AGRICULTURE DECISIONS

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Pages 175 – 264

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 2018

ANIMAL WELFARE ACT

COURT DECISION

DEPARTMENTAL DECISION

FEDERAL CROP INSURANCE ACT

COURT DECISION

HORSE PROTECTION ACT

ERRATA

COURT DECISION

--

MISCELLANEOUS ORDERS & DISMISSALS

--

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

FEDERAL CROP INSURANCE ACT

ORGANIC FOODS PRODUCTION ACT

--

CONSENT DECISIONS

ANIMAL WELFARE ACT

FEDERAL CROP INSURANCE ACT

--

ANIMAL WELFARE ACT

COURT DECISION

ANIMAL LEGAL DEFENSE FUND, INC. v. PERDUE.
No. 17-cv-2252 (CRC).
Memorandum Opinion.
Signed October 11, 2018.

AWA – Administrative enforcement – Cease and desist – Intervention – Remedy – Third party.

[Cite as: 346 F. Supp. 3d 153 (D.D.C. 2018)].

United States District Court,
District of Columbia.

The Court affirmed the Judicial Officer's ruling denying ALDF's request to intervene, which the Judicial Officer entered for the second time after the Court vacated and remanded the matter for reconsideration. The Court found that the Judicial Officer fulfilled his obligations on remand, that his interpretation of the AWA and Regulations was rational, and that his decision was not arbitrary, capricious, or contrary to the law.

MEMORANDUM OPINION

CHRISTOPHER R. COOPER, UNITED STATES DISTRICT JUDGE,
DELIVERED THE OPINION OF THE COURT.

This Court is asked to adjudicate for the second time whether the Department of Agriculture ("USDA") properly denied a request by the Animal Legal Defense Fund ("ALDF") to intervene in administrative proceedings against the Cricket Hollow Zoo. Last year, after ALDF challenged the first denial, the Court found that USDA's Judicial Officer had incorrectly applied the relevant law, vacated his decision, and remanded the case to the agency for reconsideration. *See ALDF v. Vilsack,* 237 F. Supp. 3d 15 (D.D.C. 2017). Upon reconsideration, the Judicial Officer once again denied ALDF's request to intervene, prompting this related case in which ALDF contends that he again acted arbitrarily, capriciously, and contrary to law.

ALDF now moves for summary judgment and asks the Court to order the Judicial Officer to permit its intervention. USDA, for its part, moves to dismiss the case as moot or, in the alternative, seeks summary judgment in its favor. The Court concludes that because it could grant ALDF an effective remedy, the case is not moot. Accordingly, the Court will deny USDA's motion to dismiss. But the Court also finds that the Judicial Officer's denial of ALDF's intervention applied the correct legal standards and did so in a reasonable way. Therefore, the Court will grant USDA's motion for summary judgment and deny ALDF's.

I. Background

The Court's decision in the earlier iteration of this dispute details many of the relevant facts underlying USDA's enforcement action and ALDF's desired intervention. *See Vilsack*, 237 F. Supp. 3d at 19–20. The Court summarizes here.

The Animal Welfare Act of 1966 ("AWA"), 7 U.S.C. § 2131 *et seq.*, and its implementing regulations establish minimum standards of care and treatment for animals exhibited to the public. The Animal and Plant Health Inspection Service ("APHIS"), a component of USDA, licenses animal exhibitors under the Act and enforces its care and treatment standards.

Pursuant to that authority, APHIS initiated an administrative enforcement action against Cricket Hollow Zoo, a family-owned menagerie in Manchester, Iowa with a history of non-compliance with the AWA's care and treatment standards. ALDF, which had previously sued Cricket Hollow directly and had sued USDA for its continued renewal of Cricket Hollow's license, sought to intervene in the enforcement proceeding to advocate for revocation of the license and humane relocation of Cricket Hollow's animals ("relocation remedy"). The presiding administrative law judge ("ALJ") denied ALDF's motion and the Judicial Officer upheld that decision on appeal.

ALDF sued and this Court found that the Judicial Officer had acted arbitrarily and capriciously in denying intervention under § 555(b) of the Administrative Procedure Act ("APA"), which entitles "an interested person" to appear before an agency proceeding "[s]o far as the orderly conduct of public business permits[.]" 5 U.S.C. § 555(b). The Court held

that the Judicial Officer had failed to properly consider ALDF's stated interests in intervention and remanded the case to the Judicial Officer to reconsider ALDF's request. *Vilsack*, 237 F. Supp. 3d at 24. In so doing, the Court noted that courts "have for the most part permitted denials [of intervention] . . . when, for example, other parties to the proceeding adequately represent the would-be intervenor's viewpoint or intervention would broaden unduly the issues considered, obstruct or overburden the proceedings, or fail to assist the agency's decisionmaking." *Id.* at 22 (alteration in original) (quoting *Nichols v. Bd. of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 897 (D.C. Cir. 1987)).

On remand, the Judicial Officer again denied ALDF's intervention, in part because he concluded that its arguments for a relocation remedy would not be relevant or useful to the ALJ. Administrative Record ("A.R.") 696–705. ALDF again sued, contending that this determination failed to properly consider the ways in which the ALJ's enforcement powers could yield the relocation remedy. In the interim, the ALJ issued his decision, documenting significant AWA violations by Cricket Hollow, revoking its license, and imposing a civil monetary penalty. *Id.* at 708–887. Cricket Hollow administratively appealed that decision, and the appeal is pending. *Id.* at 894–95.

II. Legal Standards

A. Motion to Dismiss

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013) (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70, 104 S. Ct. 373, 78 L.Ed.2d 58 (1983)). A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Larsen v. U.S. Navy*, 525 F.3d 1, 3–4 (D.C. Cir. 2008) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L.Ed.2d 642 (1979)). A party may lack a legally cognizable interest in the outcome "when, among other things, the court can provide no effective remedy because a party has already obtained all the relief it has sought," *Jewell*, 733 F.3d at 1204 (internal quotation marks and punctuation omitted), or "when intervening events make it impossible to

grant the prevailing party effective relief," *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (internal quotation marks omitted).

Because mootness deprives the court of subject-matter jurisdiction, a motion to dismiss for mootness is properly brought under Federal Rule of Civil Procedure 12(b)(1). *See DL v. District of Columbia*, 187 F. Supp. 3d 1, 5 (D.D.C. 2016). In assessing a 12(b)(1) motion, the Court must "treat the complaint's factual allegations as true and afford the plaintiff the benefit of all inferences that can be derived from the facts alleged." *Jeong Seon Han v. Lynch*, 223 F. Supp. 3d 95, 103 (D.D.C. 2016) (internal quotation marks omitted). Moreover, "the Court 'may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.'" *Delta Air Lines, Inc. v. Export-Import Bank,* 85 F. Supp. 3d 250, 259 (D.D.C. 2015) (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

B. Summary Judgment

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). Summary judgment is the proper stage for determining whether, as a matter of law, an agency action complies with the APA and is supported by the administrative record. *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977). The APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[.]" 5 U.S.C. § 706(2)(A). Arbitrary and capricious review is "narrow," *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971), and precludes the Court from "substitut[ing] its judgment for that of the agency," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983). Rather, the Court must determine whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). Even if the agency did not fully explain its decision, the Court may uphold it "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S. Ct. 438, 42

L.Ed.2d 447 (1974). The Court's review is limited to the administrative record, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003), and the party challenging an agency's action bears the burden of proof, *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002).

III. Analysis

A. USDA's Motion to Dismiss

USDA moves to dismiss the case as moot on the theory that APHIS has already obtained all relief to which ALDF would be legally entitled in the enforcement action. *See* Defs.' Mot. Dismiss or Mot. Summ. J. ("Defs.' Mot.") at 10–13. ALDF sought to intervene to achieve two goals: revocation of Cricket Hollow Zoo's license and relocation of its animals. A.R. 588–89. USDA notes that the ALJ ordered the revocation—a decision currently on administrative appeal. USDA contends that, notwithstanding ALDF's desire to advocate for the relocation remedy, the Judicial Officer concluded correctly that the AWA does not allow for such a remedy and thus, there is no additional legally authorized relief that ALDF could seek upon intervention.

USDA's motion to dismiss conflates what ALDF asks of this Court with what ALDF hopes to achieve in the underlying enforcement action. The crux of ALDF's claim here is not that it was impermissibly denied the relocation remedy, but that it was impermissibly denied the *opportunity to advocate* for that remedy. Its request of this Court is to restore that opportunity, so that ALDF can "participate in future hearings, motion practice, appeals, and settlement process with the right to petition to reopen the proceedings in the USDA's administrative proceeding against Cricket Hollow[.]" Compl. at 15. In short, ALDF interprets the AWA differently than USDA does, and it seeks to advance that interpretation in the administrative proceedings.

Because what ALDF seeks is the chance to advance its understanding of the law, the Court could order an effective remedy. If the Court were to order the Judicial Officer to permit intervention, ALDF would immediately have the right to partake in the proceedings and make its case regarding the AWA. For example, ALDF could appeal those aspects of the

ALJ's enforcement order with which it disagrees, *see* 7 C.F.R. § 1.145, presumably focusing on the remedial measures that it believes are appropriate. That argument may well be futile, as USDA contends. But as the Court explained in its previous decision, § 555(b) is generally protective of that type of opportunity so long as it does not burden the proceedings. *See Vilsack*, 237 F. Supp. 3d at 22 ("Because nearly every agency decision—including those made by the agency in individual adjudications—implicates public policy, broad participation in agency proceedings . . . is often necessary."). Moreover, ALDF has indicated its desire to introduce evidence that it might use to support an independent request for confiscation of the animals, *see* Pl.'s Mot. Summ. J. at 21, which intervention might enable it to do, *see* 7 C.F.R. § 1.146; Compl. at 15.

Moreover, even if ALDF's relocation arguments are as futile as USDA contends, there is still the possibility that its other stated goal in intervention—the revocation of Cricket Hollow's license—is reversed on appeal. A Court order that ALDF be allowed to intervene would ensure its ability to protect that remedy on appeal or seek it again on potential remand. *Cf. Alternative Research & Dev. Found. v. Veneman*, 262 F.3d 406, 410 (D.C. Cir. 2001) (appellate review of denied intervention-by-right is not mooted by stipulated dismissal of underlying case); *see also Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 n. 3 (11th Cir. 1996) (appeal from denial of intervention not mooted by entry of judgment in underlying case). This remains a "live" case in which the Court can grant an effective remedy. It will therefore deny USDA's motion to dismiss.

B. The Parties' Motions for Summary Judgment

The parties have filed cross-motions for summary judgment. ALDF contends that the Judicial Officer acted arbitrarily and capriciously in denying its intervention under § 555(b). Its claim rests largely on its objection to the Judicial Officer's conclusion that the ALJ lacked power to grant a relocation remedy. *See* Pl.'s Mot. Summ. J. at 17–21. USDA counters that the Judicial Officer's denial of intervention survives scrutiny because he rationally interpreted the ALJ's enforcement powers. *See* Defs.' Mot. 13–21. Because the parties' dispute regarding denial of intervention centers on the Judicial Officer's interpretation of the ALJ's

powers, review of the former requires an inquiry into the latter. The Court will first evaluate the Judicial Officer's interpretation of the law to inform its assessment of his denial under § 555(b).

1. Scope of Enforcement Powers

The Judicial Officer concluded that the AWA provides no basis for USDA, as part of an enforcement proceeding, "to seize and relocate animals or to close a facility for violations." A.R. 702. The Court reviews with deference this interpretation of the ALJ's statutory and regulatory authority. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171, 127 S. Ct. 2339, 168 L.Ed.2d 54 (2007); *see also supra*, Section II.B.

The enforcement proceeding was conducted pursuant to 7 U.S.C. § 2149. A.R. 702. The Judicial Officer interpreted § 2149 as authorizing the ALJ to impose only certain specified sanctions—"limited to revocation or suspension of an [AWA] license, assessment of a civil monetary penalty, and issuance of an order to cease and desist from future violations of the [AWA] and the Regulations." *Id.* On its face, the Judicial Officer's depiction of the ALJ's authority appears rational: section 2149 does indeed enumerate license revocation, license suspension, civil monetary assessment, and cease-and-desist orders as the penalties that USDA may impose. 7 U.S.C. § 2149.

ALDF insists, however, that the Judicial Officer interpreted the ALJ's authority too narrowly for two reasons. First, it contends that the ALJ has confiscation authority pursuant to § 2146(a), the AWA provision that authorizes USDA to investigate or inspect AWA licensees for compliance. *See* Pl.'s Mot. Summ. J. at 18–19. That provision directs USDA to promulgate regulations as "necessary to permit inspectors to confiscate . . . any animal found to be suffering" due to violations of the AWA. 7 U.S.C. § 2146(a). The regulations, in turn, authorize an APHIS official to confiscate and permanently relocate animals if temporary care provisions are insufficient.[1] 9 C.F.R. § 2.129. Responding to USDA's rebuttal that §

[1] USDA disputes that an ALJ would qualify as an APHIS official in any event. *See* Defs.' Reply at 6.

2146(a) authority is inapposite in a § 2149 enforcement proceeding, ALDF notes that: (1) § 2146(a) is a broad grant of regulatory discretion that does not foreclose the delegation of confiscation authority to the ALJ; (2) in the Final Rule promulgating confiscation practices, USDA cited the full AWA—rather than just § 2146(a)—as the relevant statutory authority; and (3) past § 2149 enforcement proceedings have resulted in orders to cease and desist § 2146(a) violations. *See* Pl.'s Reply at 6–8.

But these arguments are unavailing in the face of the deference to which the Judicial Officer is entitled. At most, the first two arguments amount to the point that the Judicial Officer *could* have reasonably interpreted the statute and regulations to authorize an ALJ to order a relocation. Had the Judicial Officer reached that conclusion, ALDF's arguments about the breadth of the underlying statutory and regulatory provisions might sustain that decision. But an argument that the statute or regulations do not foreclose one legal interpretation is not tantamount to an argument that they require that interpretation. And ALDF's third point—that ALJs have, pursuant to § 2149, ordered licensees to cease and desist from § 2146(a) violations—does not undermine the Judicial Officer's interpretation. ALDF cites an order requiring a licensee to cease and desist from preventing inspections as required by § 2146(a). Pl.'s Reply at 7–8. But it does not explain why that order to stop illegally preventing inspections—plainly encompassed by § 2149's authorized penalty of "an order that [a licensee found to have violated the law] shall cease and desist from continuing such violation," 7 U.S.C. § 2149—indicates that USDA may exercise § 2146's confiscation authority in § 2149 proceedings.

ALDF also contends that § 2149's cease-and-desist authority encompasses a relocation remedy.[2] ALDF analogizes this authority to courts' injunctive power, insisting that each power's scope is sufficiently broad to match whichever underlying violations it addresses. Pl.'s Mot. Summ. J. at 19–20. Accordingly, ALDF insists that when "a facility is systematically unable and unwilling to provide adequate care to its animals, an ALJ can use this cease and desist authority to order a facility to relocate animals to a facility that can provide adequate care." *Id.* at 20.

[2] USDA contends that ALDF failed to raise this argument at the administrative level, *see* Defs.' Mot. at 18, but the record indicates that it did, *see, e.g.*, A.R. 187.

But, while ALDF highlights language from cases to support its analogy, *id.* at 19–20, the cases themselves do not indicate that cease-and-desist power is as capacious as ALDF argues. In *NLRB v. Express Publishing Co.*, the Supreme Court limited the scope of the agency-issued order and concluded that "[a]n appropriate order . . . would go no further than to restrain respondent from any refusal to bargain and from any other acts . . . interfering" with the collective-bargaining rights of respondents' employees—in other words, a standard order to cease and desist from future violations of law. 312 U.S. 426, 438, 61 S. Ct. 693, 85 L.Ed. 930 (1941). ALDF also cites *Federal Trade Commission v. Ruberoid Co.*, but that case noted the "special competence" and discretion Congress afforded the Federal Trade Commission "to deal with problems in the general sphere of competitive practices." 343 U.S. 470, 473, 72 S. Ct. 800, 96 L.Ed. 1081 (1952). Here, by contrast, ALDF cites no authority to suggest equivalently broad powers for ALJs in USDA enforcement proceedings. *Cf. Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F.Supp.2d 52, 64 (D.D.C. 2004) ("It is axiomatic that 'administrative agencies are vested only with the authority given to them by Congress.'" (quoting *Gibas v. Saginaw Min. Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984))).

Passing references to some flexibility in cease-and-desist authority do not support the idea that § 2149 cease-and-desist authority encompasses a relocation remedy, and they certainly do not render arbitrary or capricious an interpretation that it does not. Again, ALDF's arguments about the scope of § 2149 power at best support the conclusion that an alternative interpretation of the ALJ's power would be reasonable, not that the Judicial Officer's interpretation was unreasonable. Because his decision was rational, it is entitled deference from the Court.

2. Denial of Intervention

Having concluded that the Judicial Officer rationally interpreted the ALJ's powers, the Court now assesses his denial of ALDF's intervention request. In denying ALDF's intervention, the Judicial Officer considered the following factors, identified in the Court's remand of his initial decision, as relevant to the § 555(b) inquiry:

> (1) the nature of the contested issues in the agency proceeding; (2) the prospective intervenor's precise

> interest in the agency proceeding; (3) the adequacy of representation of the prospective intervenor's interest provided by existing parties to the agency proceeding; (4) the ability of the prospective intervenor to present relevant evidence and argument in the agency proceeding; (5) the extent to which the prospective intervenor would assist in agency decision making; (6) the burden that intervention would place on the agency proceeding; and (7) the effect of intervention on the agency's mandate.

A.R. 698 (citing *Vilsack*, 237 F. Supp. 3d at 23.)

The Judicial Officer concluded that neither party to the proceeding represented ALDF's interest and its intervention would not impair the agency's mandate. *Id.* at 704. But he nevertheless denied intervention because:

> (1) due to the limited nature of the proceeding and contested issues, ALDF's appearance would not be useful; (2) ALDF is not able to present relevant evidence and argument; (3) ALDF is not able to assist the decision maker; and (4) ALDF's intervention would delay the final disposition of [the] proceeding and increase the cost of [the] proceeding.

Id.

ALDF's objects to the Judicial Officer's conclusion that its "input regarding humane disposition of Cricket Hollow's animals was 'not relevant' and 'would not assist the decision maker.'" Pl.'s Mot. Summ. J. at 17 (quoting A.R. 702–03). ALDF makes four arguments to this effect. Its first two contend that the decision was "based on an erroneous interpretation of law" because a relocation remedy is possible under either APHIS's confiscation regulation or the ALJ's cease-and-desist authority pursuant to § 2149. *Id.* For the reasons discussed, *supra* Section III.A, the Judicial Officer rationally interpreted the AWA and his decision is entitled deference. And while ALDF objects to what it perceives as insufficient attention to some of its theories regarding the ALJ's enforcement powers, the Judicial Officer addressed and rejected in sufficient detail its core

claim that the law countenances a relocation remedy. *Cf. Buckingham v. Mabus*, 772 F. Supp. 2d 295, 301 (D.D.C. 2011) (agency reasoning was sufficient under the APA when it "adequately addressed the substance of the argument . . ., even though it did not in the process enumerate every point made by [plaintiff] in support of that argument").

ALDF's next two arguments amount to an insistence that, even if the Judicial Officer's interpretation of the ALJ's formal powers were correct, his decision was nevertheless erroneous because there are other avenues through which ALDF could have argued for the humane disposition of animals. First, ALDF says, the ALJ "could at a bare minimum make specific findings pertinent to the disposition of the animals" to justify an independent request for confiscation. Pl.'s Mot. Summ. J. at 20–21. This contention goes less to ALDF's ability to present relevant argument and more to its ability to present relevant evidence that would form the basis of these findings. And the Judicial Officer addressed that issue. He concluded that the evidence ALDF could introduce would be either irrelevant or redundant to what was already in the record. A.R. 700–01. Further, the Judicial Officer concluded that "the hearing would have to be reopened if ALDF were to be allowed to present the evidence it seeks to introduce," thereby "increas[ing] the time necessary for the final disposition of th[e] proceeding and increas[ing] [its] cost[.]" *Id.* at 704. These assessments are plainly supported by the record. ALDF sought to introduce deposition testimony regarding Cricket Hollow's ability to care for the animals in the future, while the proceeding dealt with past violations. *Id.* at 700. ALDF also sought to introduce veterinary records and animal death certificates, but APHIS had already introduced extensive veterinary-record evidence indicating AWA violations and the death certificates themselves did not demonstrate additional failures to comply with the AWA, inasmuch as an animal death is not necessarily an AWA violation. *Id.* at 701.

Finally, ALDF maintains that the Judicial Officer erred in concluding that ALDF could not provide relevant argument to assist the ALJ because of the possibility of a settlement. *See* Pl.'s Mot. Summ. J. at 21–22. Specifically, it insists that intervention would enable it to advocate for relocation of the animals during any potential settlement negotiations and reject any proposed settlement that excluded relocation. Pl.'s Mot. Summ. J. at 21, 29–30. But the possibility of settlement does not render the

Judicial Officer's decision arbitrary or capricious. The operative question for the Judicial Officer was whether ALDF would assist in the ALJ's decisionmaking through relevant arguments. *See Vilsack*, 237 F.Supp.3d at 24. To be sure, an ALJ plays some role in the settlement process, *see* 7 C.F.R. § 1.138, but as ALDF itself notes, under USDA's Rules of Practice, an ALJ is generally obligated to approve a consent decision. *See id.*; Pl.'s Mot. Summ. J. at 30. Accepting ALDF's argument would dilute the "relevant argument" inquiry beyond recognition. A prospective intervener will likely have something to say about a potential settlement by virtue of being an "an interested person." 5 U.S.C. § 555(b). But that alone cannot satisfy the relevant-argument considerations of the distinct question of whether an interested person's intervention would impede "the orderly conduct of public business." *Id.* That question is tethered to the nature of the proceeding. Were it otherwise, intervention rules applicable to targeted agency actions would be indistinguishable from those governing rulemakings or licensing proceedings. As the Court has explained, that is not the case. *See Vilsack*, 237 F. Supp. 3d at 23–24.

In its Reply, ALDF contends that it "only need[ed] to show that its arguments promoting humane disposition [were] colorable to prevail on its intervention request," Pl.'s Reply at 6, because a "proposed intervenor is not required to submit or prevail on full remedies briefing as part of the motion to intervene," *id.* at 3. Simply put, ALDF maintains that the Judicial Officer approached this matter incorrectly by deciding that the ALJ lacked power to issue a relocation remedy when the pertinent question was whether ALDF could, upon intervention, make a colorable argument about the relocation remedy. But this elides that the Judicial Officer's denial was based on the conclusion that ALDF's arguments were *not* colorable. In its attempts to intervene, ALDF made clear its view that § 2146(a) authorizes ALJs to order relocation remedies and highlighted this view as a basis for intervention. *See, e.g.*, A.R. 589, 622, 691. It also referenced cease-and-desist authority as another basis for this remedy. *See, e.g.*, *id.* at 187. And APHIS responded, devoting extensive space to rebutting ALDF's views. *Id.* at 655. In other words, ALDF had ample opportunity to preview the substance of its desired merits briefing and did in fact signal its arguments. Nothing in § 555(b) prevents the Judicial Officer from denying ALDF's full merits participation once he concluded that the arguments presaged in ALDF's Motion to Intervene would not be useful because they were irrelevant to the proceeding. As explained *supra*,

the Judicial Officer's interpretation of the ALJ's powers was rational and must be afforded deference. Once he made that rational determination, it was rational for him to conclude that ALDF would not be able to provide relevant arguments to assist the decision-making and thus was not entitled to a full round of briefings attempting to do so.

ALDF also maintains that the Judicial Officer erred in his assessment of the nature of the contested issues because he concluded that "[t]he proceeding is targeted and has no broad [ ] policy implications that affects a wide range of animal rights[,] advocates[,] humane societies[,] zoos or other persons." Pl.'s Mot. Summ. J. at 25 (alterations in original) (quoting A.R. 699–700). Rather, ALDF explains that while USDA frequently prevails in enforcement proceedings for violations of the AWA's care standards, it rarely attends to the fate of the animals, which raises broader policy implications. *See id.* at 25–26. But that purported pattern alone does not render the Judicial Officer's decision arbitrary or capricious. Of course, *any* agency action might have *some* consequences for public policy, but as the Court noted in its previous opinion,

> an individualized enforcement action against a single respondent . . . is more targeted in nature than, say, a formal rulemaking or licensing proceeding that affects a wide range of consumers and competitors . . . . [T]he purpose of such proceedings is simply to determine whether the respondent violated the law and, if so, what remedy should follow.

Vilsack, 237 F. Supp. 3d at 23. The Court explained in this context that there "may be occasions where a third party can offer relevant evidence as to liability or expertise with respect to appropriate remedies" in enforcement proceedings, *id.* at 23–24, but, as discussed, the Judicial Officer rationally concluded that this was not such a case because ALDF's proposed remedies were unavailable.

Finally, ALDF contends that the Judicial Officer's decision was arbitrary and capricious because it ignored the possibility of a limited intervention. *See* Pl.'s Mot. Summ. J. at 28–30. Contrary to ALDF's assertion, the Judicial Officer did consider such a possibility, specifically disagreeing with APHIS's contention that intervention would require a

new hearing. A.R. 703–04. To be sure, the Judicial Officer's assessment omitted a detailed assessment of other types of tailored intervention. But "an agency's decision [need not] be a model of analytic precision to survive a challenge. A reviewing court will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997) (alteration in original) (quoting *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995). Here, in light of the Judicial Officer's rational conclusions that ALDF could present no relevant, non-cumulative evidence and no arguments relevant to aiding the decision maker, the basis for his denial of limited intervention was discernable and sufficient under the APA.

Naturally, the parties' briefing debates a few particular aspects of the Judicial Officer's decision to which ALDF objects, but the Court must assess the totality of that decision. Overall, the Judicial Officer fulfilled his obligations on remand. He considered each of the factors that the Court identified in its initial decision, concluding that some cut in favor of intervention while others cut against it. He denied intervention based on an accurate understanding of the limited issues to be addressed in the proceeding. Further, he rationally interpreted the AWA and its implementing regulations as precluding the remedy for which ALDF sought to advocate. Balancing these findings against the costs of an intervention that would either require the re-opening of the evidentiary record or briefing arguments that were not useful to the agency's decision-making (or both), the Judicial Officer concluded that this was not an instance in which intervention would comport with § 555(b)'s principle that intervention should be permitted only "so far as the orderly conduct of public business permits[.]" Based on the record before him, the Judicial Officer made a rational decision that was neither arbitrary, capricious, nor contrary to the law.

IV. Conclusion

For the foregoing reasons, the Court will deny Defendants' Motion to Dismiss, grant Defendants' Motion for Summary Judgment, and deny Plaintiff's Motion for Summary Judgment. A separate Order shall accompany this memorandum opinion.

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ANIMAL WELFARE ACT

DEPARTMENT DECISION

In re: LINDA L. HAGER, an individual; and EDWARD E. RUYLE, an individual.
Docket Nos. 17-0226, 17-0227.
Decision and Order.
Filed August 17, 2018.

AWA.

Charles L. Kendall, Esq., for APHIS.
Respondents Linda L. Hager and Edward E. Ruyle, pro se.
Initial Decision and Order by Channing D. Strother, Acting Chief Administrative Law Judge.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DISPOSITION, DENYING RESPONDENTS' MOTION TO DISMISS ALL CHARGES, AND COMPELLING RESPONDENTS TO CEASE AND DESIST

Introduction and Summary of Decision

The Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), Complainant, instituted this administrative enforcement proceeding under the Animal Welfare Act, as amended ("AWA"), [1]by filing a Complaint alleging that Respondents, Linda L. Hager and Edward E. Ruyle, violated section 2134 of the AWA[2] by conducting a "dealer operation" between the dates of July 13, 2015, and January 18, 2017,[3] without a required license.

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[1] 7 U.S.C. §§ 2131-59.

[2] 7 U.S.C. § 2134.

[3] Respondents opined that the parties agreed, and I ordered, that the alleged violations of Docket Nos. 16-0049 and 16-0050 should be taken up separately from the alleged violations in Docket Nos. 17-0226 and 17-0227, and Complainant thus improperly referenced certain allegedly unlicensed sales in both sets of complaints. *See* Answer to Complainant's Motion for Summary Disposition, and Motion to Dismiss all Charges at ¶ 3.4. Complainant's May 22, 2018 Motion for Summary Disposition in Response to Order Setting Procedures,

The above-captioned cases (17-0226 and 17-0227) are a second, later set of cases in which a Complaint was filed alleging violation of the AWA against both Respondents. Among other things, these cases involve Respondents' alleged unlawful operations only during a period after Respondent Hager gave up her AWA license, whereas the 16-0049 and 16-0050 dockets involve both a period during which Respondent Hager had an AWA license, and a period when she did not. Respondent Ruyle has at no time been issued an AWA license.

These two sets of cases have not been consolidated. This Decision and Order grants summary disposition only in the captioned cases for violations where no dispute regarding material allegations of fact remains. This Decision and Order does not address violations of the AWA alleged in dockets 16-0049 and 16-0050, including alleged violations between February 3, 2015 through June 27, 2015 referenced in the 2017 Complaints, which were previously alleged in Docket Numbers 16-0049 and 16-0050.[4]

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p. 2, footnote 1, states that "the allegations of unlicensed sales on the remaining 13 dates of the 16-0049 and 16-0050 Complaint are listed again in the 17-0226 and 17-0227 Complaint (the overlap is of the violations occurring in the period from February 3, 2015 through June 27, 2015), has no bearing on the disposition of the 17-0226 and 17-0227." I take this statement by Complainant to mean the overlapping alleged violations should only be considered in the prior 16-0049 and 16-0050 dockets and not in the 17-0226 and 17-0227 dockets. Thus, I will consider the overlapping violations listed in the original Complaint from February 3, 2015 through June 27, 2015, to be borne within the violations alleged in Docket Nos. 16-0049 and 16-0050, and not considered in the disposition here of Docket Nos.17-0226 and 17-0227.

[4] *See supra* note 3. Complainant notes that its motion for summary disposition is pending in Docket Nos. 16-0049 and 16-0050 and has not been acted upon. *See* Complainant Motion for Summary Disposition, 2-3. Complainant does not note that any action by the undersigned in those dockets was postponed pending resolution of summary disposition in the 17-0226 and 17-0227 dockets. *Id.* After the parties have had the opportunity to review the herein Decision and Order, they, or either party, can propose procedures for Docket Nos. 16-0049 and 16-0050.

Complainant filed its[5] Motion for Summary Disposition in Response to Order Setting Procedures on May 22, 2018. Respondents filed their "Answer to complainants [sic] motion for summary Disposition, and motion to Dismiss all charges" ("Response to Motion for Summary Disposition") on June 22, 2018. Although my March 23, 2018 Summary of Telephone Conference with Parties and Order Setting Procedures, as modified by subsequent orders, provided expressly that Complainant would have the opportunity to file a reply to Respondents' response to Complainant's Motion for Summary Disposition within fifteen days of service of that response, Complainant submitted no reply. Nor did Complainant answer Respondents' Motion to Dismiss All Charges.

Complainant contends that Respondents willfully violated the AWA by repeatedly conducting dealer operations without a license. Complainant also contends that Respondents operate a large business, the gravity of these repeated violations is great, Respondents were fully aware of the requirements of the AWA, and their unlicensed sales were not made in good faith.

Respondents have not denied that they engaged in commercial sales of puppies and kittens during a period where neither Respondent held a license as required by the AWA. However, Respondents contend that they continued to make sales based on 1) the advice of a state official that they could continue to sell animals to the pet store and 2) the belief that they could sell puppies and kittens to a pet store that maintained a "rescue permit" issued by the state without need for a USDA license. [6] Respondents also contend that Complainant obtained the records of sale in violation of the Fourth Amendment of the Constitution and, thus, should not be used as evidence against them.[7] Respondents also include many

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[5] The March 2, 2017 Complaint in these dockets, p. 1, recites that Administrator of APHIS—the current APHIS Administrator is Kevin Shea—issued it, and the Complaint is signed by then APHIS Acting Administrator, now Associate Administrator, Michael C. Gregoire. Nevertheless, while I expressly recognize that the APHIS Administrator is a human being not an inanimate object, I will respectfully refer to the "Complainant" herein with the pronoun "it."

[6] Answer at 5 (¶ VIII). *See also* March 6, 2017 Correspondence Letter from Respondents filed in Docket Nos. 16-0049 and 16-0050 at ¶ 2.3, and *infra* note 9.

[7] Answer at 4-5 (¶¶ VI-VII).

other contentions in their Answer to the Complaint regarding inspection of their dog kennels[8] that are irrelevant to the alleged violations in the instant case and were included as defense to alleged violations in Docket Numbers 16-0049 and 16-0050. [9]

Based on careful review of the pleadings before me, I find that there are no material issues of fact requiring resolution before issuing a decision. As it bears on the appropriateness of the penalty, in consideration of the Respondents' moderately sized business, gravity of the repeated violations, varying lack of good faith, and history of previous violations, I find it necessary to institute a civil penalty and a cease and desist order. Further, it is time sensitive to issue this Decision and Order, particularly a cease and desist provision, due to Respondents' ongoing AWA violations.

I find that Respondents violated section 2134 of the AWA by selling regulated animals between the dates of July 13, 2015 and January 18, 2017—which they admit to doing—without a license. Complainant requested a penalty of $50,000, revocation of Respondents' license which I understand to be a request for permanent disqualification to obtain a license, and an order to cease and desist all future violations of the AWA. As explained below, I find that the amount of the civil penalty, based on the statutory considerations, [10] should be $25,600, and that license

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[8] Answer at 1-4 (¶¶ I-V). For instance, Respondents allege that Complainant's inspectors were verbally abusive to Respondents, which, in part, caused Respondent Hager to give up her AWA license. The dockets at issue here involved activities after the license was surrendered. However Respondent Hager came to surrender her license cannot make Respondents' unlicensed activities lawful.

[9] I note at the outset that throughout this decision and order I have taken into account that "[p]ro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). *See also Ramos v. U.S. Dep't of Agic.*, 322 F. App'x 814, 820-21 (11th Cir. 2009). Respondents' filing in this docket have not been skillfully prepared. However, among other things, I have attempted to extract and consider Respondents' contentions from their filings taken all together rather than only those from their Response to Motion for Summary Disposition.

[10] 7 U.S.C. § 2149(b).

revocation, permanent disqualification from obtaining a license under the AWA, and issuance of a cease and desist order are appropriate.

I also deny Respondents' motion to dismiss because it is unfounded.

Jurisdiction and Burden of Proof

The AWA was promulgated to insure the humane care and treatment of animals intended for use in research facilities, exhibition, or as pets.[11] The AWA prohibits the sale of certain animals without a license. Congress provided for enforcement of the AWA by the Secretary of Agriculture, USDA.[12] Regulations promulgated under the AWA are in the Code of Federal Regulations, part 9, sections 1.1 through 3.142.

The burden of proof is on Complainant, APHIS.[13] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[14] such as this one, is the preponderance of the evidence.[15] The standard for summary disposition in a proceeding before a USDA Administrative Law Judge, well-articulated by then Chief Administrative Law Judge Davenport, is as follows:[16]

> The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (the Rules or the Rules of Practice) set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the

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[11] 7 U.S.C. § 2131.

[12] 7 U.S.C. §§ 2131-59.

[13] 5 U.S.C. § 556(d).

[14] 5 U.S.C. §§ 551 *et seq*.

[15] *See Herman & Maclean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

[16] *Agri-Sales, Inc.*, 73 Agric. Dec. 327, 328-30 (U.S.D.A. 2014), *aff'd* by the Judicial Officer and adopted as the final order in the proceeding, 73 Agric. Dec. 612 (U.S.D.A. 2014).

Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance. *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*, 868 Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).

While not an exact match, "no factual dispute of substance" may be equated with the "no genuine issue as to any material fact" language found in the Supreme Court's decision construing Fed. R. Civ. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). [Citation omitted.] An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. [Citation omitted.] The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. [Citation omitted.] . . . .

If a moving party supports its motion, the burden shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial. [Citation omitted.] . . . A non-moving party cannot rely upon ignorance of facts, on speculation or suspicions, and may not avoid summary judgment on a hope that something may show up at trial. [Citation omitted.] In ruling on a motion for summary judgment all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor. [Citation omitted.] . . . .

As discussed in *Anderson*, the judge's function is not himself to weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial.

> *Anderson*, *id*. at 250. The standard to be used mirrors that for a directed verdict under Fed. R. Civ. P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. [Citation omitted.] If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. [Citation omitted.]
>
> Formerly it was held that if there was what was called a scintilla of evidence, a judge was obligated to leave that determination to a jury, but recent decisions have established a more reasonable rule that in every case the question for the judge is not whether there is literally no evidence, but whether there is any upon which the jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed. [Citation omitted.] While administrative proceedings typically do not have juries, the rule's application remains applicable for a judge sitting as a fact finder performing the same function.[17]

Applicable Statutory Provisions

Congress enacted the AWA, in relevant part, because it is necessary

> to insure that animals intended for . . . use as pets are provided humane care and treatment . . . [and] essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons, or organizations . . .

[17] *Id.*

> holding them for sale as pets or for any such purpose or use.[18]

To achieve this purpose, Congress provided:

> No dealer or exhibitor shall 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 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, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.[19]

Further, the corresponding regulations mandate, in pertinent part:

> (a)(1) Any person operating or intending to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license . . . .
>
> . . . .
>
> (3) The following persons are exempt from the licensing requirements under section 2 or section 3 of the Act:
>
> (i) Retail pet stores as defined in part 1 of this subchapter;
>
> (ii) Any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross

[18] 7 U.S.C. § 2131.

[19] 7 U.S.C. § 2134.

income from the sale of such animals during any calendar year and is not otherwise required to obtain a license;

(iii) Any person who maintains a total of four or fewer breeding female pet animals as defined in part 1 of this subchapter, small exotic or wild mammals (such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, jerboas, domesticated ferrets, chinchillas, and gerbils), and/or domesticated farm-type animals (such as cows, goats, pigs, sheep, llamas, and alpacas) and sells only the offspring of these animals, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively maintains a total of more than four of these breeding female animals, regardless of ownership, or to any person maintaining such breeding female animals on premises on which more than four of these breeding female animals are maintained, or to any person acting in concert with others where they collectively maintain a total of more than four of these breeding female animals, regardless of ownership;

(iv) Any person who sells fewer than 25 dogs and/or cats per year, which were born and raised on his or her premises, for research, teaching, or testing purposes or to any research facility and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively sells 25 or more dogs and/or cats, regardless of ownership, nor to any person acting in concert with others where they collectively sell 25 or more dogs and/or cats, regardless of ownership. The sale of any dog or cat not born and raised on the premises for research purposes requires a license;

(v) Any person who arranges for transportation or transports animals solely for the purpose of breeding, exhibiting in purebred shows, boarding (not in association

> with commercial transportation), grooming, or medical treatment, and is not otherwise required to obtain a license;
>
> (vi) Any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber (including fur); . . . .

Dealers are defined as

> any 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, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes. Such term does not include a retail pet store (other than a retail pet store which sells any animals to a research facility, an exhibitor, or another dealer).[20]

The AWA provides for the following civil penalties if a violation of the statute is found in section 2149(b):

> **(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**
>
> **Any dealer**, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, **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**

[20] 7 U.S.C. § 2132(f).

> **than $10,000 for each such violation**, **and the Secretary may also make an order that such person shall cease and desist from continuing such violation**. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to 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**. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. 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, and each day during which such failure continues shall be deemed a separate offense.[21]

Procedural History

The Complaint herein was filed on March 2, 2017. Respondents filed a response on April 4, 2017, under a caption containing only the docket numbers 16-0049 and 16-0050 ("2016 dockets"), which was deemed a timely filed "Answer" for the herein dockets ("2017 dockets") by the May

[21] 7 U.S.C. § 2149(b) (emphasis added).

17, 2017 Order on Respondents Answer to Complaint in Dockets 17-0226 and 17-0227. A teleconference was held on September 6, 2017, and a deadline established for Complainant to submit a motion for decision in the 2017 dockets. During this teleconference, it was also agreed by the parties and approved by the undersigned that the 2016 dockets would not be set for hearing or consolidated with the 2017 dockets until a motion for decision was resolved in the 2017 dockets.

On October 3, 2017, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions ("Motion for Decision") relying on Rule of Practice § 1.139, "[t]he failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing."[22] Respondents submitted a "Respondents answer to motion for decision without hearing" on October 31, 2017, requesting that they be allowed to proceed with a hearing and contesting that they had not raised defenses in their Answer to the complaint that would preclude the grant of a Rule 1.139 motion.[23]

On November 20, 2017, I issued an Order Denying Complainant's Rule 1.139 Motion ("First Denial Order"). Among other things I noted that "APHIS does not mention that Respondents allege they were told by a Nebraska official that they could sell puppies to Pets R Us without a license, Motion, p. 3, citing Answer VII (p. 5), essentially proffering a legal defense, that has legal and factual components."[24] I also noted that "while [Respondents] admit they sold dogs in that time period, they apparently contend that the dogs were sold under a rescue permit and . . . thus not sold in violation of the AWA."[25] I found:

> While Respondents may be deemed to have admitted that neither of them had an AWA license during the time frame covered by Docket Nos. 17-0226 and 17-0227, and

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[22] 7 C.F.R. § 1.139.

[23] "Respondents answer to motion for decision without hearing" at 2. Respondents did not number the pages of this response and all page numbers cited are counted from the first page.

[24] First Denial Order at 4.

[25] *Id*. at 9.

> they appear to admit they sold at least some dogs in that time period, they, consistent with Rule l.136(b)(l), raise various "defenses," which are not, as APHIS apparently contends, simply legal arguments based upon facts not in dispute, but involve disputed issues of fact. They may have admitted certain material facts, but they clearly contested and therefore did not admit "material allegations" of the Complaint, and thus did not waive a hearing. [Footnote omitted.] [26]

On December 11, 2017, Complainant filed a Motion for Reconsideration of Decision Without Hearing by Reason of Admission ("Motion for Reconsideration"), which was denied on February 16, 2018 ("Second Denial Order"). There I found "Complainant's Motion for Reconsideration presents no new contentions or information. It does not show, or even purport to show, that I 'missed,' and therefore did not consider, any of Complainant's previously made contentions."[27]

On March 23, 2018, all parties participated in a teleconference.[28] During this teleconference, Complainant was informed that any future motion for summary disposition should address each of Respondents' contentions asserted in defense of the Complaint.[29] My Summary of Telephone Conference set a date for Complainant to file a motion for summary disposition, provided that Respondent may answer within the usual twenty-day deadline provided in the Rules of Practice, and provided that Complainant would have the opportunity to reply within fifteen days of service of Respondents' response. Complainant filed a Stipulated Request for Change of Filing Date, and on April 19, 2018, I issued an Order Revising Due Dates Set in March 23, 2018 Order Setting Procedures. Thereafter I issued an Errata to April 19, 2018 Order Revising Due Dates Set in March 23, 2018 Order Setting Procedures, providing the

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[26] *Id*. at 8.

[27] Second Denial Order at 4.

[28] *See* Summary of the Telephone Conference with Parties and Order Setting Procedures ("March 14, 2018 Summary of Telephone Conference").

[29] *Id.* at 5.

May 22, 2018 due date for Complainant submissions, and noting the Respondents' due date under the twenty-day deadline in the regulations.

Complainant filed a Motion for Summary Disposition in Response to Order Setting Procedures ("Motion for Summary Disposition") on May 22, 2018. On June 6, 2018, Respondents filed a request for an extension of time to answer Complainant's Motion for Summary Disposition, which was granted on June 8, 2018. On June 22, 2018, Respondents timely filed a response captioned "Answer to complainants [sic] motion for summary Disposition, and motion to Dismiss all charges" ("Response to Motion for Summary Disposition"). Neither party submitted additional documentation or proposed exhibits and, as previously mentioned, Complainant did not reply to Respondents' Response to Motion for Summary Disposition nor the motion to dismiss all charges therein.

Discussion

The Complaint alleges that Respondents conducted dealer operations, which I understand to indicate within the meaning of the AWA, that they offered for sale, delivered for transportation or transported, and/or sold, into commerce approximately 206 puppies and kittens in thirty-four (34) transactions between July 13, 2015, and January 18, 2017,[30] without a valid license in violation of the AWA. In their timely Answer to the Complaint, and in various other subsequent filings, Respondents did not deny that they sold these puppies and kittens to Pets R Us pet store but proffered certain alleged defenses that potentially presented material disputes of fact.[31]

Respondents do not specifically contend that they did not sell animals without a license, but they contend that those sales do not violate the AWA and that even if the sales violated the AWA, the sales were made in a good faith belief that they did not. Specifically, Respondents contend that they continued to sell regulated animals under an alleged "rescue permit" exception to the AWA license requirement because the retail store to

[30] *See supra* note 3.

[31] *See* First Denial Order and Second Denial Order.

which they sold the animals had such a permit.[32] Respondents also allege their sales were made in a good faith belief because they were allegedly told by a state official that the sales would be legal if conducted in the manner they were—that is, direct transportation by Respondents to the pet store.[33] Whether or not a sale was made in good faith that it was legal, does not go to whether the AWA was violated by such a sale. Rather, good faith goes to the level of penalties.

Respondents also contend that the records of sales cannot be relied on in an AWA action against them because Complainant obtained those records by illegal means from the pet store in violation of the Fourth Amendment of the United States Constitution.[34] Complainant's Motion for Decision was earlier denied because it failed to address these potential issues of material fact and sought monetary penalties with little to no factual support or explanation including the analysis of the AWA penalty criteria.[35]

Complainant's Motion for Reconsideration similarly failed to fully address potential issues of material fact presented by Respondents. Specifically, I noted in my Second Denial Order that Complainant 1) did not address the "defenses" raised by Respondents regarding the advice given by a Nebraska official that raise a material issue of fact in consideration of the penalty requested; 2) did not clearly explain the overlap of violations or which violations should be attributed to the 2016 dockets versus the 2017 dockets, and whether the relief requested only applied to certain violations presented in Appendix A of the 2017

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[32] Answer at 5 (¶ VIII); Response to Motion for Summary Disposition at 1-2 (¶ 3).

[33] Answer at 5 (¶ VIII). *See also* March 6, 2017 Correspondence Letter from Respondents filed in Docket Nos. 16-0049 and 16-0050 at ¶ 2.3, and *supra* note 9.

[34] First Denial Order at 8-9.

[35] *Id.*

Complaint; and 3) did not provide sufficient factual support for the monetary penalties requested.[36]

During the March 14, 2018 teleconference, however, Respondents stated that they are continuing to make sales to a pet shop. I noted in my Summary of the Telephone Conference that "continuing legal sales by Respondents would indicate that there is in fact an urgent need for a cease and desist order."[37] I ordered Complainant to submit a motion for summary disposition, including a full brief and reference to any materials that should be moved into the evidentiary record. I also asked Complainant to address the illegality of Respondents' sales under the AWA and regulations, any relevance or lack thereof that the pet store purchaser has a "rescue permit," and whether a cease and desist order is possible without rendering a decision on one or both cases.

In its Motion for Summary Disposition, Complainant contends that there are no material allegations of fact at issue with respect to Respondents' defenses. Complainant contends that Respondents' claim of a sincere belief that their sales were legal could not have been in good faith, especially after service of the first complaint in the 2016 dockets.[38] It contends that "'reliance' upon a third party who provides an incorrect rendering of the AWA is of no merit"[39] because the language of the AWA and regulations is unambiguous as to license requirements. Complainant further contends that there is no "rescue permit" exception within the AWA statute or regulations, and the regulations unambiguously lay out those who are subject to and exempted from the licensing requirements.[40] Complainant specifies that, even if the pet store currently maintains a "rescue permit," such permit is irrelevant; the sales at issue from Respondents to the pet store were for compensation, and thus within the definition of "dealer" under the AWA. Lastly, Complainant contends that

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[36] Second Denial Order at 4-9.

[37] March 14, 2018 Summary of the Telephone Conference at 4.

[38] Motion for Summary Disposition at 4.

[39] *Id.* (citing *McCauley*, 67 Agric. Dec. 178, 185, 2008 WL 1822261, at **4-5 (U.S.D.A. 2008)).

[40] *Id.* at 5-6 (citing 9 C.F.R. § 2.1).

a civil penalty in the amount of $50,000 is justified because the AWA provides for a civil penalty of up to $10,000 per violation, which would amount to $2,480,000 if calculated per animal, or $480,000 if calculated per transaction.[41]

In their response, Respondents contend that their business is not large and, as of the last state inspection (no date provided), their kennel had a total of 23 dogs.[42] Respondents do not provide any argument or support regarding any alleged relevance of the pet store's supposed "rescue permit," but mention an unidentified news article they claim refers to the regulation of "rescues that buy and sell dogs."[43] Respondents claim that they have tried to communicate with Complainant to settle this matter, but that the attorney for Complainant, despite an agreement to negotiate, has "deceived the court" by requesting additional filing time to enter settlement negotiations and never actually contacting Respondents to negotiate.[44] Further, Respondents contend that counsel for Complainant has "violated" "court" orders by including the duplicated alleged violations in from the 2016 dockets in the 2017 dockets, and that the case has been unreasonably delayed and, thus, should be dismissed.

I address each party's contentions as follows.

I. AWA Violations

As discussed above, the Rules of Practice do not specifically address summary disposition,[45] but USDA precedents are clear that summary disposition is appropriate where there are no issues of material fact. "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to

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[41] *Id.* at 8.

[42] *Id.* at ¶ 3.3(A). Respondents reference a "Washington Post expose" but do not cite the article or provide a copy for the record.

[43] *Id*.

[44] *Id.* at 4-5 (¶ 5).

[45] Note that I will use summary judgement synonymously with summary disposition. *See* BLACK'S LAW DICTIONARY 1573 (9th ed. 2009).

the party opposing the motion."[46] While, a hearing is preferred in situations where the parties do not agree to a consent decision and there is a need for the taking of evidence in the form of testimony and exhibits to determine issues of fact, where there is no genuine issue of material fact, the need for a hearing is obviated, and it is proper to rule.[47] Here, Complainant moved for a summary disposition regarding violation of AWA, section 2134,[48] and the corresponding regulation, section 2.1(a).[49] This decision and order disposes of the 2017 dockets in full as there are no other allegations to be considered.

Complainant contends Respondents willfully violated the AWA by repeatedly conducting dealer operations without a license. In their response, Respondents did not deny that any of the sales alleged by Complainant, detailed in Appendix A of the Complaint.[50] However, Respondents contend that the sale records, outlined in Appendix A of the Complaint, were illegally obtained in violation of the Fourth Amendment of the Constitution. This contention has no merit for current purposes, is

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[46] *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). *See also Anderson v. Liberty Lobby*, 477 U. S. 242, 252) (1986) (discussing that while the evidence must be viewed in a light most favorable to the non-moving party, mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient but must provide enough evidence to show there is a genuine issue of fact).

[47] *See Knaust*, 73 Agric. Dec. 92, 98-9 (U.S.D.A. 2014) (citing *Pine Lake Enters., Inc.*, 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); *Bauck*, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. 2010); *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations)).

[48] 7 U.S.C. § 2134.

[49] 9 C.F.R. § 2.1(a).

[50] *See* Answer at 4-5 (¶¶ VI, VII, VIII) (where Respondents argue that the records were obtained illegally but do not deny that the sales evidenced in the records took place).

beyond the scope of this administrative proceeding, and does not preclude the consideration of these records.

Respondents' argument may be construed to be on behalf of the Pets R Us pet store to whom they sold the puppies and kittens. The pet store is not a party to this proceeding. Respondents contend that a state official requested the sale records from the Pets R Us pet store, which the state regulates, and then submitted the records to the USDA investigator.[51] Respondents thus contend that the USDA investigator "took advantage" of the state official to "commit an illegal search and seizer [sic]."[52] Respondents' contention does not relate to any USDA inspection of Respondents' property or personal records. Although Respondents to not contend that any records were illegally obtained from them, it is worth noting that dealers, within the meaning of the AWA, have an obligation to maintain records regarding the sale and transport of regulated animals, and that APHIS has a right to review those records on a regular basis.[53]

Whether there was any violation of the pet store's or Respondents' Fourth Amendment rights is a matter to be pursued separately, outside of this administrative proceeding, and by an entity with proper standing to do so. If Respondents have any cause of action relating to the acquisition of these records by the Complainant, under these circumstances, jurisdiction

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[51] Answer at 4 (¶ VII).

[52] *Id.*

[53] *See* 7 C.F.R. §§ 2.75, 2.126. *See also Lesser*, 53 Agric. Dec. 1063, 1068 (U.S.D.A. 1994) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313) (stating that courts have held "that in 'closely regulated' industries--namely, those which have long been subject to close supervision and inspection--the privacy interests of business owners may be so attenuated, and the government's interest in regulating the particular industry so strong, that a warrantless inspection of the commercial premises might be responsible within the meaning of the Fourth Amendment.").

lies elsewhere as before me in this administrative proceeding is only a determination of whether Respondents have violated the AWA.

Respondents have admitted that they sold animals to the pet store[54] and that Respondent Hager voluntarily surrendered her license prior to the many admitted sales.[55] Respondent Ruyle has never had a license under the AWA. Further, Respondents do not deny that sales took place during the period Respondent Hager was unlicensed, but in fact indicate that she decided to give up her USDA license, at least in part, because Respondents apparently understood that they could continue to sale to the pet store without it.[56] Respondents' admissions and failure to deny the specific allegations, that they sold the puppies and kittens on each of the dates alleged in the Complaint, and that they did so after relinquishing any AWA license to USDA, leaves no material allegation of fact at issue with regard to violation of the AWA. Selling regulated animals without a license is a direct violation of the AWA, section 2134,[57] and the regulation, section 2.1(a).[58]

Respondents asserted that their sales to the pet store were legal because the pet store had a rescue permit. As noted, Respondents in their Response to Motion for Summary Disposition do not provide any statutory or other legal analysis in support of this bare assertion. Respondents do not claim to be a rescue organization. They do not claim themselves to have a "rescue permit" of any kind. They simply state that the pet store had a "rescue license" of some sort.[59] Complainant's statutory and regulatory analysis[60] is correct. The AWA and the regulations are clear and

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[54] Answer at 5 (¶ VIII) ("Mr. Herchenbach told us (Ms. Hager, Mr. Sipherd and his boss Annette Bredthauer [sic] that we could sell puppies to Pets R Us. We took his advice . . .").

[55] *Id. See also* Response to Motion for Summary Disposition at ¶ 2.2.

[56] *Id.* ("We took [Mr. Herchenbach's] advice, it was a huge factor when Ms. Hager turned in her USDA license.").

[57] 7 U.S.C. § 2134.

[58] 9 C.F.R. § 2.1(a).

[59] Answer at 5 (¶ VIII).

[60] Complainant's Motion for Summary Disposition at 5-8.

unambiguous. It is illegal under the AWA to make sales of puppies and kittens in the circumstances Respondents have been making them without an AWA license. There is no exception in the statute or the regulations for sales to an entity that holds a "rescue permit" or "rescue license."

There is, thus, no issue of law or fact that Respondents' sales violated the AWA. The discussion below goes to the amount of penalties to be applied to these AWA violations.

II. Penalties

Under the AWA, the appropriateness of the civil penalty should be determined "with respect to 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."[61] In consideration of each of these factors, I find that the amount of the civil penalty should be $25,600, and that license revocation, permanent disqualification from obtaining a license under the AWA, and issuance of a cease and desist order are proper.

a. Size of the business

Complainant contends, and prior to their Response to Motion for Summary Disposition Respondents did not deny, that Respondents' business is large. I find that the business is moderately sized based on the volume of sales documented (206 over about 18 months). Because this matter is regarding Respondents' dealer operations, the number of animals held at the kennel facility at any given time is not as significant a factor in this determination as the number of sales.[62] The fact that Respondents may have downsized their operations after the Complaints were brought,

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[61] 7 U.S.C. § 2149(b). Although this part of the regulation is entitled "Violations by licenses" and neither Respondent currently holds a license, it has been held that "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 (1947).

[62] *See Horton v. U.S. Dep't of Agric.*, 559 F. App'x 527, 73 Agric. Dec. 77, 88 (unpublished in Federal Reporter) (6th Cir. 2014) (upholding Judicial Officer's determination that petitioner's business was large due to the large 956 dogs sold in the market in a short amount of time, 19 months).

does not mean their business was not of significant size when the violations were committed.

b. Gravity of the violation

I find that the gravity of the violations is serious due to Respondents' repeated dealer operations and the number of transactions since Respondent Hager voluntarily relinquished her license. The Secretary has issued a number of decisions stating that "the failure to obtain an AWA license is a grave violation of the statute."[63] The gravity of these violations has been heightened by Respondents' ongoing dealer activities despite receipt of two complaints notifying them of the illegality of such admitted sales amounting to over 200 alleged illegal sales if counted per regulated animal.[64]

c. Good faith

Respondents contend that they had a good faith belief (though they offer little support as to any alleged basis for this belief) that they could continue to sell animals to the pet store because the Pets R Us pet store maintains a "rescue license" or "rescue permit." As discussed above, Respondents' contention (by referencing an uncited news article) that USDA was considering whether to regulate "rescues" is irrelevant. At issue here is not the exemption of the pet store, but whether Respondents were exempted from license requirements. As noted, Respondents in their Response to the Motion for Summary Disposition provide no analysis whatsoever that there is some sort of exception for sales to the holder of a rescue permit. The plain language of the statute is unambiguous as to license requirements, as are the statutory exemptions to license requirements. By negotiating the sale of, selling, delivering for transport, and or transporting regulated animals to the pet store, Respondents were

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[63] *Id.* at 84 (citing *Bradshaw*, 50 Agric. Dec. 499, 509 (U.S.D.A. 1991) (stating the "licensing requirements of the Act are at the center of the remedial legislation . . . . [C]ontinuing to operate without a license [ ] with full knowledge of the licensing requirements [ ] strikes at the heart of the regulatory program.")).

[64] *See* Complaint, Appendix A. *See also* Summary of Telephone Conference at 4.

"dealers," as that term is defined in the AWA, at the time of the sales and were subject to AWA license requirements.

Respondents also contend that the sales of animals without a license were made in good faith because they were advised by a state agent that they could continue to sale puppies and kittens to a pet store as long as they delivered the animals personally.[65] As Complainant contends, precedent states that the erroneous advice of a federal employee does not negate an individual's duty to comply with the AWA.[66] Further, it is counterintuitive that a dealer who maintained a USDA license would rely on the advice of a state official whose alleged advice is outside the scope of his authority.[67] Yet, proof at a hearing of reliance on erroneous advice could still go to Respondents' good faith under factors to consider when determining penalty.[68] Here, however, a hearing is not necessary to determine whether Respondents could reasonably rely in good faith on any alleged statements by a state official as to the legality of sales after they

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[65] Answer at 5 (¶ VIII). *See also* March 6, 2017 Correspondence Letter from Respondents filed in Docket Nos. 16-0049 and 16-0050 at ¶ 2.3, and *supra* note 9.

[66] *See Davenport*, 57 Agric. Dec. 189, 209 (U.S.D.A. 1998) (holding that individuals are bound by federal laws and regulations, irrespective of bad advice by federal employees); *Mazzola*, 68 Agric. Dec. 822, 839, 2009 WL 4099115 (U.S.D.A. 2009) (erroneous advise from a federal inspector does not absolve an individual of his violations); *Meyers*, 58 Agric. Dec. 861, 866 (U.S.D.A. 1999) ("It is well settled that individuals are bound by federal statutes and regulations, irrespective of the advice of federal employees.") (citing *FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947)); *Zimmerman*, 57 Agric. Dec. 1038, 1049-50, 1058 (U.S.D.A. 1998); *Davenport*, 57 Agric. Dec. 189, 227 (U.S.D.A. 1998), *appeal dismissed*, No. 98-60463 (5th Cir. 1998); *Andersen Dairy, Inc*., 49 Agric. Dec. 1, 20 (U.S.D.A. 1990); *Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (U.S.D.A. 1988); *Maquoketa Valley Coop. Creamery*, 27 Agric. Dec. 179, 186 (U.S.D.A. 1968); *Donley*, 22 Agric. Dec. 449, 452 (U.S.D.A. 1963)).

[67] *See FCIC v. Merrill*, 332 U.S. 380, 384 (1947).

[68] *See McCauley*, *supra* note 39 at 185 (stating "clear proof of bad agency advice might go to the issue of Mr. McCauley's good faith on this issue and have an impact on the sanction" but determining that the respondent could not have produced the name of the person who gave the advice and, thus, the fact could not have been determined).

were served with the 2016 Complaints. Clearly it would be unreasonable to rely on what a state official is alleged to have said, in the face of the agency charged with enforcing the AWA bringing a legal action that the statute has been violated.

Respondents' continued sales after receiving both Complaints and all the other proceedings in this case, would also render dubious the assertions of ever making sales in a good faith belief on the legality of those sales. But since there has been no hearing in this matter, for purpose of summary disposition, I will not here determine that such sales were not made in good faith and will apply a lower penalty to those sales. Whether or not they were made in good faith, they violated the AWA, and a penalty is appropriate.

d. History of previous violations

I find that Respondents have a history of previous violations due to an ongoing pattern of dealer operations that disregard AWA license requirements. Although Respondents have never been subject to a previous adjudication finding that they violated the AWA, "bad faith and a history of previous violations can also be found where a petitioner receives notice of his violations yet continues to operate without a license."[69] Here, Respondents clearly have a history of ongoing illegal sales, admittedly even after Complaints from the Administrator were

[69] *Horton*, *supra* note 62 at 89 (where a history of previous violations was found based on a continuous pattern of conduct and disregard for the AWA license requirement) (citing *Richardson*, 66 Agric. Dec. 69, 88–89 (U.S.D.A. 2007) (stating "I have consistently held under the Animal Welfare Act that an ongoing pattern of violations over a period of time establishes a violator's 'history of previous violations,' even if the violator has not been previously found to have violated the Animal Welfare Act."); *Howser*, 68 Agric. Dec. 1141, 1143 (U.S.D.A. 2009) (where a history of previous violations was found in the absence of formal complaints or penalties, after the petitioner was informed of the AWA's requirements and continued to operate her business without a license); *Mazzola*, 68 Agric. Dec. 822, 827 (U.S.D.A. 2009) (where petitioner's choice to disregard a clear warning, even in the absence of prior formal disciplinary proceedings, was sufficient to establish a history of previous violations and a lack of good faith)).

received.[70] The precedents therefore provide that, in these circumstances, I make a finding of a history of previous violations.

e. Penalty Amount

Complainant's recitation that a civil penalty in the amount of $50,000 is justified because the AWA provides for a civil penalty of up to $10,000 per violation, which would amount to $2,480,000 if calculated per animal, or $480,000 if calculated per transaction, involves no analysis of the factors set out in the statute for determining the amount of penalties, and no reference to, much less application of, precedents. Thus, this recitation is not of great utility in determining what penalties to apply.

The amount of the civil penalty is subject to my discretion within the statutory limit at the time of violation and justified with a purpose of deterring future violations.[71] Considering Respondents' contentions as to good faith sales prior the 2016 complaints in a light most favorable to Respondents as the non-moving party for summary disposition, I will apply $100 per animal sold in violation of the AWA for all sales that took place on or after July 13, 2015 and prior to Respondents' receipt of the first Complaint in the 2016 dockets in February 2016, totaling 112 sales over 12 transactions. Relying on Judicial Officer precedent, I will apply $200 per animal sold in violation of the AWA[72] for all sales that took place after receipt of the Complaint in the 2016 dockets, totaling 94 sales over 22 transactions, at which time Respondents were on notice of the

[70] *See* Summary of Telephone Conference at 4.

[71] *See Horton*, *supra* note 62 at 533 (finding that the Judicial Officer determination of $200 per dog sale was within his discretion and appropriately applied with the intent to deter future violations).

[72] *See Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 464 (5th Cir. 2015) (finding that $200 per violation at the Judicial Officer's discretion was not in error where some violations were committed prior to June 18, 2018, when regulations had a lower maximum penalty, and some violations were committed after the raise in maximum penalty).

illegality of these sales and there is no justification for any good faith reliance on erroneous advice that such sales were legal.

III. Other Contentions

In their Response to the Motion for Summary Disposition, Respondents contend that Complainant failed to discuss settlement with them after Complainant indicated that it would do so.[73] As noted, Complainant did not avail itself of the opportunity to reply to Respondents' response, even though the procedural schedule specifically allowed for such a reply. Complainant has not otherwise responded to Respondents' contentions to the effect that Complainant did not participate in good faith discussions. I am troubled by these unanswered allegations, particularly given that Complainant was granted an extension of time to file its motion for summary disposition in part on its representations to me that additional time was needed to discuss settlement.[74] Nevertheless, I have no authority to require parties to discuss settlement.

Respondents contend that counsel for Complainant "violated court order[s]" by overlapping violations in the 2016 and 2017 dockets.[75] The Complaint with overlapping violations was filed on March 2, 2017 and predated the Summary of September 6, 2017 Telephone Conference and Order, which directed that the dockets not be consolidated until resolution of pre-hearing motions and responses. Although Complainant did not address the issue of overlapping violations despite multiple opportunities to do so prior to this most recent Motion for Summary Disposition, the erroneous inclusion of the overlapping violations does not rise to a "violation of a court order." I consider this issue to be resolved per *supra*

[73] Response to Motion for Summary Disposition at 4-5 (¶ 5).

[74] *See* April 18, 2018 Stipulated Request for Change of Filing Date, filed by attorney for Complainant.

[75] Response to Motion for Summary Disposition at 3-4 (¶ 4).

pages 1-2, particularly footnote 3, and find that it is not cause for dismissal of this matter.

Lastly, Respondents contend that they have a "right to a speedy trial" and that the length of litigation has unjustly affected them, thus meriting dismissal of this case. Respondents' contention is a misunderstanding of the law. This is an administrative proceeding subject to the USDA Rules of Practice.[76] Any undue delay in these proceedings (both the 2016 and 2017 dockets) has been contributed to by Respondents' non-responsiveness,[77] while all other required time limits provided in the Rules of Practice have been adhered to. As previously mentioned, this Decision and Order will dispose of the 2017 dockets, but the 2016 dockets will proceed unless otherwise resolved.

IV. Motion to Dismiss

Respondents move to dismiss "all charges." Respondents motion is in effect a motion to dismiss on the pleadings, which is prohibited by Rule 1.143(b)(1).[78] Even if such a motion were not prohibited, Respondents have not supported it. As discussed above, none of the contentions raised by Respondents could possibly eliminate the allegations of the Complaint entirely. As shown, Respondents admit to violations of the AWA. As a matter of law, as shown above, any of Respondents' defenses could at most only reduce the penalties for those violations. In these circumstances Respondents' Motion to Dismiss is without support and is denied.

Findings of Fact

1. Respondent Linda L. Hager is an individual whose mailing address is P.O. Box 844, Crab Orchard, Nebraska 68332. Respondent Hager was a dealer as that term is defined in the AWA (7 U.S.C. § 2132(f)) and the

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[76] 7 C.F.R. §§ 1.130-1.151.

[77] *See* Order That Parties Submit Their Availability for Teleconference at 2 ("I am troubled to learn that Ms. Kennedy has been unable to schedule a telephone conference because of an inability to reach the Respondents, despite numerous efforts since my May 17, 2017 order.").

[78] 7 C.F.R. § 1.143(b)(1).

regulations (9 C.F.R. § 1.1). Respondent Hager voluntarily terminated her AWA license (number 47-A-0410) in writing and surrendered the license to the AC Regional Director on May 7, 2014, pursuant to Code of Federal Regulations, Part 9, section 2.5(a)(2), thereby terminating the validity of license number 47-A-0410.

2. Respondent Edward E. Ruyle is an individual whose mailing address is P.O. Box 844, Crab Orchard, Nebraska 68332.

3. Respondents Linda L. Hager and Edward E. Ruyle operate a medium sized commercial dog breeding facility and dealer operation at 375 Howard Street, Crab Orchard, Nebraska 68332.

4. From on or about July 13, 2015 through on or about January 18, 2017, Respondents Linda L. Hager and Edward E. Ruyle were active dealers, as that term is defined under the AWA (7 U.S.C. § 2132(f)) and the regulations (9 C.F.R. § 1.1), offering for sale, delivering for transportation or transporting, and selling, in commerce, approximately 206 puppies and kittens, on 34 separate dates, in violation of the AWA (7 U.S.C. § 2134) and regulations (9 C.F.R. § 2.l(a)).

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. From on or about July 13, 2015 through on or about January 18, 2017, Respondents Linda L. Hager and Edward E. Ruyle were active dealers, as that term is defined under the AWA (7 U.S.C. § 2132(f)) and the regulations (9 C.F.R. § 1.1), offering for sale, delivering for transportation or transporting, and selling, in commerce, approximately 206 puppies and kittens, on 34 separate dates, in violation of the AWA (7 U.S.C. § 2134) and regulations (9 C.F.R. § 2.1(a)).

3. A dealer, as that term is defined under the AWA (7 U.S.C. § 2132(f)) and the regulations (9 C.F.R. § 1.1), is not exempt under AWA regulations (9 C.F.R. § 2.1) from licensing requirements when offering for sale,

delivering for transportation or transporting, and selling, in commerce and for profit, to any entity or individual holding a "rescue permit."

ORDER

By reasons of the findings of fact above, the Respondents have violated the AWA and, therefore, the following Order is issued:

1. Respondents Linda L. Hager and Edward E. Ruyle, their agents and employees, successors and assigns, directly or indirectly, or through any corporate or other devise or person, shall **CEASE AND DESIST** from operating as a dealer, as that term is defined under the AWA (7 U.S.C. § 2132(f)) and the regulations (9 C.F.R. § 1.1), without having obtained a dealer's license under the Animal Welfare Act from the Secretary of Agriculture, in violation of section 2134 of the AWA (7 U.S.C. § 2134). This of provision of the Order shall be effective on the day after this decision becomes final.

2. Respondents Linda L. Hager and Edward E. Ruyle are assessed a joint civil penalty totaling $25,600. Respondents shall send a certified check or money order in the amount of twenty-five thousand, six hundred dollars ($25,600.00), payable to the Treasurer of the United States, to:

United States Department of Agriculture
APHIS, Miscellaneous
P.O. Box 979043
St. Louis, MO 63197-9000

within sixty (60) days from the effective date of this order. The certified check or money order shall include the docket numbers (17-0226 and 17-0227) of this proceeding in the memo section of the check or money order.

3. Respondent Linda L. Hager's license is hereby considered permanently revoked within the meaning AWA regulations, section 2.10 (9 C.F.R. § 2.10). Respondents Linda L. Hager and Edward E. Ruyle are hereby permanently disqualified from obtaining a license in accordance with the AWA regulations, section 2.11 (9 C.F.R. § 2.11).

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

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

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FEDERAL CROP INSURANCE ACT

COURT DECISION

LANE v. USDA.
No. CV 617-802.
Court Order.
Signed September 6, 2018.

FCIA – Carryover – Civil fines – Crops, irrigated versus non-irrigated – Crops, loss of – Disqualification – False claim – Intentional – Tobacco – Willful.

[Cite as: 338 F. Supp. 3d 1324 (S.D. Ga. 2018)].

United States District Court,
Southern District of Georgia,
Statesboro Division.

The Court held that the ALJ arbitrarily and capriciously found that the plaintiff filed a false crop insurance claim and, accordingly, vacated that portion of the ALJ's decision. However, the Court affirmed the ALJ's ruling that the plaintiff failed to report carryover tobacco crop in violation of the FCIA. Noting that its split finding might have implications for the sanctions imposed by the ALJ, the Court remanded the case back to the Department for purposes of determining sanctions in light of the Courts' ruling.

ORDER

J. RANDALL HALL, CHIEF JUDGE,
DELIVERED THE OPINION OF THE COURT.

Before the Court are Plaintiff and Defendant United States of America's (the "Government") cross motions for summary judgment. (Docs. 9, 15.) Plaintiff, a farmer from southeast Georgia, challenges a decision issued by an Administrative Law Judge ("ALJ") with the United States Department of Agriculture ("USDA"). The ALJ's decision found that Plaintiff made a false claim for crop insurance on his 2009 tobacco crop and that Plaintiff failed to properly report information as required by his crop insurance policy. The ALJ imposed an $11,000 fine and barred Plaintiff from participating in any federal aid program to farmers for five years. Plaintiff seeks judicial review from this Court and argues that the

decision was arbitrary and capricious.

I. BACKGROUND

Plaintiff is a farmer in Emanuel County, Georgia. In April 2009 Plaintiff planted tobacco on two plots of land: Unit 101 and Unit 104. On Unit 101 he planted 45 acres of irrigated flue cured tobacco. On Unit 104 he planted 44 acres of non-irrigated flue-cured tobacco. Plaintiff insured both units with the Great American Insurance Company ("Great American").

The centerpiece of Plaintiff's crop insurance policy, or any crop insurance policy for that matter, was the "production guarantee." When a farmer makes a claim, the loss incurred is determined by imputing the production guarantee into a mathematical formula. The production guarantee is, essentially, the number of pounds of harvested tobacco a farmer may insure on any given plot of land, and it is usually measured in pounds per acre. The production guarantee is calculated using either (1) the farmer's previous production history on the specified land or (2) if no production history is available on the specified land, county actuarial tables. Plaintiff had never farmed on Unit 104, thus Great American relied upon the county actuarial tables to calculate his production guarantee. Plaintiff's 2009 production guarantee was 1,580 pounds per acre for Unit 101 and 1,510 pounds per acre for Unit 104. His total guarantee (the production guarantee times the insured acreage) was 71,100 pounds for Unit 101 (45.0 acres X 1,580 lbs.) and 66,440 pounds for Unit 104 (44.0 acres X 1,510 lbs.).

On August 7, 2009, Plaintiff filed a notice of loss on Unit 104 due to drought and wind damage. On August 12, 2009, insurance adjuster Ned Day inspected Plaintiff's insured tobacco. Day estimated that Unit 101 would produce 2,188 pounds of tobacco per acre *(i.e.*, 98,460 lbs. total) and Unit 104 would produce 2,207 pounds of tobacco per acre (*i.e.*, 97,108 lbs. total). Because Day's estimated production per acre exceeded Plaintiff's production guarantees, Day estimated that Plaintiff would have no need to file a claim.

After harvesting the tobacco, Plaintiff reported that: (i) Unit 101 (the

irrigated plot) produced 177,099 pounds of tobacco,[1] of which 101,657 pounds were sold to Market Center Planters ("MC Planters") for $165, 042; and (ii) that Unit 104 (the non-irrigated plot) produced only 13,394 pounds of tobacco, which was sold to MC Planters for $18,515.85. Thus, according to Plaintiff's reported crop yields, Unit 101 exceeded its production guarantee by 30,557 pounds[2] while Unit 104 missed its production guarantee by 53,046 pounds. In December 2009 Plaintiff made a claim on Unit 104 for a loss of $104,429. In January 2010, Plaintiff collected an indemnity payment of $104,429.00 minus credits due to Great American, for a net payment of $72,688.

Around 2009, the Office of Inspector General in North Carolina received information about a major scheme by tobacco producers to defraud the federal crop insurance program. During its investigation, the Government subpoenaed records from Independent Tobacco Services, Inc. ("ITS"). Randy Upton, an investigator with the Risk Management Agency for the Department of Agriculture ("RMA"), sought records of tobacco producers in Georgia who failed to meet their 2009 guarantees by more than 50, 000 pounds. Mr. Upton identified Plaintiff as falling within this category, and, in 2012, began to investigate Plaintiff.

On October 31, 2012, Mr. Upton conducted an interview with Plaintiff at the Farm Service Agency office in Swainsboro, Georgia. During the interview, Mr. Upton inquired into the specifics of Plaintiff's 2009 tobacco crop. Of particular interest to Mr. Upton was Plaintiff's sale of approximately 29,000 pounds of tobacco to ITS in 2009. Plaintiff initially did not recall any sales to ITS, but when informed that Joseph Boyett bought tobacco on behalf of ITS, Plaintiff speculated that it was probably trash tobacco or might have been tobacco left over from previous years

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[1] The Court notes that despite its efforts, it could determine neither the source nor significance of this number. The Court could only determine that, for purposes of this case, it is largely irrelevant. The Government cited this number in its complaint to the ALJ, but the Government's main investigator, Randy Upton, later recanted its use and clarified that the operative number was really the 101,657 pounds sold to MC Planters. (*See* Transcript, p. 174-75.).

[2] Once again, the Court notes that it is using only the 101,657 pounds to determine the excess of the production guarantee, not the 177,099 pounds cited in the United States' complaint.

("carryover tobacco").

Based upon this interview and the results of his investigation, Upton hypothesized that Plaintiff did not suffer losses from a drought but instead (1) shifted some of his production from Unit 101 to Unit 104 and (2) sold Unit 104 tobacco to ITS. Upton's hypothesis went as follows:

> • Plaintiff exceeded his production guarantee by 30,000 pounds on Unit 101 and missed his production guarantee by 54,000 pounds on Unit 104.
>
> • Plaintiff sold 29,000 pounds to ITS which he claimed was carryover tobacco from 2006.
>
> • Assume that the 30, 000 overproduction in Unit 101 was really production from Unit 104.
>
> • Assume also that the 29, 000 sold to ITS was not carryover tobacco from 2006, but was instead production from Unit 104.
>
> • The sum of 30,000 (the overproduction from Unit 101), 29,000 (the alleged carryover tobacco), and 14,000 (Plaintiff's reported production from Unit 104) is 73,000 pounds.
>
> • 73,000 pounds is only slightly greater than the original 66,400 pound production guarantee for Unit 104.
>
> • Additionally, if Plaintiff had shifted the 30,000 pounds from Unit 104 to Unit 101, then Unit 101 would have produced only 71,000 pounds (101,000 - 30,000 = 71,000) – almost exactly the original production guarantee for Unit 101.

Thus, Upton concluded, after taking into account the adjuster's prediction that both Unit's 101 and 104 would hit their production guarantees, Plaintiff must have shifted production from Unit 104 to Unit 101.

At the conclusion of his investigation, Mr. Upton referred Plaintiff to the United States Attorney's Office. In December 2012, Plaintiff and his

attorney met with Assistant United States Attorney Edgar Bueno. Plaintiff explained that the tobacco he sold to ITS in 2009 was carryover tobacco he had grown in 2006 but stored because of unfavorable market conditions. Plaintiff also provided the United States Attorney's Office with evidence supporting the existence of a drought in 2009. The United States Attorney's Office declined to prosecute Plaintiff and referred the case back to the RMA for administrative review.

On April 25, 2014, the RMA recommended that Great American void Plaintiff's policy. The RMA wrote that "[a]n analysis by PRISM weather experts disclosed that drought conditions did not exist in Emanuel County, Georgia in 2009." (CX-22, at 3.) Subsequently, Plaintiff and Great American engaged in federally-mandated arbitration. The arbitration, however, did not focus on Plaintiff's drought claim. Rather, it focused on Plaintiff's failure to report the tobacco he claimed to carryover from 2006.

Plaintiff's insurance policy required Plaintiff to submit an acreage report every year. The policy required Plaintiff to include in his acreage report, *inter alia*, any "carryover tobacco from previous years." (RX-14, at 36.) The insurance policy defined carryover tobacco as "[a]ny tobacco produced on the FSA farm serial number in previous years that remained unsold at the end of the most recent marketing year." (*Id.* at 35.) Incorrectly reporting "any information on the acreage report for any crop year" could result in repayment of benefits by the insured "if the correction of any misreported information would affect an indemnity, prevented planting payment[,] or replant payment that was paid in a prior crop year." (*Id.* at 15.)

Using Plaintiff's failure to report any carryover tobacco on his 2009 acreage report, Great American sought to void the 2009 policy and avoid making payment on a claim submitted by Plaintiff in 2012. The arbitrator ruled in favor of Plaintiff, finding that the failure to include the 2006 carryover tobacco was: (1) "**NOT** intentional" because "[t]he overwhelming weight of the evidence was that Mr. Lane did not attempt to conceal anything and did not have knowledge that the information provided in the Acreage Reports and the Production Reports was false"; and (2) "**NOT** material" because "the failure to list the Carryover Tobacco . . . (i) in no way affected any decision making by [Great American] (or, for that matter, by USDA or any division thereof); (ii) in no way affected

[Great American's] ability to adjust any claim or loss; and (iii) in no way affected premiums charged to Mr. Lane as the insured or otherwise caused a monetary loss to the crop insurance program." (RX-36, at 5-6 (emphasis in original).)

In December 2014, the Government brought an administrative action against Plaintiff seeking the maximum penalty of a five year disqualification from participation in government crop programs as well as the imposition of an $11, 000 fine. In its complaint, the Government alleged that "drought conditions did not exist in Emanuel County, Georgia in 2009" and thus Plaintiff made a false crop insurance claim. The Government also alleged that Plaintiff "knowingly and intentionally, misrepresented material and relevant fact [sic] pertaining to [his] policy" when he "did not report alleged carryover tobacco on his acreage report, filed false Notice of Loss, and signed a 2009 loss claim production worksheet that cause [sic] an incorrect indemnity payment to be made to him." (Government's Administrative Complaint.) The Government's complaint cited as its supporting evidence, among other things, PRISM weather reports casting doubt on the existence of a drought, loss adjuster Day's prediction that Units 101 and 104 would exceed their production guarantee, Plaintiff's allegedly inconsistent October 2012 interview, and Plaintiff's failure to report any carryover tobacco.

In June 2015, ALJ Janice K. Bullard held a two-day hearing in Swainsboro, Georgia. The ALJ heard evidence from several sources, including Mr. Lane.

Christopher Webb, Plaintiff's long-time crop insurance agent, testified that he prepared Plaintiff's acreage reports for the years 2006, 2007, 2008, and 2009, and that Plaintiff did not report any carryover crop during those years. Webb testified that the form he uses does not include a special place to report carryover tobacco, but he would have noted any carryover in the remarks section of the form. Webb also testified that, although he prepared Plaintiff's notice of loss for wind damage, he did not prepare Plaintiff's notice of loss for drought. According to Webb, Plaintiff's notice of loss for drought was irregular because it included a claim number, which is normally not assigned until after the notice is submitted, and the notice identified a future, rather than present, loss.

Ned Day, the insurance adjuster who inspected Plaintiff's 2009 crop, testified that at the time of his crop inspection "both irrigated and non-irrigated crops looked to be good quality, although the non-irrigated may have had thinner leaves." (ALJ Decision, at 6.) Day further testified that "the tobacco was mature, and [he] saw no evidence of wind damage or damage due to drought." (*Id.*) Finally, Day stated that he "had never had an appraisal miss as much as the one he conducted of [Plaintiff's] 2009 tobacco crop." (*Id.* at 7.)

Randy Upton testified that he suspected Plaintiff was lying about the drought claim and had shifted some of his production from Unit 104 to Unit 101. He based this belief on Day's growing season inspection as well as the rough equivalence between Plaintiff's 30,000 pound over production on Unit 101 and his 53,000 pound underproduction on Unit 104. Upton agreed that based upon the price ITS paid Plaintiff for the tobacco it bought in 2009, the tobacco was "trash." (ALJ Decision, at 8.) Upton, however, "admitted that he had no idea where the tobacco [sold to ITS] came from, or when it was grown." (*Id.*)

Dr. Jeffrey Underwood testified as Plaintiff's expert on the weather conditions in the summer of 2009. At the time of the hearing, Dr. Underwood was the Chair of the Department of Geology and Geography at Georgia Southern University and was previously the official Nevada State Climatologist. Dr. Underwood testified that although April and May were quite wet, drought conditions existed in Emanuel County, Georgia in June and July of 2009. Dr. Underwood also noted that according to data gathered by the National Climatic Data Center, June through August 2009 in Georgia was "the sixth driest June through August" in 115 years of record keeping. (Transcript, at 530.)

Wesley Harris testified as Plaintiff's expert on the effects of the weather conditions on Plaintiff's tobacco plants. Mr. Harris earned a degree in agricultural engineering from the University of Georgia and at the time of the hearing had spent 27 years working for the Georgia agricultural extension service, much of which he spent helping farmers with the growth of nearly 4,000 acres of tobacco. Harris inspected Unit 104 in person and testified that the soil on Unit 104 was very sandy and had an "extremely, extremely limited" capacity to hold water. (Transcript, at 542.) He then testified that wet weather in the early part of the growing

season can truncate a tobacco plant's root system, potentially causing a crop failure if the tobacco then goes through a hot, dry period. Harris testified that while the tobacco leaf might still look nice and green, it will not ripen properly and will be worthless on the market. He then offered his expert opinion that 2009 "would have been an extremely challenging year. There's no way with the heavy impact of the saturated soils right after transplanting and then another shot right after that that we would have developed the root system to the point that we could sustain the type of dry hot weather that we had during the primary growing season." (Transcript, at 554.) According to Harris, the damage to Plaintiff's crop was complete by the time Plaintiff filed his notice in August 2009.

Allen Denton, a retired compliance investigator with the RMA, testified for the Government about the tobacco growing and harvesting process. Mr. Denton inspected pictures of Plaintiff's crop and testified that "based upon the date that Respondent planted his non-irrigated tobacco and the date on which [the] picture of the crop was taken, the tobacco was mature and ready to be harvested." (ALJ Decision, at 10.) He further testified that he "believed that only a catastrophic event would have prevented Respondent's crop from producing 2,000 pounds per acre, as appraised on August 12, 2009." (*Id.*)

Dan Johnson, John Paul Johnson, and Bobby Lane, all neighboring farmers, testified that they filed claims for losses due to drought in 2009.

Finally, Burt Rocker, one of Plaintiff's neighbors, and Dr. Ricky Lane, Plaintiff's brother, testified that they witnessed Plaintiff's stored carryover tobacco. Mr. Rocker testified that when he was on Plaintiff's land in early 2007, he saw tobacco barns full of tobacco. He remembered this event because it was the wrong time of year to have tobacco in storage and normally tobacco would have been sold by then. Dr. Lane testified that in 2007 or 2008 he observed tobacco in Plaintiff's warehouse. Dr. Lane also took note of this fact because he was visiting in the winter months and tobacco is not usually stored at that time.

On April 5, 2016, the ALJ issued an order finding Plaintiff "willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation [("FCIC")] or to [Great American] with respect to an insurance plan or policy under the Federal Crop Insurance

Act [(the "Act")]." (ALJ Decision, at 28.) The ALJ began her discussion by noting that "[t]he gravamen of the instant matter is whether or not [Plaintiff] experienced loss of his non-irrigated tobacco crop due to drought in 2009, or whether he filed a false claim of law." (*Id.* at 18.) The ALJ found that "the preponderance of the evidence supports the conclusion that [Plaintiff] did not suffer the loss that he reported" (*id.* at 19) and that "[Plaintiff] failed to report carryover tobacco in 2006, 2007, 2008, and 2009, which constitutes a serious lapse in his responsibilities under the crop insurance program" (*id.* at 24.). The ALJ imposed an $11,000 fine and a disqualified Plaintiff "for five years from receiving any monetary or non-monetary benefit under various statutory provisions [as well as] any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities." (Doc. 15, at 6.)

Plaintiff appealed the ALJ's decision. The Judicial Officer upheld the ALJ's decision. Plaintiff now seeks judicial review from this Court.

II. STANDARD OF REVIEW

"[W]hen a party seeks review of agency action under the [Administrative Procedures Act ("APA")], the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001). "Accordingly, the standard set forth in Rule 56 does not apply because of the limited role of a court in reviewing the administrative record. Summary judgment is the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *CS-360, LLC v. U.S. Dep't of Veterans Affairs*, 101 F. Supp. 3d 29, 32 (D.D.C. 2015) (citations and internal quotations omitted).

"Under the [APA], [a court] may set aside a decision of a federal agency only if it is 'arbitrary, capricious, an abuse of discretion, unconstitutional, in excess of statutory authority, without observance of procedure as required by law, or unsupported by substantial evidence.'" *Alma Brightleaf, Inc. v. Federal Crop Ins. Corp.*, 552 F. App'x 861, 864 (11th Cir. 2013) (quoting *Mahon v. U.S. Dep't of Agriculture*, 485 F.3d 1247, 1252 (11th Cir. 2007)). "The 'arbitrary and capricious' standard is

exceedingly deferential." *Jones Total Health Care Pharmacy, LLC v. Drug Enforcement Administration*, 881 F.3d 823, 829 (11th Cir. 2018) (quoting *Defs. of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1115 (11th Cir. 2013)). Courts "may not substitute [their] own judgment for that of the agency so long as its conclusions are rational and based on the evidence before it." *Id.* (citing *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009)).

Courts, however, "may set aside a decision as 'arbitrary and capricious when, among other flaws, the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.'" *Id.* (quoting *High Point, LLLP v. Nat'l Park Serv.*, 850 F.3d 1185, 1193-94 (11th Cir. 2017)). A decision is "unsupported by substantial evidence" when it lacks "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Alma Brightleaf, Inc.*, 552 F. App'x at 864 (quoting *Stone and Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012)). But "[a]n administrative agency's finding is supported by substantial evidence even if two inconsistent conclusions could be drawn from the evidence." *Jones Total Health*, 881 F.3d at 829 (internal quotations and citations omitted).

III. DISCUSSION

The question presented by the ALJ was "[w]hether [Plaintiff] willfully and intentionally provided false or inaccurate information with respect to a policy or plan of insurance to FCIC or any approved insurance provider, or failed to comply with a requirement of FCIC." (AJL Decision, at 1.) The ALJ found in the affirmative. This Court finds that part of the ALJ's decision was arbitrary and capricious and part of its decision was supported by substantial evidence.

A. Applicable Law

"A . . . person that willfully and intentionally provides any false or inaccurate information . . . to an approved insurance provider with respect to a policy or plan of insurance" or "willfully and intentionally fails to comply with a requirement of the [FCIC]" may be subject to civil fines or

disqualification from receiving monetary or nonmonetary benefits under federal farm programs. 7 U.S.C. § 1515(h) (1)-(3). Federal regulations further provide that "[d]isqualification and civil fines may be imposed on any participant or person who willfully and intentionally: (1) [p]rovides any false or inaccurate information to FCIC or to any approved insurance provider with respect to a policy or plan of insurance authorized under the Act either through action or omission to act when there is knowledge that false or inaccurate information is or will be provided; or (2) Fails to comply with a requirement of FCIC." 7 C.F.R. § 400.454(b)(1)-(2).

"Disqualification and civil fines may only be imposed if a preponderance of the evidence shows that the participant or other person has met the standards contained in § 400.454(b). FCIC has the burden of proving that the standards in § 400.454(b) have been met." 7 C.F.R. § 400.454(A)(3). "Disqualification and civil fines may be imposed regardless of whether FCIC or the approved insurance provider has suffered any monetary losses. However, if there is no monetary loss, disqualification will only be imposed if the violation is material in accordance with § 400.454(c)." 7 C.F.R. § 400.454(A)(4).

"Willful and intentional" means "[t]o provide false or inaccurate information with the knowledge that the information is false or inaccurate at the time the information is provided; the failure to correct the false or inaccurate information when its nature becomes known to the person who made it; or to commit an act or omission with the knowledge that the act or omission is not in compliance with a 'requirement of FCIC' at the time the act or omission occurred. No showing of malicious intent is necessary." 7 C.F.R. § 400.452. "Material" is defined as "[a] violation that causes or has the potential to cause a monetary loss to the crop insurance program or it adversely affects program integrity, including but not limited to potential harm to the program's reputation or allowing persons to be eligible for benefits they would not otherwise be entitled." *Id.*

B. The ALJ's Decision

The ALJ made three findings. First, she found that Plaintiff's 2009 Unit 104 tobacco crop did not suffer a loss due to drought. Second, she found that Plaintiff willfully and intentionally failed to report carryover tobacco from 2006. Third, she found that the arbitration decision in favor of

Plaintiff and against Great American did not preclude suit by the Government. This Court finds the ALJ's first conclusion to be arbitrary and capricious but the second conclusion to be supported by substantial evidence. Additionally, the Court finds that Plaintiff has not met his burden of demonstrating that the arbitration decision precluded suit by the Government.

1. The ALJ's Finding that Plaintiff Suffered No Loss

The foundation of the ALJ's decision that Plaintiff suffered no loss is Day's inspection. The ALJ found that Day's inspection demonstrates Plaintiff could not have suffered a loss. After setting this foundation,[3] the ALJ found that: (1) Plaintiff's explanation of carryover tobacco cannot be believed because, among other things, Plaintiff is not a credible witness; (2) Plaintiff's expert witness testimony demonstrating the effect of the wet-dry weather pattern on the non-irrigated crop must be discounted; and (3) no evidence established that the 25, 000 pounds of tobacco sold to ITS did not come from Plaintiff's 2009 crop. (ALJ Decision, at 21.) The ALJ concluded by reasoning that while "it is speculative to conclude that some of the excess production sold from Unit 101 came from Unit 104, . . . the evidence demonstrates that at least some of the 25, 000 pounds of the crop sold to ITS represents unreported tobacco harvested by [Plaintiff] in 2009, even crediting that some of the tobacco was trash tobacco from the non-irrigated acreage and some carry over tobacco." (*Id.* at 23.)

The overarching problem with the ALJ's finding is that it relies on only one piece of concrete evidence: Day's growing season inspection.[4] The

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[3] The Court notes that while it presents the ALJ's arguments in a chronological order, the ALJ did not craft her opinion in this chronological way. The Court merely re-presents the ALJ's opinion in this manner for the sake of clarity.

[4] Even Day's growing season inspection, however, is not entirely persuasive. The inspection consisted of Day measuring the number of tobacco stalks, counting the leaves on a sample of tobacco plants, and estimating how many leaves were in the 40 acres on Plaintiff's Unit 104. Day then used a handbook to determine how many pounds of tobacco would result from the estimated leaf total *assuming* the leaves would mature properly. Day testified at trial that his inspection was not related to the claim filed by Plaintiff, and that it was not an entirely accurate prediction of the expected yield. According to Day, "the actual production could be very

ALJ cites no concrete evidence indicating that a drought did not occur, no concrete evidence that the drought, if it did occur, would not have had or did not in fact have a deleterious effect on Plaintiff's tobacco crop, and no concrete evidence, despite hearing testimony from the ITS purchaser, that the tobacco sold to ITS came from Plaintiff's 2009 crop. Instead the ALJ fills her opinion with explanations of why she does not believe Plaintiff's story. She cites the fact that she does not find Plaintiff credible, she cannot find any evidence establishing the source of the crop sold to ITS, and she does not agree with Plaintiff's agricultural expert.

The second problem, which stems from the first, is that the ALJ's opinion works almost to switch the burden of proof from the Government to Plaintiff. The vast majority of the ALJ's decision consists of explaining why the ALJ does not believe Plaintiff's version of events, and it is filled with conclusions rejecting Plaintiff's arguments: "[R]espondent's explanation for carrying tobacco is not supportable" (ALJ Decision, at 20); "the preponderance of the evidence does not support [Plaintiff's] version of events" (*id.*); "Plaintiff undoubtedly sold 25,000 pounds of tobacco to ITS that he failed to report but the evidence does not establish the source of the crop" (*id.*); "the preponderance of the evidence does not support that drought conditions ravaged the non-irrigated crop" (*id.*); and "the preponderance of the evidence does not support that all of the unreported crop that [Plaintiff] sold in 2009 represented the at most dozen bales that Dr. Lane observed repeatedly in the winter months of 2007 and 2008" (*id.* at 23-24). The decision is largely devoid, however, of any explanation concerning the Government's arguments. The ALJ fails to reference any substantive Government evidence, other than the Day inspection, showing that Plaintiff's crops were not ravaged by drought. Thus, the ALJ appears to have presumed the Government was correct and required that Plaintiff prove otherwise.

The third problem, which, like the second, also stems from the first, is that the ALJ's conclusion is almost entirely speculation. The ALJ's decision rests upon two main premises: (1) Day's inspection proves

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different than [the appraisal estimate]." (Transcript, at 103.) Furthermore, Day testified that "another thing about these appraisals, you got to go by what the book says. You know that's all you can do. And it's nothing saying its exact, like I told that other lawyer. . . . It's just something to give you an idea what he's got out there." (*Id.* at 105.).

Plaintiff suffered no loss and (2) Plaintiff's sale to ITS was actually a way to dispose of his healthy Unit 104 tobacco. While the ALJ relies on at least one concrete piece of evidence - the Day inspection - to prove the first premise, she cites no concrete evidence supporting the second. She writes that "the evidence demonstrates that at least some of the 25,000 pounds of the crop sold to ITS represents unreported tobacco harvested by [Plaintiff] in 2009, even crediting that some of the tobacco was trash tobacco from the non-irrigated acreage and some carry over tobacco," thus Plaintiff "knowingly and intentionally provided false information when he certified the production worksheet for Unit 104." (ALJ Decision, at 23.) The ALJ, however, cites no evidence in support of this assertion. To the contrary, she admits that "*the evidence does not establish the source of the crop [sold to ITS]*." (ALJ Decision, at 23 (emphasis added).)

Additionally, when asked at trial whether he had any "direct evidence whatsoever that [Plaintiff] grew [the carryover tobacco] in 2009," Upton, the Government's chief investigator, responded: "The only thing I have is what Mr. Day told me that he thought the tobacco claim was suspicious because he only produced 300 pounds [per acre]." (Transcript, at 161.) Upton further admitted that despite reviewing "all of the records that were available" and "interview[ing] everybody [he] knew that had anything to do with" this case, "not one witness" ever told him that Plaintiff grew the tobacco sold to ITS in 2009. (*Id.*) Thus, a central pillar of the ALJ's opinion, that Plaintiff must have disposed of his healthy Unit 104 tobacco by selling it to ITS, is completely without any supporting evidence other than the ALJ's conclusion that she does believe Plaintiff's story.[5]

The ALJ further speculated when discounting the eyewitness testimony offered by Plaintiff showing that he did have significant carryover tobacco from 2006. The ALJ reasoned that "[t]he amount of tobacco that [Plaintiff] has said was held over is questionable, given the contradiction between Mr. Rocker's observation that [Plaintiff's] barns were full of tobacco when he would have expected the crop to have been sold and Dr. Lane's description of some bales of tobacco that did not fill a warehouse." (ALJ Decision, at 20.) But as Plaintiff points out, "there is no record of the size

[5] Interestingly, this brings the Court right back to problem number two: the ALJ appears to have placed the burden on the Plaintiff to prove he didn't make a false claim rather than on the Government to prove he did.

difference between Mr. Lane's tobacco barns and the size of the warehouse at issue." (Doc. 11, at 22.) In fact, Plaintiff contends that the warehouse is "substantially larger than the smaller portable tobacco barns." (*Id.*) Indeed, should this be the case, the contradiction cited by the ALJ would be no contradiction at all. Thus, the ALJ's discounting of the eyewitness testimony on the basis of a "contradiction" is not supported by any evidence in the record.

Finally, in the same paragraph asserting the "contradiction" between the testimony of Rocker and Dr. Lane, the ALJ writes that while she "accords weight to Dr. Lane's testimony that [Plaintiff] stored some tobacco out of season, . . . the tobacco could easily have been the bales of trash tobacco that [Plaintiff] testified he collects during the growing season." (ALJ Decision, at 20.) As Plaintiff notes in his brief, however, "this is speculation, pure and simple." (Doc. 11, at 23.) The ALJ provides no evidence that the bales the eyewitnesses saw were not from the 2006 harvest. The ALJ is right to state that the origin of the stored tobacco is uncertain, but because the Government has the burden of proof, uncertainty must weigh in favor of Plaintiff. The ALJ must make a determination based on the evidence the Government presents and determine whether the Government has met its burden of proof. Because the ALJ references no evidence supporting her assertion, the Court must conclude that this assertion is mere speculation.

The fourth problem is that the ALJ ignores the great weight of evidence put forth by Plaintiff demonstrating the he did suffer a loss. Plaintiff offered two expert witnesses on the weather pattern and tobacco agronomy. The Government offered none. The Plaintiff's expert witnesses testified to two important facts. First, Dr. Underwood testified that in 2009 Emanuel County experienced a wet spring followed by an extremely dry summer. Second, Wesley Harris testified that: (1) the wet spring would cause the tobacco plants to grow shallow roots, and that the shallow roots would cause the plants to struggle in the dry summer;[6] (2) he had

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[6] Specifically, Harris testified that "wet weather in the early part of the season, a month or so after transplanting" would have

> a deleterious effect. All of the literature that you see on particularly irrigation scheduling warns against that. And then the implication is that if you saturate the soil you create

examined the soil of Unit 104 and it had a very limited capacity for holding water;[7] (3) while the tobacco plants might have looked healthy because they were green, the lack of water would have severely hampered their ability to mature properly;[8] and (4) the damage to the crops was complete

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> anaerobic conditions down there, which will truncate the root mass. And that creates at that point an imbalance, like I was talking about between the root structure and the leaf structure. And if it is dryland tobacco and that tobacco goes into a different stress period, either from a combination of heat and dry weather or long term dry weather scenarios, it can create a crop failure.

(Transcript, at 549.)

[7] Harris testified that the soil on Unit 104 was consistent with the soil in that area of Georgia. When asked to describe the "water holding features or capacities of that soil type," Harris opined:

> Unfortunately since we have extremely low cation exchange capacities in most east Georgia soils and very low organics our water holding capacity is extremely, extremely limited. If we don't have pretty much regular rainfall or supplement it with irrigation over that period of time it's extremely difficult to be successful in producing a crop.

(Transcript, at 542.)

[8] Harris testified that tobacco needs "between an inch and a quarter to an inch-and-a half [of rain] per week" to be healthy. If the tobacco doesn't get the needed rain:

> [A] couple of things will happen. Number one, the energy production in the plant from the -- all the way down to the mitochondrion on up, begins to cease to function in a strong position. We go into almost dormancy type thing. And with tobacco where you're dealing with a very turgid and heavy leaf, once it starts to lose that capacity to continue to mature then it won't get to the point where it will actually ripen effectively. *And then you'll have essentially a nice leaf out there, but it will be worthless to the cigar/cigarette manufacturer.*

(Transcript, at 551 (emphasis added).) Additionally, when show a picture of the crop, Harris opined that

> for it to be as dark green as it is, it expresses and basically verifies my point of the type of weather conditions that he had,

by the time Day conducted his inspection.[9]

The ALJ, however, ignored Plaintiff's persuasive evidence. While the ALJ appeared to accept Dr. Underwood's testimony that Emanuel County experienced a wet spring followed by an extremely dry summer, she dismissed Harris' testimony that the truncated root system created by the wet spring would have harmed the plant in the dry summer. The ALJ reasoned that "I accord little weight to the opinion of agricultural expert Wesley Harris that wet weather early in the season would have a bad effect on the crop, as the rain fell on both irrigated and non-irrigated fields, and the irrigated unit produced tobacco in excess of the production guarantee." (ALJ Decision, at 21.) But this conclusion misunderstands the critical distinction between irrigated and non-irrigated crops. Irrigated crops have access to water. Non-irrigated crops do not. Thus, although the irrigated and non-irrigated crops both experienced a wet spring, the irrigated crops were better able to withstand the ensuing dry summer because they had artificial access to water while the non-irrigated crops suffered because they were completely at the mercy of the weather. The ALJ's dismissal of Harris' testimony is troubling both because it wrongly dismisses persuasive evidence that Plaintiff's crops did suffer a loss due to drought

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> allowed for a reduction in the root system as well as a reduction in the ability of the plant to grow as it should have. And, therefore, we didn't utilize the nitrogen that he had put on the plant early to sustain it, until it got to this point where it kicked back in - literally kicked back into gear with more favorable weather and that's why it's so green and the only way we could even begin to salvage this crop, which essentially won't happen.

(Transcript, at 557.)

[9] Examining a picture of the crop during Day's growing season inspection, and taking note of the time of year the picture was taken as well as the time the tobacco was planted, Harris answered the question of whether the tobacco had "much of an opportunity . . . to recover and develop a marketable leaf that year":

> Once you get to that stage and, again, without being right on top of it, I can't ascertain how much of that is sucker growth and how much, you know, is actual prime leaf. But the reality would be once we get this late in the year we start running out of daylight hours to be able to effectively ripen the tobacco.

(Transcript, at 558.)

and because it demonstrates a fundamental misunderstanding of the science surrounding crop growth — science that is vital to assessing the Government's complaint against Plaintiff.[10]

The fifth problem is that the ALJ's opinion is inconsistent and based on distortions of the record. The first, and perhaps most visible, distortion of the record is the ALJ's characterization of Plaintiff's testimony. The ALJ wrongly states that Plaintiff "admittedly lied to Investigator Upton during their [October 2012] interview" and "[a]t the hearing before me, [Plaintiff] admitted that he was not truthful with Mr. Upton." (ALJ Decision, at 19, 22.) The full context of Plaintiff's testimony cited by the ALJ, however, demonstrates that Plaintiff never admitted that he "lied" to Upton:

> **Plaintiff:** Everything in that [October 2012] interview and in here nothing was accurate. I was trying to

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[10] Indeed, Plaintiff's tobacco expert explained this principle in detail at trial:

> Drought is a problem, obviously, to any plant. But it is exacerbated significantly when you have high temperatures to go along with it. If any of us recall the week or two of weather we have had you certainly can relate to that very effectively. In this particular case not only did we have a relatively prolonged period of in excess of 30 days with less than two inches of rain we also had significantly high temperatures in there not only from the maximum side of it, but also from the minimum side. If we maintain nighttime temperatures as a low in the 75, 74, 76 degree range the plant literally does not respire at night. If it doesn't respire at night it can't go back into an energy state again.
>
> That would indicate to me those two scenarios right there, that the opportunity to produce a good quality tobacco crop would be almost impossible. *And that's why we are, you know, we like to see the capacity to irrigate because we could have gone in there even with a truncated and minimal root system we could have augmented the -- not only the moisture capability, but also reduced some of the temperature at that particular point during that critical stage.*

(Transcript, at 555 (emphasis added).)

> remember. *Everything that I told him was the best that I could remember at the time. Maybe some - some of it may be accurate and some of it not, you know, I'm setting there trying to remember*. We have picked out trash before, but we would sell it at the end of the year with the crop. And if you'll look –
>
> **Prosecutor:** So you are admitting you did that to have trash tobacco in 2009 that you sold in 2009?
>
> **Roundtree:** Objection. That's not accurate. That's not what the man said at all.
>
> **Prosecutor:** What were you saying?
>
> **Court:** No. Mr. Lane is saying that he didn't tell the truth here . . .

(Transcript, at 387-88 (emphasis added).) Plaintiff clearly stated that "[e]verything I told him was the best that I could remember at that time." (*Id.*) Plaintiff did not admit that he lied. Thus, not only did the ALJ wrongly characterize Plaintiff's testimony, the ALJ wrongly characterized Plaintiff's testimony on one of the most critical, and hotly contested, issues in the entire case.

The ALJ also distorted the record when she characterized Rex Denton as a "tobacco expert." When discussing why she discounted Plaintiff's testimony, the ALJ wrote that "[t]obacco expert Rex Denton testified that 21 days without rain after the crop was appraised on August 12, 2009, would have had little effect on the crop." (ALJ Decision, at 21.) Denton, however, was never identified, proffered, nor qualified as an expert. (Doc. 11, at 17.) Indeed, the transcript shows that even the ALJ agreed Denton was *not* a tobacco expert:

> **Roundtree:** Your Honor, if the witness is about to be asked to comment on the tobacco that's in this picture, I want to lodge an objection. *First that the witness' expertise in this tobacco has not been established* and, therefore, there's no foundation with that. And, second,

this witness has not been identified as an expert in tobacco. He was identified as a -- Mr. Denton is expected to testify as to his participation in the tape recorded interview of [Plaintiff] on October 31st, 2012. And I would suggest that it's inappropriate for this witness' testimony to exceed that description.

Court: Well, I hear what you're saying. *I sustain your objection on the first grounds.* Despite the fact that Mr. Denton has been -- his testimony now already has gone far afield from what has been intimated, I have numerous questions to ask somebody about the Risk Management Agency's expectations of filing claims, and tobacco claims and I believe that Mr. Denton would be the appropriate person to answer those. So as for asking Mr. Denton questions about a photograph, I really think that it's not very probative unless you're going to establish that he actually saw the crop. I mean –

Simpson: No, we are not going to establish that he was there and saw the crop. But he has extensive experience in tobacco. He has been a tobacco farmer for years.

Court: Right. I don't think you have to be an expert, Mr. Roundtree, to give your opinion about whether a crop looks good or not. But I think -- I guess what I'm saying to you it has limited probative value in this instance because it's a photograph. I mean, you -- I think you'd have to ask a whole lot of questions to establish that a photograph is as good -- will give a witness as good an opportunity to make an opinion about the quality of the crop. So you can try to do that.

I don't think we need him to be qualified as an expert to ask questions about his opinion of farming or tobacco or routines involving tobacco. I believe Mr. Denton has established he's familiar enough with it. We are not asking an opinion about anything that I think is even probative to the issue. But I do think you have to make

> some -- lay some foundation, Mr. Simpson, about whether or not any photograph, with any crop is enough to give someone the basis to say whether the crop is good, bad, routine, usual, unusual.
>
> **Simpson:** Well, I guess I'm not sure why this picture would not be enough for somebody who knows tobacco, knows the planting date, knows the –
>
> **Court:** Well, I said you're going to have to establish that with foundational questions.

(Transcript, at 241-43 (emphasis added).)

Finally, the ALJ again distorted the record to support her conclusion that "[Plaintiff's] explanation for carrying over tobacco is not supportable." (ALJ Decision, at 20.) The ALJ states that:

> [Plaintiff] maintained that tobacco would deteriorate every year that it is stored, or at least turn darker, which was the reason he could not sell it in the first place. Mr. Boyett agreed that tobacco carried over for years would be worthless. Despite the risk of further reducing its value, Respondent purportedly kept the tobacco in question for three years.

(*Id.*) The ALJ's reasoning commits two errors. First, Boyett did not "agree[ ] that tobacco carried over for years would be worthless." (ALJ Decision, at 20.) What Boyett actually said was "I don't think you could keep t*rash* tobacco for three years. It'd be bad enough as it was, but at the end of three years you would not have anything to amount to anything." (Transcript, at 226 (emphasis added).) Second, although it is technically true that Plaintiff did not sell the tobacco because it was too dark, the ALJ's characterization does not tell the full story. Plaintiff testified that purchasers will oscillate between desiring darker or lighter color tobacco.[11] When Plaintiff tried to sell his 2006 tobacco, the purchasers

[11] This fact was also supported by Boyett's testimony. When asked whether tobacco companies sometime prefer a darker and sometimes a lighter tobacco,

would not pay him what he thought it was worth because they wanted a lighter color tobacco. Because he thought the tobacco was high quality, he decided to hold it over and try to sell it the next year for a better price in hopes that darker tobacco would be in higher demand. By 2009, Plaintiff realized that he was not going to be able to recoup his losses. Thus, he determined that "a little bit [of cash] is better than nothing," and he sold his tobacco on the cheap. (Transcript, at 365.)

In sum, the Court finds that the ALJ's decision with regards to Plaintiff's reported crop failure was "arbitrary and capricious," because the ALJ's decision was not supported by substantial evidence and the ALJ "offered an explanation for its decision that [ran] counter to the evidence before the agency." *Jones Total Health*, 881 F.3d at 829. The ALJ placed more weight on Day's inspection than it was meant to bear, repeatedly misconstrued the record, and unreasonably discounted Plaintiff's substantial expert testimony. Additionally, the Court finds that the ALJ's opinion constitutes an abuse of discretion because it fails to place the burden of proof upon the Government. Thus, the Court **VACATES** the ALJ's decision finding that Plaintiff did not suffer a loss on his Unit 104 tobacco.

2. The ALJ's Finding that Plaintiff Willfully and Intentionally Failed to Report His Carryover Tobacco

The ALJ found that "[i]n addition to failing to accurately report the source of tobacco that [Plaintiff] sold in 2009, [Plaintiff] failed to report carry-over tobacco in 2006, 2007, 2008, and 2009, which constitutes a serious lapse in his responsibilities under the crop insurance program." (ALJ Decision, at 24.) The ALJ reasoned Plaintiff's excuse that he did not know he needed to report his carryover tobacco was not enough, because "ignorance of reporting requirements does not excuse him from failing to comply with FCIC's guaranteed tobacco crop provisions." (*Id.*) Additionally, the ALJ noted that Plaintiff's "assertion that he believed he did not have to report production over his guarantee is at odds with his report of excess production from Unit 101 in 2009." (*Id.*)

Boyett testified that the tobacco companies "buy according to the customer's demands' and would at times "discriminate against the darker tobacco." (Transcript, at 230.)

Plaintiff argues that "there is no evidence that [he] willfully and intentionally failed to comply with any requirement of FCIC." Plaintiff further argues that the Acreage Reporting Form provided by Great American support his position because it contains no place to report carryover tobacco. (Doc. 11, at 24.) Additionally, Plaintiff contends that "there is also no evidence that [his] omission would have in any way affected [his insurance policy]." (*Id.*) He buoys this position by asserting "the current policy does not even require carryover tobacco to be included on the acreage report." (*Id.*)

The Court finds that the ALJ did not err in finding that Plaintiff willfully and intentionally failed to report his 2006 carryover tobacco. The Guaranteed Tobacco Provisions defines carryover tobacco and states that carryover tobacco must be included in the insured acreage report. Furthermore, the ALJ could have made a finding on whether Plaintiff "intentionally and willfully" refused to report the carryover tobacco based on the credibility of Plaintiff's testimony combined with the other testimony offered at trial. Thus, the Court concludes that the ALJ's decision was "rational and based on the evidence before it." *Jones Total Health*, 881 F.3d 823, 829 (11th Cir. 2018).

C. Issue Preclusion

Plaintiff's final argument is that the federally mandated arbitration between himself and Great American precludes suit by the Government. According to Plaintiff, he "has been forced by the Government to re-litigate the identical issues in this case twice and this action is barred by issue preclusion." (Doc. 11, at 24.) Plaintiff argues that the RMA controlled the arbitration "[d]ue to its high level of involvement and direction at every single level," and that "[Great American] had the identical interest as the Government at Arbitration." (*Id.* at 25.)

"A court may give preclusive effect to a matter in dispute only when (1) that issue is identical to an issue decided in an earlier proceeding; (2) the issue was actually litigated on the merits; (3) the issue was decided in the earlier proceeding, meaning the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision; and (4) the burden of proof in the earlier proceeding is at least as stringent as the burden of proof in the current proceeding." *Bates v.*

Harvey, 518 F.3d 1233, 1240-41 (11th Cir. 2008) (quotations and internal citations omitted). "[C]ollateral estoppel can apply *only* 'when the parties are the same (or in privity) [and] if the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the earlier proceeding.'" *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1285 (11th Cir. 2004) (quoting *In re Southeast Banking Corp.*, 69 F.3d 1539, 1552 (11th Cir. 1995)). "The party seeking to invoke collateral estoppel bears the burden of proving that the necessary elements have been satisfied." *In re McWhorter*, 887 F.2d 1564, 1566 (11th Cir. 1989).

The Court finds that Plaintiff has not met his burden of proof that issue preclusion applies. Plaintiff has not identified the elements needed for issue preclusion and he has not explained why each element is met. Furthermore, although he claims that "due to its high level of involvement and direction at every single level, [the Government] controlled the Arbitration for purposes of issue preclusion," Plaintiff provides no additional supporting facts or reasoning showing that the Government was in privity with Great American during arbitration.[12] (Doc. 11, at 25.) Thus, Plaintiff has failed to establish that the Government was in privity with Great American for purposes of issue preclusion, and, for this reason alone, his argument must fail. *Pemco Aeroplex, Inc.*, 383 F.3d at 1285 ("If identity or privity of parties cannot be established, then there is no need to examine the other factors in determining whether res judicata or collateral estoppel applies."). Accordingly, the Court **AFFIRMS** the ALJ's decision that issue preclusion did not bar the Government from pursing the present action.

IV. CONCLUSION

The Court **DENIES IN PART** and **GRANTS IN PART** the parties' cross motions for summary judgment. (Docs. 9, 15.) The Court finds that the ALJ's decision regarding Plaintiff's 2009 crop insurance claim was

[12] The Court acknowledges that Plaintiff did reference his motion and brief filed before the ALJ as providing further argumentation. The Court, however, will not consider any arguments incorporated by reference because such arguments are nothing more than attempts to exceed the page limits set forth in this Court's local rules. *See FNB Bank v. Park Nat. Corp*, No. 13-0064-WS-C, 2013 WL 6842778, *1 n.1 (S.D. Ala. Dec. 27, 2017).

arbitrary and capricious, thus it **VACATES** that portion of the ALJ's decision. The Court finds that the ALJ's decision regarding Plaintiff's failure to report his carryover tobacco was not arbitrary and capricious, thus it **AFFIRMS** that portion of the ALJ's decision. Finally, the Court **AFFIRMS** the ALJ's finding that issue preclusion does not apply.

The Court, however, notes that its split finding might have implications for the sanctions that may be imposed by the ALJ in this case. *See* 7 C.F.R. section 400.454(a)(4) ("Disqualification and civil fines may be imposed regardless of whether FCIC or the approved insurance provider has suffered any monetary loss. However, if there is no monetary loss, disqualification will only be imposed if the violation is material in accordance with section 400.454(c)."). Accordingly, the Court **REMANDS** this case back to the ALJ for purposes of determining the appropriate sanctions in light of this Court's ruling. *See Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*, 781 F.3d 1271, 1290-91 (11th Cir. 2015) (finding that "remedy of remand without vacatur is within a reviewing court's equity powers under the APA"). This Court's injunction pursuant to 5 U.S.C. § 705 **SHALL REMAIN IN PLACE** until the ALJ determines the appropriate sanctions on remand.

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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. Substantive 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: https://oalj.oha.usda.gov/current.

ANIMAL WELFARE ACT

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; TOM J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-052, 15-0153, 15-0154, 15-0155.
Miscellaneous Order.
Filed August 10, 2018.

AWA – Extension of time.

Colleen A. Carroll, Esq., and Matthew Scott Weiner, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME TO FILE A REPLY TO THE RESPONDENTS' MOTION FOR REHEARING

On August 6, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("Administrator"), filed a motion requesting that I extend to August 10, 2018, the time for filing the Administrator's reply to the Respondents' motion for rehearing. The Administrator states that counsel for Respondents advised the Administrator that Respondents do not oppose the Administrator's request for an extension of time.

For good reason stated, the Administrator's motion to extend the time for filing a reply to the Respondents' motion for rehearing is granted. The time for filing the Administrator's reply to the Respondents' motion for rehearing is extended to, and includes, August 10, 2018.[1]

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[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern time. To ensure timely filing, the Administrator must ensure that his reply to the Respondents' motion for rehearing is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 10, 2018.

FEDERAL CROP INSURANCE ACT

In re: STEVE LANE.
Docket No. 15-0043.
Remand Order.
Filed December 10, 2018.

FCIA – Remand.

Mark R. Simpson, Esq., for RMA.
George H. Rountree, Esq., and Robert F. Mikell, Esq., for Respondent.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.
Remand Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER REMANDING CASE TO THE CHIEF JUDGE FOR FURTHER ACTION

Summary of Procedural History

On December 11, 2014, Brandon Willis, Manager of the Federal Crop Insurance Corporation ("Manager"), instituted this administrative proceeding by filing a Complaint against Steve Lane ("Respondent") under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501-24); its Regulations codified at 7 C.F.R. §§ 400.451-.458 (Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings (7 C.F.R.§§ 1.130-.151) ("Rules of Practice") instituted by the Secretary of the United States Department of Agriculture.

The Manager alleges that Respondent violated the Federal Crop Insurance Act and its Regulations by willfully and intentionally providing false or inaccurate information to the Great American Insurance Company ("Great American") and to the United States Department of Agriculture, Risk Management Agency ("Risk Management Agency" or "RMA") relative to his 2009 crop insurance policy.[1] On December 31, 2014, Respondent filed an Answer and Hearing Demand in which he denied the material allegations of the Complaint.

On June 23, 2015 through June 24, 2015, in Savannah, Georgia, Administrative Law Judge ("ALJ"), Janice K. Bullard conducted an oral hearing. George H. Rountree and Robert F. Mikell, with Brown Rountree PC, in Statesboro, Georgia, represented the Respondent. Mark R. Simpson, with the Office of the General Counsel, United States Department of Agriculture, in Atlanta, Georgia, represented the Manager. On September 25, 2015, Respondent filed a motion to reopen the record to submit additional post-hearing evidence, and, on October 26, 2015, the ALJ granted Respondent's motion and admitted post-hearing evidence to the record.

On April 5, 2016, after Respondent and the Manager filed post-hearing briefs,[2] the ALJ issued a Decision and Order: (1) concluding that Respondent willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to Great American with respect to an insurance plan or policy under the Federal Crop Insurance Act; (2) disqualifying Respondent for five years from receiving any monetary or nonmonetary benefit under seven specific statutory provisions and any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities; and (3) imposing on Respondent a civil fine in the amount of $11,000.[3]

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[1] *See* Complaint ¶¶ III(c)-(d) at 9.

[2] The parties' post-hearing briefs include: Respondent's Written Closing Arguments; Complainant's Closing Argument; Respondent's Reply to Complainant's Closing Arguments; and Claimant's Response to Respondent's Reply to Complainant's Closing Argument.

[3] *See* ALJ's Decision and Order, IV at 28, Order at 28-29.

On April 18, 2016, Respondent appealed the ALJ's Decision and Order to the Judicial Officer,[4] and on May 19, 2016, the Manager filed a response thereto. On May 23, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

On April 5, 2017, based upon his consideration of the record, the Judicial Officer found that no change or modification of the ALJ's April 5, 2016 Decision and Order was warranted and, accordingly, the Judicial Officer entered a Decision adopting the ALJ's April 5, 2016 Decision and Order as USDA's final order in this proceeding. The Rules of Practice provide, when the Judicial Officer finds no change or modification of the ALJ's decision is warranted, the Judicial Officer may adopt an ALJ's decision as the final order in a proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. *See* 7 C.F.R. § 1.145(i).

Respondent, timely filed an appeal of the ALJ's Decision and Order, as affirmed and adopted by the Judicial Officer, with the United States District Court for the Southern District of Georgia, Statesboro Division (CV 617-082) (District Court). By Order entered on September 6, 2018, the District Court **DENIED IN PART** and **GRANTED IN PART** the parties' cross motions for summary judgment. The Court found that the ALJ's decision regarding Respondent's 2009 crop insurance claim, was arbitrary and capricious, and thus **VACATED** that portion of the ALJ's decision. However, the Court found that the ALJ's decision regarding Respondent's failure to report his carryover tobacco was not arbitrary and capricious, and thus **AFFIRMED** that portion of the ALJ's decision. The District Court also **AFFIRMED** the ALJ's finding that issue preclusion does not apply and that the federally mandated arbitration between the Respondent and Great American did not preclude suit by the Government.

The District Court noted that its split finding might have implications for the sanctions that may be imposed by the ALJ in this case. *See* 7

[4] Respondent appeal filings included Respondent's Appeal to Judicial Officer (Appeal Petition) and Respondent's Brief in Support of Appeal.

C.F.R. §400.454(a)(4). Accordingly, the District Court **REMANDED** this case back to the ALJ, and/or the Judicial Officer, for purposes of determining the appropriate sanctions in light of the District Court's ruling. Citing *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*, 781 F.3d 1271, 1290-91 (11th Cir. 2015) (finding that "remedy of remand without vacatur is within a reviewing court's equity powers under the APA"), the District Court specifically held that the Court's injunction entered pursuant to 5 U.S.C. § 705 **SHALL REMAIN IN PLACE** until the ALJ (and/or the Judicial Officer) determines the appropriate sanctions on remand.

For the foregoing reasons, the following Order is issued.

ORDER

This case is hereby **REMANDED** back to the Chief Judge for further action consistent with the District Court's September 6, 2018 Order.

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FOOD AND NUTRITION ACT

In re: FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES.
Docket No. 18-0059.
Order of Dismissal (Without Prejudice).
Filed October 23, 2018.

HORSE PROTECTION ACT

In re: WINDING CREEK STABLES, LLC.
Docket No. 15-0142.
Order of Dismissal (With Prejudice).
Filed September 10, 2018.

In re: JOE COOPER, an individual.
Docket No. 17-0176.
Order of Dismissal (With Prejudice).
Filed October 11, 2018.

In re: PHILIP TRIMBLE.
Docket No. 15-0097.
Order Granting Petition for Appeal.
Filed November 29, 2018.

HPA – Appeal, petition for – Appointments Clause – Hearing, new.

Thomas N. Bolick, Esq., and Lauren C. Axley, Esq., for APHIS.
Jan Rochester, Esq., for Respondent.
[1]

Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER GRANTING RESPONDENT'S PETITION FOR APPEAL TO JUDICIAL OFFICER FOR A NEW HEARING

Summary of Relevant Procedural History

The Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture (USDA), Complainant, instituted this administrative enforcement proceeding under the Horse Protection Act, as amended ("HPA" or "Act")[2] by Complaint filed on April 9, 2015, alleging that on or about March 30, 2013 the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering for the purpose of showing or exhibiting the horse known as "Main Sweetie" at the 2013 Mississippi Charity Horse Show ("Horse Show") in Jackson, Mississippi while the horse was sore. On April 23, 2015, Respondent filed an answer, admitting that he entered the Horse Show on March 30, 2013, to show or exhibit, but strongly denying that Main Sweetie was entered into the Horse Show while sore.

Following a lengthy discovery exchange and a pre-hearing process, the matter was set for hearing on March 21, 2017 in Nashville, Tennessee, before United States Administrative Law Judge Channing D. Strother ("ALJ Strother").

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[1] On May 8, 2015, Jan Rochester, Esquire, filed a Notice of Appearance on behalf of the Respondent.

[2] 15 U.S.C. §§ 1821 – 1831.

On March 9, 2017, Respondent filed a Motion to Dismiss; or in the alternative, Motion to Stay Proceedings ("Motion to Dismiss"), arguing that a USDA ALJ could not adjudicate the proceeding because "USDA ALJs are not duly appointed as required by U.S. Constitution, art. 2, §2, cl. 2."[3] Respondent's requested relief was that the HPA enforcement action be dismissed.

On March 10, 2017, ALJ Strother issued an Order Holding in Abeyance on Motion to Dismiss or in the Alternative Motion to Stay Proceedings holding that:

> Because Respondent is raising novel issues of law which USDA has not been provided an opportunity to address, and which may not be properly before me to rule upon, Respondent's motions will be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing.[4]

While ALJ Strother held in abeyance his ruling on Respondent's motion to dismiss, he denied the request to stay the proceedings, finding that moving forward with the hearing would be appropriate to ensure exhaustion of administrative remedies.

As noted, neither party briefed any Article II issues in post hearing briefs; however, on June 29, 2018, Respondent filed Respondent's Petition for Appeal to Judicial Officer, or Alternatively, Motion for Extension of Time ("Petition"), which again raised the Appointments Clause issue. On July 27, 2018, Complainant filed a timely response to the motion

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[3] Citing *Freytag v. Comm'r*, 501 U.S. 868 (1991); *PHH Corp. v. Consumer Fin. Prot*. Bureau, 839 F.3d 1, 6 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018); *Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n*, 832 F.3d 277 (D.C. Cir. 2016), *reh'g en banc* F.3d 75 *granted, judgment vacated* (Feb. 16, 2017), *on reh'g en banc,* 868 F.3d 1021 (D.C. Cir. 2017), *rev'd and remanded sub nom. Lucia v. SEC*, 138 S. Ct. 2044 (2018), *and vacated,* 736 F. App'x 2 (D.C. Cir. 2018).

[4] *See* Order Holding in Abeyance Ruling on Motion to Dismiss or in the Alternative Motion to Stay Proceedings at 2.

("Response"). Complainant does not oppose Respondent's request for a new hearing pursuant to *Lucia v. SEC*, 138 S. Ct. 2044 (2018) ("*Lucia*").

For the reasons discussed more fully below, Respondent's Petition is granted. Complainant agrees that, under *Luci*a's analysis, USDA ALJs are Officers of the United States and must be appointed consistent with the Appointments Clause. Because the ALJ in this case was not so appointed at the time of the subject hearing, *Lucia* holds that Respondent is entitled to a new hearing. *Lucia*, 138 S. Ct. at 2055.

USDA Administrative Law Judge Channing D. Strother Was Properly Appointed at the Time His Decision and Order Was Issued But Not at the Time of the Hearing

In a ceremony on July 24, 2017, the Secretary of the United States Department of Agriculture, Sonny Perdue ("Secretary Perdue"), personally ratified the prior appointments of Chief ALJ Bobbie J. McCartney (retired from that position on 1/20/2018), ALJ Jill S. Clifton, and ALJ Channing D. Strother and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that he "conducted a thorough review of the qualifications of this Department's administrative law judges," and "affirm[ing] that in a ceremony conducted on July 24, 2017, [he] ratified the agency's prior written appointments of the [USDA ALJs] before administering their oath of office . . ."

On June 21, 2018, almost one year later, the U.S. Supreme Court held that the Securities and Exchange Commission's ALJs are inferior officers of the United States, U.S. Const. Art. II, § 2, cl. 2, and therefore must be appointed consistent with the Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) ("*Lucia*"). The Supreme Court did not expressly address the issue of whether the SEC's November 30, 2017 order ratifying the prior appointments of it's ALJs was sufficient to meet the constitutional requirements of the Appointments Clause. *Id.* at n.6. However, courts have upheld ratifications following constitutional challenges, including under the Appointments Clause. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 659 (1997); *see also CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016); *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015); *Doolin Sec. Sav.*

Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998);[*] *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). Furthermore, and perhaps more importantly, the actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office, go well beyond a simple recitation of ratification, are clearly consistent with the Supreme Court's ruling in *Lucia* and are therefore entitled to full deference. Accordingly, certainly as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to the Appointments Clause, were duly appointed by a "head of the department" as required by U.S. Constitution, Art. 2, § 2, cl. 2 and the Supreme Court's ruling in *Lucia.*

ALJ Strother issued his Decision and Order in this matter on June 8, 2018, well after the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements. However, the Decision and Order is, and of course must be, based on the record evidence adduced during the three-day hearing held before him on March 21 through 23, 2017, in Nashville, Tennessee. As of the dates of the hearing, Respondent's Counsel had timely raised an Appointments Clause challenge to ALJ Strother's authority to conduct the hearing which had not yet been cured.

Respondent Is Entitled to A New Hearing
Consistent with the Supreme Court's Ruling in *Lucia*

Respondent's Motion correctly references the following language from the Supreme Court's decision in *Lucia:*

> This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before. a properly appointed" official. Id., at 183, 188. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a

[*] EDITOR'S NOTE: This decision was superseded by statute as stated in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir.), *judgment entered*, 762 F. App'x 7 (D.C. Cir. 2019).

> constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

Consistent with the Supreme Court's ruling, Respondent will be granted a new hearing by "another ALJ (or the Commission itself)."[5] Complainant's position that the July 24, 2017, ratification cured any Appointments Clause defect in the prior appointments of USDA's ALJs is affirmed; however, in light of the fact that only one ALJ other than Judge Strother is currently serving as an ALJ at the USDA Office of Administrative Law Judges ("OALJ"), and in light of the fact that the limited judicial and administrative resources of OALJ have been strained by a number of remands in other cases raising Appointments Clause issues, and to ensure that Respondent is provided the opportunity of a new hearing free of an Appointments Clause issue as quickly as possible,[6] I will hold the new hearing to which Respondent is entitled in my capacity as the duly appointed Judicial Officer of the Secretary of Agriculture.[7]

The parties are advised that I shall exercise the full powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued by ALJ Strother is hereby **vacated**, and the written record which has already been made by the parties in this proceeding will be

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[5] *Lucia*, 138 S. Ct. at 2055.

[6] This administrative enforcement action has been pending since April 9, 2015, and involves transactions occurring as early as March 30, 2013.

[7] The Secretary of Agriculture has delegated the authority to the Judicial Officer to act as the final deciding officer in various USDA adjudicatory proceedings. 7 C.F.R. § 2.35. The Judicial Officer has been appointed by the Secretary of Agriculture, consistent with the Appointments Clause. Doc. 1-2 at 13; *Blackburn v. U.S. Dep't of Agric.*, No. 17-4102 (D.C. Cir. Oct. 19, 2017).

reviewed *de novo* to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any ***new*** testimony or other evidence. Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits that have already been admitted into evidence as part of that written record.

The parties will be given an opportunity to show good cause for the submission of any ***new*** evidence not previously submitted in this proceeding during the three-day hearing held on March 21 through 23, 2017, in Nashville, Tennessee. The current record includes, but may not

be limited to, all sworn witness testimony,[8] all admitted exhibits,[9] as well as all accepted post-hearing filings.[10]

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[8] During the three-day hearing Complainant presented the following witnesses: Jennifer Wolf (Tr. 33-56), Animal Care inspector, USDA; Michael Pearson (Tr. 57-74.), Farm Loan Office, USDA (formerly Animal Care Inspector, USDA, APHIS); Dr. Ronald Johnson (Tr. 75-353.), VMO, USDA, APHIS, Animal Care, presented as examining VMO and an expert witness in equine veterinary care and detection of horse soring under the HPA; and Dr. Clement Dussault (Tr. 652-717), Senior Staff Veterinarian, National Veterinary Accreditation Program (formerly Field Veterinary Officer, USDA), presented as a rebuttal witness and an expert witness in detection of horse soring under the HPA. Respondent presented the following witnesses: Rachel Reed (Tr. 355-67), employee, SHOW, Inc.; Clay Sanderson (Tr. 447-58), Respondent's assistant horse trainer; Philip Trimble (Respondent) (Tr. 459-99); Amy Trimble (Tr. 598-650), wife of Respondent and the individual who presented the horse for inspection; Dr. Michael Harry (Tr. 368-446), private treating veterinarian for Main Sweetie, and presented as an expert witness in equine veterinary medicine; and Dr. Stephen Mullins (Tr. 512-96), private veterinarian, and presented as an expert in equine veterinary medicine. Parties were allowed an opportunity to *voir dire* before expert witnesses were accepted to testify regarding expertise.

[9] Admitted to the record were Complainant's exhibits identified as CX 1 through CX 7 and CX 10 through CX 13; and Respondent's exhibits, identified as RX 1, RX 2, RX 5, RX 6, RX 8 through RX 12, RX 20 through RX 23, RX 25, RX 30 through RX 32, RX 42, RX 43, RX 50, and RX 54 through RX 59. A Joint Notice of Errata and Proposed Corrections in relation to the hearing transcripts, signed by both parties, was filed on April 25, 2017. The corrections were accepted by a separate Order Approving Proposed Transcript Corrections, issued on June 8, 2018.

[10] Respondent filed a Post Hearing Brief ("Respondent's PHB") on June 1, 2017. Complainant filed a proposed Findings of Fact, Conclusions of Law, Order, and Brief in support thereof ("Complainant's PHB") on June 2, 2017. Respondent filed a Post Hearing Reply Brief ("Respondent's PHRB") on June 21, 2017. Complainant filed a Brief in Reply to the Respondent's Post Hearing Brief ("Complainant's PHRB") and an Addendum to Complainant's Post Hearing Reply Brief ("Complainant's Addendum"), on June 22, 2017. Neither Respondent's nor Complainant's Post Hearing Briefs, nor Post Hearing Reply Briefs, addressed the issues in Respondent's March 10, 2017 Motion to Dismiss, or in the alternative, Motion to Stay Proceedings.

ORDER

THEREFORE ORDERED, within 20 days of the date of this Order, the parties are directed to submit proposals for the conduct of further proceedings consistent with the Supreme Court's *Lucia* decision, the USDA Rules of Practice and Procedure, and with the guidelines set forth herein above. Submissions are intended to aid me in my task to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any *new* testimony or other evidence and must specifically identify and address those issues. A pre-hearing conference call will be scheduled with the parties to provide an opportunity for oral argument regarding the submissions.

FURTHER ORDERED, copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

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In re: KETIH BLACKBURN, an individual.
Docket No. 17-0094.
Remand Order.
Filed December 12, 2018.

HPA – Remand.

Colleen A. Carroll, Esq., for APHIS.
Robin L. Webb, Esq., for Respondent.
Initial Decision by Bobbie J. McCartney, Chief Administrative Law Judge.
Order entered by Bobbie J. McCartney, Judicial Officer.

ORDER REMANDING CASE TO THE CHIEF JUDGE FOR FURTHER ACTION

Respondent, Keith Blackburn, timely petitioned the United States Court of Appeals For the Sixth Circuit ("the Sixth Circuit") for review of a September 15, 2018 order of the United States Department of Agriculture ("USDA") Judicial Officer denying reconsideration of his decision affirming an administrative law judge's ("ALJ") entry of

default judgment for failure to file a timely answer to a complaint against Respondent for violation of the Horse Protection Act.

In a decision entered on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) *("Lucia")*, the Supreme Court held that "ALJs of the Securities and Exchange Commission are 'Officers of the United States' and thus subject to the Appointments Clause." *Id.* at 2055. Because the petitioner in that case timely challenged the constitutional validity of the ALJ officer adjudicating his case, the Supreme Court held that he was entitled to a new hearing before a properly appointed ALJ who had not previously presided over his case. *Id.*

On appeal to the Sixth Circuit, USDA conceded that its ALJs are also Officers of the United States who must be appointed consistent with the Appointments Clause. USDA also acknowledged that the subject ALJ had not been properly appointed as required by *Lucia* at the time of the entry of the default decision and that Blackburn had timely challenged the constitutionality of the ALJ's appointment in his administrative proceedings. USDA then moved to remand the case for further proceedings, consistent with *Lucia*. Mr. Blackburn did not oppose remand.

Based on the foregoing, by Order filed September 11, 2018 (*Keith Blackburn v. AGRI*, Case No. 17-4102), the Sixth Circuit **GRANTED** USDA's motion to remand, **VACATED** the Judicial Officer's decision, and **REMANDED** this case for further proceedings consistent with the Supreme Court's decision in *Lucia*.

ORDER

In accordance with the Sixth Circuit's September 11, 2018 Order, this matter is hereby remanded to the Chief ALJ for further proceedings consistent with the Supreme Court's decision in *Lucia*.

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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 Orders] with the sparse case citation but without the body of the order. Default 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: https://oalj.oha.usda.gov/current].

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BAKER WALNUT, INC.
Docket No. 18-0038.
Default Decision and Order.
Filed October 24, 2018.

FEDERAL CROP INSURANCE ACT

In re: JANET PALMER.
Docket No. 18-0043.
Default Decision and Order.
Filed August 16, 2018.

ORGANIC FOODS PRODUCTION ACT

In re: RICHARD LANDRIGAN, d/b/a BONNIE BLUE RANCH AND GROVE.
Docket No. 18-0053.
Default Decision and Order.
Filed September 11, 2018.

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CONSENT DECISIONS

ANIMAL WELFARE ACT

In re: GERHARD FELTS, a/k/a GARY FELTS, d/b/a BLACK DIAMOND KENNEL.
Docket No. 18-0071.
Consent Decision and Order.
Filed August 20, 2018.

In re: CINDY BARDIN, an individual d/b/a JUNGLE EXPERIENCE and EXOTIC ANIMAL EXPERIENCE.
Docket No. 16-0009.
Consent Decision and Order.
Filed August 31, 2018.

In re: VIRGINIA SAFARI PARK AND PRESERVATION CENTER, INC., a/k/a VIRGINIA SAFARI PARK, INC., a Virginia corporation; MEGHAN MOGENSEN, an individual; and ERIC MOGENSEN, an individual.
Docket Nos. 15-0107, 15-0108, 15-0109.
Consent Decision and Order.
Filed September 13, 2018.

In re: VIRGINIA SAFARI PARK AND PRESERVATION CENTER, INC., a/k/a VIRGINIA SAFARI PARK, INC., a Virginia corporation.
Docket No. 15-0116.
Consent Decision and Order.
Filed September 13, 2018.

FEDERAL CROP INSURANCE ACT

In re: JAMES M. THOMPSON II.
Docket No. 17-0267.
Consent Decision and Order.
Filed August 14, 2018.

HORSE PROTECTION ACT

In re: BRENT COBURN.
Docket No. 15-0141.
Modified Consent Decision and Order.
Filed August 31, 2018.

In re: RICHARD "DICK" MYERS.
Docket No. 15-0145.
Consent Decision and Order.
Filed September 5, 2018.

In re: BOBBY HUGH, an individual.
Docket No. 17-0134.
Consent Decision and Order.
Filed September 5, 2018.

In re: JEFFREY L. GREEN, an individual.
Docket No. 14-0115.
Consent Decision and Order.
Filed September 6, 2018.

In re: HAROLD ROBERTS, an individual; SHERRY ROBERTS, an individual; and ANDREW MYERS, an individual.
Docket Nos. 14-0116, 14-0117, 14-0118.
Consent Decision and Order.
Filed September 6, 2018.

In re: WINDING CREEK STABLES, LLC; TERRY DOTSON; and LESLIE DOTSON.
Docket Nos. 15-0142, 15-0143, 15-0144.
Consent Decision and Order.
Filed September 6, 2018.

In re: DEBORAH BONNER, an individual.
Docket No. 17-0339.
Consent Decision and Order.
Filed September 19, 2018.

In re: STEVE HANKINS, an individual.
Docket No. 17-0044.
Consent Decision and Order.
Filed September 19, 2018.

In re: CASSIE SLAGLE, an individual.
Docket No. 17-0050.
Consent Decision and Order.
Filed October 31, 2018.

In re: RODNEY SLAGLE, an individual.
Docket No. 17-0051.
Consent Decision and Order.
Filed October 31, 2018.

In re: JACKIE BARRON.
Docket Nos. 16-0070 & 17-0032.
Consent Decision and Order.
Filed November 2, 2018.

In re: EDGAR ABERNATHY, an individual d/b/a ABERNATHY STABLES.
Docket No. 17-0081.
Consent Decision and Order.
Filed November 9, 2018.

In re: CARROLL COUNTS, an individual.
Docket No. 17-0082.
Consent Decision and Order.
Filed November 9, 2018.

In re: VIRGINIA COUNTS, an individual.
Docket No. 17-0083.
Consent Decision and Order.
Filed November 9, 2018.

In re: JOANN COLLINS, an individual.
Docket No. 17-0063.
Consent Decision and Order.
Filed November 19, 2018.

In re: CLAYTON DAVIS, an individual.
Docket No. 17-0064.
Consent Decision and Order.
Filed November 19, 2018.

In re: TINA MOSS, an individual.
Docket No. 17-0065.
Consent Decision and Order.
Filed November 19, 2018.

In re: TERRY GIVENS, an individual.
Docket No. 17-0117.
Consent Decision and Order.
Filed November 27, 2018.

In re: SHEA SPROLES, an individual.
Docket No. 16-0072.
Consent Decision and Order.
Filed November 29, 2018.

In re: GARY SPROLES, an individual.
Docket No. 16-0074.
Consent Decision and Order.
Filed November 29, 2018.

In re: SHEA MCKENZIE SPROLES, an individual.
Docket No. 17-0033.
Consent Decision and Order.
Filed November 29, 2018.

In re: TERRY ALAN RIDDLEY, an individual.
Docket Nos. 16-0107 & 17-0165.
Consent Decision and Order.
Filed December 13, 2018.

In re: RODNEY DICK, an individual.
Docket No. 17-0077.
Consent Decision and Order.
Filed December 20, 2018.

In re: BETH REED, an individual.
Docket No. 17-0101.
Consent Decision and Order.
Filed December 20, 2018.

ORGANIC FOODS PRODUCTION ACT

In re: COZY VALLEY FARM, LLC.
Docket No. 18-0041.
Consent Decision and Order.
Filed August 17, 2018.

In re: NATURAL FOOD CERTIFIERS.
Docket No. 18-0074.
Consent Decision and Order.
Filed August 29, 2018.

In re: JOHN L. ZOOK.
Docket No. 18-0042.
Consent Decision and Order.
Filed September 13, 2018.

POULTRY PRODUCTS INSPECTION ACT

In re: SUMMIT POULTRY, INC.
Docket No. 18-0058.
Consent Decision and Order.
Filed July 2, 2018.

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