official record.

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MISCELLANEOUS ORDERS & DISMISSALS

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BURNETTE FOODS, INC., a Michigan corporation.
Docket No. 11-0334.
Miscellaneous Order.
Filed December 21, 2015.

AMAA – Cherry Industry Administrative Board – Geographical applicability – Optimum supply formula – Petition to reconsider – Property, taking of – Reserve requirement – Sales constituency – Tart Cherry Order – Volume restrictions.

James J. Rosloniec, Esq. for Petitioner.
Sharlene A. Deskins, Esq. for AMS.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER

PROCEDURAL HISTORY

On July 6, 2015, Burnette Foods, Inc. [Burnette], filed a Petition to Reconsider the Decision of the Judicial Officer [Petition to Reconsider] requesting that I reconsider *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819 (U.S.D.A. June 19, 2015), and requesting an extension of time within which to file a brief in support of its Petition to Reconsider.

On July 9, 2015, I conducted a conference call with James J. Rosloniec, counsel for Burnette, and Sharlene A. Deskins, counsel for the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], to discuss Burnette's request for an extension of time to file a brief in support of its Petition to

Reconsider. Based upon the agreement of the parties, I extended the time for filing Burnette's brief in support of its Petition to Reconsider to August 21, 2015, and extended the time for filing the Administrator's response to Burnette's Petition to Reconsider and supporting brief to September 18, 2015.[1]

On August 20, 2015, Burnette filed a Brief in Support of Petition to Reconsider the Decision of the Judicial Officer [Supporting Brief]. The Administrator requested, and I granted, two additional extensions of time to file a response to Burnette's Petition to Reconsider and Supporting Brief,[2] and on October 5, 2015, the Administrator timely filed Respondent's Opposition to Petition to Reconsider the Decision of the Judicial Officer. On October 9, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Burnette's Petition to Reconsider.

DISCUSSION

Summary of Denial of Burnette's Petition to Reconsider

The rules of practice applicable to this proceeding[3] provide that a party to a proceeding may file a petition to reconsider an order issued by the Judicial Officer, as follows:

> **§ 900.68 Petitions for reopening hearings; for rehearings or reargruments of proceedings; or for reconsideration of orders.**

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[1] Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538821 (U.S.D.A. July 9, 2015) (Order Granting Burnette's Req. to File a Br. in Support of Burnette's Pet. to Reconsider and Extending the Time for Filing the Administrator's Resp. to Burnette's Pet. to Reconsider and Burnette's Br.).

[2] Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 5916954 (U.S.D.A. Sept. 16, 2015) (Order Granting the Administrator's Req. to Extend the Time for Filing the Administrator's Resp. to Burnette's Pet. to Reconsider Burnette's Br.); Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 5916956 (U.S.D.A. Oct. 2, 2015) (Order Granting the Administrator's Second Req. to Extend the Time for Filing Administrator's Resp. to Burnette's Pet. to Reconsider and Burnette's Br.)..

[3] The rules of practice applicable to this proceeding are the Rules of Practice Governing Proceedings on Petitions to Modify or to Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71).

> (a) *Petition requisite—*
> . . . .
> (3) *Petitions to rehear or reargue proceedings, or to reconsider orders*. A petition to rehear or reargue the proceeding or to reconsider the final order shall be filed within 15 days after the date of service of such order. Every such petition shall state specifically the matters claimed to have been erroneously decided, and alleged errors must be briefly stated.

7 C.F.R. § 900.68(a)(3). The purpose of a petition to reconsider is to seek correction of manifest errors of law or fact. A petition to reconsider is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition to reconsider is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised in Burnette's Petition to Reconsider and Supporting Brief, I do not find any error of law or fact, any change in controlling law, or any unusual circumstances necessitating modification of *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819 (U.S.D.A. June 19, 2015). Therefore, I deny Burnette's Petition to Reconsider.

Burnette's Petition to Reconsider and Supporting Brief

Burnette raises five issues in its Petition to Reconsider and Supporting Brief. First, Burnette contends I erroneously found CherrCo, Inc., is not a "sales constituency" (Burnette's Pet. to Reconsider ¶ 2a at 2-3; Burnette's Supporting Brief ¶ 2a at 2-4).

The federal marketing order regulating the handling of "Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin" (7 C.F.R. pt. 930) [Tart Cherry Order] defines the term "sales constituency," as follows:

> **§ 930.16 Sales constituency.**

> Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

7 C.F.R. § 930.16.

I found CherrCo, Inc., is not a "sales constituency" because CherrCo, Inc., is an organization which receives consignments of tart cherries from its member-cooperatives and does not direct where the consigned tart cherries are sold.[1] Burnette asserts I ignored many facts relating to the relationship between CherrCo, Inc., and its member-cooperatives and asserts CherrCo, Inc.'s activities go well beyond those of a mere consignee of tart cherries belonging to CherrCo, Inc.'s member-cooperatives (Burnette's Supporting Brief ¶ 2a at 2).

The record supports Burnette's assertion that CherrCo, Inc.'s activities go well beyond those of a mere consignee of tart cherries belonging to CherrCo, Inc.'s member-cooperatives, as I stated in the June 19, 2015, Decision and Order:

> CherrCo, Inc., was created to provide a uniform price structure for its member-cooperatives. CherrCo, Inc., provides a variety of services for its member-cooperatives, including establishment of a minimum price for tart cherries sold by its members, storage of tart cherries, inventory management, and release of tart cherries for shipment to buyers (Tr. at 550-52).

Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538819, at *5 (U.S.D.A. June 19, 2015). However, despite my agreement with Burnette's assertion that CherrCo, Inc.'s activities go well beyond those of a mere consignee of tart cherries belonging to CherrCo, Inc.'s member-cooperatives, Burnette raises nothing in its Petition to

[1] Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538819, at *5, 12 (U.S.D.A. June 19, 2015).

Reconsider or Supporting Brief that convinces me that my finding that CherrCo, Inc., does not direct where consigned tart cherries are sold, is error. The record establishes that CherrCo, Inc.'s member-cooperatives select their own sales agents (Tr. at 550, 558, 572). Once a member-cooperative's sales agent sells tart cherries to a buyer, the sales agent notifies CherrCo, Inc., of the identity of that buyer, the quantity of tart cherries sold to that buyer, the price, and other terms of sale (Tr. at 530-48). Therefore, I reject Burnette's contention that CherrCo, Inc., is a "sales constituency," as that term is defined in the Tart Cherry Order.

Second, Burnette contends I erroneously concluded the Cherry Industry Administrative Board complies with 7 C.F.R. § 930.20(g). Burnette contends the Cherry Industry Administrative Board has more than one member from, or affiliated with, a single sales constituency, CherrCo, Inc., in violation of 7 C.F.R. § 930.20(g). (Burnette's Pet. to Reconsider ¶ 2b at 3; Burnette's Supporting Brief ¶ 2b at 4).

The Tart Cherry Order limits the number of Cherry Industry Administrative Board members from one district who can be from, or affiliated with, a single sales constituency, as follows:

> **§ 930.20 Establishment and membership.**
>
> . . . .
> (g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

7 C.F.R. § 930.20(g). Burnette established, and the Administrator does not dispute, that multiple members of the Cherry Industry Administrative Board are also members of cooperatives that are members of CherrCo, Inc. However, as discussed in *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819, at *4-5 (U.S.D.A. June 19, 2015), I reject Burnette's contention that CherrCo, Inc., is a sales constituency; therefore, I also reject Burnette's contention that the Cherry Industry Administrative Board, as constituted, violates 7 C.F.R. § 930.20(g).

Third, Burnette contends I erroneously concluded the Secretary of Agriculture is not required to include imported tart cherry products in the Tart Cherry Order optimum supply formula (Burnette's Pet. to Reconsider ¶ 2c at 4-5; Burnette's Supporting Br. ¶ 2c at 4-9).

The Tart Cherry Order provides the method by which the Cherry Industry Administrative Board establishes the optimum supply level each crop year, as follows:

> **§ 930.50 Marketing policy.**
>
> (a) *Optimum supply*. On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years reduced by average sales that represent dispositions of exempt cherries and restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is necessary to recommend otherwise with respect to sales of exempt and restricted percentage cherries, to which shall be added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

7 C.F.R. § 930.50(a). Burnette argues, since the optimum supply formula in 7 C.F.R. § 930.50(a) is calculated based upon "sales" and the optimum supply formula does not differentiate between sales of foreign-produced tart cherry products and sales of domestically-produced tart cherry products, the optimum supply formula must be read as including sales of both foreign-produced tart cherry products and domestically-produced tart cherry products (Burnette's Supporting Br. ¶ 2(c)(i)-(iii) at 4-8).

I disagree with Burnette's contention that the optimum supply formula must be read as including sales of both foreign-produced tart cherry products and domestically-produced tart cherry products. As an initial matter, 7 C.F.R. § 930.50(a) does not explicitly include sales of foreign-produced tart cherry products. Moreover, the Secretary of Agriculture issued the Tart Cherry Order in 1996[2] and the record contains no indication that the Cherry Industry Administrative Board has ever used foreign-produced tart cherry products sales data to establish an optimum supply level for any crop year.[3] Based upon the absence of an explicit reference to sales of foreign-produced tart cherry products in 7 C.F.R. § 930.50(a) coupled with the Cherry Industry Administrative Board's consistent interpretation of the method by which to establish the optimum supply level, I reject Burnette's contention that 7 C.F.R. § 930.50(a) must be read as including sales of both foreign-produced tart cherry products and domestically-produced tart cherry products.

Burnett also argues the failure to include imported tart cherry products in the optimum supply formula in 7 C.F.R. § 930.50(a) results in disorderly marketing conditions in violation of 7 U.S.C. § 602(1) (Burnette's Supporting Br. ¶ 2c(iv) at 8-9). While Burnette cites testimony of witnesses who expressed the opinion that the Cherry Industry Administrative Board should consider issues relating to imported tart cherry products,[4] Burnette fails to cite any basis for its contention that the failure to include imported tart cherry products in the optimum supply formula in 7 C.F.R. § 930.50(a) results in disorderly marketing conditions contrary to the policy of Congress, as declared in 7 U.S.C. § 602(1).

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[2] 61 Fed. Reg. 49,939 (Sept. 24, 1996).

[3] Burnette states the Cherry Industry Administrative Board "has steadfastly refused to consider imported tart cherry products." (Burnette's Supporting Brief ¶ 2c(ii) at 6).

[4] *See* Burnette's Supporting Brief ¶ 2c(iii) at 7 n.4.

Fourth, Burnette contends I erroneously reversed Administrative Law Judge Jill S. Clifton's ruling exempting from Tart Cherry Order volume restrictions tart cherries delivered from harvest directly to canners and processed into metal cans. Burnette, relying on *Horne v. Department of Agric.*, 576 U.S. ____, 135 S. Ct. 2419 (2015), asserts application of Tart Cherry Order volume restrictions to the canned segment of the tart cherry industry results in an unconstitutional taking of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States. (Burnette's Pet. to Reconsider ¶ 2d at 5-7; Burnette's Supporting Br.¶ 2d at 9-18).

Horne involved a challenge to the reserve requirement in a marketing order issued under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674), entitled "Raisins Produced From Grapes Grown in California" (7 C.F.R. pt. 989) [Raisin Order]. Marvin D. Horne, Laura Horne, and their family argued the reserve requirement in the Raisin Order resulted in an unconstitutional taking of their property in violation of the Fifth Amendment. The Supreme Court of the United States held the Raisin Order reserve requirement— a requirement that growers set aside a certain percentage of their raisin crops for the account of the Government, free of charge— was an unconstitutional taking of property in violation of the Fifth Amendment. The Court described the Raisin Order reserve requirement and the property rights transferred from raisin growers to the Government when raisin growers are subject to the Raisin Order reserve requirement, as follows:

> The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. App. to Pet. for Cert. 179a; Tr. of Oral Arg. 31. The Committee's raisins must be physically segregated from free-tonnage raisins. 7 CFR § 989.66(b)(2). Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. § 989.66(a). The Committee disposes of what become its raisins as it

> wishes, to promote the purposes of the raisin marketing order.
>
> Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them, *Loretto*, 458 U.S., at 435, 102 S. Ct. 3164 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," *id*., at 431, 102 S. Ct. 3164 (internal quotation marks omitted), as it essentially does. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id*., at 432, 102 S. Ct. 3164.

Horne v. Department of Agric., 576 U.S. ____, 135 S. Ct. 2419, 2428 (2015).

In *Horne*, the imposition of the Raisin Order reserve requirement resulted in the raisin growers' loss of the entire bundle of property rights in the appropriated raisins—the rights to possess, use and dispose of the raisins—which loss the Supreme Court found to constitute a taking under the Fifth Amendment. Under the Tart Cherry Order, the Cherry Industry Administrative Board does not obtain the right to possess, use, or dispose of the tart cherries that are subject to volume restrictions. Instead, producers of canned tart cherry products retain possession, control, and ownership of their tart cherries that are subject to Tart Cherry Order volume restrictions. Therefore, I find *Horne* inapposite.

Burnette also argues *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is consistent with its position that application of

Tart Cherry Order volume restrictions to the canned segment of the tart cherry industry results in an unconstitutional taking of property in violation of the Fifth Amendment. In *Lucas*, the Supreme Court held a regulation that deprives a property owner of all economically beneficial use of his or her land is a per se taking. Burnette asserts, "[i]n the instant case a *per se* taking has occurred because Burnette has been, and is being, deprived of all benefit of the tart cherry products which it is required to place into reserves." (Burnette's Supporting Br. ¶ 2d(vii)-(viii) at 15-16).

Contrary to Burnette's contention, Burnette does not lose all economically beneficial use of tart cherry products it is required to place into reserves. As discussed in the June 19, 2015, Decision and Order, Burnette retains options to use and dispose of tart cherries even when volume restrictions are in effect:

> If the Cherry Industry Administrative Board establishes restricted percentages, handlers are required to set aside a portion of their tart cherry production. The Tart Cherry Order provides numerous methods by which a handler can comply with volume restrictions. These methods include storing product in inventory reserves, redeeming grower diversion certificates, destroying product, donating product to charitable organizations, donating product for new market development or market expansion, and exporting product to countries other than Canada and Mexico. The form of the cherries (frozen, canned, dried, or concentrated juice) a handler places in inventory reserve is at the option of the handler.

Burnette Foods, Inc., AMAA Docket No. 11-0334, 2015 WL 4538819, at *4 (U.S.D.A. June 19, 2015) (footnotes omitted). Therefore, I find *Lucas* inapposite.

Burnette further contends the Supreme Court's takings analyses in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *Andrus v. Allard*, 444 U.S. 51 (1979), support Burnette's contention that the application of Tart Cherry Order volume restrictions to the canned segment of the tart cherry industry results in an unconstitutional

taking of property in violation of the Fifth Amendment (Burnette's Supporting Br. ¶ 2d(vii) at 15-16).

The Court in *Penn Central* applied a balancing test to determine whether regulation of property amounts to a taking of that property:

> In engaging in these essentially *ad hoc*, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra*, 369 U.S., at 594, 82 S.Ct., at 990. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e.g., United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). The Court in *Allard* held a regulation that reduces the value of property and bars trade in lawfully acquired property does not necessarily effect a taking in violation of the Fifth Amendment.[5]

The primary benefit of Tart Cherry Order volume restrictions is that handlers receive higher prices for their tart cherries that are not required to be held in reserve than they would have received had no volume restrictions been in effect. Burnette enjoyed the higher prices for its tart cherries that it was able to market in normal commercial outlets. The benefit of the higher price offsets the negative economic impact of Tart Cherry Order volume restrictions. As discussed in *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, 2015 WL 4538819, at *4 (U.S.D.A. June 19, 2015), the interference caused by Tart Cherry Order volume

[5] Andrus v. Allard, 444 U.S. 51, 66-68 (1979).

restrictions limits, but does not destroy, Burnette's ability to use and dispose of its tart cherries and does not rise to the level of a physical invasion. When this interference is balanced against the economic benefits of higher prices for tart cherries that are not required to be held in reserve and the benefits of this public program promoting the common good, including a stable supply of tart cherries, the application of Tart Cherry Order volume restrictions to Burnette does not result in a taking under the *Penn Central* and *Allard* analyses,[6] as Burnette contends.

Fifth, Burnette contends the decision to limit the geographical applicability of the Tart Cherry Order to Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, has no rational basis, was purely a political consideration, and violates the equal protection and due process safeguards of the Fifth Amendment to the Constitution of the United States (Burnette's Supporting Br. ¶ 2e at 18-20).

Burnette's contention that the limited geographical applicability of the Tart Cherry Order violates the "equal protection and due process safeguards" of the Fifth Amendment is raised for the first time in Burnette's Supporting Brief. It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[7] Therefore, I find Burnette's argument regarding the constitutionality of the limited geographical applicability of the Tart Cherry Order comes too late to be considered.

For the foregoing reasons, the following Order is issued.

ORDER

Burnette's Petition to Reconsider, filed July 6, 2015, is denied.

This Order shall become effective upon service on Burnette.

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[6] *See* Horne v. Dep't of Agric., 576 U.S. ____, 135 S. Ct. 2419, 2429 (2015) (stating a regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*).

[7] Zoocats, Inc., 68 Agric. Dec. 1072, 1074 (U.S.D.A. 2009) (Order Den. Resp't's Pet. to Reconsider and Administrator's Pet. to Reconsider); Schmidt, 66 Agric. Dec. 596, 599 (U.S.D.A. 2007) (Order Den. Pet. to Reconsider).

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ANIMAL WELFARE ACT

In re: AARON BLOOM.
Docket No. 14-0201.
Order of Dismissal.
Filed July 30, 2015.

In re: BETH ANN TINSLEY.
Docket No. 15-0015.
Miscellaneous Order.
Filed October 8, 2015.

In re: AARON BLOOM, an individual d/b/a ADIRONDACK FAMILY ZOO.
Docket No. 16-0011.
Order of Dismissal.
Filed November 6, 2015.

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation.
Docket No. 15-0152.
Miscellaneous Order.
Filed December 30, 2015.

In re: PAMELA J. SELLNER, an individual.
Docket No. 15-0153.
Miscellaneous Order.
Filed December 30, 2015.

In re: THOMAS J. SELLNER, an individual.
Docket No. 15-0154.
Miscellaneous Order.
Filed December 30, 2015.

MISCELLANEOUS ORDERS & DISMISSALS

In re: PAMELA J. SELLNER, TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket No. 15-0155.
Miscellaneous Order.
Filed December 30, 2015.

CIVIL RIGHTS

In re: EDDIE WISE & DOROTHY WISE.
Docket No. 16-0002.
Order of Dismissal.
Filed November 17, 2015.

FEDERAL CROP INSURANCE ACT

In re: STEVE LANE.
Docket No. 15-0043.
Miscellaneous Order.
Filed October 26, 2015.

FEDERAL MEAT INSPECTION ACT

In re: UNITED SOURCE ONE, INC.
Docket No. 15-0100.
Order of Dismissal.
Filed July 17, 2015.

In re: HOME FRESH FOODS, INC.
Docket No. 15-0092.
Order of Dismissal.
Filed August 21, 2015.

In re: ZAHIBA HALLA MEATS, INC.
Docket No. 15-0127.
Miscellaneous Order.
Filed October 6, 2015.

In re: DANIEL W. AULT.
Docket No. 15-0128.
Miscellaneous Order.
Filed October 6, 2015.

In re: MOHAMMED Y. KHAN.
Docket No. 15-0129.
Miscellaneous Order.
Filed October 6, 2015.

In re: DAWOOD ISHKIRAT.
Docket No. 15-0130.
Miscellaneous Order.
Filed October 6, 2015.

In re: MOHAMMED M. MUSA.
Docket No. 15-0131.
Miscellaneous Order.
Filed October 6, 2015.

In re: RATEB H. ISHKIRAT.
Docket No. 15-0132.
Miscellaneous Order.
Filed October 6, 2015.

HORSE PROTECTION ACT

In re: JUSTIN R. JENNE, d/b/a JUSTIN JENNE STABLES AT FRAZIER AND FRAZIER FARMS.
Docket No. 13-0080.
Miscellaneous Order.
Filed July 16, 2015.

HPA – Administrative procedure – Evidence – Petition to reopen hearing.

Sharlene Deskins, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO REOPEN HEARING

On March 11, 2014, Administrative Law Judge Janice K. Bullard [ALJ] conducted a hearing in this proceeding. Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator]. Justin R. Jenne appeared pro se.[1] On July 29, 2014, the ALJ issued a Decision and Order.

On September 8, 2014, Mr. Jenne filed an Appeal to Judicial Officer [Appeal Petition] and concurrently filed a Petition to Re-open Hearing for Submission of Additional Evidence [Petition to Reopen Hearing] requesting that the ALJ consider additional evidence that Mr. Jenne failed to adduce at the March 11, 2014, hearing. On October 30, 2014, the Administrator filed a response opposing Mr. Jenne's Petition to Reopen Hearing.[2] On June 18, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Jenne's Petition to Reopen Hearing.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151), which are applicable to this proceeding, apportion jurisdiction to rule on a petition to reopen a hearing and set forth the requirements for a petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

[1] Prior to the March 11, 2014 hearing, Dudley W. Taylor, Taylor & Knight, Knoxville, Tennessee, represented Mr. Jenne, but, in a March 6, 2014 conference call with the ALJ and Ms. Deskins, Mr. Taylor withdrew his representation of Mr. Jenne.

[2] Complainant's Opposition to the Appeal to the Judicial Officer and Pet. to Re-Open Hr'g for Submission of the Additional Evid. and Complainant's Appeal Pet.

> (a) *Petition requisite*—(1) *Filing; service; ruling.* . . . . Any such petition filed prior to the filing of an appeal of the Judge's decision pursuant to § 1.145 shall be ruled upon by the Judge, and any such petition filed thereafter shall be ruled upon by the Judicial Officer.
>
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(1)-(2).

Mr. Jenne concurrently filed his Appeal Petition and his Petition to Reopen Hearing. Therefore, pursuant to 7 C.F.R. § 1.146(a)(1), jurisdiction to rule on Mr. Jenne's Petition to Reopen Hearing lies with the Judicial Officer.

Mr. Jenne attached to the Petition to Reopen Hearing the evidence he seeks to introduce and describes the purpose of the evidence to be introduced. Specifically, Mr. Jenne seeks to reopen the hearing to introduce the Affidavit of Justin R. Jenne, dated September 5, 2014, and supporting attachments, in which Mr. Jenne asserts, prior to the institution of this proceeding and *Jenne*, No. 13-0308, 2015 WL 1776433 (U.S.D.A. Apr. 13, 2015), he had never been accused by the United States Department of Agriculture of violating the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act], and he is unable to pay a civil penalty. Mr. Jenne offers the following as reasons for his failure to adduce the evidence in question at the March 11, 2014, hearing:

> 2. Judge Bullard noted in her Decision and Order that Respondent had not presented any evidence supporting a lesser penalty. Upon advice of counsel, Respondent believes that there are mitigating circumstances which he hopes that Judge Bullard will consider and issue a revised Decision and Order.

Pet. to Reopen Hr'g ¶ 2 at 1.

Evidence of Mr. Jenne's compliance with the Horse Protection Act prior to the institution of this proceeding and *Jenne*, No. 13-0308, 2015 WL 1776433 (U.S.D.A. Apr. 13, 2015), and evidence of Mr. Jenne's inability to pay a civil penalty could have been adduced at the March 11, 2014, hearing. Mr. Jenne has not set forth a good reason for his failure to adduce available evidence at the March 11, 2014, hearing, as required by 7 C.F.R. § 1.146(a)(2).

Under these circumstances, I decline to reopen the instant proceeding to receive in evidence the September 5, 2014 Affidavit of Justin R. Jenne and accompanying financial records.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Jenne's Petition to Reopen Hearing, filed September 8, 2014, is denied.

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In re: JOHN PUCKETT.
Docket No. 14-0171.
Miscellaneous Order.
Filed September 3, 2015.

In re: JOHN ALLEN.
Docket No. 13-0348.

Miscellaneous Order.
Filed September 17, 2015.

In re: JOHN ALLEN.
Docket No. 15-0063.
Miscellaneous Order.
Filed September 17, 2015.

In re: BRYAN DEBERRY & WILLIAM EDGAR ABERNATHY, d/b/a ABERNATHY STABLES.
Docket Nos. 14-0119; 14-0120.
Order of Dismissal.
Filed October 14, 2015.

ORGANIC FOODS PRODUCTION ACT

In re: REINHOLD HEYDE & MILTON HEYDE, d/b/a HEYDE FARM.
Docket Nos. 14-0068, 14-0069.
Miscellaneous Order.
Filed October 8, 2015.

In re: KRIEGEL, INC. & LAURANCE KRIEGEL.
Docket Nos. 15-0050, 15-0051.
Miscellaneous Order.
Filed December 15, 2015.

OFPA – Administrative procedure – Petition to reconsider, timely filing of.

Buren W. Kidd, Esq. for Complainant.
Laurance Kriegel, pro se.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER

PROCEDURAL HISTORY

On November 20, 2015, Kriegel, Inc., and Laurance Kriegel [Respondents] filed a "Motion for Reconsideration Response to Decision and Order" [Petition to Reconsider] requesting that I reconsider *Kriegel, Inc.*, OFPA Docket Nos. 15-0050 and 15-0051, 2015 WL 7687428 (U.S.D.A. Oct. 29, 2015). The Hearing Clerk served the Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], with Respondents' Petition to Reconsider on November 20, 2015,[1] and, pursuant to the rules of practice applicable to this proceeding,[2] the Administrator was required to file with the Hearing Clerk a reply to Respondents' Petition to Reconsider no later than December 10, 2015.[3]

The Administrator failed to file a timely reply to Respondents' Petition to Reconsider, and, on December 14, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Respondents' Petition to Reconsider.

CONCLUSION BY THE JUDICIAL OFFICER

The Hearing Clerk served Respondents with *Kriegel, Inc.*, OFPA Docket Nos. 15-0050 and 15-0051, 2015 WL 7687428 (U.S.D.A. Oct. 29, 2015), on November 4, 2015.[4] The Rules of Practice provide that a petition to reconsider must be filed within ten days after the date of service of the Judicial Officer's decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . . .

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[1] Hearing Clerk's Office Proof of Service, dated November 20, 2015.

[2] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

[3] 7 C.F.R. § 1.146(b).

[4] *See* United States Postal Service Domestic Return Receipts for article number 7013 3020 0001 0700 7788 and article number 7013 3020 0001 0700 7795.

> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). Therefore, Respondents were required to file a petition to reconsider *Kriegel, Inc.*, OFPA Docket Nos. 15-0050 and 15-0051, 2015 WL 7687428 (U.S.D.A. Oct. 29, 2015), no later than November 16, 2015.[5] On November 20, 2015, Respondents filed the Petition to Reconsider *Kriegel, Inc.*, OFPA Docket Nos. 15-0050 and 15-0051, 2015 WL 7687428 (U.S.D.A. Oct. 29, 2015). Respondents' Petition to Reconsider was not timely filed. Accordingly, Respondents' Petition to Reconsider is denied.[6]

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[5] Ten days after the date the Hearing Clerk served Respondents with *Kriegel, Inc.*, OFPA Docket Nos. 15-0050 and 15-0051, 2015 WL 7687428 (U.S.D.A. Oct. 29, 2015), was Saturday, November 14, 2015. The Rules of Practice provide that when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time*. Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h). The next business day after Saturday, November 14, 2015, was Monday, November 16, 2015.

[6] Mitchell, AWA Docket No. 09-0084, 70 Agric. Dec. 409 (U.S.D.A. Mar. 8, 2011) (Order Den. Pet. for Recons.) (denying, as late-filed, the respondent's petition to reconsider filed 24 days after the Hearing Clerk served the respondent with the decision and order); Sergojan, AWA Docket No. 07-0119, 69 Agric. Dec. 1438 (U.S.D.A. Aug. 3, 2010) (Order Den. Pet. to Reconsider) (denying, as late-filed, the respondent's petition to reconsider filed 22 days after the Hearing Clerk served the respondent with the order denying late appeal); Noble, A.Q. Docket No. 09-0033, 69 Agric. Dec. 518 (U.S.D.A.

For the foregoing reasons, the following Order is issued.

ORDER

Respondents' Petition to Reconsider, filed November 20, 2015, is denied.

This Order shall become effective upon service on Respondents.

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POULTRY PRODUCTS INSPECTION ACT

In re: UNITED SOURCE ONE, INC.
Docket No. 15-0100.
Order of Dismissal.
Filed July 17, 2015.

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Jan. 20, 2010) (Order Den. Pet. to Reconsider) (denying, as late-filed, the respondent's motion to reconsider filed 19 days after the Hearing Clerk served the respondent with the order denying late appeal); Stanley, A.Q. Docket No. 06-0007, 65 Agric. Dec. 1171 (U.S.D.A. Dec. 5, 2006) (Order Den. Pet. to Reconsider) (denying, as late-filed, a petition to reconsider filed 13 days after the date the Hearing Clerk served the respondents with the decision and order); Heartland Kennels, Inc., AWA Docket No. 02-0004, 61 Agric. Dec. 562 (U.S.D.A. Dec. 17, 2002) (Order Den. Second Pet. for Recons.) (denying, as late-filed, a petition to reconsider filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); Finch, AWA Docket No. 02-0014, 61 Agric. Dec. 593 (U.S.D.A. Dec. 16, 2002) (Order Den. Pet. for Recons.) (denying, as late-filed, a petition to reconsider filed 15 days after the date the Hearing Clerk served the respondent with the decision and order).

SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

In re: JOHN R. SHOUP, d/b/a DINSDALE ELEVATOR.
Docket No. 15-0018.
Miscellaneous Order.
Filed October 21, 2015.

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DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL HEALTH PROTECTION ACT

JOSE G. JIMENEZ.
Docket No. 15-0046.
Default Decision and Order.
Filed July 16, 2015.

ANIMAL WELFARE ACT

PHYLLIS J. BRITZ, an individual d/b/a WINDY RIDGE KENNELS.
Docket No. 15-0005.
Default Decision and Order.
Filed December 10, 2015.

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CONSENT DECISIONS

ANIMAL WELFARE ACT

Plumpton Park Zoological Gardens, Inc.
Docket No. 14-0024.
Filed August 10, 2015.

City of Clay Center, a municipality d/b/a Clay Center Zoo.
Docket No. 15-0113.
Filed August 17, 2015.

FEDERAL CROP INSURANCE ACT

Steven Vinson, d/b/a 3V Farms.
Docket No. 14-0152.
Filed July 20, 2015.

Timothy Ellis, d/b/a Bobo Farms.
Docket No. 14-0024.
Filed December 30, 2015.

FEDERAL MEAT INSPECTION ACT

Rio Tex Wholesale Meat Processing Division.
Docket No. 15-0096.
Filed October 29, 2015.

Mountainair Heritage Meat Processing, Inc.
Docket No. 16-0017.
Filed November 5, 2015.

Halal Meat Slaughter House, Inc. & Zafer R. Kafozi.
Docket Nos. 15-0093, 15-0094.
Filed November 17, 2015.

CONSENT DECISIONS

Westminster Meats, LLC.
Docket No. 16-0030.
Filed December 18, 2015.

Zahiba Halal Meats, Inc. & Daniel W. Ault.
Docket Nos. 15-0127, 15-0128.
Filed December 29, 2015.

FOOD AND NUTRITION ACT

State of Vermont, Department for Children and Families.
Docket No. 14-0153.
Filed August 19, 2015.

HORSE PROTECTION ACT

Matthew McWilliams.
Docket No. 14-0172.
Filed August 10, 2015.

John Puckett.
Docket No. 14-0171.
Filed September 3, 2015.

Jerry W. Collier.
Docket Nos. 13-0327, 15-0017.
Filed November 5, 2015.

Mona Dean.
Docket No. 14-0090.
Filed November 5, 2015.

Brandon Stout.
Docket No. 14-0133.
Filed November 10, 2015.

Rachel M. Castaldi.
Docket Nos. 13-0072, 15-0099.
Filed December 16, 2015.

ORGANIC FOODS PRODUCTION ACT

Reinhold Heyde & Milton Heyde, d/b/a Heyde Farm.
Docket Nos. 14-0068, 14-0069.
Filed October 8, 2015.

PLANT PROTECTION ACT

Richard Wilson.
Docket No. 15-0089.
Filed October 14, 2015.

John Silvia, LLC, d/b/a meyerlemontree.com and keylimepietree.com
Docket No. 15-0177.
Filed December 15, 2015.

Richard Espada.
Docket No. 15-0178.
Filed December 15, 2015.

POULTRY PRODUCTS INSPECTION ACT

Halal Meat Slaughter House, Inc. & Zafer R. Kafozi.
Docket Nos. 15-0093, 15-0094.
Filed November 17, 2015.

Westminster Meats, LLC.
Docket No. 16-0030.
Filed December 18, 2015.

Zahiba Halal Meats, Inc. & Daniel W. Ault.
Docket Nos. 15-0127, 15-0128.
Filed December 29, 2015.

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