No. 16-

IN THE

Supreme Court of the United States

AUSTIN "JACK" DECOSTER AND PETER DECOSTER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Food, Drug, and Cosmetic Act makes it unlawful to "introduc[e]" any "adulterated" food into interstate commerce or to "caus[e]" such an occurrence. 21 U.S.C. § 331(a). In *United States* v. *Park*, this Court held that § 331 imposes *personal* criminal liability on anyone whose corporate position confers "the power to prevent or correct [such] violations" within the company, whether or not the individual had any actual "knowledge of, or personal participation in," the violation. 421 U.S. 658, 670, 676 (1975). The defendant in *Park* had been sentenced to pay a *de minimis* fine, and at the government's urging, the Court did not consider whether such an offense could constitutionally be punished by a term of incarceration.

Petitioners pleaded guilty to a *Park* violation arising from their company's shipment of adulterated eggs. It is stipulated that Petitioners did not know the eggs were adulterated. The district court sentenced them to three-month terms of imprisonment.

The questions presented are:

1. Whether the Due Process Clause prohibits the imposition of a term of imprisonment as punishment for a supervisory liability offense, such as the one described in *United States* v. *Park*.

2. Whether *United States* v. *Park* and its precursor, *United States* v. *Dotterweich*, 320 U.S. 277 (1943), should be overruled.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. Petitioners are not corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Austin "Jack" DeCoster and Peter DeCoster respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 828 F.3d 626 and reproduced at Pet. App. 1a–31a. The district court's sentencing opinion is reported at 99 F. Supp. 3d 920 and reproduced at Pet. App. 32a–108a.

JURISDICTION

The decision below was entered on July 6, 2016. The court of appeals denied Petitioners' timely petition for rehearing on September 30, 2016. Pet. App. 109a–110a. On November 29, 2016, Justice Alito extended the time for filing the petition to January 10, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

The statutory provisions involved are 21 U.S.C. §§ 331 and 333. The text of each is reproduced at Pet. App. 111a–139a.

INTRODUCTION

This case presents a fundamental question of criminal responsibility and punishment—one that, until the conflicting decision below, had prompted a uni-

form response from federal and State appellate courts.

Criminal liability typically results "only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette* v. *United States*, 342 U.S. 246, 250–51 (1952). Over time, this Court has recognized exceptions to that general rule, sometimes labeled "public welfare offenses," which "impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal." *Staples* v. *United States*, 511 U.S. 600, 606 (1994). In these cases, in other words, a defendant may act out of a pure motive, but nonetheless be held criminally liable—and subjected to traditional criminal punishments like imprisonment—if by his "hand," he personally commits unlawful conduct.

This case involves a form of criminal liability still further removed from the traditional rule that a criminal act joins "an evil-meaning mind" to "an evil-doing hand," *Morissette* 342 U.S. at 250–51. In *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and *United States* v. *Park*, 421 U.S. 658 (1975), this Court adopted an "unusually strict" form of criminal "vicarious liability." See *Meyer* v. *Holley*, 537 U.S. 280, 287 (2003). Under this "*Park* doctrine," an officer or employee may be held criminally liable for a corporate violation of the Federal Food, Drug, and Cosmetic Act (FDCA) *whether or not* the defendant had "knowledge of, or personal participation in, the act made criminal by the statute." *Park*, 421 U.S. at 670. The only proof necessary to convict is "that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *Id.* at 673–74.

The *Park* doctrine thus treats the FDCA as imposing a kind of supervisory or vicarious liability that holds an *individual* criminally liable for an *organizational* failing. And it does so without requiring any degree of proof that the person charged had either any "evil-meaning" intent, or an "evil-doing hand." The only necessary link to the unlawful conduct is the defendant's place in an organizational chain of command.

Though offenses like these are clear outliers, they have existed in English and American law since at least the mid-19th century. The understanding was that while these offenses were *procedurally* treated as crimes, they were "in substance . . . a civil proceeding," to which only traditionally civil consequences such as monetary penalties attached. See *Queen* v. *Stephens* (1866) L.R. 1 Q.B. 702, 708–10; *People* v. *Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918). Offenses akin to *Park* liability thus were not punished through incarceration, and appellate courts for decades held that it would violate due process to do so. See, *e.g.*, *Lady J. Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999).

The decision below broke through that guardrail. It held that a person convicted of a *Park* offense may be sentenced to a term of imprisonment, at least if the trial judge concludes at sentencing that the defendant carried out his or her corporate responsibilities in a negligent fashion.

That decision thus creates a stark conflict about whether the kind of offense established in *Dotterweich* and *Park* and committed in this case—the crime of having an oversight role in an organization that violates the law—may as a constitutional matter be punished by depriving an individual of liberty. It also raises fresh questions about whether the

Court's long-criticized decisions in *Dotterweich* and *Park* should finally be reviewed and revised. Petitioners respectfully submit that the Court should grant both questions and address the validity of the prison sentences imposed below.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND.

The Food and Drug Administration (FDA) has broad statutory power to regulate a quarter of the Nation's economy, including the manufacture, labeling, sale, and distribution of products ranging from foodstuffs to prescription and over-the-counter drugs; vaccines and medical devices; cosmetics like nail polish and perfume; pet food; livestock feed; and tobacco products.[1]

These sweeping regulatory powers are backed by a long list of criminal prohibitions. See 21 U.S.C. § 331(a)–(ddd). An introductory clause, applicable to all 55 subsections, directs that both the "acts" described in each subsection and "the causing thereof are prohibited." These provisions have been regarded as establishing strict liability, and thus punishable whether or not the person who "acts" or "caus[es]" the unlawful act does so with a culpable mental state. Generally, any such violation is a misdemeanor, punishable by up to a year in prison and a $100,000 fine. See § 333(a)(1); 18 U.S.C. § 3571(b)(5) (setting maximum fine). A second or successive violation, or one committed with intent to defraud or mislead, is a felony punishable by up to three years' imprisonment

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[1] FDA, *About FDA: What does FDA regulate?*, http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194879.htm (last updated Mar. 4, 2016); *see also* 29 U.S.C. § 393(b)(2).

and a $250,000 fine. 21 U.S.C. § 333(a)(2); see also 18 U.S.C. § 3571(b)(3).

This Court first announced the expansive liability theory at issue here in *United States* v. *Dotterweich*, 320 U.S. 277 (1943). A small company and its president were charged with shipping misbranded drugs. The jury acquitted the company but convicted its president, who was sentenced to a $500 fine and 60 days' probation. See *United States* v. *Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom.* 320 U.S. 277 (1943). The court of appeals vacated the conviction, holding that with narrow exceptions, only a "principal," such as a company, could be held liable under § 333; an employee did not bear liability. *Id.* at 503.

A bare majority of the Court reinstated the conviction. It held that an individual can face personal criminal liability under § 333, based on his corporation's violation of § 331, if he "shares responsibility in the business process resulting in unlawful distribution." 320 U.S. at 284. The Court did not explain the contours of this liability, deeming it "too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation," and sufficient to trust "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." *Id* at 285. The dissenting justices protested that "in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge," and further objected to the majority's failure to establish clear standards. *Id.* at 286, 292–93 (Murphy, J., dissenting).

The Court next addressed this liability theory in *United States* v. *Park*, 421 U.S. 658 (1975). The president of a national supermarket chain was convicted under § 331 because his company sold food adulterated through storage in a rodent-infested warehouse. *Id.* at 660. The district court imposed a $250 criminal fine. *Id.* at 666. The court of appeals reversed, holding the jury instructions erroneous because they permitted conviction without a finding of "gross negligence" or similar "wrongful action" by the defendant. *Id.* at 667.

This Court held, however, that no such finding was required. The Court said the FDCA "imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions." *Id.* at 676. Under *Park*, it is irrelevant whether the defendant had "knowledge of, or personal participation in, the act made criminal by the statute." *Id.* at 670. A conviction may rest on proof "that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *Id.* at 673–74. All "individuals who execute the corporate mission" are potentially liable. *Id.* at 672.

At oral argument, the United States conceded that a case involving imprisonment would present "more serious due process problems," but urged the Court not to "reach that difficult situation" because Mr. Park faced only a small fine. It also averred that "district courts are disinclined to impose" jail sentences in such cases. Tr. of Oral Arg. 6–7, *United States* v. *Park*, 421 U.S. 658 (1975) (No. 74-215). For many years, that prediction held true. Until 2011, *Park* of-

fenses were invariably punished through fines and/or probation; no prison sentence was imposed.

II. FACTUAL BACKGROUND.

1. In 2010, a *salmonella* outbreak was traced to Quality Egg, which at the time was one of the nation's largest egg producers.

"*Salmonella* microorganisms are ubiquitous and are commonly found in the digestive tracts of animals, especially birds and reptiles." 74 Fed. Reg. 33,030, 33,031 (Jul. 9, 2009). In humans, *salmonella* symptoms can be severe, but "[m]ost healthy people recover without antibiotic treatment" in 4 to 7 days. *Id.* *Salmonella Enteritidis* (SE) is a particularly harmful strain that accounts for approximately 20% of U.S. infections. *Id.*

In 2009, FDA issued a new regulation called the "Egg Safety Rule," which aimed to reduce the incidence of SE contamination. *Id.* at 33,033. The Rule, which took effect for large-scale producers like Quality Egg on July 9, 2010, *id.* at 33,034, imposed several new industry mandates.

In particular, the Rule imposed SE testing standards for the first time. Egg producers now must test the environment in which chickens are raised and housed for SE. 21 C.F.R. §§ 118.4(a), 118.5(a), (b). In the event of a positive test, affected barns must be "clean[ed] and disinfect[ed]" before a new flock is introduced. § 118.4(d). A producer must also respond to a positive environmental test either by ceasing to sell whole shell eggs into the marketplace, see §§ 118.3, 118.5, 118.6, or by testing egg samples, under specified protocols, to ensure the eggs remain safe to consume, see § 118.7(b)(1).

2. Quality Egg responded to these new federal mandates by hiring experts to strengthen the company's existing SE containment measures. Consistent with expert recommendations, Quality Egg modified its protocols for cleaning and disinfection, rodent control, SE testing and monitoring, and vaccination. Pet. App. 141a. It started vaccinating its chickens against *salmonella*—a step the Rule did not require. *Id.* When environmental tests were positive, the company cleaned the affected barns and others before placing new flocks in them. *Id.* at 142a. And once the Egg Safety Rule took effect in July 2010, Quality Egg began testing eggs in a manner compliant with the Rule. Every one of those egg tests came back negative. *Id.*

3. In August 2010, a multi-state SE outbreak sickened thousands of consumers. FDA traced SE-infected eggs back to Quality Egg facilities. In coordination with FDA, Quality Egg conducted egg tests on a scale that far exceeded the requirements of the Rule. Those additional tests uncovered, for the first time, the presence of SE in eggs produced by the company. A subsequent FDA investigation found that Quality Egg had followed appropriate procedures for the sampling and testing of both environmental SE contamination and egg contamination. FDA also acknowledged that its draft "guidance for industry" on Egg Safety Rule compliance was released only after the outbreak occurred.

But FDA also found fault with conditions at Quality Egg's farms. It noted rodent burrows and birds nests in and around barns and greater-than-expected numbers of live rodents and flies in certain barns. Some barns were also not properly sealed or had structural damage, allowing wildlife to enter, and some appeared to be leaking manure.

III. PROCEEDINGS BELOW.

In May 2014, the government filed criminal charges against both Quality Egg and Petitioners (the company's owner and chief operating officer, respectively). Quality Egg faced three counts, including a charge of introducing adulterated eggs into interstate commerce.[2] The company pleaded guilty to all three, and paid a $6.79 million criminal fine, as well as $83,000 in criminal restitution. The company also paid nearly $7.8 million in compensation for medical bills and other damages.

Petitioners were charged with a single count of misdemeanor introduction of adulterated eggs into interstate commerce, solely by virtue of their status as "Responsible Corporate Officers of Quality Egg." Pet. App. 153a. Petitioners pleaded guilty to this *Park* allegation, stipulating to three key facts in the process.

First, each Petitioner exercised control "over the operations of Quality Egg and related entities and assets in Iowa." Second, during 2010, "Quality Egg introduced . . . into interstate commerce food, that is shell eggs, that were adulterated" due to SE contamination, and "if the contamination of eggs had been known," each Petitioner "was in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs." Third, and critically, the government's investigation found no

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[2] Quality Egg was also charged with bribing a USDA official and misbranding eggs with intent to defraud or mislead. The bribery charge related to two incidents in 2010 when Quality Egg employees paid USDA inspectors to release eggs for sale that did not meet quality control standards. Neither Petitioner was found to have known of the bribes. Pet. App. 46a–47a, 80a n.24.

one "employed by or associated with Quality Egg, including [Petitioners], who had knowledge, [prior to FDA's post-outbreak investigation], that eggs sold by Quality Egg were, in fact, contaminated." Pet. App. 158a–159a, 174a–175a.

Though Petitioners conceded liability under *Park* and agreed to pay criminal fines at the $100,000 statutory maximum, one aspect of sentencing was sharply contested. Petitioners argued that the district court could not constitutionally impose a jail sentence for a "responsible corporate officer" violation; the government contended otherwise and, although it did not request any particular sentence, suggested to the district court that the full range of sentences, including imprisonment, was available. The parties also disputed the factual predicate for the district court's sentencing decision; in particular, they disagreed about whether Quality Egg's SE prevention measures had been appropriately designed and implemented. The parties resolved a number of these factual disputes by adopting a second set of stipulations. See Pet. App. 140a–150a. The parties' experts continued to dispute, however, the "expected efficacy of certain preventative measures and the actual cause of the *salmonella* outbreak at Quality Egg." *Id.* at 147a. The district court did not resolve that dispute, saying it would not "base any sentencing decision . . . on the experts." Sentencing Tr. 55.

The district court rejected Petitioners' constitutional arguments, issued a written opinion explaining its view, Pet. App. 32a–108a, and imposed a three-month sentence of incarceration and a $100,000 fine on each defendant. It then encouraged Petitioners to appeal, saying: "You should. I would if I were you." Sentencing Tr. 163–64.

A splintered Eighth Circuit panel affirmed. Judge Murphy's lead opinion explained that *Park* makes individuals criminally liable for violations within their "'responsibility and authority' . . . regardless of whether they were aware of or intended to cause the violation." Pet. App. 7a. It also conceded that "courts have determined that due process is violated when prison terms are imposed for vicarious liability crimes." *Id.* at 8a. It concluded, however, that *Park* liability "is not equivalent to vicarious liability," reasoning that a *Park* charge is based on the defendant's "own failure to prevent or remedy" the violation, rather than "the relationship between" the defendant and the violator. *Id.* at 9a. The lead opinion then agreed with the district court that Petitioners "failed to take sufficient measures to improve" conditions on Quality Egg's farms; thus, Petitioners were "liable for negligently failing to prevent the salmonella outbreak." *Id.* at 9a–10a. On this basis, Judge Murphy voted to sustain their sentences.

Judge Gruender concurred. He too acknowledged that "imprisonment based on vicarious liability would raise serious due process concerns." Pet. App. 17a. He reasoned, however, that those concerns were not presented because he read *Park* "to require a showing of negligence" as a prerequisite to *conviction*. In particular, he reasoned that a negligence standard was necessary to avoid the constitutional sentencing issue Petitioners had raised. And he noted that this Court consistently "interpret[s] statutes . . . in a way that avoids 'criminaliz[ing] a broad range of apparently innocent conduct,'" which would be the result of attaching *Park* liability to a strict liability construction of the FDCA. *Id.* at 18a–20a (second alteration in original). Judge Gruender's vote to affirm thus rest-

ed on his view that "the district court found [Petitioners] negligent." *Id.* at 17a.

Judge Beam dissented. He explained that "the improvident prison sentences imposed in this case were due process violations," Pet. App. 31a, because the district court improperly relied on a "vicarious-liability standard" in imposing sentence, *id.* at 25a–26a. The "sole basis" of the charges against Petitioners was "salmonella contamination of eggs sold by Quality Egg," which the government "fully conceded" Petitioners did not know about. *Id.* at 24a–25a & n.2. He explained further that Petitioners' "supposed negligence in performing executive functions on behalf of Quality Egg" cannot establish the "measure of a guilty mind" or "personal[ ] participa[tion]" required by due process. *Id.* at 30a.

Petitioners unsuccessfully sought rehearing *en banc*. Chief Judge Riley and Judges Wollman and Loken voted to grant rehearing. Pet. App. 110a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD REVIEW WHETHER DUE PROCESS PERMITS A SUPERVISORY LIABILITY OFFENSE TO BE PUNISHED WITH PRISON TIME.

A. The Decision Below Conflicts With Circuit And State High Court Decisions Holding That Supervisory Offenses Like Those Created In *Park* May Not Be Punished Through Incarceration.

The decision below breaks with a long tradition in American law. Until this case, every appellate court to consider the question had held that due process principles sharply limit the range of available punishments where the government chooses to prosecute

a *Park*-style offense—one that rests liability not on the defendant's personal conduct or intent, but on his or her "responsible relation," via an organizational flow chart, to the act that constitutes the crime.

This is just such a case. Petitioners were charged as "responsible corporate officers." They had little choice but to plead guilty because, just as the government alleged, Petitioners possessed sufficient corporate authority over Quality Egg to prevent eggs from being shipped *if* they had known of the contamination—which the government concedes they did not. That suffices, under *Park*, to make Petitioners criminally liable. But appellate courts have always held that such a "crime" may not lawfully be punished by depriving the defendant of liberty. The Eighth Circuit's unprecedented decision merits this Court's immediate review.

1. The decision below conflicts directly with *Lady J. Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). *Lady J.* squarely held that where, as in *Park*, criminal liability is premised on the defendant's "responsible relation" to an unlawful act committed by the company, due process does not permit the offense to be punished through imprisonment.

Lady J. addressed a city ordinance that made "owners of adult entertainment establishments criminally liable for acts committed by their servants, agents and employees . . . within [their] scope of authority under the owner." *Id.* at 1367. The Eleventh Circuit explained that this was materially indistinguishable from a *Park* offense. Like *Park*, the ordinance imposed supervisory liability "for acts or omissions" committed by others that the owner "has the power to prevent." *Id.*

The Eleventh Circuit left "intact the City's authority to fine owners for violations committed by their employees," but concluded that "incarceration is a different matter." *Id.* Specifically, it held that *Park*-style supervisory liability, which does not require proof of an "unlawful act" or "unlawful intent" on the part of the defendant, "is acceptable . . . *only if the penalty does not involve imprisonment*." *Id.* (emphasis added). The Eleventh Circuit accordingly invalidated portions of the ordinance, holding that "the City may not use it to incarcerate owners." *Id.* at 1368.

2. Several State high courts have reached the same conclusion. The first and most influential opinion to address the issue in these terms was *People* v. *Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918). There, then-Judge Cardozo confronted a New York statute that imposed criminal liability on a manager for his company's child-labor violations. A supervisor violated "the statute if he employ[ed] the child himself," and "equally if the child [was] employed by agents to whom he ha[d] delegated 'his own power to prevent.'" *Id.* at 476. The court upheld the State's power "to punish [such] offenders by fines moderate in amount," which equally could have been recovered "through . . . a civil action." *Id.* But Judge Cardozo cautioned:

> in sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison. . . . This case does not require us to decide that life or liberty may be forfeited without tinge of personal fault through the acts or omissions of others. The statute is not void as a whole, though some of its penalties may be excessive. The good is to be severed from the bad.

Id. at 477 (citations omitted); see also *id.* at 477–78 (Crane, J., concurring) (a legislature may not "make

acts mala prohibita with the result that an employer can be imprisoned for the acts of his servant"). This Court has cited *Sheffield Farms* as "question[ing] whether imprisonment [is] compatible with the reduced culpability required for such regulatory offenses." *Staples*, 511 U.S. at 617.[3]

Subsequently, three State high courts squarely held that prison sentences may not be imposed as punishment for a *Park*-style supervisory offense. In *Commonwealth* v. *Koczwara*, the Pennsylvania Supreme Court invalidated a three-month prison term imposed because the defendant's employees sold alcohol to minors. The court held that the prison sentence "deprive[d] [him] of due process," even as it upheld a $500 criminal fine, because "[l]iability for all true crimes, wherein an offense carries with it a jail sentence, must be based exclusively upon personal causation." 155 A.2d 825, 830 (Pa. 1959). The court also emphasized that it had "found *no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense." *Id.*

In *Davis* v. *City of Peachtree City*, the Georgia Supreme Court confronted another statute designed to "hold the master liable if he fails to prevent his servant from" selling alcohol to minors. 304 S.E.2d 701, 703 (Ga. 1983). *Davis* held that a person should not "face[] a possible restraint of his liberty" simply because an "employee fails to exercise good judgment," finding that neither a deprivation of liberty nor the collateral consequences that would attach could be

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[3] Judge Cardozo's reasoning echoed the rationale underlying the development of the public welfare offense in the nineteenth century. *See*, *e.g.*, *Stephens*, L.R. 1 Q.B. at 708 (nuisance prosecution of a supervisor, though criminal in form, was "in substance . . . a civil proceeding"); *infra* p. 25.

"justified under the due process clauses of the Georgia or United States Constitutions." *Id.* at 703–04.

The Minnesota Supreme Court's decision in *State* v. *Guminga*, 395 N.W.2d 344 (Minn. 1986), is to similar effect. That court had previously sustained a supervisory liability conviction under a statute punishable only by a $350 fine. *State* v. *Young,* 294 N.W.2d 728, 730 (Minn. 1980). *Guminga* revisited that conclusion in light of a new sentencing regime that required courts to include a prior supervisory liability misdemeanor when calculating a defendant's criminal history score. See 395 N.W.2d at 346. Given this potential collateral effect, which could lead to (or increase) imprisonment, the court held that "criminal penalties based on vicarious liability . . . are a violation of substantive due process. . . . Such an intrusion on personal liberty is not justified by the public interest protected, especially when there are alternative means by which to achieve the same end, such as civil fines." *Id.* at 346–47.[4]

3. The Eighth Circuit addressed the same issue as did the Eleventh Circuit and the high courts of Pennsylvania, Minnesota, and Georgia, but reached an incompatible conclusion.

The lead opinion below did not question the correctness of these decisions, but sought to distinguish them by positing that there is a meaningful differ-

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[4] The high courts of four other States have upheld decisions imposing small fines for vicarious liability offenses, but have pointedly reserved decision on whether a sentence of imprisonment would be lawful. *See State* v. *Hy Vee Food Stores, Inc.*, 533 N.W.2d 147, 150 (S.D. 1995); *State* v. *Beaudry*, 365 N.W.2d 593, 602 (Wisc. 1985); *City of Chi.* v. *Hertz Commercial Leasing Corp.*, 375 N.E.2d 1285, 1290, 1294 (Ill. 1978); *Iowa City* v. *Nolan*, 239 N.W.2d 102, 105 (Iowa 1976).

ence between *Park*-style liability and pure "vicarious" liability. See Pet. App. 9a. But as this Court has explained, *Park* actually created an "*unusually strict*" form of "traditional vicarious liability." See *Meyer*, 537 U.S. at 285–87 (emphasis added).

Further, *Lady J.* specifically *equated* the statute before it with *Park* liability, seeing both as imposing liability on a defendant who "is in a 'responsible relation'" to the violation, *i.e.*, who "has the power to prevent violations from occurring." 176 F.3d at 1367 (citing *Park,* 421 U.S. at 670–73). The two Circuits thus reached opposite conclusions about exactly the same issue. The State cases likewise involved offenses predicated on the "fail[ure] to prevent" violations. *E.g.*, *Davis*, 304 S.E.2d at 703.

Nor is this conflict avoided by the panel's suggestion below that Petitioners were "liable for negligently failing to prevent" Quality Egg's FDCA violations. Pet. App. 10a; see *id.* at 20a (Gruender, J., concurring). Petitioners' sole offense of conviction—the only crime for which they can lawfully be punished—did not involve negligence. They were charged solely with being "Responsible Corporate Officers of Quality Egg," *id.* at 153a, and they admitted guilt on that basis only. That is, they conceded that "*if* the contamination of eggs had been known to [each] defendant, he was in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs." *Id.* at 158–159a (emphasis added); accord *id.* at 174–175a. This is the core *Park* offense, which (contrary to the concurrence below, see *id.* at 18a–20a) does not turn on proof of negligence.[5] And it

[5] Indeed, *Park reversed* a decision that sought to limit liability to cases of "gross negligence and inattention," 421 U.S. at 667, emphasizing that the FDCA holds defendants personally and

is this same form of liability that the Eleventh Circuit and the State high courts held "may not [be] use[d] . . . to incarcerate." *Lady J.*, 176 F.3d at 1368; see also *Guminga*, 395 N.W.2d at 345 ("the statute in question does violate the due process clauses of the Minnesota and the United States Constitutions"); *Davis*, 304 S.E.2d at 702 (challenged "ordinances violate the [Georgia and federal] due process clauses").

Nor did the courts below purport to find the species of negligence made relevant by the criminal law. *Criminal* negligence requires proof that the defendant's conduct represented a "*gross* deviation from the standard of care that a reasonable person would observe in the actor's situation." ALI Model Penal Code § 2.02(2)(c)–(d) (emphasis added). The government did not seek, and the district court did not make, any finding regarding the applicable standard of care, let alone whether Petitioners' personal conduct reflected a gross departure from such a standard. Instead, both courts below faulted Petitioners for failing to take steps the district court thought prudent in hindsight, see Pet App. 9a–10a, 80a–84a, without asking whether Petitioners violated any regulatory requirements (which they did not) or industry standards (as to which the district court expressly declined to rely on expert testimony, see Sentencing Tr. 55).

At most, then, what the courts below found was that Petitioners were negligent in the *civil* law sense of a "failure[] to exercise reasonable care" in addressing the presence of *Salmonella* in the farm environment. Pet. App. 21a (Gruender, J., concurring). That sort of civil negligence can be alleged in many *Park*-style cases—and often is. *E.g.*, *Sheffield Farms*, 121

"strictly liable," *Austin* v. *United States*, 509 U.S. 602, 618 n.11 (1993), regardless of whether they took appropriate precautions.

N.E. at 477 ("there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of this child"). But a court's conclusion that civil *tort* liability could be established does not, and should not, resolve whether the quintessential criminal law punishment of imprisonment may be imposed.

B. This Issue Is Critically Important To FDA-Regulated Companies And Their Officers And Employees.

The decision below exposes the officers and employees of essentially every FDA-regulated company that operates within the Eighth Circuit to imprisonment for regulatory violations in which they may have played no direct role. Further, because key subsections of the FDCA's criminal provisions contain interstate commerce requirements, *e.g.*, 21 U.S.C. § 331(a)-(d), and because "[a]ny offense involving . . . transportation in interstate or foreign commerce" may be "prosecuted in any district from, through, or into which such commerce" flows, 18 U.S.C. § 3237(a), even companies that have no physical presence in the Eighth Circuit could find their officers or employees subject to imprisonment under the unprecedented standard adopted below.

The FDA also has announced that it wants to pursue more *Park* cases, and seek harsher penalties in those cases. *Park* charges are attractive to prosecutors because there is almost no way to defend against them.[6] And very few *Park* sentences will be amenable to appeal. Few defendants will have the resources to

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[6] *See*, *e.g.*, *United States* v. *Starr*, 535 F.2d 512, 514 (9th Cir. 1976) (rejecting impossibility defense where defendant's remedial efforts were thwarted by rogue employee disobeying instructions and attempting to sabotage subsequent FDA inspection).

litigate their misdemeanor sentences up to this Court; and absent a stay, any appeals they might take will be swiftly mooted. See *Lane* v. *Williams*, 455 U.S. 624, 631 (1982) (no jurisdiction to review "sentences [that] expired during the course of these proceedings"). The Court should grant this case now, before more defendants are sentenced to imprisonment on the theory endorsed by the district court in this case: "[Y]ou . . . were the captain of the ship. And the ship went down." Sentencing Tr. 155.

1. The FDCA authorizes the prosecution of a huge range of potential violations. 21 U.S.C. § 331(a), under which Petitioners were charged, prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded." This language itself has a broad reach. Food is "deemed to be misbranded" in at least 25 enumerated circumstances, § 343(a)–(y), ranging from failure to give sufficient prominence to required labeling statements, § 343(f), to the improper use of the term "ginseng," § 343(u).

Moreover, section 331 has *54 additional subsections*, which prohibit—and, through section 333, criminalize—everything from the (unknowing) "receipt in interstate commerce of . . . adulterated or misbranded" products, § 331(c), to the "sale or offering for sale of colored oleomargarine or colored margarine" in noncompliant packaging, § 331(m), to the "charitable distribution of tobacco products," § 331(rr). Under *Park*, a company's violation of any one of these provisions can lead to the indictment and conviction of an officer or employee, without any showing of knowledge, intent, or personal involvement on the part of the defendant. And under the decision below, imprisonment may follow.

2. FDA has specifically signaled its intention to aggressively prosecute individuals under *Park*. In a March 2010 letter, FDA declared it would "increase the appropriate use of misdemeanor prosecutions . . . to hold responsible corporate officials accountable." Letter from Comm'r Hamburg to Sen. Grassley at 2 (Mar. 4, 2010), https://goo.gl/pDwvj2; see also Dep't of Justice, *Assistant Attorney General Tony West Speaks at the 12th Annual Pharmaceutical Regulatory and Compliance Congress* (Nov. 2, 2011), https://goo.gl/UlzCTl ("we will consider prosecutions against individuals, including misdemeanor prosecutions under the *Park* Doctrine").

FDA also revised its procedures to pave the way. Previously, FDA would "ordinarily exercise[ ] its prosecutorial discretion to seek criminal sanctions against a person only when a prior warning or other type of notice can be shown." FDA, *Regulatory Procedures Manual*, § 6-5-1 (Mar. 2007). No longer. See FDA, *Regulatory Procedures Manual*, § 6-5-3 (June 2015). The Department of Justice likewise instructs prosecutors that § 333(a)(1) liability "does not require proof of fraudulent intent, or even of knowing or willful conduct" and "an individual who stands in responsible relation to the violative conduct, even if he or she did not engage in the conduct itself, may be liable." Dep't of Justice, *U.S. Attorneys' Manual* § 4-8.210 (2017).

These developments presaged "a regulatory offensive" that has involved increased targeting of individual defendants under the *Park* doctrine and attempts to obtain stiffer penalties against them. Andrew C. Baird, *The New Park Doctrine: Missing the Mark*, 91 N.C. L. Rev. 949, 950 (2013); see also, *e.g.*, Proposed Jury Instrs. at 32, *United States* v. *Root*, No. 5:14-cr-00926 (W.D. Tex. Jan. 7, 2016); Gov't Sen-

tencing Mem. at 8, *United States* v. *Myrter*, No. 2:15-cr-218 (W.D. Pa. Oct. 4, 2016); Second Proposed Jury Instrs. at 3–4, *United States* v. *Sen*, No. 2:13-CR-56 (E.D. Tenn. Dec. 9, 2013); *United States* v. *Higgins*, No. 09-403-4, 2011 WL 6088576, at *1 (E.D. Pa. Dec. 7, 2011); Info. ¶¶ 23, 25, *United States* v. *Hermelin*, No. 11-cr-85 (E.D. Mo. Mar. 10, 2011); *United States* v. *Purdue Frederick Co.*, 495 F. Supp. 2d 569, 576 (W.D. Va. 2007). Prison sentences were imposed in two cases. See Am. J. at 2, *Hermelin*, No. 11-cr-85 (Mar. 24, 2011) (17-day sentence); *Higgins*, 2011 WL 6088576, at *14 (9-month sentence, based on evidence of personal misconduct).

3. Some of these cases also illustrate the stark potential for mismatch between charge and sentence presented by the government's recent deployment of the *Park* doctrine. In one, for example, the government asked the district court to impose "the maximum [statutory] penalty of 12 months." It acknowledged that the defendants had been charged under *Park* "with what is essentially a strict liability offense," and had pleaded guilty to that offense only, but contended that in fact they had "acted knowingly and intentionally and caused both actual and potential harm to the public." See Sentencing Mem. at 6, *United States* v. *Bohner*, No. 2:09-cr-403 (E.D. Pa. Nov. 18, 2011).

There is no cause for the government to proceed in this way. The FDCA's felony provision allows willful violations of the regulatory requirements set forth in § 331—those committed with "intent to defraud or mislead"—to be punished with terms of imprisonment for up to three years. 21 U.S.C. § 333(a)(2). This heightened sanction dovetails naturally with the standard required for conviction—evidence of intentional personal conduct and a culpable mindset.

When the government thinks prison is warranted, that is what it should charge and prove.

The decision below, however, authorizes prison sentences even where the government does not charge and cannot prove beyond a reasonable doubt that the defendant personally violated the FDCA (intentionally or otherwise). As here, the government can instead charge that the *company* violated a regulatory requirement; that the defendant failed to prevent the violation (whether or not the defendant knew there was a violation that needed preventing); and then seek to prove at sentencing that the defendant's conduct was "negligent" in some respect. That is a far different path to prison than anything the criminal law has previously endorsed.

C. The Decision Below Is Incorrect.

Due process bars the government from imprisoning a person for an offense predicated on his unknowing failure to prevent a company from committing a strict liability violation.

Until this case, that had been the conclusion of every American appellate court to consider the question. See *supra* § I.A. Scholars have agreed that, "[t]o the extent that vicarious liability can be justified in the criminal law, it should not be utilized to bring about the type of moral condemnation which is implicit when a sentence of imprisonment is imposed." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.4 (2d ed. 2016); see also Francis B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 717 (1930) ("Where the offense . . . is punishable by imprisonment or a serious penalty, it seems clear that the doctrine of *respondeat superior* must be repudiated as a foundation for criminal liability."). Thus, sentences like those imposed below have been

almost unheard of in American criminal law. See *Koczwara*, 155 A.2d at 830 ("We have found *no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense."); cf. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' . . . .").

This uniformity is unsurprising. "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. It prevents the persecution of the innocent for the . . . actions of others." *Bridges* v. *Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring) (citation omitted); see also *Scales* v. *United States*, 367 U.S. 203, 224 (1961) ("In our jurisprudence guilt is personal . . . ."); *Korematsu* v. *United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) ("[I]f any fundamental assumption underlies our system, it is that guilt is personal . . . ."). And its roots run very deep indeed. See *King* v. *Huggins* (1730) 93 Eng. Rep. 915, 917 (KB) ("[I]n criminal cases the principal is not answerable for the act of the deputy . . . they must each answer for their own acts, and stand or fall by their own behaviour."); *Deuteronomy* 24:16 (King James) ("[F]athers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.").

Thus, even as the development of the public welfare offense caused a partial erosion of the historical principle that crime requires both "a vicious will" and "an unlawful act," 4 William Blackstone, *Commentaries* *21; see *Morissette*, 342 U.S. at 252–54 & nn.11–12, courts and commentators alike warned that impris-

onment should not be imposed absent personal culpable conduct. Indeed, the cases that gave rise to the public welfare doctrine stressed the essentially civil nature of the penalties available. *E.g.*, *Queen* v. *Tolson,* 60 L.T. 899, 903–04 (Q.B. 1889) (in determining whether *mens rea* is required, "a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest" is very different from imprisonment), *quoted in Staples*, 511 U.S. at 617 n.13.[7]

That was true particularly in the rare cases involving supervisory liability. For example, in the seminal English case of *Queen* v. *Stephens* (1866) L.R. 1 Q.B. 702, *cited in Morissette*, 342 U.S. at 253 n.12, a quarry owner was indicted because his workmen threw debris into a river "without his knowledge and against his general orders." *Stephens*, L.R. 1 Q.B. at 703. The court affirmed his conviction, explaining that while the case was technically "of a criminal nature," it was "in substance . . . a civil proceeding," especially because "the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued." *Id.* at 708–10. That was true notwithstanding "the general rule that a principal is not criminally answerable for the act of his agent"—a principle the court did not question. *Id.* at

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[7] *See also* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 67, 72 (1933) (explaining that "offenses involving small monetary penalties came to be recognized as a special class of offense for which no *mens rea* was required" and arguing that "if the offense be punishable by imprisonment, . . . proof of a guilty mind" should be required); Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 Ind. L.J. 729, 742 (1996) ("The cases which first defined the public welfare offense involved primarily statutes which imposed light fines for violations, not prison terms.").

710 (Blackburn, J.); see also *Sheffield Farms*, 121 N.E. at 476 (permitting criminal fines for a supervisory offense that equally could have been recovered "through . . . a civil action").

To draw the line at imprisonment is only natural. "[T]he combination of stigma and loss of liberty involved in a … sentence of imprisonment sets that sanction apart from anything else the law imposes." Herbert L. Packer, *The Limits Of The Criminal Sanction* 130–31 (1968). It has thus been accepted that imprisonment should be reserved for those who are, through deed or state of mind, culpable for violating the law through their own personal conduct. Sayre, *Public Welfare Offenses*, *supra*, at 72.

Dotterweich and *Park* called none of this into question. See John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1375 (1979). Both cases involved modest fines only. And when the issue was raised at oral argument in *Park*, the government conceded that a prison sentence would present a "difficult situation" that "might conceivably" raise "serious due process problems." Tr. of Oral Arg. 6–7, *Park*, No. 74-215.

That concession was apt. The Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997). Few liberties are more deeply rooted than freedom from imprisonment, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529 (2004); *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001), or the principle that "guilt is personal," *Scales*, 367 U.S. at 224; see *supra* p. 24. The Court should review this case and, by reversing, reaffirm those fundamental principles.

II. THE *PARK* DOCTRINE IS ATEXTUAL, UNWORKABLE, AND SHOULD BE OVERRULED.

This case also presents the Court with a prime opportunity to revisit, and correct, the atextual construction of the FDCA's penalty provisions adopted in *Dotterweich* and *Park*. Though Petitioners did not challenge the validity of the *Park* doctrine below, the Eighth Circuit opinions upholding their sentence call directly into question whether § 331 should be read to impose liability without proof of *mens rea* or personal participation. See Pet. App. 20a (Gruender, J., concurring) (because § 333 permits incarceration, "I would interpret *Park* not to impose vicarious liability on executives under § 331").

Dotterweich and *Park* have little connection to the statutory text, create a liability standard that departs without warrant from basic principles of crime and punishment, invite arbitrary and selective enforcement, and give rise to serious constitutional problems like the one presented in this case. They should be overruled.

Petitioners acknowledge that the *Park* doctrine has been on the books for many years. But "*stare decisis* is a 'principle of policy' rather than 'an inexorable command.'" *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). Accordingly, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Likewise, "[w]here . . . changes [in doctrine] have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Patterson* v. *McLean Credit*

Union, 491 U.S. 164, 173 (1989) (citations omitted) (collecting "cases where statutory precedents have been overruled").

Here, these considerations counsel strongly in favor of a fresh look at the *Park* doctrine.

A. These Decisions Have No Basis In The Statutory Text And Disregard Basic Interpretive Principles.

The operative language of § 331 says merely that "[t]he following acts and the causing thereof are prohibited." Section 333(a)(1), in turn, provides that "[a]ny person who violates a provision of section 331" is criminally liable.

There is nothing complex about that language: A person who *directly* commits a forbidden act (*e.g.*, by introducing an adulterated food product into interstate commerce) is liable, and so too is someone who "*cause*[*s*]" such an act to occur. These are familiar concepts in the law. They plainly do not embrace liability for a person who, on paper, had the power to prevent an unlawful act if, hypothetically, he had known it was about to happen. And yet, that is precisely the conclusion that *Dotterweich* and *Park* embraced.

Neither decision identified any plausible textual basis for imposing liability on so-called "responsible corporate officers." *Dotterweich* derived its conclusion principally from the perceived "purposes" of the FDCA, and otherwise sought to anchor its construction in the notion that "all persons who aid and abet" a company's "commission" of a misdemeanor "are equally guilty." 320 U.S. at 284. But aiding-and-abetting liability has always turned on whether the defendant acted with "the *intent* of facilitating the offense's commission." *Rosemond* v. *United States*, 134

S. Ct. 1240, 1245 (2014) (emphasis added). Neither *Park* nor *Dotterweich* reflects any such requirement; no intention need be proved at all. See 2 LaFave, *supra,* § 13.4 (describing *Dotterweich* as a "particularly outrageous" failure of statutory construction).[8]

Park is equally unsound. *Park* did suggest in passing that "responsible corporate agents are held criminally accountable for 'causing' violations," 421 U.S. at 673, but the liability standard *Park* established—which asks merely whether the defendant hypothetically could have *stopped* someone else from violating the law—does not require any showing of *causation*, as that concept is traditionally understood in criminal law. Where a crime depends on the occurrence of a particular result, "a defendant generally may not be convicted unless his conduct is 'both (1) the actual cause, and (2) the "legal" cause . . . of the result.'" *Burrage* v. *United States*, 134 S. Ct. 881, 887 (2014) (citing 1 LaFave, *supra*, § 6.4(a); ALI Model Penal Code § 2.03). Even where an offense creates strict liability, this standard is not satisfied "unless the actual result is a probable consequence of the actor's conduct." ALI Model Penal Code § 2.03(4); *accord* 1 LaFave, *supra*, § 6.4(a). Because *Park* liability is entirely indifferent to the "probable consequence[s] of the actor's conduct"—and, indeed, to the nature or quality of that conduct—it imposes liability without causation, and thus permits "the limitless extrapolation of liability without fault." See ALI Model Penal Code § 2.03(4), explanatory note.

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[8] Indeed, *Dotterweich* did not even give careful consideration to the question that precedes and underlies the question of imputed liability: whether § 331 imposes strict liability. It merely "assumed an affirmative answer." 2 LaFave, *supra*, § 13.4; *see also* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 118–19.

In fact, *Park* liability finds so little purchase in the statutory text that courts (including the district court here) and commentators have described the "responsible corporate officer" doctrine as "a common-law theory of liability." *E.g.*, *Celentano* v. *Rocque*, 923 A.2d 709, 722 (Conn. 2007); see also Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 Stan. Envtl. L.J. 283, 309 (2002); Pet. App. 36a n.3. But if so, the *Park* doctrine must fall, for the federal courts have no power to create common-law crimes. *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

Dotterweich and *Park* also failed to address the rule of lenity, which requires ambiguities in a criminal statute to be resolved in a defendant's favor. *E.g.*, *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). This rule serves crucial purposes that *Park* and *Dotterweich* ignore. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985). The rule of lenity thus "keeps [the] courts from making criminal law in Congress's stead." *United States* v. *Santos*, 553 U.S. 507, 514, (2008) (plurality).

Dotterweich and *Park* nevertheless impose a novel and far-reaching form of criminal liability without any sign of congressional authorization. That step should be regarded as unsupportable. Just as the Court would not read a statute to impose strict liability "where doing so would 'criminalize a broad range of apparently innocent conduct,'" it should not read a statute to impose strict *and imputed* liability unless

Congress has said unmistakably that it intends that result. See *Staples*, 511 U.S. at 610 (quoting *Liparota*, 471 U.S. at 426); *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari) ("[W]e should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.").

B. These Decisions Criminalize A Broad Range Of Innocent Conduct, Invite Arbitrary Enforcement, And Fail To Give Fair Warning Of What Is Forbidden.

Park liability is also "unworkable," *Payne*, 501 U.S. at 827, because it gives rise to several significant practical and constitutional problems.

Park exposes a large number of people to criminal liability even where no personal culpability exists. Liability "is by no means necessarily confined to a single corporate agent or employee"; it reaches anyone "who by virtue of their managerial positions or other similar relation to the actor [who violates the FDCA] could be deemed responsible for" a violation. See 421 U.S. at 670–72.

United States v. *Starr*, 535 F.2d 512 (9th Cir. 1976), well illustrates the resulting problems. There, the secretary-treasurer of a food company reprimanded the company's janitor in the presence of an FDA inspector and instructed him to make corrections necessary to address an infestation in the company's warehouse. But the janitor disobeyed, and during a second inspection informed inspectors that the mice were still in the warehouse and that he had taken no action to remove them. Indeed, the janitor also falsely suggested to inspectors that the warehouse suffered

from other violations. The government nevertheless prosecuted the *executive*, despite having direct knowledge that the janitor had intentionally thwarted his remedial efforts. See *id.* at 515–16.

The upshot is that essentially anyone in the chain of command of a company, large or small, with at least nominal responsibility for a given activity, is a potential *Park* defendant. It could be the owner or the CEO, "as there is little if anything within most companies' operation that is not, at least on paper, within their supervisory authority and responsibility." Richard A. Samp & Cory L. Andrews, *Restraining Park Doctrine Prosecutions Against Corporate Officials Under the FDCA*, 13 Engage 19, 24 (Oct. 2012). It could be the manager or officer who was "physically present" on the premises where the violation occurred. See Gov't Sentencing Mem. at 8, *Myrter*, No. 2:15-cr-218. Or it could be a truck driver or a store clerk who implements a policy set by someone else. Cf. *United States* v. *Gen. Nutrition, Inc.*, 638 F. Supp. 556, 563 (W.D.N.Y. 1986) (retail clerks' "low position[s] in the corporate hierarchy . . . do not excuse their" unknowing § 331 violations based on misleading marketing). In many cases, none of these people will have had any contemporaneous knowledge that the violation was occurring, let alone any intention to cause its occurrence. But if a prosecutor so chooses, they will be held liable. *Park* says their "responsible relation" to the corporate offense is sufficient to make them criminals.

Park thus creates a nearly boundless risk of arbitrary enforcement. If everyone in the chain of command is equally guilty, who should be prosecuted? The remarkable answer, expressly endorsed by both *Park* and *Dotterweich*, is that we must simply trust in "the good sense of prosecutors, the wise guidance of

trial judges, and the ultimate judgment of juries." *Dotterweich*, 320 U.S. at 285; see also *Park*, 421 U.S. at 669–70. But this Court does not allow legislatures to take that approach, reasoning that punitive statutes with a "standardless sweep" dangerously "allow[ ] policemen, prosecutors, and juries to pursue their personal predilections." See *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). There is no sound reason for courts to tread a path that legislatures may not walk. The *Park* doctrine should instead be overruled.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 10, 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 15-1890, No. 15-1891

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AUSTIN DECOSTER, also known as Jack,

Defendant-Appellant.

NATIONAL ASSOCIATION OF MANUFACTURERS;
CATO INSTITUTE; WASHINGTON LEGAL FOUNDATION;
CHAMBER OF COMMERCE OF THE UNITED STATES;
PHARMACEUTICAL RESEARCH AND
MANUFACTURERS OF AMERICA,

Amici on Behalf of Appellant(s).

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER DECOSTER,

Defendant-Appellant.

NATIONAL ASSOCIATION OF MANUFACTURERS;
CATO INSTITUTE; WASHINGTON LEGAL FOUNDATION,

Amici on Behalf of Appellant(s).

Submitted: March 17, 2016

Filed: July 6, 2016

Rehearing and Rehearing En Banc Denied
September 30, 2016*

OPINION

Before MURPHY, BEAM, and GRUENDER, Circuit Judges.

MURPHY, Circuit Judge.

Austin "Jack" DeCoster and Peter DeCoster both pled guilty, as "responsible corporate officers" of Quality Egg, LLC, to misdemeanor violations of 21 U.S.C. § 331(a) for introducing eggs that had been adulterated with salmonella enteritidis into interstate commerce. The district court[1] sentenced Jack and Peter to three months imprisonment. The DeCosters appeal, arguing that their prison sentences and 21 U.S.C. § 333(a)(1) are unconstitutional, and claiming in the alternative that their prison sentences were procedurally and substantively unreasonable. We affirm.

I.

Jack DeCoster owned Quality Egg, LLC, an Iowa egg production company. Jack's son Peter DeCoster served as the company's chief operating officer. Quality Egg operated six farm sites with 73 barns which were filled with five million egg laying hens. It also had 24

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* Chief Judge Riley, Judge Wollman and Judge Loken would grant the petitions for rehearing en banc. Judge Kelly did not participate in the consideration or decision of this matter.

[1] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa.

barns which were filled with young chickens that had not yet begun to lay eggs. Additionally, the company owned several processing plants where eggs were cleaned, packed, and shipped.

Jack also owned and operated several egg production companies in Maine, and Peter worked at those facilities. In 2008, salmonella enteritidis ("salmonella") tests conducted at the Maine facilities came back positive. The DeCosters succeeded in eliminating salmonella from their Maine facilities by following the recommendations of hired consultants, including poultry disease specialist Dr. Charles Hofacre and rodent control expert Dr. Maxcy Nolan.

Periodically the DeCosters also tested the Iowa hens and facilities for salmonella. Some of these tests came back positive in 2006, and the positive test results increased in frequency through the fall of 2010. Until the USDA adopted its new egg safety rule in July 2010, Quality Egg was not legally obligated to conduct salmonella tests of its eggs after receiving positive environmental test results. Nevertheless, Quality Egg tested its eggs in April 2009 after being notified that a Minnesota restaurant purchaser had had a salmonella outbreak. The sample of its eggs tested negative for salmonella.

Other than conducting the single egg test in April 2009, Quality Egg did not test or divert eggs from the market before July 2010 despite receiving multiple positive environmental and hen test results. In 2009 the DeCosters hired Dr. Hofacre and Dr. Nolan to consult on the company's Iowa operations. The consultants recommended implementing the same measures in Iowa as had been used in Maine. Although the DeCosters claim they adopted all of the recommendations, the precautions implemented by Quality

Egg failed to eradicate salmonella. The Centers for Disease Control and Prevention estimated that about 56,000 Americans fell ill with salmonellosis in 2010 after consuming contaminated eggs. In August 2010, federal and state officials determined that the salmonella outbreak had originated at Quality Egg's facilities. In response Quality Egg recalled eggs that had been shipped from five of its six Iowa farm sites between May and August 2010.

The FDA inspected the Quality Egg operations in Iowa from August 12-30, 2010. Investigators discovered live and dead rodents and frogs in the laying areas, feed areas, conveyer belts, and outside the buildings. They also found holes in the walls and baseboards of the feed and laying buildings. The investigators discovered that some rodent traps were broken, and others had dead rodents in them. In one building near the laying hens, manure was found piled to the rafters; it had pushed a screen out of the door which allowed rodents into the building. Investigators also observed employees not wearing or changing protective clothing and not cleaning or sanitizing equipment.

The FDA concluded that Quality Egg had failed to comply with its written plans for biosecurity and salmonella prevention. One government expert reported that "there were minimal to no records from the poultry [ ] barns to indicate that company personnel [had] implemented the written plans [to eliminate salmonella]." The agency also discovered that the company's eggs tested positive for salmonella at a rate of contamination approximately 39 times higher than the current national rate, and that the contamination had spread throughout all of the Quality Egg facilities. In October 2010 the FDA instructed Quality Egg to

euthanize every hen, remove the manure, repair its facilities, and disinfect its barns to prevent the risk of another outbreak.

The government then began a criminal investigation of the company's food safety practices and ultimately filed a criminal information against Quality Egg and both of the DeCosters. The investigation revealed that Quality Egg previously had falsified records about food safety measures and had lied to auditors for several years about pest control measures and sanitation practices. Although its food safety plan stated that Quality Egg performed flock testing to identify and control salmonella, no flock testing was ever done. Quality Egg employees had also bribed a USDA inspector in 2010 to release eggs for sale which had been retained or "red tagged" for failing to meet minimum quality grade standards. Quality Egg also misled state regulators and retail customers by changing the packing dates of its eggs and selling the misbranded eggs into interstate commerce. The parties additionally stipulated that one Quality Egg employee was prepared to testify at trial that Jack DeCoster had once reprimanded him because he had not moved a pallet of eggs in time to avoid inspection by the USDA. The investigation also revealed that in 2008 Peter DeCoster had made inaccurate statements to Walmart about Quality Egg's food safety and sanitation practices.

Quality Egg pled guilty to: (1) a felony violation of 18 U.S.C. § 201(b)(1) for bribing a USDA inspector, (2) a felony violation of 21 U.S.C. § 331(a) for introducing misbranded eggs into interstate commerce with intent to defraud and mislead, and (3) a misdemeanor violation of 21 U.S.C. § 331(a) for introducing adulterated eggs into interstate commerce. Jack and Peter each

pled guilty to misdemeanor violations of 21 U.S.C. § 331(a) as responsible corporate officers under the Food Drug & Cosmetic Act (FDCA). In their plea agreements, the DeCosters stated that they had not known that the eggs were contaminated at the time of shipment, but stipulated that they were in positions of sufficient authority to detect, prevent, and correct the sale of contaminated eggs had they known about the contamination. The parties also stipulated that the DeCosters' advisory guideline range was 0 to 6 months imprisonment, and both defendants agreed to be sentenced based on facts the sentencing judge found by a preponderance of the evidence.

Before sentencing, the DeCosters argued that sentences of incarceration would be unconstitutional because they had not known that the eggs were contaminated at the time they were shipped. The district court denied the motions, imposed $100,000 fines on both Jack and Peter DeCoster and sentenced them to three months imprisonment. *See* 21 U.S.C. § 333(a)(1) (explaining that anyone who violates section 331 "shall be imprisoned for not more than one year or fined not more than $1,000, or both"); 18 U.S.C. § 3571(b)(5) (setting maximum fine of $100,000 for class A misdemeanor not resulting in death). The court determined that although nothing in the record indicated that Peter and Jack had actual knowledge that the eggs they sold were infected with salmonella, the record demonstrated that their safety and sanitation procedures were "egregious," that they ignored the positive salmonella environmental test results before July 2010 by not testing their eggs, and that they knew that their employees had deceived and bribed USDA inspectors. The district court explained that the record supported the inference that the DeCosters had "created a work environment where

employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so." The district court accordingly concluded that this was not a case involving "a mere unaware corporate executive."

The DeCosters appeal, arguing that their prison sentences under 21 U.S.C. § 333(a)(1) are unconstitutional under the Due Process Clause and the Eighth Amendment. In the alternative they claim that their sentences were procedurally and substantively unreasonable.

II.

Under the FDCA responsible corporate officer concept, individuals who "by reason of [their] position in the corporation [have the] responsibility and authority" to take necessary measures to prevent or remedy violations of the FDCA and fail to do so, may be held criminally liable as "responsible corporate agents," regardless of whether they were aware of or intended to cause the violation. *United States v. Park*, 421 U.S. 658, 673-74, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). The FDCA "punishes neglect where the law requires care, or inaction where it imposes a duty" because according to Congress, the "public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors." *Id.* at 671, 95 S.Ct. 1903 (internal quotation marks omitted). A corporate officer may avoid liability under this doctrine by showing that he was "powerless to prevent or correct the violation." *Id.* at 673, 95 S.Ct. 1903 (internal quotation marks omitted).

The DeCosters argue that their prison sentences violate due process and the Eighth Amendment. The government contends that because the DeCosters raise

an Eighth Amendment claim, their case is governed exclusively by that amendment. *See Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). The Supreme Court has explained that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* (internal quotation marks omitted).

The DeCosters raise two separate constitutional claims. They first argue that their sentences are not proportional to their crimes as required by the Eighth Amendment. *See Graham v. Florida*, 560 U.S. 48, 60, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). They also argue that the penalty of incarceration of any length for this misdemeanor offense would violate substantive due process. *See Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001); *see also United States v. Greenbaum*, 138 F.2d 437, 438 (3d Cir.1943) (concluding that three month prison sentence for corporate officer's FDCA misdemeanor violation did not violate due process); *United States v. Higgins*, 2011 WL 6088576, at *10 (E.D. Pa. Dec. 7, 2011) (same for nine month prison sentence).

We review de novo a substantive due process claim. *United States v. Clemmons*, 461 F.3d 1057, 1061 (8th Cir.2006). The DeCosters argue that their prison sentences are unconstitutional because they did not personally commit wrongful acts. They analogize this case to others where courts have determined that due process is violated when prison terms are imposed for vicarious liability crimes. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir.1999); *State v. Guminga*, 395 N.W.2d 344, 346

(Minn.1986); *Davis v. City of Peachtree City*, 251 Ga. 219, 304 S.E.2d 701, 703-04 (1983); *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825, 830 (1959). The Eleventh Circuit explained in *Lady J.* that "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.'" 176 F.3d at 1367.

Officer liability under the FDCA, however, is not equivalent to vicarious liability. *See Park*, 421 U.S. at 674-75, 95 S.Ct. 1903. Under vicarious liability, a supervisory party is held liable "for the actionable conduct of a subordinate . . . based on the relationship between the two parties." *Liability*, *Black's Law Dictionary* (10th ed. 2014). Under the FDCA, in contrast, a corporate officer is held accountable not for the acts or omissions of others, but rather for his own failure to prevent or remedy "the conditions which gave rise to the charges against him." *See Park*, 421 U.S. at 675, 95 S.Ct. 1903. Thus, "some measure of blameworthiness" is "import[ed]" directly to the corporate officer. *Id.* at 673, 95 S.Ct. 1903.

Here, as owner of Quality Egg, Jack decided which barns were subject to salmonella environmental testing, and as chief operating officer, Peter coordinated many of the company's salmonella prevention and rodent control efforts. Neither of the DeCosters claim to have been "powerless" to prevent Quality Egg from violating the FDCA. *See id.* Despite their familiarity with the conditions in the Iowa facilities, they failed to take sufficient measures to improve them. On this record, the district court reasonably found that "the defendants 'knew or should have known,' of the risks posed by the insanitary conditions at Quality Egg in Iowa, 'knew or should have known' that additional testing needed to be performed before the suspected shell eggs were

distributed to consumers, and 'knew or should have known' of [ ] proper remedial and preventative measures to reduce the presence of [salmonella]." The FDCA "punishes neglect where the law requires care." *Id.* at 671, 95 S.Ct. 1903 (internal quotation marks omitted). We conclude that the record here shows that the DeCosters are liable for negligently failing to prevent the salmonella outbreak. *See id.* at 678-79, 95 S.Ct. 1903 (Stewart, J., dissenting) (reading majority opinion in *Park* as establishing a negligence standard).

The DeCosters argue that their prison sentences also violate the Due Process Clause because they did not know that the eggs the company distributed had salmonella. We have explained that "the imposition of severe penalties, especially a felony conviction, for the commission of a morally innocent act may violate" due process. *See United States v. Enochs*, 857 F.2d 491, 494 n.2 (8th Cir.1988). The elimination of a mens rea requirement does not violate the Due Process Clause for a public welfare offense where the penalty is "relatively small," the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty. *See Staples v. United States*, 511 U.S. 600, 617, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (citing *Morissette v. United States*, 342 U.S. 246, 256, 72 S.Ct. 240, 96 L.Ed. 288 (1952)); *Holdridge v. United States*, 282 F.2d 302, 309-10 (8th Cir.1960).

The three month prison sentences the DeCosters received were relatively short. *See Staples*, 511 U.S. at 617, 114 S.Ct. 1793. We have previously determined that even a maximum statutory penalty of one year imprisonment for a misdemeanor offense is "relatively small" and does not violate due process. *See United*

States v. Flum, 518 F.2d 39, 43-45 (8th Cir.1975) (en banc), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 454, 46 L.Ed.2d 390 (1975); 21 U.S.C. § 333(a)(1); *cf. United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir.1985) (concluding that a felony conviction which carried a penalty of a maximum of two years imprisonment was not relatively small).

The DeCosters' misdemeanor convictions also do not gravely damage their reputations. In *Flum*, we explained that a misdemeanor conviction under a federal law which provided for a maximum imprisonment of one year did not gravely "besmirch" the defendant's reputation because it did not brand him as a "felon or subject him to any burden beyond the sentence imposed." *See* 518 F.2d at 43; *cf. Wulff*, 758 F.2d at 1125 (felony conviction would irreparably damage a defendant's reputation because a felon loses his civil rights). Similarly in this case, the DeCosters will not be branded as felons, and the record does not identify any additional civil sanctions they may be subject to beyond their sentences. Finally, the elimination of criminal intent under 21 U.S.C. § 333(a) did not violate due process because, as the Supreme Court has explained, "Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms." *Park*, 421 U.S. at 673, 95 S.Ct. 1903.

The dissent argues that we must treat the FDCA, 21 U.S.C. §§ 331(a), 333(a)(1), as requiring a defendant to know he violated the statute in order to be subject to its penalties because the statute has "no express congressional statement" to omit a mens rea requirement. We rely however "on the nature of the statute and the particular character of the items regulated to

determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Staples*, 511 U.S. at 607, 114 S.Ct. 1793. The FDCA regulates services and products which affect the health and well being of the public. For this reason, Congress has not required "awareness of some wrongdoing" in order to hold responsible corporate agents accountable for violating the statute. *Park*, 421 U.S. at 672-73, 95 S.Ct. 1903 (internal quotation marks omitted). Although the "requirements of foresight and vigilance imposed on responsible corporate agents [in 21 U.S.C. § 331(a)] are beyond question demanding, and perhaps onerous, [ ] they are no more stringent" than required to protect the unknowing public from consuming hazardous food, such as salmonella infected eggs. *Id.* at 672, 95 S.Ct. 1903. The language in the FDCA and Supreme Court precedent interpreting the statute support the conclusion that defendants are not required to have known that they violated the FDCA to be subject to the statutory penalties.

As the Third Circuit explained in *United States v. Greenbaum*, "[t]he constitutional requirement of due process is not violated merely because mens rea is not a required element of a prescribed crime." 138 F.2d 437, 438 (3d Cir.1943). In *Greenbaum*, the court affirmed a corporate president's three month prison sentence for introducing adulterated eggs into interstate commerce in violation of the same statute at issue in this case. *Id.* at 439. The *Greenbaum* court explained that "the legislative intent to dispense with mens rea as an element of [a misdemeanor FDCA] offense has a justifiable basis" because such offenses "are capable of inflicting widespread injury, and [ ] the requirement of proof of the offender's guilty knowledge and wrongful

intent would render enforcement of the prohibition difficult if not impossible." *Id.* at 438. For the same reasons, we conclude that the DeCosters' sentences do not violate the Due Process Clause even though mens rea was not an element of their misdemeanor offenses.

The DeCosters also claim that their sentences violate the Eighth Amendment. We review this issue de novo. *United States v. Martin*, 677 F.3d 818, 821 (8th Cir.2012). The Eighth Amendment bars prison sentences that are "grossly disproportionate for a particular defendant's crime." *Graham v. Florida*, 560 U.S. 48, 60, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). To determine whether a specific sentence is grossly disproportionate we weigh "the harshness of the penalty" against "the gravity of the offense," and we also consider the "harm caused or threatened to the victim or to society, and the culpability and degree of the defendant's involvement." *United States v. Lee*, 625 F.3d 1030, 1037 (8th Cir.2010) (internal quotation marks omitted).

On this record, the DeCosters' three month prison sentences are not grossly disproportionate to the gravity of their misdemeanor offenses. When defining the statutory penalties in the FDCA, Congress recognized the importance of placing the burden on corporate officers to protect consumers "who are wholly helpless" from purchasing adulterated food products which could make them ill. *See United States v. Dotterweich*, 320 U.S. 277, 285, 64 S.Ct. 134, 88 L.Ed. 48 (1943). "[T]he public has a right to expect" a heightened degree of foresight and care from "those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." *Park*, 421 U.S. at 672, 95 S.Ct. 1903. The 2010 salmonella outbreak may have affected up to

56,000 victims, some of whom were hospitalized or suffered long term injuries. For one example, a child hospitalized in an intensive care unit for eight days was saved by antibiotics which damaged his teeth, causing them to be capped in stainless steel.

We conclude this is not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *United States v. Spires*, 628 F.3d 1049, 1054 (8th Cir.2011) (internal quotation marks omitted). Moreover, the DeCosters' three month prison sentences fell at the low end of the prescribed statutory range of 21 U.S.C. § 333(a) (one year maximum), and we have "never held a sentence within the statutory range to violate the Eighth Amendment," *United States v. Vanhorn*, 740 F.3d 1166, 1170 (8th Cir.2014). We decline to do so here as well. We conclude that the district court's sentences in this case do not violate the Eighth Amendment.

III.

Finally, the DeCosters argue that their sentences are procedurally and substantively unreasonable. "When analyzing a sentence for procedural error, we review a district court's interpretation and application of the guidelines de novo and its factual findings . . . for clear error." *United States v. Callaway*, 762 F.3d 754, 759 (8th Cir.2014). We review the substantive reasonableness of a sentence for abuse of discretion. *Id.* at 760.

The DeCosters claim that their sentences are procedurally unreasonable because the court relied on clearly erroneous facts. *See United States v. Feemster*, 572 F.3d 455, 461 (8th Cir.2009). First, the DeCosters argue that the court erred by stating that they had

"ignore[d]" the positive environmental salmonella tests before 2010. During sentencing a district court may rely on facts it finds by a preponderance of the record evidence. *See United States v. Nassif*, 921 F.2d 168, 170 (8th Cir.1990). Here, the court found that while the DeCosters cleaned their barns and administered a second salmonella vaccine to their chickens in 2010, they did not test or divert eggs until July 2010 even though they had reason to suspect their contamination. The court did not clearly err by determining that the actions or inactions of the DeCosters was insufficient and blameworthy under these circumstances. *See Park*, 421 U.S. at 672, 95 S.Ct. 1903 (explaining that corporate officers may be held liable for failing to "devise whatever measures are necessary to ensure compliance with the [FDCA]").

The DeCosters also argue that the district court erred by finding that they "failed to follow" the methods they had previously used to eliminate salmonella in their Maine facilities. They concede however that they previously stipulated that no expert had a basis to testify about whether Quality Egg "fully" and "effectively" implemented all of the specialist recommendations in Iowa. They also agree with the probation office determination that they had not effectively implemented the methods used at their Maine facilities. The district court did not clearly err in interpreting the evidence to show that the DeCosters had failed to follow all of the expert recommendations.

The DeCosters also argue that their sentences are substantively unreasonable because the district court gave substantial weight to prior offenses and regulatory violations committed by Quality Egg employees even though the DeCosters had not sanctioned those

actions and the violations were unrelated to the salmonella outbreak. The sentences here are presumptively reasonable because they are within the stipulated guideline range of 0 to 6 months imprisonment for each defendant. *See Callaway*, 762 F.3d at 760. Furthermore, the district court did not abuse its discretion by considering the Quality Egg employees' pattern of deceiving the FDA. A sentencing court may consider "'any information concerning the background, character, and conduct of [a] defendant.'" *See United States v. Rogers*, 423 F.3d 823, 828 (8th Cir.2005) (quoting USSG § 1B1.4). Here, the court considered such background information and found that the DeCosters had "created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have felt pressure to do so." In fact, one employee alleged that Jack DeCoster had once reprimanded him because he had not moved a pallet of eggs in time to avoid inspection by the USDA. Peter DeCoster was similarly personally implicated in the company's violations because of inaccurate statements he made to Walmart about Quality Egg's food safety and sanitation practices.

We conclude that the district court properly considered relevant past conduct and imposed substantively reasonable sentences on the DeCosters.

IV.

For these reasons the judgments of the district court are affirmed.

GRUENDER, Circuit Judge, concurring.

The DeCosters do not challenge either the constitutionality of § 331(a) or the sufficiency of the factual basis for their pleas. Rather, they claim that due process concerns prevent them from being sentenced to prison for a crime involving no mens rea on their part because it is based solely on their positions as responsible corporate officers—*i.e.*, vicarious liability. I agree with the dissent that imprisonment based on vicarious liability would raise serious due process concerns. However, because the district court found the DeCosters negligent, they were not held vicariously liable for violations committed by others, and this case thus does not implicate these concerns. I therefore concur in the judgment and join Judge Murphy's opinion to the extent that it recognizes that the DeCosters were negligent.[1] I write separately in order to make clear my view that *Park* requires a finding of negligence in order to convict a responsible corporate officer under § 331.

The DeCosters pleaded guilty to misdemeanor violations of 21 U.S.C. § 331(a), which provides:

> The following acts and the causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded.

A misdemeanor violation of § 331 is punishable by up to one year's imprisonment. § 333(a)(1). On its face, § 331(a) appears to impose strict liability on

[1] I also join Judge Murphy's opinion in rejecting the DeCosters' Eighth Amendment challenge and their claims that the sentences are procedurally and substantively unreasonable.

defendants who introduce or cause to be introduced into interstate commerce any adulterated food. *Cf. United States v. Carlson*, 810 F.3d 544, 555 (8th Cir.2016) (applying strict liability standard to defendant convicted of misdemeanor violation of § 331 where defendant personally participated in violations). Nothing in the statute clearly states that a corporate officer can be imprisoned for acts committed solely by a subordinate. However, the *Park* Court read § 331 to hold corporate officers liable for "causing" violations committed by their subordinates. *See United States v. Park*, 421 U.S. 658, 673-74, 678-79, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975).[2] The question, then, is whether § 331 applies vicarious liability to corporate officers or whether corporate officers can only be in violation when they negligently fail to prevent their subordinates' violations. For three reasons, I read *Park* to require a showing of negligence before exposing a responsible corporate officer to imprisonment for the acts of a subordinate.

First, the language from Park strongly suggests—if not outright asserts—that the Supreme Court adopted a negligence standard for a § 331 conviction. The Court noted that the FDCA "punishes 'neglect where the law requires care, or inaction where it imposes a duty.'" *Park*, 421 U.S. at 671, 95 S.Ct. 1903 (quoting *Morissette v. United States*, 342 U.S. 246, 255, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). A corporate officer is liable where he could have prevented a violation "with no more care

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[2] The dissent attempts to distinguish *Park* from this case by pointing out that the defendant in *Park* was convicted under § 331(k), not § 331(a). Yet the theory underlying *Park* prosecutions—that the executive "caused" the violation by breaching the duty of care to ensure compliance with the FDCA—comes from language that applies to all of § 331.

than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Id.* (quoting *Morissette*, 342 U.S. at 256, 72 S.Ct. 240). According to the Court, the FDCA "imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur." *Id.* at 672, 95 S.Ct. 1903. This language establishes negligence as the standard. *See Black's Law Dictionary* (10th ed. 2014) (defining negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm"). Moreover, the *Park* dissent expressly concluded that the Court had articulated a negligence standard. *See id.* at 678-79, 95 S.Ct. 1903 (Stewart, J., dissenting) (interpreting the majority opinion as establishing a negligence standard but concluding that the jury instructions "did not conform to the standards that the Court itself sets out today"). Tellingly, the *Park* Court did not contest the dissent's claim that the standard it had described amounted to negligence.

Second, I read the language from *Park* as establishing a negligence standard as a matter of constitutional avoidance. *See Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 892-93 (8th Cir.2013). The few courts that have considered the question all agree that imprisonment based on vicarious liability violates substantive due process. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367-68 (11th Cir.1999); *Davis v. City of Peachtree City*, 251 Ga. 219, 304 S.E.2d 701, 703 (1983); *State v. Guminga*, 395

N.W.2d 344, 345 (Minn.1986).[3] Section 333(a) imposes up to one year's imprisonment for any misdemeanor violation of § 331. For this reason, I would interpret *Park* not to impose vicarious liability on executives under § 331. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

Finally, reading *Park* to require negligence is consistent with the Supreme Court's practice of interpreting statutes that fail to state a specific mens rea in a way that avoids "criminaliz[ing] a broad range of apparently innocent conduct." *See Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). Here, given the broad range of conduct that would be criminalized under a vicarious liability standard—essentially all conduct committed by corporate officers that falls short of eliminating every possible FDCA violation—I instead read *Park* as providing that a corporate officer "causes" a subordinate's violation of § 331 only when the violation resulted from the corporate officer's negligence.

I concur in the judgment because the DeCosters were negligent in failing to prevent the FDCA violations. Both pleaded guilty to failing to prevent the introduction of adulterated food into interstate commerce despite holding "position[s] of sufficient authority . . . to

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[3] *See also Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825, 830 (1959) (holding that imprisonment for vicarious liability crime violated due process under Pennsylvania Constitution).

detect, prevent, and correct the sale" of the eggs. Further, I agree with Judge Murphy that the district court found sufficient facts to support the conclusion that the DeCosters were negligent.[4] In particular, the court concluded that the DeCosters "knew or should have known" about the risks presented by the insanitary conditions at Quality Eggs's Iowa facilities and about the proper preventative and remedial measures that they should have taken in response. *See Park*, 421 U.S. at 671, 95 S.Ct. 1903 ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." (quoting *Morissette*, 342 U.S. at 255, 72 S.Ct. 240)). The DeCosters' challenge to their sentences relies on the premise that they were held vicariously liable for their subordinates' violations—that is, liability was imputed to them based solely on their positions in the company. But because the DeCosters were negligent, their liability is not vicarious. Instead, they are responsible for their own failures to exercise reasonable care to prevent the introduction of adulterated food. The law is clear that a defendant can be sentenced to imprisonment based on negligence—or, for that matter, based on strict liability stemming from his own conduct. *See Staples v. United States*, 511 U.S. 600, 607 & n.3, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994); *Morissette*, 342 U.S. at 251 n. 8, 72 S.Ct. 240. I

[4] The DeCosters agreed to have the district court sentence them based on facts found at sentencing. While the DeCosters objected at sentencing to potential imprisonment on Sixth Amendment grounds, *see Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), they do not argue this point on appeal and therefore waive this objection. *See United States v. Cowan*, 696 F.3d 706, 709 n. 2 (8th Cir.2012).

therefore concur in the judgment and join Judge Murphy's opinion to the extent that it relies on the DeCosters' negligence in affirming their sentences of imprisonment.

BEAM, Circuit Judge, dissenting.

Austin (Jack) and Peter DeCoster, entered pleas of guilty because their corporation sold eggs contaminated by a strain of salmonella enteritidis bacteria during a period of time extending "[b]etween about the beginning of 2010 and in or about August 2010." The government contends that these were federal misdemeanor offenses under 21 U.S.C. § 331(a) and § 333(a)(1). As noted by the district court,[1] they were at the time of the alleged offenses the two ranking corporate officers of Quality Egg, LLC (Quality Egg)—Jack being the trustee of the trust that owned Quality Egg and Peter, his son, being the Chief Operating Officer of this multistate corporate enterprise.

At all relevant times, Quality Egg operated six Iowa farms with 73 barns filled with 5 million laying hens and 24 barns filled with young chicks that had not begun to lay eggs. Quality Egg also had several processing plants where eggs were cleaned, packed, and shipped. Jack also owned several other egg-production companies in the state of Maine where Peter apparently spent part of his working time. Collectively, these were large, diverse, and labor-intensive agricultural operations requiring several levels and areas of management, as well as a substantial number of "hands-on" production workers.

At the outset, it is compelling to discern that the DeCosters' pleas of guilty and waiver of trial by jury in

[1] I admit to advancing a measure of factual redundancy by way of this dissent. However, I do so to lay a foundation for some additional evidentiary emanations crucial to an adequate understanding of the management of this complex business operation insofar as such management relates to the criminal prosecution of these two corporate executives.

defense of these criminal misdemeanor charges were substantially cabined by a series of factual and procedural stipulations by the prosecutors and the DeCosters pursuant to Federal Rule of Criminal Procedure 11, all of which were accepted by and binding upon the district court.

The record discloses that salmonella contamination of eggs sold by Quality Egg was the sole basis for adulteration claims under § 331(a) concerning the DeCosters as individuals. Given such factual predicate, the government stipulated that "[t]o date" (April 18, 2014), "the government's investigation has not identified any personnel employed by or associated with Quality Egg, including the defendant[s], who had knowledge during the [charged] time frame from January 2010 through August 12, 2010, that eggs sold by Quality Egg were, in fact, contaminated with *Salmonella* [*Enteritidis*]." Further, the government conceded that the criminal complaint against the DeCosters as executives of Quality Egg was animated by salmonella-prevention regulations published by the FDA on July 9, 2009, but not placed in force until July 9, 2010, through adoption of an Egg Safety Rule. The government also stipulated that "until adoption of the Egg Safety Rule in July 2010, there was no legal or regulatory requirement" for Quality Egg to comply with these regulations. The record also establishes that, given the state of the art of poultry-sanitation management, egg-safety difficulties, especially involving salmonella contamination, are inherent in such operations.[2]

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[2] Respectfully, I do not agree that *Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489, casts a long, dark incarceration shadow over the DeCosters as contended by the court's opinion and the separate concurrence, especially in view of the more recent

In short, large numbers of employees and supervisors were needed and employed by Quality Egg in an attempt to avoid problems with this ubiquitous pathogen. Thus, the misdemeanor convictions found and imposed by the district court in response to the DeCosters' very limited guilty pleas amounted to crimes and sentences based upon almost wholly nonculpable conduct.

On the record and the stipulated facts, it is also clear that the DeCosters lacked the necessary mens rea or "guilty mind," that is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime," *Mens Rea*, *Black's Law Dictionary* (10th ed. 2014). This mens rea requirement is especially applicable when the crime, as here, is punished by imprisonment. Although § 333(a)(1) purports to authorize a criminal misdemeanor sentence of "imprison[ment] for not more than one year," the DeCosters' presentence motions to preclude any such sentence of imprisonment based

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Supreme Court jurisprudence emerging from *Zadvydas*, *Staples*, and *Torres*. The opinions should note that Park's sentence actually amounted to $250 in fines and no incarceration.

It is also unfair for the concurrence to contend that the DeCosters negligently failed to prevent a salmonella outbreak within the broad reach of their corporate operations. After all, the government fully conceded in the plea agreements used to obtain the convictions that neither the DeCosters nor any other Quality Egg employees were aware of any salmonella contamination at any times relevant to the misdemeanor violations charged in the criminal informations. It is likewise inequitable in my view for the court and the concurrence to credit the government's inflammatory sentencing rhetoric received by the district court to support corporate-officer incarceration especially since such pleas were obtained through benign factual stipulations of criminal liability fully agreed upon by the parties.

upon the vicarious-liability standard the district court applied should have been granted.

The Fifth Amendment Due Process Clause forbids the government from depriving any person of liberty without due process of law. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). Such a due process violation as attends the DeCosters' prison sentence is well illustrated in *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). Under the National Firearms Act, 26 U.S.C. §§ 5801-5872, any fully automatic weapon is a "firearm" within the meaning of the statute. *Staples*, 511 U.S. at 602, 114 S.Ct. 1793. The Act, in turn, makes it a crime to possess a firearm that is not registered. *Id.* at 602-03, 114 S.Ct. 1793. Staples possessed an unregistered semi-automatic rifle that, unbeknownst to him, had been modified to permit automatic firing. *Id.* at 603, 114 S.Ct. 1793. Upon prosecution under the Act, the district court ruled that the government did not have to prove that Staples knew the weapon fired automatically because of the modification by someone else. *Id.* at 604, 114 S.Ct. 1793. He was convicted and sentenced to prison. *Id.*

On appeal, the Supreme Court reversed, saying "we must construe [an imprisonment] statute in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." *Id.* at 605, 114 S.Ct. 1793 (citation omitted). While the government argued, as it does in this case, that a presumption of the need for a finding of mens rea did not apply in *Staples*, the Supreme Court rejected the argument and reversed, holding that

Staples's lack of knowledge of the weapon's capability of automatic fire prohibited his conviction and prison sentence. *Id.* at 619, 114 S.Ct. 1793. And, the Supreme Court's more recent and perhaps more forceful iteration of this state-of-mind requirement came in *Torres v. Lynch*, ——U.S. ——, 136 S.Ct. 1619, —— L.Ed.2d —— (2016). The Court, amplifying on *Staples*, stated:

> Consider the law respecting *mens rea*. In general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense. That is so even when the "statute by its terms does not contain" any demand of that kind. In such cases, courts read the statute against a "background rule" that the defendant must know each fact making his conduct illegal. Or otherwise said, they infer, absent an express indication to the contrary, that Congress intended such a mental-state requirement.

Torres, 136 S.Ct. at 1630-31 (citations omitted) (first quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); next quoting *Staples*, 511 U.S. at 619, 114 S.Ct. 1793).

There is, of course, no express congressional statement to the contrary contained in § 331(a) or § 333(a)(1). While it might be possible to concoct an actionable interpretation of § 333(a)(1) that omits a mens rea requirement, Congress has no power to enact a federal statute that violates the Fifth Amendment Due Process Clause.

This court and the district court cite cases that they contend support a rationale that a criminal sentence of imprisonment is sometimes valid without proof of mens rea, or, a guilty mind. But, the cases advanced

by the government and the courts cannot bear the load placed upon them, both as matters of fact and law. *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943), a case substantially predating *Zadvydas*, *Staples*, and *Torres*, provided an opinion fashioned to remedy an unexpected jury verdict. Dotterweich, who was the president and general manager of a pharmacal company, was charged, along with his corporation, with three misdemeanor counts of violation of the Federal Food, Drug and Cosmetic Act under § 331(a) and § 331(a)(1). *Dotterweich*, 320 U.S. at 278, 64 S.Ct. 134. The jury found the corporation not guilty but convicted Dotterweich, fining him $500 on each of the three misdemeanor counts and imposing 60 days of probation. *Id.*; *see United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir.1942), *rev'd*, *Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48. There was no incarceration. The circuit court reversed the conviction and sentence but the Supreme Court reversed on the facts involved. *Dotterweich*, 320 U.S. at 285, 64 S.Ct. 134. Four justices dissented from Justice Frankfurter's reversal opinion. *Id.* at 293, 64 S.Ct. 134.

Both courts also advance the holding in *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). As an initial matter, it must be noted that Park was charged with 21 U.S.C. § 331(k), whereas the purported DeCoster violations involve § 331(a). *Id.* at 660, 95 S.Ct. 1903. And, Park was individually charged as President of Acme Markets, Inc., and tried and convicted by a jury on five counts of violating subsection (k). *Id.* at 660, 666, 95 S.Ct. 1903. He was, however, sentenced to $50 per count for a total of $250.00. *Id.* at 666, 95 S.Ct. 1903. There was no incarceration. Incarceration of Dotterweich or Park, as we now know, would have violated Supreme Court

precedent as clearly established in *Zadvydas*, *Staples*, and *Torres*.

In fashioning sentences or affirmances of such sentences today, the court and the district court opinions complain at length that Quality Egg between 2006 and 2010 failed to sufficiently test eggs for salmonella and perform other corporate activities in connection with its consumption-egg production and marketing. But, the government's individual criminal-activity allegations at issue here are bottomed upon acts occurring only in late July and early August of 2010.

The basis for the court's affirmance of the district court is fully encapsulated as follows:

> Here, as owner of Quality Egg, Jack decided which barns were subject to salmonella environmental testing, and as chief operating officer, Peter coordinated many of the company's salmonella prevention and rodent control efforts. Neither of the DeCosters claim to have been "powerless" to prevent Quality Egg from violating the FDCA. Despite their familiarity with the conditions in the Iowa facilities, they failed to take sufficient measures to improve them. On this record, the district court reasonably found that "the defendants 'knew or should have known,' of the risks posed by the insanitary conditions at Quality Egg in Iowa, 'knew or should have known' that additional testing needed to be performed before the suspected shell eggs were distributed to consumers, and 'knew or should have known' of [ ] proper remedial and preventative measures to reduce the presence of [salmonella]." The FDCA "punishes neglect where the law requires care." We conclude that the record here shows that the

> DeCosters are liable for negligently failing to prevent the salmonella outbreak.

Ante at 8-9 (alterations in original) (citations omitted).

Thus, the court validates the district court's prison sentence based upon the DeCosters' supposed negligence in performing executive functions on behalf of Quality Egg. However, there is no precedent that supports imprisonment without establishing some measure of a guilty mind on the part of these two individuals, and none is established in this case. The government concedes in the DeCosters' plea agreements that they did not know that any eggs distributed by Quality Egg at any relevant times "were, in fact, contaminated with *Salmonella* [*Enteritidis*]." Indeed, the plea agreements explicated above further concede that no person associated with Quality Egg had knowledge of salmonella contamination at any relevant time. And when first alerted to the problem by the FDA in August of 2010, Quality Egg immediately, and at great expense, voluntarily recalled "hundreds of millions of shell eggs produced at Quality Egg's facilities." This is hardly the stuff of "guilty minds."

Finally, I concede that the court cites two cases in which individual prison sentences were imposed for violations of § 331(a) and § 333(a)(1). They are *United States v. Greenbaum*, 138 F.2d 437 (3d Cir.1943), and *United States v. Higgins*, No. 09-403-4, 2011 WL 6088576 (E.D. Pa. Dec. 7, 2011). Neither case is apposite here for reasons of fact or law. *Greenbaum* is clearly wrong given Supreme Court precedent established since 1943, especially that found in *Zadvydas*, *Staples*, and *Torres*. And defendant Higgins, contrary to the DeCosters, "personally participated in the decisions to proceed with unauthorized clinical trials to

test the safety and efficacy of [adulterated compounds] on humans." *Higgins*, 2011 WL 6088576, at *13.

There is no proof that the DeCosters, as individuals, were infected with a "guilty mind" or, perhaps, even with negligence. Clearly, the improvident prison sentences imposed in this case were due process violations.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. IOWA, CENTRAL DIVISION

No. C 14-3024-MWB

UNITED STATES OF AMERICA,

Plaintiff,

v.

QUALITY EGG, LLC, et al.,

Defendant.

Signed April 14, 2015

MEMORANDUM OPINION AND ORDER
REGARDING DEFENDANTS' MOTIONS
PRIOR TO SENTENCING

MARK W. BENNETT, District Judge.

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I. INTRODUCTION

Gilead is a fictional novel based in the small town of Gilead, Iowa. The main character, Reverend John Ames, is dying from heart complications and, in a Ciceronian fashion,[1] he decides to write a letter to his seven-year-old son with the intention that his son will read that letter after Reverend Ames dies. The novel is an account of life lessons learned by Reverend Ames as well as daily occurrences with his son, wife, and other family and community members. In a theoretical sense, the imagery from one scene in *Gilead* aptly incorporates some of the key contents of this case—*i.e.*,

[1] Marcus Tullius Cicero, an infamous Roman philosopher, statesman, and attorney, directed *De Officiis* (*On Duties* or *On Obligations*), in part, to his son, also named Marcus. *See* CICERO, ON DUTIES 34 (M.T. Griffin & E.M. Atkins eds., Cambridge University Press 1991). "It is both genuinely appropriate to Marcus Cicero and also directed at others, particularly young Romans of the governing class," wrote Miriam Griffin in the Introduction. *Id.* Cicero's text begins as follows: "Marcus, my son, you have been a pupil of Cratippus' for a year already, and that in Athens." *Id.* at 109. Interestingly, the historical context in which Cicero wrote his work placed him in a state of unease, not unlike Reverend Ames's state in *Gilead* based on his health, because of Cicero's "uncertainty and anxiety about the fate of the Roman Republic[.]" *Id.* at 23.

chicken eggs, a father and a son, rural Iowa, and a disaster:

> My mother took a great deal of pride in her chickens, especially after the old man was gone and her flock was unplundered. Culled judicially, it throve, yielding eggs at a rate that astonished her. But one afternoon a storm came up and a gust of wind hit the henhouse and lifted the roof right off, and hens came flying out, sucked after it, I suppose, and also just acting like hens. My mother and I saw it happen, because when she smelled the rain coming she called me to help her get the wash off the line.
>
> It was a general disaster . . .
>
> Marilynne Robinson, GILEAD 66-67 (2004).

In August 2010, a disaster on a much larger scale than the one described in *Gilead* occurred. At that time, "a storm came up and a gust of wind hit the henhouse," so to speak, when thousands of people across the country were sickened by adulterated eggs sold at restaurants and grocery stores. It was determined that the eggs carried *Salmonella Enteritidis* (SE) bacteria, and the eggs were traced back to an Iowa-based company, Quality Egg, LLC (Quality Egg). That company, for several years prior to 2010, owned and operated egg production and processing facilities in small towns, like the fictional town of Gilead, across Iowa, including: Galt, Clarion, Alden, and Dows.[2]

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[2] Quality Egg also operated under the names Wright County Egg, Environ, and Lund/Wright Company. *See* Austin DeCoster's PSIR at ¶ 6; *see also* Peter DeCoster's PSIR at ¶ 6. Quality Egg also operated two distinct processing facilities under an agreement with Hillandale Farms in Alden, Iowa, and West

Austin "Jack" DeCoster owned and controlled the activities of Quality Egg. Peter DeCoster, Austin DeCoster's son, was the Chief Operating Officer of Quality Egg. Together, the father-son duo exercised significant control over the operations of the company. After the U.S. Food and Drug Administration (FDA) presented epidemiologic information to Quality Egg, the defendants voluntarily recalled millions of dozens of eggs in 2010.

The two executives of Quality Egg, Austin and Peter DeCoster, were later charged with shipping and selling shell eggs that contained SE across state lines as responsible corporate officers under 21 U.S.C. §§ 331(a) and 333(a)(1).[3] The two defendants pleaded

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Union, Iowa. *See* Austin DeCoster's PSIR at ¶ 8; *see also* Peter DeCoster's PSIR at ¶ 8.

[3] The "responsible corporate officer" (RCO) doctrine is a creation of the common law. As Brenda S. Hustis and John Y. Gotanda explain, "The RCO doctrine arose from two United States Supreme Court decisions involving prosecutions under the Federal Food, Drug, and Cosmetic Act of 1938 ('FDCA')." Brenda S. Hustin & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*,25 LOY. U. CHI. L.J. 169, 172-73 (1994) (citing *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975); *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943)). The authors summarize the holdings in *Park* and *Dotterweich*, and provide the following: "In short, in Dotterweich and Park, the Supreme Court established the principle that a corporate official with authority and responsibility for supervising subordinates may be held criminally liable—without a showing of affirmative wrongful action or intent—for a subordinate's violation of a public welfare statute that contains no mens rea requirement and carries only misdemeanor penalties. The principle has become known as the RCO doctrine." *Id.* at 176; *see also Park*, 421 U.S. at 673-74, 95 S.Ct. 1903 ("The concept of a 'responsible relationship' to, or a 'responsible share' in, a violation of the [FDCA] indeed imports some measure of blameworthiness; but it is equally clear that the

guilty to their crimes on June 3, 2014 (docket nos. 16-1, 17-1), and they appeared before me on April 13, 2015, for sentencing. On June 3, 2014, Austin DeCoster also appeared, on behalf of the defendant organization, and pleaded guilty to three counts of a three-count Information, including Bribery of a Public Official in violation of 18 U.S.C. § 201(b)(1) (Count 1); Selling Misbranded Food With Intent to Defraud or Mislead, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2) (Count 2); and Selling Adulterated Food, in violation of 21 U.S.C. §§ 331(a) and 333(a)(1) (Count 3). On April 13, 2015, I also sentenced the organization, Quality Egg.

II. THE DEFENDANTS' MOTIONS PRIOR TO SENTENCING

A sentencing matter arose from motions filed by the two individual defendants, Austin DeCoster and Peter DeCoster (referred to jointly below as the DeCosters or the defendants), prior to their sentencing hearing. Austin DeCoster filed his Motion That A Sentence Of Incarceration Or Confinement Is Unconstitutional (docket no. 64) on October 6, 2014. A memorandum in support of Austin Decoster's motion was filed two days later (docket no. 67). On October 22, 2014, Peter

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Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."); *Dotterweich*, 320 U.S. at 281, 64 S.Ct. 134 ("[The FDCA] dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.").

DeCoster submitted a motion (docket no. 71), which relied on Austin DeCoster's memorandum and adopted the same arguments and constitutional challenges.

The core of the defendants' contention was that for their "strict liability offense, a sentence of incarceration, including intermittent, community, or home confinement, or other restriction on liberty other than probation, would be unconstitutional" on due process grounds. Austin DeCoster's Memorandum at 2-3. This is because the defendants "had no knowledge of the violation and no knowledge of the conduct underlying the offense." *Id.* at 1.

In reply, the prosecutors filed a resistance brief on October 23, 2014 (docket no. 74). The prosecutors requested that I "deny the defendants' motions" and "impose the sentences that [I] find[ ] appropriate in light of the evidence." Resistance Brief at 2. The prosecutors' argument was two-fold: (1) the defendants knew about the insanitary conditions at Quality Egg, and, therefore, had knowledge that there was an increased risk of their eggs being adulterated; and (2) even if proof of *mens rea* is absent, a sentence of incarceration would not be unconstitutional based on either the due process clause of the Fifth Amendment or the Eighth Amendment. *Id*. at 4, 6.

The defendants filed a joint reply brief on November 6, 2014 (docket no. 78). That brief repeated arguments from the defendants' initial memorandum and urged that the case law, the Due Process Clause, and the Eighth Amendment,[4] do not permit a sentence of

[4] Nowhere in the defendants' initial brief, in support of their motion that a sentence of incarceration or confinement is unconstitutional, do they argue that imprisonment would violate the Eighth Amendment. *See* Austin DeCoster's Memorandum at 1-7.

imprisonment or confinement for the defendants' offenses. Defendants' Reply Brief at 4, 7. Additionally, according to the defendants, proving the defendants' alleged relevant "knowledge" of their offenses by a preponderance of the evidence at sentencing, rather than a trial by jury, would be a violation of the Sixth Amendment of the Constitution. *Id.* at 9.

III. FACTUAL BACKGROUND

On June 2, 2014, the DeCosters pleaded guilty before United States Magistrate Judge Leonard T. Strand to selling adulterated food into interstate commerce in violation of the FDCA, 21 U.S.C. § 331(a), which is a misdemeanor offense, carrying a possible term of imprisonment of up to one year. *See* 21 U.S.C. § 331(a); *see also* 21 U.S.C. § 333(a)(1).[5] The defendants committed the crimes in their capacities as

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Rather, the defendants only made that contention after the prosecutors argued that the defendants incorrectly framed their argument. As the prosecutors put it,

> As an initial matter, although defendants assert that "[a] sentence of incarceration . . . would violate [their] *constitutional right to due process*," [Austin DeCoster's Memorandum at 2] (emphasis added), it is not clear that they have framed their argument in the correct terms. Defendants are not contesting the constitutionality of being subjected to criminal liability in the first instance; they challenge only the *punishment* that may be imposed for their crimes. A defendant's claim that the severity of his penalty is disproportionate to his offense is ordinarily understood to implicate the Eighth Amendment, which prohibits "cruel and unusual punishment." U.S. Const. amend. VIII.

Resistance Brief at 10.

[5] Section 331(a) prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded," and "causing" of the same acts. 21 U.S.C. § 331(a). Section

corporate officers of Quality Egg: Austin DeCoster was the trustee of the DeCoster Revocable Trust, which owned Quality Egg, and Peter DeCoster was the Chief Operating Officer.

According to his plea agreement, Austin DeCoster "exercised substantial control over the operations of Quality Egg and related entities and assets in Iowa." Austin DeCoster's Rule 11 Plea Agreement (docket no. 16-1), ¶ 7. Peter DeCoster "exercised some control over the production and distribution of shell eggs by Quality Egg and related entities and assets in Iowa." Peter DeCoster's Rule 11 Plea Agreement (docket no. 17-1), ¶ 7. The following facts quoted from the parties' Rule 11 plea agreements are undisputed and were stipulated to by the parties:

> Between about the beginning of 2010 and in or about August 2010, Quality Egg introduced and caused to be introduced into interstate commerce food, that is shell eggs, that were adulterated. The shell eggs were adulterated in that they contained a poisonous and deleterious substance, that is, *Salmonella Enteritidis*, that may have rendered them injurious to health. Quality Egg produced, processed, held, and packed the contaminated eggs in Iowa and sold and caused the distribution of the eggs to buyers in states other than Iowa. At the time Quality Egg sold the contaminated eggs, if the contamination of eggs had been known to the defendant[s], [they] [were] in [ ] position[s] of

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333(a)(1) provides that "[a]ny person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both." 21 U.S.C. § 333(a)(1).

> sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs.[6]

Austin DeCoster's Rule 11 Plea Agreement at ¶ 7; Peter DeCoster's Rule 11 Plea Agreement at ¶ 7.

According to the findings of the CDC, as set forth in the defendants' PSIRs, there were thousands of consumers sickened by the SE outbreak in 2010. *See* Austin DeCoster's PSIR at ¶ 59; *see also* Peter DeCoster's PSIR at ¶ 59. In fact, "the CDC determined that approximately 1,939 reported illnesses and/or cases of salmonellosis were likely associated with the SE outbreak in 2010."[7] Austin DeCoster's PSIR at

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[6] "According to the Centers for Disease Control and Prevention ("CDC"), *Salmonella* is a group of bacteria that can cause diarrheal illness in humans. They are microscopic living creatures that pass from the feces of people or animals to other people or other animals. There are many different kinds of *Salmonella* bacteria." Austin DeCoster's PSIR at ¶ 11; Peter DeCoster's PSIR at ¶ 11. People infected by *Salmonella* "develop diarrhea, fever, and abdominal cramps 12 to 72 hours after infection," and the illness generally persists for "four to seven days[.]" Austin DeCoster's PSIR at ¶ 12; Peter DeCoster's PSIR at ¶ 12. While some infected persons recover without treatment, some are hospitalized by severe diarrhea, and in some cases, the *Salmonella* infection can "spread from the intestines to the blood stream, and then to other body sites, and can cause death unless the person is treated promptly with antibiotics." Austin DeCoster's PSIR at ¶ 12; Peter DeCoster's PSIR at ¶ 12.

[7] The statistics are more calamitous than they initially appear. The number of persons affected by the outbreak in 2010 was presumably a lot higher. Because there were 1,939 reported cases of SE, and for every laboratory-confirmed case, there are 29 cases of SE unreported, the CDC estimated that "more than 56,000 persons in the United States may have been sickened by the SE outbreak in 2010." Austin DeCoster's PSIR at ¶ 72 n. 14; Peter DeCoster's PSIR at ¶ 72 n. 14.

¶ 72; Peter DeCoster's PSIR at ¶ 72. Based on the DeCosters' plea agreements, the parties agreed that the DeCosters did not have "knowledge, during the time frame from January 2010 through August 12, 2010, that eggs sold by Quality Egg were, in fact, contaminated with *Salmonella Enteritidis*." Austin DeCoster's Rule 11 Plea Agreement at ¶ 7; Peter DeCoster's Rule 11 Plea Agreement at ¶ 7.

After the SE outbreak was traced back to Quality Egg's facilities, the FDA requested that Quality Egg issue a voluntary recall of hundreds of millions of shell eggs produced at Quality Egg's facilities. See Austin DeCoster's PSIR at ¶ 10, 63; *see also* Peter DeCoster's PSIR at ¶ 10, 63. Quality Egg followed the FDA's request. According to the parties' stipulations, other than one occasion in 2009, "prior to July 2010, Quality Egg did not conduct SE tests on eggs or divert eggs from the market based upon the receipt of a positive environmental SE result." Parties' Stip. at ¶ 2; *see also* Austin DeCoster's PSIR at ¶ 25; Peter DeCoster's PSIR at ¶ 25. After Quality Egg's recall, between August 12, 2010 and August 30, 2010, the FDA conducted a regulatory inspection of Quality Egg's facilities in Iowa and observed "egregious unsanitary conditions," including live and dead rodents, beetles, flies, and frogs in the laying areas, feed areas, and conveyer belts, and a room filled with manure. Austin DeCoster's PSIR at ¶ 66; Peter DeCoster's PSIR at ¶ 66.

It is important to note, here, that I adopt every unobjected to portion of the defendants' PSIRs as findings of fact in this case. Because certain unobjected to portions of the defendants' PSIRs are particularly

relevant to this Memorandum Opinion and Order,[8] I set them forth below:

A. Quality Egg Provided False Information and Documents

29. Between 2007 and 2010, one of Quality Egg's major customers was U.S. Foodservice ("USFoods"). The broker for Quality Egg's USFoods account was Lund Eggs, owned by Joan Lund (now deceased). As a condition for buying eggs produced by Quality Egg, USFoods required that the Quality Egg plants where the USFoods eggs were processed—primarily Quality Egg Plants 3 and 6—undergo annual food safety audits by an independent auditing firm, one of which was AIB. Each audit consisted of a scheduled two-day plant visit: one day the auditor conducted a physical inspection of the plant; the other day the auditor reviewed the food safety and sanitation-related paperwork that Quality Egg was required to maintain, which included Quality Egg's HACCP Plan. The HACCP Plan itself required Quality Egg to maintain documentation of certain tasks to be performed daily, weekly, or monthly. When the AIB auditor completed his review of the facilities and documentation, he produced two documents: (1) a formal AIB Audit Report that explained his findings and observations, and gave the facility a score; and (2) a USFoods Addendum, which was a checklist of items required specifically by USFoods. The auditor provided these two

[8] The numbers of the paragraphs that I cite to in the three defendants' PSIRs are listed in numerical order. However, to be clear, paragraphs 23 to 33, 45 to 48, and 66 to 71 are taken from Austin DeCoster's and Peter DeCoster's PSIRs. Paragraphs 53 to 62 are taken from Quality Egg's PSIR. Also, as the reader will soon become aware, I have redacted the names of certain persons, not the DeCosters, from this Memorandum Opinion and Order.

documents to Joan Lund, who in turn submitted them to USFoods. In order to supply eggs to USFoods, the audited facility had to receive a score of "Superior," which was 900 points or higher.

30. During every AIB audit between 2007 and 2010, Quality Egg and [redacted] made significant misrepresentations, including material omissions, to two AIB auditors with regard to Quality Egg's food safety and sanitation practices and procedures. With respect to the documentation required for every audit, [redacted] and others at Quality Egg directed the manufacture and falsification of documents required for the audit, with the intent that the auditors and USFoods would rely on the fabricated documents. On the days leading up to each audit, [redacted] identified numerous documents that were supposed to have been completed monthly, weekly, or daily that were missing from Quality Egg's files; many of those documents then appeared in the files on the day the auditor was to review them. On the days leading up to an audit, [redacted] gave Quality Egg employees blank, signed forms and instructed them to fill in the missing information. Among the forms that were manufactured and completed late at the direction of [redacted] and others at Quality Egg were preoperative sanitation reports, daily clean-up forms, pest control reports, daily maintenance reports, and visitor logs.

31. Both through documents and through oral representations, [redacted] and Quality Egg misled the AIB auditors about the pest control measures that were in place in the processing plants and layer barns. [redacted] and Quality Egg represented to AIB auditors during the annual audits that Quality Egg had a pest control program in place for Plants 3 and 6 during the entire time period between 2007 and 2010. In fact,

Quality Egg's retention of a pest control company was sporadic over this time period. For various time periods between July 2006 and August 2010, Quality Egg had no outside pest control services to deal with rodents or insects in the processing plants, and had no outside pest control services at all to deal with rodents in the layer barns.

32. [redacted] and Quality Egg also misled the AIB auditors about the Salmonella prevention strategies and measures used by Quality Egg for Plants 3 and 6, with the intent that the auditors and USFoods would rely on those misrepresentations. The USFoods Addenda that the AIB auditors completed required Quality Egg's plants to have in place "product testing protocols and appropriate intervention technologies to reduce or limit the amount of Salmonella found in fresh shell eggs," and that such measures be included in Quality Egg's HACCP Plan. For each AIB audit between 2007 and 2010, [redacted] and Quality Egg provided the AIB inspector with documents that indicated that Quality Egg performed flock testing to identify and control Salmonella. In fact, no such "flock testing" was ever done. For the August 2009 AIB audits for Plants 3 and 6, [redacted] and Quality Egg made the further misrepresentation B reflected in the USFoods Addenda for those audits B that Quality Egg had a Salmonella program in place for the layer and pullet barns. Moreover, [redacted] and Quality Egg did not take preventative measures or employ strategies to reduce or limit Salmonella in Quality Egg's table eggs when they received positive results from the sporadic SE environmental testing and necropsies that Quality Egg did perform.

33. When Quality Egg first started selling eggs to USFoods through Lund Eggs, Quality Egg represented

to Lund Eggs that it had a very aggressive Salmonella prevention program that was ahead of the industry. Quality Egg told Lund Eggs that it performed blood tests for Salmonella on pullets and also environmental swab tests. [redacted] and Quality Egg represented to Lund Eggs and USFoods during an audit by USFoods that, if its tests came back positive for Salmonella, Quality Egg would divert the eggs. In fact, no eggs were ever diverted, even though [redacted] and Quality Egg received numerous positive environmental SE tests for Plants 3 and 6.

. . .

B. Quality Egg Bribed a USDA Official

45. On more than one occasion in 2010, inspectors of the U.S. Department of Agriculture (USDA) exercised their official authority to retain pallets of shell eggs at Quality Egg's egg production and processing facilities in Wright County, Iowa. Such pallets of eggs were retained for failing to meet minimum quality grade standards promulgated by the USDA. Pursuant to USDA procedures, USDA inspectors must retain or "red tag" pallets of eggs which, upon inspection, fail to meet appropriate standards. Pallets of retained or "red tagged" eggs are legally restricted and cannot be shipped or sold unless such eggs are properly re-processed and released for shipment or sale by appropriate USDA personnel. Specifically, the retained pallets of eggs at Quality Egg's facility contained too great a percentage of restricted eggs under minimum USDA quality grade standards. That is, too many of these restricted eggs qualified as "checks," "dirty eggs," "leakers," or "losses" as defined by 21 U.S.C. § 1033(g).

46. On or about April 12, 2010, [redacted] authorized the disbursement of $300 in Quality Egg petty cash to

[redacted] knowing and intending that the cash would be used by [redacted] to bribe a USDA inspector. Specifically, [redacted] instructed Quality Egg's Chief Financial Officer to give [redacted] $300 from Quality Egg's petty cash fund. [redacted] and [redacted] provided the bribe to the inspector in an attempt to corruptly influence the inspector with regard to an official act, that is, to exercise his authority to release pallets of retained eggs for sale by Quality Egg without re-processing them as required by law and USDA standards. On at least one additional occasion in 2010, [redacted] and [redacted] provided a bribe to the same inspector for the same purpose. The inspector is now deceased.

47. In providing the bribes, [redacted] and [redacted] were each acting within their scope of employment at Quality Egg and were acting with intent to benefit Quality Egg.

48. The prosecutor's investigation has revealed no evidence that, prior to the bribe made on or about April 12, 2010, either [defendant] had knowledge that the bribe was going to occur.

. . .

C. Quality Egg Changed the "Julian Dates" on Packages of Eggs and Sold Misbranded Eggs into Interstate Commerce

53. In the United States shell egg industry, shell egg producers put dates on cases of eggs to designate the date that the eggs were processed. The dates are typically expressed as a "Julian date." In turn, as is well known in the shell egg industry, shell eggs are typically processed within 24 hours of the time the eggs are laid. Processing dates are typically applied to cases of eggs and not necessarily to each individual

carton of eggs. At the relevant times, the States of California and Arizona required that shell eggs be sold within 30 and 24 days of processing; other states had similar laws restricting the sale of older eggs.

54. Beginning no later than January 1, 2006, and continuing until approximately August 12, 2010, Quality Egg personnel, under the direction and with the approval of [redacted], shipped some eggs in interstate commerce to various wholesale customers with deliberately mislabeled processing dates and expiration dates. In fact, some of the eggs were older than indicated by the dates on the egg cases. Some of the eggs were also shipped with no labeling so that, in some instances, labeling with inaccurate processing and expiration dates could be sent to wholesalers and affixed to the cases at the destination.[9]

55. Because Quality Egg produced in excess of one million eggs every day and the market varied up and down frequently, Quality Egg often had a surplus of eggs in storage. Quality Egg's options were to sell the surplus eggs to a wholesale shell egg customer or to sell them to a breaker facility that bought them for approximately one-half the market price of shell eggs. Quality Egg's typical practice was to sell the eggs at a reduced price to a wholesale shell egg customer rather than to sell them to a breaker. These surplus eggs had been in storage for periods of time ranging from 14 days to 40 or more days. [redacted] referred to older eggs as "distressed eggs." [redacted] also said the only way he would not sell such eggs to a wholesale shell egg customer was if the eggs were moldy. If said eggs

[9] I omitted the footnotes in paragraphs 53 and 54 from Quality Egg's PSIR.

were moldy, then [redacted] would instruct Quality Egg personnel to sell the eggs to a breaker facility.[10]

56. There were a number of ways that, under the direction and approval of [redacted], Quality Egg mislabeled older eggs with newer processing and expiration dates prior to shipping the eggs to customers in California, Arizona, and other states. Sometimes Quality Egg personnel did not put any processing or corresponding expiration dates on the eggs when they were processed. The eggs would be kept in storage for several days and up to several weeks. Then, just prior to shipping the eggs, Quality Egg personnel labeled the eggs with processing dates that were false, in that the dates were more recent than the dates that the eggs had actually been processed, with corresponding false expiration dates. In other instances, Quality Egg personnel relabeled older eggs with processing dates that were false, in that the dates were more recent than the dates that the eggs had actually been processed, with corresponding false expiration dates. Quality Egg personnel did this by removing the original labeling and affixing new, false labeling to the egg cases, and also by placing new, false labeling over existing labeling on the egg cases. In other instances, Quality Egg personnel sent new labeling with processing dates that were false, in that dates were more recent than the dates that the eggs had actually been processed and with corresponding false expiration dates, with the drivers of the trucks in which the eggs were shipped, so the wholesale customer could apply

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[10] I note that there was an objection to paragraph 55; however, based on the defendants' subsequent objections I consider it withdrawn. Even if it is not withdrawn, I overrule the objection, and, in any event, I am permitted to consider this information when analyzing the factors set forth under 18 U.S.C. § 3553(a).

the new labeling at the destination. In addition, at the request of certain wholesale customers, Quality Egg personnel printed new labeling with processing dates that were false, in that dates were more recent than the dates that the eggs had actually been processed and with corresponding false expiration dates, and sent false labeling to the wholesale customers so that older cases of eggs could be relabeled to falsely indicate more recent dates.

57. Through these mislabeling practices, Quality Egg personnel, including [redacted], intended to mislead, at least, state regulators and retail egg customers regarding the age of the eggs. These mislabeling practices had the effect of misleading state regulators and retail egg customers regarding the age of these eggs.

58. In mislabeling eggs with false processing and corresponding expiration dates, [redacted] and other Quality Egg personnel were each acting within the scope of their employment by Quality Egg and were acting with intent to benefit Quality Egg.

59. The mislabeling of eggs at Quality Egg with inaccurate dates was a common practice and was well known among several Quality Egg employees. It was an ongoing practice before [redacted] became involved in Quality Egg sales in 2002.

60. As a result of the mislabeling of eggs with false processing and corresponding expiration dates, [redacted] and other Quality Egg personnel caused an actual, reasonably foreseeable, pecuniary harm to more than 250 retail egg customers in a total amount of more than $400,000 but not more than $1,000,000.[11]

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[11] I omitted a footnote in paragraph 60 of Quality Egg's PSIR.

61. The prosecutor has investigated whether any persons became ill or otherwise sustained bodily injury as a result of ingesting eggs sold with false processing and corresponding expiration dates. To date, the prosecutor's investigation has not identified any such persons.

62. To date, the prosecutor's investigation has revealed no evidence that Peter DeCoster and/or [Austin] DeCoster had knowledge of these mislabeling practices.

. . .

D. Quality Egg Failed to Meet FDA Regulatory Standards

66. Between August 12, 2010, and August 30, 2010, the FDA conducted a regulatory inspection of the following Quality Egg facilities: Layers 1, 2, 3, 4, and 6, and the feed mill. Many egregious unsanitary conditions were observed. Items noted were: live and dead rodents (mice) and frogs found in the laying areas, feed areas, conveyer belts, and outside of the buildings; skeletal remains of a chicken on a conveyer belt; numerous holes in walls and baseboards in the feed and laying buildings; missing vent covers; rodent traps were broken, did not have bait in them, and some traps still had dead rodents in them; manure piled to the rafters in one building, which was below the laying hens; a room was so filled with manure that it pushed the screen out of the door, allowing rodents access to the building; and live and dead beetles and flies throughout the chicken barns.

67. Based upon the inspection, the FDA issued a "Form 483 Inspectional Observations" report ("483 Report") and subsequently issued a more detailed

"Establishment Inspection Report." The following observations were included in the 483 Report:

> A. DeCoster[12] failed to implement and follow its written SE prevention plan (by failing to effectively implement various aspects of its egg biosecurity plan related to dogs, cats, rodents and other wild animals, and manure management);
>
> B. DeCoster failed to take steps to ensure there was no introduction or transfer of SE into or among poultry houses (including, with regard to inadequate doorway accesses, protective clothing, cleaning/sanitization of equipment, uncaged chickens using manure eight feet high to access the laying area, and a door being blocked by excess manure);
>
> C. DeCoster failed to achieve satisfactory rodent and pest control (as evidenced by the observation of specified numbers of live mice, and numerous live and dead maggots and live and dead flies);
>
> D. DeCoster failed to adequately document the monitoring of rodents and other pest control measures;
>
> E. DeCoster failed to adequately document compliance with biosecurity measures;
>
> F. Regarding the feed mill, wild birds were observed in the storage and milling areas (and nesting material was in the "closed" mixing system, ingredient storage, and truck filling

[12] According to the defendants' PSIRs, the FDA 483 Report used "DeCoster" as a shorthand reference for the company, Quality Egg, not to refer to a specific person. *See* Austin DeCoster's PSIR at ¶ 67 n. 13; *see also* Peter DeCoster's PSIR at ¶ 67 n. 13.

areas), ingredient bins had rusted holes and were otherwise inadequately closed, and outside grain bins had topside doors/lids open to the environment with pigeons entering and leaving the bins; and

G. Samples were collected during the inspection that tested positive for SE.

68. As of October 14, 2010, the FDA had made several determinations regarding SE contamination at Quality Egg facilities and the steps necessary to address the contamination. According to the FDA, Quality Egg's environmental and egg testing and the FDA's environmental and feed testing established that the SE contamination at Quality Egg's facilities was widespread. Given the extremely high level and pervasive nature of the contamination and the conditions identified at Quality Egg's facilities that were not sufficient to prevent the spread of SE, the FDA determined that depopulation of each of Quality Egg's hen houses was the appropriate action to minimize the likelihood of a recurrence of a food borne outbreak. The FDA offered the following reasons for its determination that lesser measures would be insufficient:

- Pervasive Salmonella Enteritidis (SE) contamination throughout the entirety of Wright County Eggs' (WCE) operation. SE was found in 63% (46/73) of house environments and in eggs from 40% (31/77) of houses. Additionally, SE was isolated from the wash water, feed mill, feed samples, feed ingredients, and a pullet house. These data are indicative of widespread SE contamination that is not localized to any one part of WCE's operation, but is

instead spread throughout the entirety of the WCE operation.

- The known presence of an additional egg-associated pathogen, Salmonella Heidelberg (SH), at the pullet houses. The younger a bird is, the more susceptible it is to infection. Since this pathogen was present at a time when the pullets were susceptible to colonization, it is possible that these birds, if they are now laying eggs, are producing eggs that contain SH.
- An incidence rate of SE positive eggs that is approximately 39 times higher than the estimate cited in the FDA's egg safety rule as being the current national incidence rate. Based on WCE's egg tests, the FDA calculated that 1 out of every 516 eggs at WCE was positive for SE compared to the expected rate of 1 in 20,000. This data is for the operation as a whole and importantly, all WCE farms have been determined to be producing SE positive eggs.
- The likelihood that current layers in production now have been exposed to SE positive feed. Current layers (Sites 2 and 4) would have been placed at WCE pullet rearing facilities sometime (approximate) between April and May 2010. These birds would have been fed potentially contaminated feed for several months prior to the FDA's identification of SE in the feed. As stated above, younger birds are more susceptible to colonization. Thus, current layers at Sites 2 and 4 may be producing eggs that contain SE.

- The likelihood that houses will be recontaminated. In light of the inter-connectivity of houses in an in-line operation, the fact that WCE houses are connected through a common walkway and biosecurity concerns revealed during the FDA's inspections, such as the lack of doors to some houses, the FDA is concerned about the possibility of recontamination. Given the pervasive nature of SE at WCE, even if a house environment is presently SE-negative, there is a distinct possibility that it will not remain SE-negative but will become contaminated with SE present elsewhere in WCE's facilities.
- An SE negative environmental test is not always indicative of SE negative eggs. At WCE there are eight houses with SE negative environmental tests that produced eggs that tested positive for SE (Farm 2 House 1; Farm 3 House 1; Farm 4 Houses 1 and 4; and Farm 6 Houses 1, 4, 5, and 8). These observations, coupled with the pervasive nature of SE at WCE's facilities, suggest that environmental negatives in WCE houses at present must be viewed with caution.
- A house with a negative environment and negative egg test still has the potential to produce positive eggs. Because only one—1,000 egg sample has been taken and because infected hens are known to lay SE positive eggs intermittently, it is very plausible that the full extent of SE contamination of eggs being produced at WCE has not yet been discovered and that the 40% figure mentioned above

is an underestimation of the extent of contamination.

- An inefficacious vaccination program in place at the time current layers were being grown out. A total of 54 flocks were vaccinated but 57% (31/54) of houses with vaccinated layers had SE positive environments and 17% (9/54) of houses with vaccinated layers produced eggs that tested positive for SE. The vaccination program appears to be inefficacious regardless of whether one or two doses were administered.
- While WCE claims to be operating a new and improved vaccination scheme presently, no data has been provided to the FDA which would demonstrate efficacy of that program.

69. In addition, the FDA emphasized that depopulation alone would not be sufficient, but should be done in conjunction with the following "necessary actions":

> removal of manure from all sites, cleaning and disinfection of all houses subsequent to manure removal, verification that cleaning and disinfection has rendered facilities free of SE and SH, repair of facilities to prevent ingress by rodents or birds, and resolution of all items described on the FDA Form 483. Such actions should be completed before repopulating any facility with chickens at any stage of maturity. In addition, we also believe you (WCE) must make certain that your (WCE's) feed mill and pullet rearing facilities are free of SE and SH. Once the entirety of WCE operations is free of SE and SH, adequate biosecurity measures must be followed to prevent a reoccurrence.

70. Between August 19, 2010, and August 24, 2010, the FDA conducted a regulatory inspection of Hillandale's West Union (Layer 9) and Alden facilities and its corporate office. It was discovered that Hillandale purchased/obtained all their pullets from Quality Egg. It was also discovered that Hillandale purchased all the feed for their facility in Alden, Iowa, from Quality Egg.

71. Excessive bird activity was observed at Hillandale's grain storage facility. In addition, grain and other ingredients were stored outside open to the environment, therefore allowing birds and rodents access to the grain and to potentially contaminate it with SE through fecal matter.

Austin DeCoster's PSIR at ¶ 29-33, 45-48, 66-71; Peter DeCoster's PSIR at ¶ 29-33, 45-48, 66-71; Quality Egg's PSIR at ¶ 53-62.

IV. ISSUES

There are three primary issues I address in this Memorandum Opinion and Order: (1) Whether, under the Sixth Amendment, it was permissible for me to find at the defendants' sentencing hearing that they had relevant knowledge of the conduct underlying their strict liability offense; (2) Whether, absent proof of *mens rea*, the sanction of imprisonment for their offense would be unconstitutional in violation of the Eighth Amendment's prohibition on cruel and unusual punishment; and (3) Whether, absent proof of *mens rea*, the sanction of imprisonment for their offense would be unconstitutional in violation of the Due Process Clause of the Fifth Amendment.

V. DISCUSSION

A. Whether The Sixth Amendment Was Violated By My Factual Finding At The Defendants' Sentencing Hearing

1. Defendants' Arguments

In their initial brief, the defendants claimed to have "no knowledge of the violation and no knowledge of the conduct underlying the offense" to which they pleaded guilty. Austin DeCoster's Memorandum at 1. Rather, their plea agreements were based on their roles as "corporate officers" at Quality Egg. *Id*. In the absence of *mens rea*, the defendants argued, imprisonment would be unconstitutional, in violation of the right to due process and the Eighth Amendment's prohibition on cruel and unusual punishment. *See id*. at 3; *see also* Defendants' Reply Brief (docket no. 78), 4.

Early in their reply brief, the defendants took issue with the prosecutors' assertion that their constitutional argument could be avoided if I determined at the defendants' sentencing hearing "that defendants in fact had culpable mental states." Defendants' Reply Brief at 3 (quoting Resistance Brief at 2). Such a finding of fact would, according to the defendants, be a constitutional violation under the Sixth Amendment. This is because, citing to *Alleyne v. United States*, —— U.S. ——, 133 S.Ct. 2151, 2162-63, 186 L.Ed.2d 314 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court has "repeatedly held that where a finding of fact would increase the range of penalties to which the defendant may be exposed, the Sixth Amendment requires that fact to be proved to a jury or admitted by the defendant." *Id*. Therefore, the defendants alleged that the issue of whether they,

in fact, were involved in the offense is "not open" to me. *Id.* Because the admitted facts prove that the defendants' conviction is only a criminal violation of strict and vicarious liability and the defendants had no *mens rea*, they argued, I "should instead hold that a sentence of imprisonment or confinement would be unconstitutional in this case [.]" *Id.* at 3-4.

Later in their reply brief, the defendants returned and added to their argument that proving the defendants had relevant knowledge of their offenses by a preponderance of the evidence at their sentencing, rather than at a trial by jury, would be a violation of the Sixth Amendment. *See id*. at 9-10. The defendants, again in reliance on *Alleyne*, reiterated that "absent an admission by the defendant, the government must prove *to a jury* 'every fact that [is] a basis for imposing or increasing punishment.'" *Id*. at 9 (quoting *Alleyne*, 133 S.Ct. at 2159). In this case, both defendants signed plea agreements indicating they had no "direct involvement in the sale of the contaminated eggs," and neither of the defendants, nor any employees at Quality Egg, "had knowledge that the eggs were adulterated with SE." *Id.* at 10. Because the defendants' admissions do not prove that they had knowledge of or involvement in the offense, the defendants argued that "no judicial finding of fact could now preempt the question of whether a prison sentence is constitutionally permissible." *Id.* The defendants continued:

> If the DeCosters' position is correct, and a prison sentence cannot be imposed with a determination that the defendant had personal knowledge of the offense conduct or personal involvement in the offense conduct, then that fact cannot permissibly be determined by a court because it would supply

> a "basis for imposing or increasing punishment." *Alleyne*, 133 S.Ct. at 2159.

Id. Thus, the defendants argued that I must first decide whether the imposition of a term of imprisonment is unconstitutional, here, before I consider the prosecutors' claims as to the defendants' *mens rea* at sentencing.

2. Prosecutors' Arguments

Contrary to the defendants' assertions, the prosecutors argued that the defendants "were in no ways 'wholly innocent and unknowing' . . . about the conduct to which they pled guilty." Resistance Brief at 2. The prosecutors referred to information in the defendants' PSIRs, and the defendants' objections to their PSIRs, to further the prosecutors' point. For instance, the defendants' PSIRs suggest that the defendants knew of SE contamination at Quality Egg between January and August 2010 because of "necropsies that found SE in the organs of laying hens and positive environmental tests for SE."[13] *Id.* at 4-5 (citing Austin DeCoster's PSIR at ¶ 16-22; Peter DeCoster's PSIR at ¶ 16-22).

In addition, the prosecutors argued that the defendants' objections (and lack thereof) to their PSIRs prove that the defendants knew about the "preventative and ameliorative measures recommended to address the company's SE and pest control problem." *Id.* at 5. This is because they were aware of the recommendations by Dr. Charles Hofacre and Dr. Maxcy P. Nolan, III,[14]

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[13] A "necropsy" is an autopsy performed on an animal.

[14] The parties stipulated that "neither Dr. Charles Hofacre nor Dr. Maxcy Nolan has a basis to testify that Quality Egg fully and effectively implemented all of Dr. Hofacre's and Dr. Nolan's recommendations." Parties' Stip. ¶ 1. However, the parties also

which were designed to prevent SE contamination, and did not follow all of their recommendations at Quality Egg's Iowa facilities. The defendants' "familiarity" with the procedures employed by Austin DeCoster's Maine egg farms is also "telling" in that "those experiences show that following and enforcing stringent preventative and remedial measures may effectively control SE." *Id*. at 6. Finally, the defendants "do not contest" that "multiple SE environmental tests performed in Quality Egg barns and layer hen necropsies tested positive for SE," yet shell eggs produced in those environments were sold to consumers and not diverted, and Quality Egg performed no testing of such eggs "until late July 2010, when an FDA egg safety rule took effect[.]" *Id*. (citing Austin DeCoster's Sealed Objection to PSIR (docket no. 55), ¶¶ 8, 21; Peter DeCoster's Sealed Objection to PSIR (docket no. 56), ¶ 4). In other words, according to the prosecutors, the defendants' claims that they had no knowledge of the SE contamination are negated by their own submissions to the Court.

Lastly, the prosecutors indicated that they were "prepared to present evidence" at the defendants' sentencing hearing to bolster their claim that the defendants knew of the conditions, which "increased the likelihood of *Salmonella* contamination and proliferation." *Id.* at 5. However, no additional evidence was presented because the scope of the contested issues was narrowed by the parties' stipulations. Based on the defendants' PSIRs and objections, the prosecutors argued in their briefs and at sentencing, it is clear that

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stipulated that "a number of recommendations were implemented, but that the measures implemented were not effective in stopping the outbreak of *salmonella* that occurred at Quality Egg." *Id.*

the defendants knew about the insanitary conditions at Quality Egg in Iowa and the lack of a proper response to that problem in order to minimize and prevent SE contamination. *Id.* Therefore, the prosecutors made the case that the defendants' motions are based on a "fundamentally flawed premise" because they, indeed, "knew about the conditions that caused the introduction of adulterated eggs into interstate commerce[.]" *Id*. at 6.

3. Analysis

Relying primarily on *Alleyne*, 133 S.Ct. at 2159, and *Apprendi*, 530 U.S. at 466, 120 S.Ct. 2348, the defendants argued that if I found, as a matter of fact, that the defendants had relevant knowledge of their strict liability crimes, the Sixth Amendment would be violated. This is because that "finding of fact *would increase the range of penalties to which the defendant[s] may be exposed*," and "the Sixth Amendment requires that fact to be proved to a jury or admitted by the defendant."[15] Defendant's Reply Brief at 3 (emphasis added). At the sentencing, I found the defendants' reliance on *Alleyne* and *Apprendi* misplaced. My finding on this issue only requires a brief explanation before I proceed to considering the defendants' constitutional challenges.

In *Alleyne*, a defendant was convicted of robbery affecting commerce and the use of a firearm during and in relation to a crime of violence. *Alleyne*, 133 S.Ct. at 2156. At the defendant's sentencing, the judge, instead of a jury, found brandishing, which increased

[15] "The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.'" *Alleyne*, 133 S.Ct. at 2156.

the mandatory minimum sentence to which the defendant was subjected from five years to life in prison into seven years to life in prison. *Id.* at 2156, 2160. In finding that the defendant's Sixth Amendment rights were violated in *Alleyne*, the Supreme Court held that "[f]acts that increase the mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt." *Id*. at 2158. In reaching that holding, the Supreme Court reasoned that "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is *whether the fact constitutes an 'element' or 'ingredient' of the charged offense.*" *Id.* (quoting *United States v. O'Brien*, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010); *Apprendi*, 530 U.S. at 483 n. 10, 120 S.Ct. 2348) (emphasis added). Elsewhere in that opinion, the Supreme Court reiterated that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Id.* at 2162. The Supreme Court further explained that, in *Apprendi* (a prior decision),[16] the Court decided that "a fact is by

[16] In *Apprendi*, the defendant fired several .22-caliber bullets into an African American family's home. *Apprendi*, 530 U.S. at 469, 120 S.Ct. 2348. The family recently moved into what was previously an all-white neighborhood. *Id.* The defendant pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of third-degree offense of unlawful possession of an antipersonnel bomb. *Id.* at 469-70, 120 S.Ct. 2348. The trial judge accepted the defendant's guilty pleas, and also found, by a preponderance of the evidence, that the defendant committed the offense with a biased purpose and purpose to intimidate. *Id.* at 470-71, 120 S.Ct. 2348. Accordingly, the trial judge "held that the hate crime enhancement applied." *Id*. at 471, 120 S.Ct. 2348. In reviewing the trial judge's decision and the New Jersey statutory scheme at issue, the Supreme Court found that the defendant's sentence was unconstitutionally enhanced because the trial judge made a finding that the

definition an element of the offense and must be submitted to the jury *if it increases the punishment above what is otherwise legally prescribed.*" *Id.* at 2158 (citing *Apprendi*, 530 U.S. at 483, 120 S.Ct. 2348) (emphasis added). Later in the opinion for *Alleyne*, the Supreme Court clearly articulated what its holding did not entail—namely, *Alleyne* "does not mean that any fact that influences judicial discretion must be found by a jury." *Id.* at 2163. Rather, the Supreme Court continued: "We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Id.*; *see also United States v. Higgins*, No. 2:09-cr-403-4, 2011 WL 6088576, at *1, *10 (E.D.Pa. Dec. 7, 2011) (defendant pleaded guilty, as a responsible corporate officer, to introducing adulterated and misbranded medical devices into interstate commerce, "in violation of 21 U.S.C. §§ 331(a) and 331(a)(1)," but that "guilty plea does not cabin or circumscribe the Court's consideration of relevant facts at sentencing[.]").

Unlike in *Alleyne* and *Apprendi*, my factual finding that the defendants had relevant knowledge of their strict liability crimes—that is, knowledge of the insanitary conditions at Quality Egg, and the increased risk that their processing plants were contaminated with SE, does not constitute an element of their offense, or "increase[ ] the punishment above what is otherwise

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defendant committed his crime with a purpose to intimidate his victims based on their race, by a preponderance of evidence, which increased the defendant's statutory maximum term of imprisonment. *Id.* at 471, 491-92, 497, 120 S.Ct. 2348. In reaching that decision, the Supreme Court reasoned, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348.

legally prescribed." *Alleyne*, 133 S.Ct. at 2158 (citing *Apprendi*, 530 U.S. at 483 n. 10, 120 S.Ct. 2348). Thus, based on the Supreme Court's precedent, cited to by the defendants, it is unnecessary that this factual issue be submitted to the jury. *Id.* Rather, the defendants pleaded guilty to violating 21 U.S.C. § 331(a), which has a statutory maximum penalty of "imprisonment for not more than one year or fined not more than $1,000, or both." *See* 21 U.S.C. § 331(a); *see also* 21 U.S.C. 333(a)(1) ("Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both."). Nor were the defendants unaware of the floor (or mandatory minimum sentence) and ceiling (or mandatory maximum sentence) of their sentencing ranges based on their plea agreements.[17] Also, unlike in *Alleyne* and *Apprendi*, the floor and the ceiling, respectively, of the defendants' statutorily authorized sentencing ranges were never impacted by my factual findings. The sentencing guideline range, based upon a total offense level of 4, and a criminal history category of I, remained at zero months to six months in

[17] As the prosecutors rightly pointed out, according to paragraphs three and four of the defendants' plea agreements, both defendants "understood the maximum statutory penalties for their crimes," including imprisonment of up to one year and probation. Resistance Brief at 4; *see also* Austin DeCoster's Rule 11 Plea Agreement at ¶ 3-4; Peter DeCoster's Rule 11 Plea Agreement at ¶ 3-4. Both defendants' base offense levels are 6, and those offense levels were not enhanced as a consequence of my finding that the defendants had knowledge of the insanitary conditions at Quality Egg and the increased risk that their shell eggs were contaminated with SE. *See* Austin DeCoster's PSIR at ¶ 85; *see* also Peter DeCoster's PSIR at ¶ 85. Their offense levels were only decreased by 2 points based on their acceptance of responsibility. *See* Austin DeCoster's PSIR at ¶ 92; *see also* Peter DeCoster's PSIR at ¶ 92.

prison. *See* Austin DeCoster's PSIR at ¶ 127; *see also* Peter DeCoster's PSIR at ¶ 127. Therefore, the defendants erred in asserting that *Alleyne* and *Apprendi* are applicable to this case.

In addition, as indicated in the defendants' plea agreements, both defendants agreed to be "sentenced based on facts to be found by the sentencing judge *by a preponderance of the evidence and agree facts essential to the punishment need not be (1) charged in the Indictment or Information; (2) proven to a jury; or (3) proven beyond a reasonable doubt.*" Austin DeCoster's Rule 11 Plea Agreement at ¶ 8 (emphasis added); Peter DeCoster's Rule 11 Plea Agreement at ¶ 8 (emphasis added). However, despite what is provided in their plea agreements, and, therefore, agreed to by the defendants, the defendants demanded a higher standard of persuasion on this issue in their reply brief. Inconsistent with their plea agreements, the defendants argued in their reply brief that the prosecutors' proposal to prove their prior knowledge of their offenses to me, by a preponderance of the evidence, would violate their Sixth Amendment rights. *See* Reply Brief at 9-10. Thus, alternatively, I find that the defendants clearly waived in their respective plea agreements their belated assertion of an *Alleyne-Apprendi* issue. Based on a correct reading of *Alleyne* and *Apprendi*, the defendants' plea agreements, and the evidence presented by the prosecutors at the defendants' sentencing hearing, I disagree with the defendants' claim that a Sixth Amendment violation occurred by not submitting the factual issue of whether the defendants had relevant knowledge of their strict liability offenses to a jury.

During oral arguments at the DeCosters' sentencing their counsel further refined their Sixth Amendment

argument. The defendants' argument was that if it was unconstitutional to impose any incarceration for the offense of conviction, because that would violate due process and the Eighth Amendment where no actual knowledge was established, then it would also violate the Sixth Amendment. I pointed out that was a silly argument because, if they won on the due process or Eighth Amendment claims, I could not impose incarceration, rendering their *Alleyne-Apprendi* argument moot. If they did not win on the due process and Eighth Amendment arguments, there was no *Alleyne-Apprendi* issue because the sentencing range, either statutorily or by the Guidelines, was not increased by any judicial fact-finding.

For argument's sake, even if I agree with the defendants that they had no relevant knowledge of their criminal conduct, I am still well within my discretion to impose a sentence of imprisonment for the defendants' violations of 21 U.S.C. § 331(a) for the reasons discussed below.

B. Whether the Eighth Amendment Permits a Sentence of Imprisonment for the Defendants' Strict Liability Offenses

1. Defendants' Arguments

The defendants' reply brief asserted that when courts consider whether a defendant's sentence is "grossly disproportionate" to the defendant's crime, and thus, in violation of the Eighth Amendment, courts consider "'the gravity of the offense and the harshness of the penalty,' as well [sic] the sentences imposed for similar offenses by judges within the jurisdiction and across the country.'" Defendants' Reply Brief at 7. Applying that standard, the defendants argued that a prison sentence or confinement "would be disproportionate"

to the defendants' crime "because this, a strict vicarious liability crime, is the most minor offense known to the law." *Id.* at 8.

The defendants further contended that their crime "is a pure status offense—a criminal violation based upon the fact that *someone else* subordinate to the defendant broke the law." *Id.* Because someone else violated the law, with no criminal intent, when a defendant is charged under a strict vicarious liability theory, courts have traditionally warned that jailing a defendant on that basis, as here, would be "unjustifiable." *Id.* Although such case law is grounded on the Due Process Clause, "the basic principle" set forth in those cases also applies to the Eighth Amendment: "Imprisonment for a person *who did not commit the crime* would indeed be 'grossly disproportionate,' and would therefore violate the Eighth Amendment, just at it would violate the Due Process Clause." *Id.* at 8-9 (quoting *Graham v. Florida*, 560 U.S. 48, 60, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)). The defendants advanced their argument by relying on a recent district court decision: "That is why a district judge ruled in a relatively recent FDCA case that 'prison sentences are not appropriate' where there is an 'absence of government proof of knowledge by the individual defendants of the wrongdoing.'" *Id.* at 9 (quoting *United States v. Purdue Frederick Co.*, 495 F.Supp.2d 569, 576 (W.D.Va.2007)).

The defendants also disagreed with the prosecutors that imprisonment is justified for deterrence purposes. The defendants argued that "it would not serve any rational deterrence purpose to impose a prison sentence on a corporate officer who had *nothing to do with the underlying offense* and who is not charged with any degree of fault." *Id.* This is because such a "rule

of liability" would enable courts to sentence business executives to terms of imprisonment where such business executives did "everything in their power to prevent the offense from occurring." *Id*. The defendants categorized the prosecutors' deterrence theory as "irrational." *Id.* The prosecutors' theory, the defendants contended, is "wholly insufficient" to serve as justification for imprisoning the defendants as their links to the crime committed are their statuses at Quality Egg. *Id.*

2. Prosecutors' Arguments

The prosecutors' resistance brief focused on refuting the defendants' general contention that the Constitution "forbids 'sentence[s] of incarceration . . . or other restriction[s] on liberty other than probation' for any 'strict liability offense.'" Resistance Brief at 10 (citing Austin DeCoster's Memorandum at 2). The prosecutors asserted that the defendants' claim, that punishment of incarceration would be unconstitutional, implicates the Eighth Amendment, not the due process clause as the defendants asserted. *Id.* at 10-11. The prosecutors continued by quoting *Ewing v. California*, 538 U.S. 11, 23, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), a Supreme Court case discussing the Eighth Amendment's standard: "The Eighth Amendment does not require strict proportionality between crime and sentence. It forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 11.

Citing *Graham*, the prosecutors added that, in "consider[ing] whether certain sentencing practices are categorically disproportionate as applied to certain classes of offenders or offenses," Resistance Brief at 11, the Supreme Court analyzes "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there

is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61, 130 S.Ct. 2011 (quoting *Roper v. Simmons*, 543 U.S. 551, 572, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)). The Supreme Court will also be guided by "'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" and the Court analyzes "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 61, 67, 130 S.Ct. 2011 (citations omitted). According to the prosecutors, the maximum statutory term under 21 U.S.C. § 333(a)(1) of one-year imprisonment fits within the limits established by the Eighth Amendment. Resistance Brief at 12.

In addition, there is no case law, the prosecutors contended, that "construes the Eighth Amendment, or any other constitutional provision, to impose a per se constitutional bar to imprisonment for strict-liability offenses." *Id.* Rather, the FDCA's one-year prison sentence furthers the penological goals and congressional efforts to deter the introduction of unsafe foods and drugs into the economy. *Id.* at 13. To bolster their argument, the prosecutors provided a thorough overview of relevant case law "upholding sentences of imprisonment for strict-liability offenses[.]" *Id.* The prosecutors discussed the facts of relevant federal district court cases in which the defendants were convicted of FDCA violations and sentenced to prison, even though they lacked knowledge of the wrongdoing.[18] *Id*. at 14-15. The prosecutors noted that custodial sentences have also been imposed in strict-

[18] For example, the prosecutors cited to and analyzed four "particularly relevant" cases involving four executives of Synthes Corporation, who received prison sentences from five to nine

liability offense cases outside the context of food and drug laws. *See id*. at 16.

3. Analysis

The defendants have failed to convince me that even a sentence of the statutory maximum of one year in prison is "grossly disproportionate" to their offense, and therefore, in violation of the Eighth Amendment. *See* 21 U.S.C. § 333(a)(1); *see also Ewing*, 538 U.S. at 23, 123 S.Ct. 1179. The Eighth Circuit Court of Appeals has clearly articulated the standard to apply when determining whether a sentence is "grossly disproportionate" to a defendant's offense:

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months, after being convicted of strict liability misdemeanors under the FDCA because the corporation conducted illegal clinical trials of a bone cement. *See* Resistance Brief at 14 (citing *United States v. Bohner*, No. 2:09-cr-403-5 (E.D.Pa. Dec. 13, 2011); *Higgins*, 2011 WL 6088576; *United States v. Huggins*, No. 2:09-cr-403-3, 2011 WL 6180623 (E.D.Pa. Dec. 13, 2011); *United States v. Walsh*, No. 2:09-cr-403-6 (E.D.Pa. Nov. 21, 2011)). The prosecutors also discussed *United States v. Hermelin*, No. 4:11-cr-85 (E.D.Mo. Mar. 11, 2011), a case involving a Chief Executive Officer of KV Pharmaceuticals, who was sentenced to thirty, later reduced to seventeen, days in prison for his company's sale of misbranded morphine sulfate tablets. *Id.* The prosecutors also referenced several recent and past district court cases in which defendants, convicted of FDCA misdemeanors, were sentenced to prison or confinement. *See id*. at 15 (citing *United States v. Sen*, 24 F.Supp.3d 732 (E.D.Tenn.2014); *United States v. Eric Jensen*, No. 13-cr-01138M-01 (D.Colo. May 13, 2014); *United States v. Ryan Jensen*, No. 13-cr-01138M-02 (D.Colo. May 13, 2014); *United States v. Osborn*, No. 3:12-CR-047-M(01) (N.D.Tex. Oct. 18, 2012); *United States v. Haga*, 821 F.2d 1036, 1038 n. 2 (5th Cir.1987); *United States v. Kocmond*, 200 F.2d 370, 374 (7th Cir.1953); *United States v. Greenbaum*, 138 F.2d 437, 440 (3d Cir.1943); *United States v. Coleman*, 370 F.Supp.2d 661, 663 (S.D.Ohio 2005)).

> To determine whether a sentence is grossly disproportionate, we examine "'the gravity of the offense compared to the harshness of the penalty.'" [*United States v. Paton*, 535 F.3d 829, 837 (8th Cir.2008) (quoting *Ewing*, 538 U.S. at 28, 123 S.Ct. 1179)]. In weighing these matters, we consider the "harm caused or threatened to the victim or to society, and the culpability and degree of the defendant's involvement." [*United States v. Wiest*, 596 F.3d 906, 911-12 (8th Cir.2010)]. We also consider a defendant's history of felony recidivism, if there is one. *Paton*, 535 F.3d at 837 (citing *Ewing*, 538 U.S. at 29, 123 S.Ct. 1179).

United States v. Lee, 625 F.3d 1030, 1037 (8th Cir.2010). Prior to articulating the above standard, the Eighth Circuit Court of Appeals explained that "it is 'exceedingly rare' for a noncapital sentence to violate the Eighth Amendment." *Id.* Also, as the prosecutors rightly asserted, in analyzing if a sentencing practice is categorically disproportionate as applied to an entire class of offenders, the Supreme Court considers several factors. *See Graham*, 560 U.S. at 61, 130 S.Ct. 2011. It looks to "'legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue," "controlling precedents," "the Court's own understanding and interpretation of the Eighth Amendment's test, history, meaning, and purpose," and if the challenged practice "serves legitimate penological goals." *Id*. at 61, 67, 130 S.Ct. 2011.

In this case, the DeCosters' contaminated eggs caused harm to thousands of consumers. Those consumers were sickened, and some of the consumers'

injuries were severe.[19] Both defendants were involved in the crimes committed: Austin DeCoster was "the person ultimately responsible for the operations of Quality Egg and the various egg facilities in Iowa associated with Quality Egg" and Peter DeCoster was "one of the persons responsible for running the operations of Quality Egg and the various egg facilities in Iowa associated with Quality Egg." *See* Austin DeCoster's Rule 11 Plea Agreement at ¶ 7; *see also* Peter DeCoster's Rule 11 Plea Agreement at ¶ 7. This was not the first time that Austin DeCoster appeared before me for sentencing.[20] Thus, based on the harm

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[19] One of the victim's fathers provided a statement at the defendants' sentencing hearing. He traveled from Dallas, Texas, to Sioux City, Iowa, to tell the tragic story of his son. His son was poisoned by SE after consuming eggs produced at Quality Egg, and he was placed in the intensive care unit of a children's medical hospital for eight days. While at the hospital, the son received an extremely strong dose of IV antibiotics, which was necessary to save his life, and that treatment was followed by six weeks of oral antibiotics. Consequently, the victim is required to have his young teeth capped in stainless steel. The father discussed the enormous psychological trauma on his son because of the stainless steel crowns on all his teeth. I simply cannot imagine the unbelievable psychological impact on an eight-year-old child of having a mouthful of stainless steel, much like the fictional assassin, Jaws, in the James Bond movies.

[20] Austin DeCoster was sentenced to two counts in September of 2003 of Continuing Employment of Unauthorized Aliens. Austin DeCoster's PSIR at ¶ 96. Austin DeCoster was sentenced to 5 years of probation on each count and ordered to pay a fine ($3,000.00 on each count), special assessment ($10.00 on each count), and restitution ($875,000.00). *Id.* In addition, in July of 2003, Austin DeCoster's prosecution was deferred for five years on his charge for Conspiracy to Conceal, Harbor, or Shield From Detection Through Employment and Attempt to Conceal, Harbor, or Shield From Detection Illegal Aliens. Austin DeCoster's PSIR at ¶ 102. Austin DeCoster received five years of supervision on that charge. *Id.* By contrast, Peter DeCoster did not appear before

caused, the defendants' involvement in the crimes, and Austin DeCoster's criminal history, the sentence of one year in prison is *not* "grossly disproportionate" to the defendants' crimes. *See Ewing*, 538 U.S. at 30-31, 123 S.Ct. 1179 ("We hold that [the defendant's] sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments."); *United States v. Vanhorn*, 740 F.3d 1166, 1170 (8th Cir.2014) ("Because nothing in the record indicates that the sentence [(one within the statutory range of not less than 15 years nor more than 30 years)] is grossly disproportionate to his crime, [the defendant's] sentence does not violate the Eighth Amendment.").

In addition, as the prosecutors pointed out in their resistance brief, the Eighth Circuit Court of Appeals has explained that it has "never held a sentence within the statutory range to violate the Eighth Amendment." *See* Resistance Brief at 12; *see also Vanhorn*, 740 F.3d at 1170 (citing *United States v. Neadeau*, 639 F.3d 453, 456 (8th Cir.2011), in turn citing *United States v. Collins*, 340 F.3d 672, 680 (8th Cir.2003)). Here, any prison sentence of one year or less fits within the statutory range of punishment provided by 21 U.S.C. § 333(a)(1). See 21 U.S.C. § 333(a)(1). Therefore, I remain unconvinced that the defendants'

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me in 2003 for sentencing. Peter was only charged with Conspiracy to Conceal Harbor or Shield From Detection Through Employment and Attempt to Conceal, Harbor, or Shield From Detection Illegal Aliens. Peter DeCoster's PSIR at ¶ 101. However, Peter DeCoster's prosecution was deferred for five years via a pretrial diversion program, and he received five years of supervision. Peter DeCoster's PSIR at ¶ 101.

sentences are unconstitutional under the Eighth Amendment where their sentences fall within the statutory range established by Congress under 21 U.S.C. § 333(a)(1) and the sentencing guideline range of zero to six months, and based on the sentencing factors under 18 U.S.C. § 3553(a) discussed at the defendants' sentencing hearing.

Purdue Frederick Co., a case relied upon by the defendants, is inapplicable. In *Purdue Frederick Co*., the District Court for the Western District of Virginia accepted the pleas of three corporate officers, who pleaded guilty to the misdemeanor charge of misbranding a prescription opioid pain medication, OxyContin, in violation of the FDCA. *Purdue Frederick Co*., 495 F.Supp.2d at 570. The government agreed to sentences for the individual defendants without any imprisonment after the defendants "agreed to pay a total of $34.5 million to the Virginia Medicaid Fraud Unit's Program Income Fund." *Id.* at 573. The government conceded that "a sentence of incarceration under the federal sentencing guidelines would be unusual based on the facts of the case." *Id.* at 576. The defendants stressed "their lack of prior criminal record, their strong commitment to civic and charitable endeavors, as well as their other positive personal attributes." *Id.* The district court acknowledged the "potential damage by the misbranding," which, "was substantial," and did not minimize the danger to the public because of the defendants' crime. *Id.* However, in reaching its decision not to impose prison time, the district court reasoned that "while the question is a close one, in the absence of government proof of knowledge by the individual defendants of the wrongdoing, prison sentences are not appropriate." *Id.* at 576.

Unlike the plea agreements in *Purdue Frederick Co*., which explicitly "provide[d] for no incarceration for the individual defendants," the plea agreements in this case do not provide for no incarceration for either defendant. *Purdue Frederick Co*., 495 F.Supp.2d at 576. Rather, in the prosecutors' resistance brief, here, they argued for "sentences that the Court determines to be appropriate, including sentences of prison or other confinement if the Court finds such custodial sentences to be warranted." Resistance Brief at 20. Paragraphs three and four of the defendants' plea agreements provide that the defendants understand that the maximum penalties for their crimes include "not more than 1 year imprisonment without the possibility of parole or a term of probation of not more than 5 years [.]" Austin DeCoster's Rule 11 Plea Agreement at ¶ 3-4; Peter DeCoster's Rule 11 Plea Agreement at ¶ 3-4.

In addition, in the prosecutors' resistance brief, the prosecutors argued that the defendants had knowledge of the significant presence of SE in the laying hens and their environments at Quality Egg in Iowa between January and August 2010. For example, in their resistance brief, the prosecutors highlighted that the defendants' submissions to the Court proved their knowledge of the SE contamination at Quality Egg's facilities. This is because their objections "reflect their knowledge of the preventative and ameliorative measures recommended to address the company's SE and pest control problems." Resistance Brief at 5.

The prosecutors also argued in their briefs and at the defendants' sentencing hearing that Quality Egg in Iowa did *not* follow the same SE prevention and remediation practices as those implemented at Quality Egg's Maine facilities. Even after SE was detected

in Quality Egg's Iowa facilities, the defendants failed to follow the methods used at their Maine plants to resolve that problem, such as depopulating, cleaning, and retesting the barns. The matter was only addressed after the 2010 SE outbreak took place. Together, I was persuaded that the defendants had knowledge of the increased risk of SE in the processing plants, and did not minimize SE contamination in their plants, despite having knowledge of how to effectively deal with SE contamination. *See* Austin DeCoster's PSIR at ¶ 16-22; *see also* Peter DeCoster's PSIR at ¶ 16-22.

Also, distinct from the defendants in *Purdue Frederick Co*., Austin DeCoster has a prior criminal record. *Cf. Purdue Frederick Co*., 495 F.Supp.2d at 576. Austin DeCoster was fined $14,000 for falsifying drivers' logs in 1976 in the district of Maine. *See* Austin DeCoster's PSIR at ¶ 95. In 2003, Austin DeCoster was sentenced by me to concurrent terms of five years of probation on two counts of Continuing Employment of Unauthorized Aliens, fined $3,000 on each count, and ordered to pay a $10 special assessment on each count and restitution in the amount of $875,000, which reflects the seriousness of the crime. *See id*. at ¶ 96. As indicated in his Information, Austin DeCoster's convictions were based on his "aid[ing] and abet[ing] in the pattern and practice of continuing to employ certain aliens, after knowing that the aliens were not authorized to work in such employment in the United States" at his egg production business in north central Iowa. *Id.*

By contrast, the prosecutors' four "particularly relevant" cases, including *Bohner*, No. 2:09-cr-403-5; *Higgins*, 2011 WL 6088576; *Huggins*, 2011 WL 6180623; and Walsh, No. 2:09-cr-403-6, involved the prosecutions of four senior executives of Synthes, a

major medical-device maker, for conducting illegal clinical trials of a bone cement. All of the senior executives were sentenced to prison, and their prison terms ranged from five to nine months. Those cases, unlike *Purdue Frederick Co*., are markedly similar to the facts presented here. After two of the four defendants brought motions seeking to modify their sentences, the District Court for the Eastern District of Pennsylvania wrote memorandum opinions for those two cases to explain the court's rationale for its sentencing decisions.[21] One of the court's two memorandum opinions, which addressed the sentencing of Thomas Higgins, was relied upon by the prosecutors in their resistance brief, and was instructive in resolving the present issue before me.

In *Higgins*, the defendant was the former President of Synthes Spine Division and Senior Vice President of Global Strategy, Synthes. *Higgins*, 2011 WL 6088576 at *1. The defendant pleaded guilty "as a responsible corporate officer to the introduction into interstate commerce of adulterated and misbranded medical devices . . . in violation of 21 U.S.C. §§ 331(a) and 331(a)(1)." *Id.* In pleading guilty, the defendant maintained that "he did not know at the time that his conduct was illegal and he did not intend to violate the law," and because he did not have such knowledge, the defendant asserted that he "[could not] be imprisoned."[22] *Id.* at *9. The district court disagreed.

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[21] *See*, *e.g.*, *Higgins*, 2011 WL 6088576, at *13-*14; *see also Huggins*, 2011 WL 6180623, at *13-*14.

[22] The District Court for the Eastern District of Pennsylvania determined that Higgins "knew" the bone cement "was potentially dangerous"; he "knew, or should have known," that the planned development of the cement was "potentially suspect, and caution and strict adherence to regulatory procedure was

It reasoned, "Defendant is mistaken that his plea of guilty to a strict liability offense ensures a sentence of probation commensurate with less blameworthy conduct." *Id.* at *9. The district court highlighted the defendants' "pattern of deception with the FDA," and that the "decision-makers ignored such clear warnings of the potentially fatal nature of the product for such an extended period." *Id.* at *10. The defendant also argued that "it was error to impose a term of imprisonment for a strict liability crime, 'thus rendering the underlying conviction and sentence unconstitutional.'" *Id.* at *13 (citation omitted). The district court rejected that argument. In doing so, it noted, "[u]nder *Park*, a conviction based on strict liability for the offense in this case is permissible." *Id.* (citing *Park*, 421 U.S. at 673, 95 S.Ct. 1903; *Dotterweich*, 320 U.S. at 280-81, 64 S.Ct. 134). The court sentenced the defendant to prison for nine months, or "within the statutorily prescribed maximum 'for not more than one year,'" following which it noted that "[d]isappointed hopes for probation do not constitute a constitutional infirmity in the sentence imposed." *Id*. at *14; *see also* 21 U.S.C. § 333(a).

Higgins bolsters my decision that there is not an Eighth Amendment violation for imposing a sentence of imprisonment for violating the specific provisions of the FDCA at issue. The defendants, like the corporate

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required"; and he "knew or should have known" the bone cement needed "further testing before the product could be safely used on humans." *Higgins*, 2011 WL 6088576, at *4. Three people died during clinical tests of Synthes. *Id.* at *9. However, as the prosecutors, in this case, rightly pointed out in their resistance brief, the district court in *Higgins* "emphasized that criminal liability under the FDCA required no [proof of knowledge of wrongdoing]." Resistance Brief at 14; *see also Higgins*, 2011 WL 6088576, at *13-*14.

officer in *Higgins*, pleaded guilty to strict liability offenses, but maintained their lack of knowledge and intention of the alleged criminal conduct. Also, as in *Higgins*, evidence was presented that the defendants "knew, or should have known," of the risks posed by the insanitary conditions at Quality Egg in Iowa, "knew, or should have known" that additional testing needed to be performed before the suspected shell eggs were distributed to consumers, and "knew, or should have known" of the proper remedial and preventative measures to reduce the presence of SE. *See Higgins*, 2011 WL 6088576, at *4.

From early 2006 to 2010, for example, the defendants "were generally aware of the positive SE test results as they were received," and the "positive [SE] test results continued, and increased in frequency, into the fall of 2010" when the recall began in August. *See* Austin DeCoster's PSIR at ¶ 16-17, 19; *see also* Peter DeCoster's PSIR at ¶ 16-17, 19; Parties' Stip. at ¶ 7. Prior to July 2010,[23] despite the receipt of positive SE test results, Quality Egg did not test or divert eggs from the market. Parties' Stip. at ¶ 2; *see also* Austin DeCoster's PSIR at ¶ 63; Peter DeCoster's PSIR at ¶ 63. Quality Egg's decisions to ignore the SE test results; failure to comply with important food safety standards and practices, such as USDA regulations; and knowledge of deception and bribery of USDA inspectors by Quality Egg's personnel,[24] is analogous

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[23] The parties stipulated that "until the adoption of the Egg Safety Rule in July 2010, there was no legal or regulatory requirement" to conduct SE tests. Parties' Stip. at ¶ 2

[24] The defendants' PSIRs provide that on more than one occasion in 2010, Quality Egg's personnel paid cash bribes to a USDA inspector to unlawfully release eggs that had been retained or "red tagged" for failing to meet minimum quality

to the defendant's conduct in *Higgins*. Nothing in the record indicates that the individual defendants had actual knowledge that the eggs sold by Quality Egg were infected with SE, and Austin DeCoster disagrees that he knew the USDA quality grade requirements were being violated.

However, the record supports the inference that the individual defendants created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so. Because the offending parties were never disciplined for their actions, according to the record, it does appear that their conduct was

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grade standards without re-processing the eggs as required by law and USDA standards. *See* Austin DeCoster's PSIR at ¶ 45-48; *see also* Peter DeCoster's PSIR at ¶ 45-48. The parties also stipulated to the following regarding the bribes:

> [redacted] would testify that he told Peter DeCoster about the first bribe after it occurred, and would testify that Peter DeCoster responded by telling him never to do it again. The parties stipulate that [redacted] would testify that he recalls [redacted] telling him that [redacted] had told [Austin] DeCoster that [redacted] had "taken care of" some eggs that had been retained. The parties further stipulate that [redacted] would testify that, at some point soon after this conversation between [redacted] and [Austin] DeCoster, [Austin] DeCoster stated to [redacted], "Way to get those eggs out the door."

Parties' Stip. ¶ 11. In the next paragraph, the parties stipulated to the following: "[redacted] would testify that, about three days after he gave [redacted] cash to use for the second bribe, he overhead Peter DeCoster saying to [redacted], 'Be careful about what you are doing. This is a federal offense.'" Parties' Stip. ¶ 12. The prosecutors indicated that, in view of the conflicting evidence and credibility considerations, they would not ask me to find that either Austin or Peter DeCoster knew of the bribes at any particular time.

condoned. In addition, the parties stipulated that a Quality Egg manager "would testify that [Austin] DeCoster instructed him" that Quality Egg should not divert more than "1-2% of the eggs based upon 'checks.'" Parties' Stip. ¶ 9; *see also* Austin DeCoster's PSIR at ¶ 42; Peter DeCoster's PSIR at ¶ 42.

The record is also replete with evidence regarding Quality Egg's and the defendants' misrepresentations regarding its food safety and sanitation practices and procedures and independent audits, such as defendant Peter DeCoster's inaccurate statements about a Flock Testing Policy and a Safe Quality Food Institute Program to Walmart in 2008.[25] *See* Parties' Stip. ¶¶ 5-6; *see also* Austin DeCoster's PSIR at ¶ 28; Peter DeCoster's PSIR at ¶ 28. The prosecutors argued that Peter DeCoster knew or should have known certain portions of his presentation were false. *See* Parties' Stip. ¶¶ 5-6; see also Peter DeCoster's PSIR at ¶ 24. At the defendants' sentencing, I agreed with the prosecutors that, based on the evidence, Peter DeCoster delivered a presentation to Walmart that consisted of inaccurate information regarding Quality Egg's food safety and sanitation practices.

In addition, between 2007 and 2010, Quality Egg provided false information to its auditors, AIB, as to safety and sanitation procedures employed at the company, and even manufactured and falsified documents with the intent that USFoods and AIB would rely on such fabricated documents. *See* Austin DeCoster's PSIR at ¶ 29-33; *see also* Peter DeCoster's PSIR at

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[25] At the defendants' sentencing, the prosecutors did not ask me to find that Austin DeCoster read any version of the Walmart presentation. *See* Austin DeCoster's PSIR at ¶ 23-24. Thus, the prosecutors did not prove that Austin DeCoster was aware of the false statements provided in the presentation to Walmart.

¶ 29-33. Quality Egg personnel also bribed a USDA official, twice, in order to sell a higher percentage of eggs, even though the eggs did not meet USDA standards. *See* Austin DeCoster's PSIR at ¶ 45-48; *see also* Peter DeCoster's PSIR at ¶ 45-48. Quality Egg changed the packing dates of their eggs, which misled state regulators and retail egg customers, and sold misbranded eggs into interstate commerce. *See* Quality Egg's PSIR at ¶ 53-62. Finally, Quality Egg failed to meet FDA regulatory standards, and following the SE outbreak, FDA officials visited Quality Egg's Iowa facilities and described the insanitary conditions observed there as "egregious." *See* Austin DeCoster's PSIR at ¶ 66-71; *see also* Peter DeCoster's PSIR at ¶ 66-71. In sum, the public's interest in health and well-being based on the production and sale of safe foods must outweigh the "demanding, and perhaps onerous" tasks placed on those who "voluntarily assume positions of authority," such as the DeCosters, and enter regulated industries with a profit motive being their driving force. *See Park*, 421 U.S. at 671, 95 S.Ct. 1903 ("The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.").

While the defendants' violations of 21 U.S.C. § 331 required no proof of knowledge in order impose the statutorily permitted term of imprisonment, I refer to the above conduct to distinguish this case from a mere unaware corporate executive, and explain why a probationary sentence is inappropriate under the circumstances presented. *See Higgins*, 2011 WL 6088576,

at *10 ("Unlike *Park*, this matter does not involve holding an unaware corporate executive accountable for vermin in a warehouse."). The factual similarities between this case and *Higgins*, and the dissimilarities between this case and *Purdue Frederick Co*., support my decision to impose a prison sentence here.

Further buttressing my finding is the philosophical justification underlying the defendants' punishment, *i.e*., deterring other corporate officers from similar criminal conduct, which is also relevant to my analysis of the 18 U.S.C. § 3553(a) factors. Agreeing with the prosecutors, I find that the imposition of a prison term, one established by Congress under 21 U.S.C. § 333(a)(1), will protect the public from additional crimes that the defendants may commit in their individual capacities (*i.e*., specific deterrence). *See* 18 U.S.C. § 3553(a)(2)(C) ("to protect the public from further crimes of the defendant[s]"). Given the defendants' careless oversight and repeated violations of safety standards, there is an increased likelihood that these offenses, or offenses like these, could happen again. The punishment will also serve to effectively deter against the marketing of unsafe foods and widespread harm to public health by similarly situated corporate officials and other executives in the industry (*i.e*., general deterrence).[26] *See* 18 U.S.C. § 3553(a)(2)(B) ("to afford adequate deterrence to criminal conduct"); *see also* Resistance Brief at 13; *Graham*, 560 U.S. at 67, 130 S.Ct. 2011 ("In this inquiry the Court also

[26] *See* Patrick O'Leary, *Credible Deterrence: FDA and the Park Doctrine In The 21st Century*, 68 FOOD & DRUG L.J. 137, 176 (2013) ("Most importantly, the credible threat of individual prosecution is a uniquely salient deterrent in an industry where the cost of misconduct can too often be measured in human lives.").

considers whether the challenged sentencing practice serves legitimate penological goals.") (citations omitted); *Park*, 421 U.S. at 673, 95 S.Ct. 1903 ("Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.") The sanction I imposed "reflect[s] the seriousness of the offense," it serves "to promote respect for the law" by like corporate officials, and it is a "just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

In light of the above, I decided to give effect to the penal sanction provided under 21 U.S.C. § 333(a)(1), and I found that the defendants' sentence is not cruel and unusual punishment in violation of the Eighth Amendment. I turn now to explain why the defendants' sentences also do not violate their due process rights under the Fifth Amendment.

C. Whether The Fifth Amendment Permits a Sentence of Imprisonment for the Defendants' Strict Liability Offenses

1. Defendants' Arguments

The defendants contended that to sentence them to prison, or otherwise restrict their liberty (aside from probation), would violate their constitutional rights under the Due Process Clause of the Fifth Amendment. Austin DeCoster's Memorandum at 3. This is because "[t]he government may not deprive a person of his liberty based on an offense that is both strict and vicarious in its character, because that would allow a person to be jailed solely because others, acting without criminal intent, committed a violation of the law."

Defendants' Reply Brief at 5. The defendants characterized their claim as a "traditional due process challenge," and noted that the highest courts in Minnesota, Georgia, and Pennsylvania ruled that "due process principles forbid imprisonment as a punishment for a strict vicarious liability offense." *Id.* The defendants also asserted that other state supreme courts, including Iowa's Supreme Court in *Iowa City v. Nolan*, 239 N.W.2d 102, 104-05 (Iowa 1976), have indicated "they would reach the same conclusion." *Id*.

In addition, the defendants asserted that the Supreme Court "has held that penalties imposed [for strict liability offenses] must be 'small' and not give rise to 'grave damage to an offender's reputation.'" Austin DeCoster's Memorandum at 3-4 (citing *Staples v. United States*, 511 U.S. 600, 616-17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994); *Morissette v. United States*, 342 U.S. 246, 256, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). For example, the Supreme Court upheld the constitutionality of the FDCA offense and the "light" penalties imposed in *Park*, 421 U.S. at 666, 95 S.Ct. 1903 and *Dotterweich*, 320 U.S. at 281, 64 S.Ct. 134. Citing to *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir.1960), the defendants contended that the Eighth Circuit Court of Appeals adopted the same approach as the Supreme Court, holding that "for the elimination of an intent requirement not to offend due process, it must be the case that 'the penalty is relatively small' and the 'conviction does not gravely besmirch.'" *Id.* Harking back to an opinion by Judge Benjamin N. Cardozo in *People v. Sheffield Farms-Slawson-Decker Co*., 225 N.Y. 25, 121 N.E. 474, 477 (1918), the defendants contended that in cases where strict and vicarious liability exist, courts are inclined to impose fines as the maximum punishment. Defendants' Reply Brief at 1-2. Thus, because a term of imprisonment is not a

"small penalty," the defendants requested "a fine and/or term of probation." Austin DeCoster's Memorandum at 3.

The defendants reiterated that the prosecutors failed to account for any factually similar case law: the prosecutors have "not identified a single case, in any court, in which an American judge has imposed a sentence of incarceration or confinement in a situation like this one, where criminal liability is both strict and vicarious, i.e., where (1) the conviction does not rest on any admission or jury determination that anyone acted with criminal knowledge or intent, and (2) the conviction likewise does not rest on any admission or jury determination that the defendant himself committed any relevant act." Defendants' Reply Brief at 1. Instead, the defendants argued that the prosecutors only cite a "raft of ordinary strict-liability cases," in which a defendant "at least personally committed the unlawful act." *Id.* That case law does not "consider[ ] or address[ ] whether incarceration or confinement would also be permissible if the defendant were merely vicariously liable for the strict-liability offense committed by someone else." *Id*. at 6-7. The defendants go so far as to argue that no case law exists to support the prosecutors' position that "the Due Process Clause permits defendants to be deprived of their liberty because someone in the company that they lead has committed a strict-liability offense." *Id.* at 7; *see also* Austin DeCoster's Memorandum at 1-2.

According to the defendants, the prosecutors "devote[ ] scant attention" to the defendants' alleged due process violation argument. Reply Brief at 5 (citing Resistance Brief at 7-8). Instead of confronting the prosecutors' arguments, and the case law cited by

the prosecutors on pages 16 through 20 of the prosecutors' resistance brief, which are targeted at refuting the defendants' due process challenge, the defendants created a straw man argument.[27] In doing so, the defendants focused their attention on distinguishing *Park* from the facts of this case. The defendants contended that the "question whether a term of imprisonment or confinement could be imposed in a strict vicarious liability case simply was not at issue in *Park*." *Id*. The defendants continued on this line of argument by asserting that *Staples*, 511 U.S. at 616, 114 S.Ct. 1793, confirms Park's limited scope. *Id*. at 6. There, the Supreme Court "approvingly" referred to Judge Cardozo's opinion in *Sheffield Farms-Slawson-Decker Co*. and "suggested that 'imprisonment' would not be 'compatible with the reduced culpability for such regulatory offenses.'" *Id*. (citing *Staples*, 511 U.S. at 617, 114 S.Ct. 1793). "The Court would not have made that statement if *Park* had held that prison sentences are permissible in all FDCA cases," the defendants wrote. *Id.* Thus, the defendants argued that I should adhere to the "longstanding tradition, dating back at least as far as Judge Cardozo's time," and reject a prison sentence in this context. *Id.* at 7.

2. Prosecutors' Arguments

Despite the prosecutors' belief that the Fifth Amendment's Due Process Clause does not control in

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[27] Here is the defendants' argument: "The government devotes scant attention to defendants' due process argument, essentially arguing that the Supreme Court's decision in *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975), has already approved imprisonment as a punishment for strict vicarious liability offenses under the FDCA. *See* [Resistance Brief at 7-8]. That suggestion lacks all foundation." Defendants' Reply Brief at 5.

this case, they directly addressed and rebutted the defendants' contentions that their constitutional challenge arises under that clause. *See* Resistance Brief at 7-10, 16-20. "The necessary predicate for a substantive due process claim is the deprivation of a fundamental right that is objectively, deeply rooted in this Nation's history and tradition, or an executive abuse of power . . . which shocks the conscience." *Id*. at 16-17 (internal quotation marks and citations omitted). According to the prosecutors, the defendants failed to show that the imposition of a custodial sentence equals a due process violation under these standards. History has proven otherwise, the prosecutors argued: "[T]he FDCA and other strict-liability statutes have long been punishable with prison sentences, and there is a long history of defendants going to prison for those crimes." *Id.* at 17. Therefore, the prosecutors contended, the defendants' due process arguments are meritless.

The defendants were incorrect, the prosecutors argued, in asserting that "courts construe crimes as strict-liability offenses only where 'the penalty is relatively small.'" *Id.* at 18 (citing Austin DeCoster's Memorandum at 4). While the principle from the *Holdridge* case, relied on by the defendants, is one of statutory interpretation, not a constitutional limitation, even if that principle did apply in constitutional terms, here, the sanction of one-year in prison would fit within the "relatively small" category. *Id.* The prosecutors advanced their argument by noting that a person who violates the FDCA faces a sanction of imprisonment "for not more than one year," a fine, or both. *Id.* (quoting 21 U.S.C. § 333(a)(1)). That sanction, the prosecutors argued, is the "'short jail sentence[ ],'" which both the Supreme Court and the Eighth Circuit Court of Appeals consider "compatible with a pre-

sumption of legislative intent to create a strict-liability, public-welfare offense." *Id.* 18-19 (citing *Staples*, 511 U.S. at 616, 114 S.Ct. 1793; *United States v. Flum*, 518 F.2d 39, 42 (8th Cir.1975)). The prosecutors pointed out that the defendants' claims are also refuted by "the longstanding precedent upholding the constitutionality of strict-liability statutes imposing much greater penalties." *Id.* at 19 (citations omitted).

Additionally, the defendants' general assertion that "'strict liability criminal offenses' are a matter of 'constitutional uncertainty,'" fails. *Id.* at 17 (citing Austin DeCoster's Memorandum at 3). That argument conflicts with precedent of the Supreme Court providing that a person punished for violating the law, without *mens rea*, does *not* constitute a due process violation. *Id.* at 18-19 (citing *United States v. Balint*, 258 U.S. 250, 252, 42 S.Ct. 301, 66 L.Ed. 604 (1922)). Earlier in their resistance brief, the prosecutors cited to several Supreme Court decisions, asserting that the Court has "repeatedly" determined that, even absent proof of *mens rea*, "criminal penalties may be imposed for violations of the FDCA." *Id.* at 7 (citing *Park*, 421 U.S. at 671-73, 95 S.Ct. 1903; *Dotterweich*, 320 U.S. at 281, 64 S.Ct. 134; *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91, 84 S.Ct. 559, 11 L.Ed.2d 536 (1964); *Smith v. California*, 361 U.S. 147, 152, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *Morissette*, 342 U.S. at 254-56, 72 S.Ct. 240). Citing to *United States v. Hiland*, 909 F.2d 1114, 1127-28 (8th Cir.1990), the prosecutors noted that the Eighth Circuit Court of Appeals reached the same holding in regard to the relevant statutory provisions of the FDCA as the Supreme Court. *Id.* at 7-8. In the Supreme Court cases relied upon by the prosecutors, the Court did not suggest that the strict-liability misdemeanor

offense established by the FDCA was unconstitutional. *Id.* at 8. Rather, the prosecutors noted, "the Court has explained that '[t]here is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise.'" *Id.* (citing *Smith*, 361 U.S. at 152, 80 S.Ct. 215). Nor has the Supreme Court "ever suggested" that a statutorily permitted prison sentence "could not constitutionally be imposed." *Id.* "To the contrary, the Court has noted the prospect of imprisonment without further analysis." *Id.* (citing *Park*, 421 U.S. at 666, 95 S.Ct. 1903).

Finally, the prosecutors also advanced their argument by discussing the Supreme Court's recognition of the "legitimate and important purposes" served by the imposition of strict liability for FDCA violations. *Id.* The prosecutors focused on three purposes. First, "the strict-liability standard plainly advances the federal government's efforts to protect public health and safety." *Id.* Second, quoting passages from *Dotterweich*, 320 U.S. at 284-85, 64 S.Ct. 134, and *Park*, 421 U.S. at 672, 95 S.Ct. 1903, the prosecutors contended that the DeCosters, as responsible corporate officers, "have a much greater ability than consumers themselves to discover, correct, or prevent adulteration or other violative conditions." *Id.* at 9. Third, if a strict-liability standard did not exist when violations of the FDCA occurred, responsible corporate officers, such as the DeCosters, "would have an added, and perverse, incentive to insulate themselves from information that might reveal a violation of the law." *Id.* at 10. By contrast, the strict-liability standard serves as a necessary impetus for corporate officers to investigate and alleviate possible problems of adulteration when they have general or specific knowledge about such problems. *Id.*

3. Analysis

The defendants are incorrect in arguing that a sentence of incarceration would violate their due process rights under the Fifth Amendment. In making their claim, the defendants asserted that non-binding authority from the state supreme courts of Minnesota, Georgia, and Pennsylvania have ruled that "due process principles forbid imprisonment as a punishment for a strict vicarious liability offense." Defendants' Reply Brief at 5. The defendants then referred to *Iowa City v. Nolan*, 239 N.W.2d at 104-05, arguing that Iowa's highest court indicated it "would reach the same conclusion." *Id.* I disagree.[28] Focusing my attention on *Nolan*, 239 N.W.2d at 104-05, I find that the

[28] Like the defendants' citation to *Nolan*, their citations to the highest state courts' decisions in *State v. Guminga*, 395 N.W.2d 344 (Minn.1986), *Davis v. City of Peachtree City*, 251 Ga. 219, 304 S.E.2d 701 (Ga.1983), and *Com. v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (Pa.1959), are inapposite. *See* Reply Brief at 2, 5. *Guminga*, *Davis*, and *Koczwara* are cases in which state supreme courts determined it was unconstitutional on due process grounds for defendants to be held vicariously liable and imprisoned for different state and municipal liquor law violations. *See Guminga*, 395 N.W.2d at 345-46, 349; see also Davis, 251 Ga. at 221, 304 S.E.2d 701; *Koczwara*, 397 Pa. at 584-88, 155 A.2d 825. The cases cited to by the defendants are distinguishable. *Guminga* and *Koczwara* were decided under the state constitutions of Minnesota and Pennsylvania, respectively. In *Guminga*, the Minnesota Supreme Court "specifically and exclusively decide[d] the question under the provisions of the Minnesota Constitution herein cited." *Guminga*, 395 N.W.2d at 349. In *Koczwara*, the Supreme Court of Pennsylvania explained, "Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land clause of Section 9, Article I of the Constitution of the Commonwealth of Pennsylvania." *Koczwara*, 397 Pa. at 585, 155 A.2d 825. *Davis* is distinguishable as it takes a fairly extreme, absolute position that no criminal penalties can be imposed, even

defendants misconstrued the holding of that case as Iowa's Supreme Court did not rule on that particular issue.[29]

In *Nolan*, the defendant was charged with "over a dozen vehicle parking violations under three separate Iowa City ordinances," and after an appeal, he was found guilty and fined twenty dollars. *Nolan*, 239 N.W.2d at 102. The defendant's defense consisted of a challenge to the constitutionality of these ordinances, which "impose[d] a form of strict or vicarious liability upon the registered owner of an illegally parked vehicle." *Id*. at 103. Iowa's Supreme Court found that defense unconvincing. In doing so, the court noted that "[i]t is upon the *constitutional validity* of this vicarious liability that our decision in this appeal must rest." *Id.* (emphasis added).

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if the penalty is limited to a fine: "Although some commentators and courts have found that vicarious criminal liability does not violate due process in misdemeanor cases which involve as punishment only a slight fine and not imprisonment, we decline to so hold." *Davis*, 251 Ga. at 221, 304 S.E.2d 701 (citations omitted).

[29] When I pressed one of the defense attorneys at the defendants' sentencing hearing on this issue he referred me to a parenthetical cited in the defendants' brief which indicates that Iowa's Supreme Court in *Nolan* decided that whether a violator of the strict-liability offense of illegally parking his vehicle "may be subject to imprisonment is not before us now." Reply Brief at 2 (quoting *Nolan*, 239 N.W.2d at 102). However, three pages later in the same brief, the defendants suggest that the high court of Iowa has indicated that it would "reach the same conclusion" as the highest courts in Minnesota, Georgia, and Pennsylvania, who "held that due process principles forbid imprisonment as a punishment for a strict vicarious liability offense." *Id.* at 5 (citing *Guminga*, 395 N.W.2d at 346; *Davis*, 304 S.E.2d at 704; *Koczwara*, 155 A.2d at 830).

The highest court of Iowa explained that the United States Supreme Court in a series of cases, including *Morissette*, 342 U.S. 246, 72 S.Ct. 240, "carved out an exception to the general criminal due process considerations in the area of public welfare offenses." *Id.* at 104. A few paragraphs later, Iowa's Supreme Court continued: "Not only may public welfare legislation dispense with a mens rea or scienter requirement, it may, and frequently does, impose a vicarious 'criminal' liability for the acts of another." *Id.* Iowa's Supreme Court held that based on the rationale of the case law discussed in the opinion, "a registered owner may be vicariously liable for his illegally parked vehicle and subject to punishment pursuant to a public welfare regulation. *Whether he may be subjected to imprisonment is not before us now*." *Id*. at 105 (emphasis added).[30] Thus, in *Nolan*, the highest court of Iowa is actually silent on the matter of imprisonment, and it does not even foreshadow a possible ruling.

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[30] After that holding, Iowa's Supreme Court invites the reader to compare the language of the statute involved in *Park*, 421 U.S. at 666 n. 10, 95 S.Ct. 1903, with Justice Cardozo's language in *Sheffield Farms*, 225 N.Y. at 32-33, 121 N.E. 474, and the holding in *Koczwara*, 397 Pa. at 586, 155 A.2d 825. In *Park*, the statutory sections addressed in footnote 10 are 21 U.S.C. §§ 333(a) and (b), which provide for fines and/or imprisonment of a defendant convicted of violating the FDCA. In *Sheffield Farms*, Judge Cardozo explained, "[I]n sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison. We leave that question open." *Sheffield Farms*, 225 N.Y. at 32-33, 121 N.E. 474. In *Koczwara*, the Supreme Court of Pennsylvania held that "the punishment of imprisonment deprives the defendant of due process of law under these facts," but left "intact the five hundred dollar fine imposed by Judge Hoban under the subsequent offense section." *Koczwara*, 397 Pa. at 586, 155 A.2d 825.

In addition, analogous to the defendant in *Higgins*, 2011 WL 6088576, at *13, who was sentenced to nine months in prison and no constitutional violation was found, the defendants, here, argued that their convictions, as responsible corporate officers for a strict liability offense under the FDCA, are unconstitutional unless the penalties imposed are "small" and a conviction does not cause "grave damage to an offender's reputation." Austin DeCoster's Memorandum at 3-4 (citations omitted). The defendants, in this case, grounded their arguments on two Supreme Court cases, *i.e.*, *Park*, 421 U.S. at 666, 95 S.Ct. 1903, and *Dotterweic*h, 320 U.S. at 277, 64 S.Ct. 134, where the Supreme Court upheld the constitutionality of the FDCA offense and affirmed a fine of $250, and a fine of $500 and a 60-day probation, respectively. *See id*. at 4. The defendants also relied on a decision of the Eighth Circuit Court of Appeals, *i.e.*, *Holdridge*, 282 F.2d at 310, which allegedly "adopted" the same approach as the Supreme Court.[31] *Id.* at 4. Later, in their reply brief, the defendants repeatedly cited Justice Cardozo's opinion in *Sheffield Farms*, 121 N.E. at 477. *See* Defendants' Reply Brief at 1-4. After analyzing the case law relied on by the defendants, I am further compelled to reject their due process challenge.

In *Park*, the defendant, the president and chief executive officer of a large national food store chain,

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[31] It is unclear from the defendants' brief whether the defendants argued that the Eighth Circuit Court of Appeals adopted the approach of Justice Stewart in his dissenting opinion in *Park*, which the defendants egregiously misrepresented, or the approach of the majority's opinion in *Park*, 421 U.S. at 666, 95 S.Ct. 1903, and *Dotterweich*, 320 U.S. at 277, 64 S.Ct. 134. *See* Austin DeCoster's Memorandum at 4.

Acme Markets, Inc., was convicted of causing adulteration of food. This was because the food was exposed to rodent contamination at Acme's warehouse, which had traveled in interstate commerce and held for sale. *Park*, 421 U.S. at 660, 95 S.Ct. 1903. The Supreme Court granted certiorari to determine "whether the jury instructions in the prosecution of [the defendant corporate officer] under § 301(k) of the [FDCA] were appropriate under [*Dotterweich*, 320 U.S. at 277, 64 S.Ct. 134]."[32] *Id*. at 660, 95 S.Ct. 1903. In finding that the jury instructions were appropriate, the Supreme Court clarified the standard of liability of corporate officers under the FDCA as construed in *Dotterweich*. *Id.* at 667, 95 S.Ct. 1903. The Supreme Court wrote,

> The rationale of the interpretation given the Act in *Dotterweich*, as holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of, has been confirmed in our subsequent cases. Thus, the Court has reaffirmed the proposition that "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors." [*Smith*, 361 U.S. at 152, 80 S.Ct. 215]. In order to make "distributors of food the strictest censors of their merchandise," *ibid*., the Act punishes "neglect where the law requires care, or inaction

[32] *See* O'Leary, *supra* note 26, at 142, for a clear explanation of the evolution of the jurisprudence from *Dotterweich* to *Park*. O'Leary notes, "That FDA still has a strict-liability criminal charge at its disposal today is the product of nearly seven decades of often contentious historical development, beginning with *Dotterweich* in 1943, and taking its present shape in *Park* in 1975." *Id.*

> where it imposes a duty." [*Morissette*, 342 U.S. at 255, 72 S.Ct. 240]. "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Id.* at 256, 72 S.Ct. at 246. *Cf.* Hughes, Criminal Omissions, 67 Yale L.J. 590 (1958).
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> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them. *Cf.* Wasserstrom, Strict Liability in the Criminal Law, 12 Stan.L.Rev. 731, 741-745 (1960). The Act does not, as we observed in *Dotterweich*, make criminal liability turn on "awareness of some wrongdoing" or "conscious fraud."

Id. at 671, 95 S.Ct. 1903. The dissenting opinion of Justice Potter Stewart in Park, which the defendants relied on in their initial brief,[33] agrees with the majority's standard of liability for corporate executives

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[33] The defendants argued, "The penalties in [*Park* and *Dotterweich*] were 'light,' recognized Justice Stewart in dissent, but the imposition of 'imprisonment for a year' for a strict liability offense would be 'wholly alien to fundamental principles of our law.'" Austin DeCoster's Memorandum at 4 (citing *Park*, 421 U.S. at 682-83, 95 S.Ct. 1903) (Stewart, J., dissenting). In reply, the prosecutors correctly asserted that the Supreme Court has "noted

under the FDCA, and indicates that under the FDCA "*even a first conviction can result in imprisonment for a year*, and a subsequent offense is a felony carrying a punishment of up to three years in prison." *Park*, 421 U.S. at 678, 682-83, 95 S.Ct. 1903 (Stewart, J., dissenting) (emphasis added). Therefore, although *Park* does not directly concern the imposition of a term of imprisonment for a corporate official who violated the FDCA, the Supreme Court upholds the constitutionality of the FDCA and does *not* find that the prospect of a year in prison for violating the FDCA is unconstitutional.[34]

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the prospect of imprisonment without further analysis," and the defendants "mischaracterize Justice Stewart's dissent in *Park*." Resistance Brief at 8. The prosecutors wrote, "It was the trial court's 'tautolog[ical]' jury instructions that Justice Stewart viewed as 'wholly alien' to fundamental principles, [*Park*, 421 U.S. at 680-82, 95 S.Ct. 1903], not the prospect of imprisonment for food and drug offenses." *Id*. (citing *Park*, 421 U.S. at 678, 95 S.Ct. 1903). I agree with the prosecutors' interpretation of Justice Stewart's dissent. The defendants' interpretation of Justice Stewart's dissenting opinion is baseless.

[34] Relatedly, the District Court for the Eastern District of Pennsylvania in *Higgins* already underscored the weaknesses in the defendants' position, in part for relying on *Park* and *Dotterweich*. Citing to *Park* and *Dotterweich*, the district court explained, "Under *Park*, a conviction based on strict liability for the offense in this case [of violating the FDCA] is permissible." *Higgins*, 2011 WL 6088576, at *14 (citing *Park*, 421 U.S. at 673, 95 S.Ct. 1903 ("The Act does not . . . make criminal liability turn on 'awareness of some wrongdoing' . . . ."); [*Dotterweich*, 320 U.S. at 280-81, 64 S.Ct. 134] (In the interest of the "larger good" of keeping impure and adulterated food and drugs out of the channels of commerce, the statute "dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing.")) The district court noted that the defendant presented no "reason to question the constitutionality of *Park* as

Holdridge, another case relied on by the defendants, which arises out of the Eighth Circuit, also does not advance the defendants' constitutional due process claim. The Eighth Circuit Court of Appeals noted that the Supreme Court, in *Morissette*, 342 U.S. at 246, 72 S.Ct. 240,[35] observed "that there is a class of criminal

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applied to the circumstances presented here." *Id.* at *14. Neither have the defendants in this case.

[35] It is worth noting that, in *Higgins*, the defendant, citing to *Morissette*, 342 U.S. at 256, 72 S.Ct. 240, contended, like the defendants here, that "his conviction as a responsible corporate officer for a strict liability offense is 'constitutionally permissible only where the penalties are 'relatively small' and conviction does not cause 'grave damage to an offender's reputation.'" *Higgins*, 2011 WL 6088576 at *13. However, in sentencing the defendant to nine months in prison for his violation of the FDCA, the District Court for the Eastern District of Pennsylvania distinguished *Morissette* from *Higgins*:

> *Morissette* decided "quite a different question" concerning the constitutional parameters of a conviction for conversion of government property without proof of intent. 342 U.S. at 248, 72 S.Ct. 240. *Morissette* did not decide the constitutional boundaries of strict liability crimes proscribed by statutes and regulations directed to health and welfare concerns. *Id*. at 248, 253-54, 72 S.Ct. 240. Defendant does not explain why *Morissette* should be applied to the circumstances presented here. Nor does *Higgins* provide a reason to depart from the teachings of *Park*, which held that the FDCA "imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions." 421 U.S. at 676, 95 S.Ct. 1903 (1975) (decided after *Morissette*).

Id. Similar to the defendant in *Higgins*, the defendants, here, have not articulated why *Morissette* is applicable. Additionally, *Holdridge*, unlike this case, concerned the prosecution of defendants for violating a statute that prohibited the re-entry onto a military reservation after having been removed and ordered not to re-enter; it did not regard strict liability offenses aimed at

offenses, theretofore recognized and approved by [the Supreme Court], where motive or criminal intent is not a factor in the crime." *Holdridge*, 282 F.2d at 309. Cases that involve the prosecution of food and drug acts, as here, for instance, serve as ready examples of "this kind of legislation." *Id.* Quoting the Supreme Court, the Eighth Circuit Court of Appeals highlighted that the penalties for those who violate such laws "commonly are relatively small, and conviction does not [sic] grave damage to an offender's reputation." *Id.* at 310 (quoting *Morissette*, 342 U.S. at 256, 72 S.Ct. 240). That "interpretation" of federal criminal statutes that lack a motive or criminal intent, as the prosecutors rightly pointed out in their resistance brief, does not necessarily equate to a "constitutional limitation." Resistance Brief at 18.

Even if it is assumed, *arguendo*, that *Holdridge* provides a "constitutional limitation" on the penalties imposed for strict-liability offenses under the FDCA,[36]

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health and welfare concerns. *See Holdridge*, 282 F.2d at 304; *see also Higgins*, 2011 WL 6088576 at *13.

[36] If one leaves aside the factual distinctions between this case and *Holdridge*, one could reasonably make that argument based on a proposition in *Holdridge*, which the Eighth Circuit Court of Appeals derived from the case law:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element in [sic] then not violative of the due process clause. *Shevlin-Carpenter Co. v. State of Minnesota*, 218

the prosecutors are right in asserting that the punishment imposed under 21 U.S.C. § 333(a) is considered a "relatively small" penalty as it is a "short jail sentence[ ]." *Id*.; *see also Staples*, 511 U.S. at 616, 114 S.Ct. 1793 (noting that "the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary," and referred to a fine of up to $200, or six months in jail, or both, in one case as an example of a "light penalty"); *see also Flum*, 518 F.2d at 42 (finding that the statutory penalty for carrying a weapon onto an airplane, which was a strict-liability offense, carried with it "a maximum fine of $1000 or imprisonment for not more than one year, or both," which made the "offense a misdemeanor," and "is thus 'relatively small.'"). Therefore, compared to other cases, the penalty I imposed of a three-month term of imprisonment is "relatively small," and the conviction of this offense does not "gravely besmirch" either defendant. *Holdridge*, 282 F.2d at 310.

Further bolstering the prosecutors' position is their alternative argument that the Eighth Circuit Court of Appeals has upheld the constitutionality of strict-liability statutes, and found no Fifth Amendment due process violation, where the penalty imposed was far beyond a one-year term of imprisonment. *See, e.g., United States v. Wilcox*, 487 F.3d 1163, 1168-69 (8th Cir.2007) (affirmed defendant's sentence of 110 months in prison for the crime of sexual abuse of a minor, and rejected defendant's claim that statutory

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> U.S. 57, 69-70, 30 S.Ct. 663, 54 L.Ed. 930; [*Balint*, 258 U.S. at 252, 42 S.Ct. 301]; *Williams v. State of North Carolina*, 325 U.S. 226, 238, 65 S.Ct. 1092, 89 L.Ed. 1577.

Holdridge, 282 F.2d at 310.

provisions and jury instructions were unconstitutional, in violation of his due process rights, for not requiring knowledge that the victim was underage).

Lastly, the defendants *repeatedly* pressed *Sheffield Farms* upon me and requested that I adhere to a "longstanding tradition" begun by Judge Cardozo,[37] and not impose a term of imprisonment.[38] Defendants' Reply Brief at 2-3, 5-8. In *Sheffield Farms*, the defendant, a corporation, was convicted of violating section 162 of the Labor Law.[39] *Sheffield Farms*, 225 N.Y. at 27, 121 N.E. at 475. The issue addressed in the opinion was whether there was "any evidence of guilt." *Id*. In

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[37] The "longstanding tradition," according to the defendants, is "of judicial opinions warning that our Constitution does not permit prison sentences to be imposed in this circumstance." Defendants' Reply Brief at 7.

[38] Through my own research, I discovered that there are two versions of the opinion for *Sheffield Farms*: a New York Official Reports version and the National Reporter System version. Because I have encountered inconsistencies between the two versions, I will include parallel citations to both opinions. However, I will only quote the language that appears in the official version.

[39] That section provided the following: "No child under the age of fourteen years shall be employed or permitted to work in or in connection with any mercantile * * * establishment specified in the preceding section." *Sheffield Farms*, 225 N.Y. at 27, 121 N.E. at 475. Judge Cardozo explained that a first-time violation of that law is punishable "by a fine of not less than twenty nor more than fifty dollars (Penal Law, sec. 1275)." *Id.* However, he continued: "Heavier fines *and even imprisonment may follow a repetition of the offense* (Penal Law, sec. 1275)." *Id.* (emphasis added). Thus, unlike penalties for violations of 21 U.S.C. § 331, which are contained in 21 U.S.C. § 333(a)(1), imprisonment did not follow for a first-time violation of the statute at issue in *Sheffield Farms* based on the Penal Law, which attached the penalty. At the time *Sheffield* was written in 1918, imprisonment could follow in New York if the offense was repeated.

affirming the lower court's judgment, Judge Cardozo wrote that "there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of this child; that the omission to discover and prevent was a sufferance of the work; and that for the resulting violation of the statute, *a fine was properly imposed*." *Id.* at 33, 121 N.E. at 477 (emphasis added).

In their reply brief, the defendants argued that "[n]early a century ago, Judge Cardozo cautioned that his court's acceptance of the government's 'power to fine' for regulatory offenses should 'not be understood as sustaining to a like length the power to imprison,' and he expressed strong doubt that 'life or liberty may be forfeited without tinge of personal fault through the acts or omissions of others.'" Reply Brief at 2 (citing *Sheffield Farms*, 121 N.E. at 477). In making these claims, the defendants misrepresented Judge Cardozo's opinion. I quote from the full pertinent portion of the opinion cited to by the defendants to highlight the defendants' misrepresentations:

> In these and like cases, the duty to make reparation to the state for the wrongs of one's servants, when the reparation does not go beyond the payment of a moderate fine, is a reasonable regulation of the right to do business by proxy. That right is not strictly absolute any more than any other. In such matters, differences of degree are vital ([*Ten. House Dept. v. McDevitt*, 215 N.Y. 160, 169, 109 N.E. 88 (1915)]; *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223 [34 S.Ct. 853, 58 L.Ed. 1284 (1914)]). Even a fine may be immoderate (*Standard Oil Co. of Indiana v. Missouri*, 224 U.S. 270, 286 [32 S.Ct. 406, 56 L.Ed. 760 (1912)]; *Waters-Pierce Oil Co. v. Texas*, 212

> U.S. 86, 111 [29 S.Ct. 220, 53 L.Ed. 417 (1909)]). But in sustaining the power to fine, we are not to be understood as sustaining to a like length the power to imprison. *We leave that question open*. That there may be reasonable regulation of a right is no argument in favor of regulations that are extravagant. Exceptional principles apply to callings of such a nature that one may be excluded from them altogether. Of these it may be true that by engaging in them at all, one accepts the accompanying conditions (*Miller v. Strahl*, 239 U.S. 426 [36 S.Ct. 147, 60 L.Ed. 364 (1915)]; *People v. Rosenheimer*, 209 N.Y. 115 [102 N.E. 530 (1913)]; *People v. Roby*, 52 Mich. 577 [18 N.W. 365 (1884)]). We speak rather of callings pursued of common right, where restrictions must be reasonable (*People v. Beakes Dairy Co*., 222 N.Y. 416, 427 [119 N.E. 115 (1918)]). *This case does not require us to decide that life or liberty may be forfeited without tinge of personal fault through the acts or omissions of others* (*Comm. v. Stevens*, 153 Mass. 421, 424, 425 [26 N.E. 992 (1891)]; *Comm. v. Morgan*, 107 Mass. 199, 203 [(1871)]; *Comm. v. Riley*, 196 Mass. 60, 62 [81 N.E. 881 (1907)]; *Mousell Bros. v. London & N.W. Ry. Co*., 1917, 2 K.B. 836, 843, 844; [*The Queen v. Tolson*, L.R. 23 Q.B.D. 168, 185]). The statute is not void as a whole though some of its penalties may be excessive. The good is to be severed from the bad. The valid penalties remain.

Sheffield Farms, 225 N.Y. at 33, 121 N.E. at 477 (emphasis added). When one reads the parts of Judge Cardozo's opinion cited to by the defendants in context, it becomes clear to the reader that Judge Cardozo left open or unresolved the matters referred to by

the defendants.[40] Therefore, the defendants appear to have mistakenly, or perhaps inadvertently, edited language from *Sheffield Farms*. The defendants' misrepresentations of Judge Cardozo's opinion in *Sheffield Farms*, coupled with their misrepresentation of *Nolan* and mischaracterization of Justice Stewart's dissenting opinion in *Park*, undermine their arguments. Ultimately, I find defendants' claims that the

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[40] The beginning sentences of Judge Frederick E. Crane's concurring opinion fortify my interpretation of Judge Cardozo's majority opinion that he did not address the issue of imprisonment. *Sheffield*, 225 N.Y. at 35, 121 N.E. 474 (Crane, J., concurring). In Judge Crane's words, "I concur in the opinion of Judge CARDOZO, but I do not think that we should leave the question of punishment by imprisonment open for further discussion. The matter is here, in my judgment, for determination." Unlike Judge Cardozo, Judge Crane made his position on this issue clear:

> I recognize that this is the law regarding many police regulations and statutes creating minor offenses, and that there is a distinction between acts mala prohibita and mala in se, but I do not believe that the Legislature is unlimited in its power to make acts mala prohibita with the result that an employer can be imprisoned for the acts of his servant. [*People ex rel. Cossey v. Grout*, 179 N.Y. 417, 433, 72 N.E. 464 (N.Y.1904)]. Nearly all the cases upon this subject have been those fixing a penalty to be recovered either in a civil or a criminal proceeding. Others have been prosecutions for a misdemeanor such as in this case resulting in a fine. To this extent I concede that the employer is liable irrespective of his knowledge or negligence, but when an employer may be prosecuted as for a crime to which there is affixed a penalty of imprisonment for an act which he in no way can prevent, we are stretching the law regarding acts mala prohibita beyond its legal limitation. [*Chicago, B. & Q. Ry. v. United States*, 220 U.S. 559, 31 S.Ct. 612, 55 L.Ed. 582 (N.Y.1911)].

Id.

due process clause of the Fifth Amendment does not permit a sentence of imprisonment for violating the strict liability offense under the present circumstances unpersuasive.[41]

In general, the Supreme Court has permitted the punishment of persons for violating strict liability offenses. Contrary to the defendants' arguments, strict liability offenses are *not* a "matter of 'constitutional uncertainty'" nor does the punishment for committing such an offense constitute a due process violation. *See Balint*, 258 U.S. at 252, 42 S.Ct. 301 ("It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is *an absence of due process of law*. But that objection is considered and overruled in *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69, 70, 30 S.Ct. 663, 666, 54 L.Ed. 930 (1910), in which it was held that in the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide '*that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance*.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some

[41] The prosecutors referenced the one Supreme Court decision in which the high court invalidated a strict-liability offense on due process grounds where the defendants lacked knowledge of a city ordinance's felon registration requirement. *See* Resistance Brief at 17-18; *see also Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). Here, neither defendant argued that they lacked knowledge of the FDCA regulatory scheme, or cited case law to refute the prosecutors' claim that the Supreme Court has invalidated another strict-liability offense, or that the logic of *Lambert* has been extended to other like cases.

social betterment rather than the punishment of the crimes as in cases of mala in se.") (emphasis added).

More specifically, as the prosecutors rightly pointed out in their resistance brief, Resistance Brief at 7, the Supreme Court has permitted the imposition of criminal punishments for violations of the FDCA absent mens rea. *See*, *e.g.*, *Park*, 421 U.S. at 671-73, 95 S.Ct. 1903 ("[The FDCA] does not, as we observed in *Dotterweich*, make criminal liability turn on 'awareness of some wrongdoing' or 'conscious fraud'"); *Dotterweich*, 320 U.S. at 281, 64 S.Ct. 134 ("[The FDCA] dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing."); *Wiesenfeld Warehouse Co.*, 376 U.S. at 91, 84 S.Ct. 559 ("It is settled law in the area of food and drug regulation that a guilty intent is not always a prerequisite to the imposition of criminal sanctions."); *Smith*, 361 U.S. at 152, 80 S.Ct. 215 ("[F]ood and drug legislation" is a "principal example" of a penal statute that "dispense[s] with any element of knowledge on the part of the person charged"); *Morissette*, 342 U.S. at 256, 72 S.Ct. 240 ("[L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element."). Taking guidance from the Supreme Court, the Eighth Circuit Court of Appeals has similarly applied the statutory provisions of the FDCA. *See*, *e.g.*, *Hiland*, 909 F.2d at 1127-28 (finding that "[u]nder § 333(a)(1), neither knowledge nor intent is required for a misdemeanor violation" (citing *Park*, 421 U.S. at 668-73, 95 S.Ct. 1903)). To date, the Supreme Court has not invalidated the FDCA, or ruled that the penalties authorized by 21 U.S.C. § 333(a)(1) for the strict liability misdemeanor offense under 21 U.S.C. § 331(a) are unconstitutional on due process grounds. Thus, upon my review of the case law and the relevant provisions of the FDCA, which clearly

provided for criminal prosecution and up to one year of imprisonment for the crimes the defendants committed, I am unpersuaded by the defendants' due process challenge. *See* 21 U.S.C. §§ 331(a), 333(a)(1).

VI. CONCLUSION

For the reasons discussed above, I denied the defendants' motions at their sentencing hearing on April 13, 2015. For the reasons given at the sentencing hearing, I imposed a sentence of three months imprisonment for each of the DeCosters.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-1890

UNITED STATES OF AMERICA,

Appellee,

v.

AUSTIN DECOSTER, also known as Jack,

Appellant.

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al*.,

Amici on Behalf of Appellant(s).

No: 15-1891

UNITED STATES OF AMERICA,

Appellee,

v.

PETER DECOSTER,

Appellant.

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al*.,

Amici on Behalf of Appellant(s).

Appeal from U.S. District Court for the
Northern District of Iowa - Ft. Dodge
(3:14-cr-03024-MWB-2)
(3:14-cr-03024-MWB-3)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Chief Judge Riley, Judge Wollman and Judge Loken would grant the petitions for rehearing en banc.

Judge Kelly did not participate in the consideration or decision of this matter.

September 30, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

FEDERAL STATUTES

21 U.S.C. § 331. Prohibited acts

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344, 350d, 355, or 360bbb-3 of this title.

(e) The refusal to permit access to or copying of any record as required by section 350a, 350c, 350f(j), 350e, 354, 360bbb-3, 373, 374(a), 379aa, or 379aa-1 of this title; or the failure to establish or maintain any record, or make any report, required under section 350a, 350c(b), 350f, 350e, 354, 355(i) or (k), 360b(a)(4)(C), 360b(j), (l) or (m), 360ccc-1(i), 360e(f), 360i, 360bbb-3, 379aa, 379aa-1, 387i, or 387t of this title or the refusal to permit access to or verification or copying of any such required record; or the violation of any record-keeping requirement under section 2223 of this title (except when such violation is committed by a farm).

(f) The refusal to permit entry or inspection as authorized by section 374 of this title.

(g) The manufacture within any Territory of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

(h) The giving of a guaranty or undertaking referred to in section 333(c)(2) of this title, which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, tobacco product, or cosmetic; or the giving of a guaranty or undertaking referred to in section 333(c)(3) of this title, which guaranty or undertaking is false.

(i)(1) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of section 344 or 379e of this title.

(2) Making, selling, disposing of, or keeping in possession, control, or custody, or concealing any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit drug.

(3) The doing of any act which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of section

344, 348, 350a, 350c, 355, 360, 360b, 360c, 360d, 360e, 360f, 360h, 360i, 360j, 360ccc, 360ccc-1, 360ccc-2, 374, 379, 379e, 387d, 387e, 387f, 387g, 387h, 387i, or 387t(b) of this title concerning any method or process which as a trade secret is entitled to protection; or the violating of section 346a(i)(2) of this title or any regulation issued under that section..[1] This paragraph does not authorize the withholding of information from either House of Congress or from, to the extent of matter within its jurisdiction, any committee or subcommittee of such committee or any joint committee of Congress or any subcommittee of such joint committee.

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, tobacco product, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

(*l*) Repealed. Pub.L. 105-115, Title IV, § 421, Nov. 21, 1997, 111 Stat. 2380.

(m) The sale or offering for sale of colored oleomargarine or colored margarine, or the possession or serving of colored oleomargarine or colored margarine in violation of subsections (b) or (c) of section 347 of this title.

(n) The using, in labeling, advertising or other sales promotion of any reference to any report or analysis furnished in compliance with section 374 of this title.

(o) In the case of a prescription drug distributed or offered for sale in interstate commerce, the failure of

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[1] So in original.

the manufacturer, packer, or distributor thereof to maintain for transmittal, or to transmit, to any practitioner licensed by applicable State law to administer such drug who makes written request for information as to such drug, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold, or such other printed matter as is approved by the Secretary. Nothing in this paragraph shall be construed to exempt any person from any labeling requirement imposed by or under other provisions of this chapter.

(p) The failure to register in accordance with section 360 or 387e of this title, the failure to provide any information required by section 360(j), 360(k), 387e(i), or 387e(j) of this title, or the failure to provide a notice required by section 360(j)(2) or 387e(i)(3) of this title.

(q)(1) The failure or refusal

(A) to comply with any requirement prescribed under section 360h, 360j(g), 387c(b), 387g, 387h, or 387*o* of this title;

(B) to furnish any notification or other material or information required by or under section 360i, 360j(g), 387d, 387i, or 387t of this title; or

(C) to comply with a requirement under section 360*l* or 387m of this title.

(2) With respect to any device or tobacco product, the submission of any report that is required by or under this chapter that is false or misleading in any material respect.

(r) The movement of a device or tobacco product in violation of an order under section 334(g) of this title or the removal or alteration of any mark or label required by the order to identify the device or tobacco product as detained.

(s) The failure to provide the notice required by section 350a(c) or 350a(e) of this title, the failure to make the reports required by section 350a(f)(1)(B) of this title, the failure to retain the records required by section 350a(b)(4) of this title, or the failure to meet the requirements prescribed under section 350a(f)(3) of this title.

(t) The importation of a drug in violation of section 381(d)(1) of this title, the sale, purchase, or trade of a drug or drug sample or the offer to sell, purchase, or trade a drug or drug sample in violation of section 353(c) of this title, the sale, purchase, or trade of a coupon, the offer to sell, purchase, or trade such a coupon, or the counterfeiting of such a coupon in violation of section 353(c)(2) of this title, the distribution of a drug sample in violation of section 353(d) of this title or the failure to otherwise comply with the requirements of section 353(d) of this title, the distribution of drugs in violation of section 353(e) of this title, failure to comply with the requirements under section 360eee-1 of this title, the failure to comply with the requirements under section 360eee-3 of this title, as applicable, or the failure to otherwise comply with the requirements of section 353(e) of this title.

(u) The failure to comply with any requirements of the provisions of, or any regulations or orders of the Secretary, under section 360b(a)(4)(A), 360b(a)(4)(D), or 360b(a)(5) of this title.

(v) The introduction or delivery for introduction into interstate commerce of a dietary supplement that is unsafe under section 350b of this title.

(w) The making of a knowingly false statement in any statement, certificate of analysis, record, or report required or requested under section 381(d)(3) of this

title; the failure to submit a certificate of analysis as required under such section; the failure to maintain records or to submit records or reports as required by such section; the release into interstate commerce of any article or portion thereof imported into the United States under such section or any finished product made from such article or portion, except for export in accordance with section 381(e) or 382 of this title, or with section 262(h) of Title 42; or the failure to so export or to destroy such an article or portions thereof, or such a finished product.

(x) The falsification of a declaration of conformity submitted under section 360d(c) of this title or the failure or refusal to provide data or information requested by the Secretary under paragraph (3) of such section.

(y) In the case of a drug, device, or food—

(1) the submission of a report or recommendation by a person accredited under section 360m of this title that is false or misleading in any material respect;

(2) the disclosure by a person accredited under section 360m of this title of confidential commercial information or any trade secret without the express written consent of the person who submitted such information or secret to such person; or

(3) the receipt by a person accredited under section 360m of this title of a bribe in any form or the doing of any corrupt act by such person associated with a responsibility delegated to such person under this chapter.

(z) Omitted

(aa) The importation of a prescription drug in violation of section 384 of this title, the falsification of any

record required to be maintained or provided to the Secretary under such section, or any other violation of regulations under such section.

(bb) The transfer of an article of food in violation of an order under section 334(h) of this title, or the removal or alteration of any mark or label required by the order to identify the article as detained.

(cc) The importing or offering for import into the United States of an article of food by, with the assistance of, or at the direction of, a person debarred under section 335a(b)(3) of this title.

(dd) The failure to register in accordance with section 350d of this title.

(ee) The importing or offering for import into the United States of an article of food in violation of the requirements under section 381(m) of this title.

(ff) The importing or offering for import into the United States of a drug or device with respect to which there is a failure to comply with a request of the Secretary to submit to the Secretary a statement under section 381(o) of this title.

(gg) The knowing failure to comply with paragraph (7)(E) of section 374(g) of this title; the knowing inclusion by a person accredited under paragraph (2) of such section of false information in an inspection report under paragraph (7)(A) of such section; or the knowing failure of such a person to include material facts in such a report.

(hh) The failure by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food to comply with the sanitary transportation practices prescribed by the Secretary under section 350e of this title.

(ii) The falsification of a report of a serious adverse event submitted to a responsible person (as defined under section 379aa or 379aa-1 of this title) or the falsification of a serious adverse event report (as defined under section 379aa or 379aa-1 of this title) submitted to the Secretary.

(jj)(1) The failure to submit the certification required by section 282(j)(5)(B) of Title 42, or knowingly submitting a false certification under such section.

(2) The failure to submit clinical trial information required under subsection (j) of section 282 of Title 42.

(3) The submission of clinical trial information under subsection (j) of section 282 of Title 42 that is false or misleading in any particular under paragraph (5)(D) of such subsection (j).

(kk) The dissemination of a television advertisement without complying with section 353c of this title.

(*ll*) The introduction or delivery for introduction into interstate commerce of any food to which has been added a drug approved under section 355 of this title, a biological product licensed under section 262 of Title 42, or a drug or a biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, unless—

(1) such drug or such biological product was marketed in food before any approval of the drug under section 355 of this title, before licensure of the biological product under such section 262 of Title 42, and before any substantial clinical investigations involving the drug or the biological product have been instituted;

(2) the Secretary, in the Secretary's discretion, has issued a regulation, after notice and comment,

approving the use of such drug or such biological product in the food;

(3) the use of the drug or the biological product in the food is to enhance the safety of the food to which the drug or the biological product is added or applied and not to have independent biological or therapeutic effects on humans, and the use is in conformity with—

(A) a regulation issued under section 348 of this title prescribing conditions of safe use in food;

(B) a regulation listing or affirming conditions under which the use of the drug or the biological product in food is generally recognized as safe;

(C) the conditions of use identified in a notification to the Secretary of a claim of exemption from the premarket approval requirements for food additives based on the notifier's determination that the use of the drug or the biological product in food is generally recognized as safe, provided that the Secretary has not questioned the general recognition of safety determination in a letter to the notifier;

(D) a food contact substance notification that is effective under section 348(h) of this title; or

(E) such drug or biological product had been marketed for smoking cessation prior to September 27, 2007; or

(4) the drug is a new animal drug whose use is not unsafe under section 360b of this title.

(mm) The failure to submit a report or provide a notification required under section 350f(d) of this title.

(nn) The falsification of a report or notification required under section 350f(d) of this title.

(oo) The sale of tobacco products in violation of a no-tobacco-sale order issued under section 333(f) of this title.

(pp) The introduction or delivery for introduction into interstate commerce of a tobacco product in violation of section 387k of this title.

(qq)(1) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp (including tax stamp), tag, label, or other identification device upon any tobacco product or container or labeling thereof so as to render such tobacco product a counterfeit tobacco product.

(2) Making, selling, disposing of, or keeping in possession, control, or custody, or concealing any punch, die, plate, stone, or other item that is designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any tobacco product or container or labeling thereof so as to render such tobacco product a counterfeit tobacco product.

(3) The doing of any act that causes a tobacco product to be a counterfeit tobacco product, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit tobacco product.

(rr) The charitable distribution of tobacco products.

(ss) The failure of a manufacturer or distributor to notify the Attorney General and the Secretary of the Treasury of their knowledge of tobacco products used in illicit trade.

(tt) Making any express or implied statement or representation directed to consumers with respect to a tobacco product, in a label or labeling or through the

media or advertising, that either conveys, or misleads or would mislead consumers into believing, that

(1) the product is approved by the Food and Drug Administration;

(2) the Food and Drug Administration deems the product to be safe for use by consumers;

(3) the product is endorsed by the Food and Drug Administration for use by consumers; or

(4) the product is safe or less harmful by virtue of—

(A) its regulation or inspection by the Food and Drug Administration; or

(B) its compliance with regulatory requirements set by the Food and Drug Administration;

including any such statement or representation rendering the product misbranded under section 387c of this title.

(uu) The operation of a facility that manufactures, processes, packs, or holds food for sale in the United States if the owner, operator, or agent in charge of such facility is not in compliance with section 350g of this title.

(vv) The failure to comply with the requirements under section 350h of this title.

(ww) The failure to comply with section 350i of this title.

(xx) The refusal or failure to follow an order under section 350*l* of this title.

(yy) The knowing and willful failure to comply with the notification requirement under section 350f(h) of this title.

(zz) The importation or offering for importation of a food if the importer (as defined in section 384a of this title) does not have in place a foreign supplier verification program in compliance with such section 384a of this title.

(aaa) The failure to register in accordance with section 381(s) of this title.

(bbb) The failure to notify the Secretary in violation of section 360bbb-7 of this title.

(ccc)(1) The resale of a compounded drug that is labeled "not for resale" in accordance with section 353b of this title.

(2) With respect to a drug to be compounded pursuant to section 353a or 353b of this title, the intentional falsification of a prescription, as applicable.

(3) The failure to report drugs or adverse events by an entity that is registered in accordance with subsection (b) of section 353b of this title.

(ddd)(1) The manufacture or the introduction or delivery for introduction into interstate commerce of a rinse-off cosmetic that contains intentionally-added plastic microbeads.

(2) In this paragraph—

(A) the term "plastic microbead" means any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof; and

(B) the term "rinse-off cosmetic" includes toothpaste.

21 U.S.C. § 333. Penalties

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead

(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(2) Notwithstanding the provisions of paragraph (1) of this section[1], if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

(b) Prescription drug marketing violations

(1) Notwithstanding subsection (a) of this section, any person who violates section 331(t) of this title by—

(A) knowingly importing a drug in violation of section 381(d)(1) of this title,

(B) knowingly selling, purchasing, or trading a drug or drug sample or knowingly offering to sell, purchase, or trade a drug or drug sample, in violation of section 353(c)(1) of this title,

(C) knowingly selling, purchasing, or trading a coupon, knowingly offering to sell, purchase, or trade such a coupon, or knowingly counterfeiting such a coupon, in violation of section 353(c)(2) of this title, or

(D) knowingly distributing drugs in violation of section 353(e)(1) of this title,

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[1] So in original. Words "of this section" probably should not appear.

shall be imprisoned for not more than 10 years or fined not more than $250,000, or both.

(2) Any manufacturer or distributor who distributes drug samples by means other than the mail or common carrier whose representative, during the course of the representative's employment or association with that manufacturer or distributor, violated section 331(t) of this title because of a violation of section 353(c)(1) of this title or violated any State law prohibiting the sale, purchase, or trade of a drug sample subject to section 353(b) of this title or the offer to sell, purchase, or trade such a drug sample shall, upon conviction of the representative for such violation, be subject to the following civil penalties:

(A) A civil penalty of not more than $50,000 for each of the first two such violations resulting in a conviction of any representative of the manufacturer or distributor in any 10-year period.

(B) A civil penalty of not more than $1,000,000 for each violation resulting in a conviction of any representative after the second conviction in any 10-year period.

For the purposes of this paragraph, multiple convictions of one or more persons arising out of the same event or transaction, or a related series of events or transactions, shall be considered as one violation.

(3) Any manufacturer or distributor who violates section 331(t) of this title because of a failure to make a report required by section 353(d)(3)(E) of this title shall be subject to a civil penalty of not more than $100,000.

(4)(A) If a manufacturer or distributor or any representative of such manufacturer or distributor provides

information leading to the institution of a criminal proceeding against, and conviction of, any representative of that manufacturer or distributor for a violation of section 331(t) of this title because of a sale, purchase, or trade or offer to purchase, sell, or trade a drug sample in violation of section 353(c)(1) of this title or for a violation of State law prohibiting the sale, purchase, or trade or offer to sell, purchase, or trade a drug sample, the conviction of such representative shall not be considered as a violation for purposes of paragraph (2).

(B) If, in an action brought under paragraph (2) against a manufacturer or distributor relating to the conviction of a representative of such manufacturer or distributor for the sale, purchase, or trade of a drug or the offer to sell, purchase, or trade a drug, it is shown, by clear and convincing evidence—

(i) that the manufacturer or distributor conducted, before the institution of a criminal proceeding against such representative for the violation which resulted in such conviction, an investigation of events or transactions which would have led to the reporting of information leading to the institution of a criminal proceeding against, and conviction of, such representative for such purchase, sale, or trade or offer to purchase, sell, or trade, or

(ii) that, except in the case of the conviction of a representative employed in a supervisory function, despite diligent implementation by the manufacturer or distributor of an independent audit and security system designed to detect such a violation, the manufacturer or distributor could not reasonably have been expected to have detected such violation,

the conviction of such representative shall not be considered as a conviction for purposes of paragraph (2).

(5) If a person provides information leading to the institution of a criminal proceeding against, and conviction of, a person for a violation of section 331(t) of this title because of the sale, purchase, or trade of a drug sample or the offer to sell, purchase, or trade a drug sample in violation of section 353(c)(1) of this title, such person shall be entitled to one-half of the criminal fine imposed and collected for such violation but not more than $125,000.

(6) Notwithstanding subsection (a) of this section, any person who is a manufacturer or importer of a prescription drug under section 384(b) of this title and knowingly fails to comply with a requirement of section 384(e) of this title that is applicable to such manufacturer or importer, respectively, shall be imprisoned for not more than 10 years or fined not more than $250,000, or both.

(7) Notwithstanding subsection (a)(2), any person that knowingly and intentionally adulterates a drug such that the drug is adulterated under subsection (a)(1), (b), (c), or (d) of section 351 of this title and has a reasonable probability of causing serious adverse health consequences or death to humans or animals shall be imprisoned for not more than 20 years or fined not more than $1,000,000, or both.

(c) Exceptions in certain cases of good faith, etc.

No person shall be subject to the penalties of subsection (a)(1) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on

request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 331(a) or (d) of this title, if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 331(a) of this title, that such article is not adulterated or misbranded, within the meaning of this chapter designating this chapter or to the effect, in case of an alleged violation of section 331(d) of this title, that such article is not an article which may not, under the provisions of section 344 or 355 of this title, be introduced into interstate commerce; or (3) for having violated section 331(a) of this title, where the violation exists because the article is adulterated by reason of containing a color additive not from a batch certified in accordance with regulations promulgated by the Secretary under this chapter, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the color additive, to the effect that such color additive was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this chapter; or (4) for having violated section 331(b), (c) or (k) of this title by failure to comply with section 352(f) of this title in respect to an article received in interstate commerce to which neither section 353(a) nor 353(b)(1) of this title is applicable, if the delivery or proffered delivery was made in good faith and the labeling at the time thereof contained the same directions for use and warning statements as were contained in the labeling at the time of such

receipt of such article; or (5) for having violated section 331(i)(2) of this title if such person acted in good faith and had no reason to believe that use of the punch, die, plate, stone, or other thing involved would result in a drug being a counterfeit drug, or for having violated section 331(i)(3) of this title if the person doing the act or causing it to be done acted in good faith and had no reason to believe that the drug was a counterfeit drug.

(d) Exceptions involving misbranded food

No person shall be subject to the penalties of subsection (a)(1) of this section for a violation of section 331 of this title involving misbranded food if the violation exists solely because the food is misbranded under section 343(a)(2) of this title because of its advertising.

(e) Prohibited distribution of human growth hormone

(1) Except as provided in paragraph (2), whoever knowingly distributes, or possesses with intent to distribute, human growth hormone for any use in humans other than the treatment of a disease or other recognized medical condition, where such use has been authorized by the Secretary of Health and Human Services under section 355 of this title and pursuant to the order of a physician, is guilty of an offense punishable by not more than 5 years in prison, such fines as are authorized by Title 18, or both.

(2) Whoever commits any offense set forth in paragraph (1) and such offense involves an individual under 18 years of age is punishable by not more than 10 years imprisonment, such fines as are authorized by Title 18, or both.

(3) Any conviction for a violation of paragraphs (1) and (2) of this subsection shall be considered a felony violation of the Controlled Substances Act [21

U.S.C. § 801 et seq.] for the purposes of forfeiture under section 413 of such Act [21 U.S.C. § 853].

(4) As used in this subsection the term "human growth hormone" means somatrem, somatropin, or an analogue of either of them.

(5) The Drug Enforcement Administration is authorized to investigate offenses punishable by this subsection.

(f) Violations related to devices

(1)(A) Except as provided in subparagraph (B), any person who violates a requirement of this chapter which relates to devices shall be liable to the United States for a civil penalty in an amount not to exceed $15,000 for each such violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding. For purposes of the preceding sentence, a person accredited under paragraph (2) of section 374(g) of this title who is substantially not in compliance with the standards of accreditation under such section, or who poses a threat to public health or fails to act in a manner that is consistent with the purposes of such section, shall be considered to have violated a requirement of this chapter that relates to devices.

(B) Subparagraph (A) shall not apply—

(i) to any person who violates the requirements of section 360i(a) or 360j(f) of this title unless such violation constitutes (I) a significant or knowing departure from such requirements, or (II) a risk to public health,

(ii) to any person who commits minor violations of section 360i(e) or 360i(g) of this title (only with

respect to correction reports) if such person demonstrates substantial compliance with such section, or

(iii) to violations of section 351(a)(2)(A) of this title which involve one or more devices which are not defective.

(2)(A) Any person who introduces into interstate commerce or delivers for introduction into interstate commerce an article of food that is adulterated within the meaning of section 342(a)(2)(B) of this title or any person who does not comply with a recall order under section 350*l* of this title shall be subject to a civil money penalty of not more than $50,000 in the case of an individual and $250,000 in the case of any other person for such introduction or delivery, not to exceed $500,000 for all such violations adjudicated in a single proceeding.

(B) This paragraph shall not apply to any person who grew the article of food that is adulterated. If the Secretary assesses a civil penalty against any person under this paragraph, the Secretary may not use the criminal authorities under this section to sanction such person for the introduction or delivery for introduction into interstate commerce of the article of food that is adulterated. If the Secretary assesses a civil penalty against any person under this paragraph, the Secretary may not use the seizure authorities of section 334 of this title or the injunction authorities of section 332 of this title with respect to the article of food that is adulterated.

(C) In a hearing to assess a civil penalty under this paragraph, the presiding officer shall have the same authority with regard to compelling testimony or production of documents as a presiding officer has under section 346a(g)(2)(B) of this title. The third

sentence of paragraph (5)(A) shall not apply to any investigation under this paragraph.

(3)(A) Any person who violates section 331(jj) of this title shall be subject to a civil monetary penalty of not more than $10,000 for all violations adjudicated in a single proceeding.

(B) If a violation of section 331(jj) of this title is not corrected within the 30-day period following notification under section 282(j)(5)(C)(ii) of Title 42, the person shall, in addition to any penalty under subparagraph (A), be subject to a civil monetary penalty of not more than $10,000 for each day of the violation after such period until the violation is corrected.

(4)(A) Any responsible person (as such term is used in section 355-1 of this title) that violates a requirement of section 355(o), 355(p), or 355-1 of this title shall be subject to a civil monetary penalty of

(i) not more than $250,000 per violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding; or

(ii) in the case of a violation that continues after the Secretary provides written notice to the responsible person, the responsible person shall be subject to a civil monetary penalty of $250,000 for the first 30-day period (or any portion thereof) that the responsible person continues to be in violation, and such amount shall double for every 30-day period thereafter that the violation continues, not to exceed $1,000,000 for any 30-day period, and not to exceed $10,000,000 for all such violations adjudicated in a single proceeding.

(B) In determining the amount of a civil penalty under subparagraph (A)(ii), the Secretary shall take

into consideration whether the responsible person is making efforts toward correcting the violation of the requirement of section 355(o), 355(p), or 355-1 of this title for which the responsible person is subject to such civil penalty.

(5)(A) A civil penalty under paragraph (1), (2), (3), (4), or (9) shall be assessed, or a no-tobacco-sale order may be imposed, by the Secretary by an order made on the record after opportunity for a hearing provided in accordance with this subparagraph and section 554 of Title 5. Before issuing such an order, the Secretary shall give written notice to the person to be assessed a civil penalty, or upon whom a no-tobacco-sale order is to be imposed, under such order of the Secretary's proposal to issue such order and provide such person an opportunity for a hearing on the order. In the course of any investigation, the Secretary may issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation.

(B) In determining the amount of a civil penalty, or the period to be covered by a no-tobacco-sale order, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. A no-tobacco-sale order permanently prohibiting an individual retail outlet from selling tobacco products shall include provisions that allow the outlet, after a specified period of time, to request that the Secretary compromise, modify, or terminate the order.

(C) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty

which may be assessed under paragraph (1), (2), (3), (4), or (9). The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

(D) The Secretary may compromise, modify, or terminate, with or without conditions, any no-tobacco-sale order.

(6) Any person who requested, in accordance with paragraph (5)(A), a hearing respecting the assessment of a civil penalty or the imposition of a no-tobacco-sale order and who is aggrieved by an order assessing a civil penalty or the imposition of a no-tobacco-sale order may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 60-day period beginning on the date the order making such assessment was issued, or on which the no-tobacco-sale order was imposed, as the case may be.

(7) If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment becomes final, and if such person does not file a petition for judicial review of the order in accordance with paragraph (6), or

(B) after a court in an action brought under paragraph (6) has entered a final judgment in favor of the Secretary,

the Attorney General shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 60-day period

referred to in paragraph (6) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

(8) If the Secretary finds that a person has committed repeated violations of restrictions promulgated under section 387f(d) of this title at a particular retail outlet then the Secretary may impose a no-tobacco-sale order on that person prohibiting the sale of tobacco products in that outlet. A no-tobacco-sale order may be imposed with a civil penalty under paragraph (1). Prior to the entry of a no-sale order under this paragraph, a person shall be entitled to a hearing pursuant to the procedures established through regulations of the Food and Drug Administration for assessing civil money penalties, including at a retailer's request a hearing by telephone, or at the nearest regional or field office of the Food and Drug Administration, or at a Federal, State, or county facility within 100 miles from the location of the retail outlet, if such a facility is available.

(9) Civil monetary penalties for violation of tobacco product requirements

(A) In general

Subject to subparagraph (B), any person who violates a requirement of this chapter which relates to tobacco products shall be liable to the United States for a civil penalty in an amount not to exceed $15,000 for each such violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding.

(B) Enhanced penalties

(i) Any person who intentionally violates a requirement of section 387b(5), 387b(6), 387d, 387h(c), or 387k(a) of this title, shall be subject to a civil monetary penalty of—

(I) not to exceed $250,000 per violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding; or

(II) in the case of a violation that continues after the Secretary provides written notice to such person, $250,000 for the first 30-day period (or any portion thereof) that the person continues to be in violation, and such amount shall double for every 30-day period thereafter that the violation continues, not to exceed $1,000,000 for any 30-day period, and not to exceed $10,000,000 for all such violations adjudicated in a single proceeding.

(ii) Any person who violates a requirement of section 387k(g)(2)(C)(ii) or 387k(i)(1) of this title, shall be subject to a civil monetary penalty of—

(I) not to exceed $250,000 per violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding; or

(II) in the case of a violation that continues after the Secretary provides written notice to such person, $250,000 for the first 30-day period (or any portion thereof) that the person continues to be in violation, and such amount shall double for every 30-day period thereafter that the violation continues, not to exceed $1,000,000 for any 30-day period, and not to exceed $10,000,000 for all such violations adjudicated in a single proceeding.

(iii) In determining the amount of a civil penalty under clause (i)(II) or (ii)(II), the Secretary shall

take into consideration whether the person is making efforts toward correcting the violation of the requirements of the section for which such person is subject to such civil penalty.

(g) Violations regarding direct-to-consumer advertising

(1) With respect to a person who is a holder of an approved application under section 355 of this title for a drug subject to section 353(b) of this title or under section 262 of Title 42, any such person who disseminates or causes another party to disseminate a direct-to-consumer advertisement that is false or misleading shall be liable to the United States for a civil penalty in an amount not to exceed $250,000 for the first such violation in any 3-year period, and not to exceed $500,000 for each subsequent violation in any 3-year period. No other civil monetary penalties in this chapter (including the civil penalty in subsection (f)(4)) shall apply to a violation regarding direct-to-consumer advertising. For purposes of this paragraph: (A) Repeated dissemination of the same or similar advertisement prior to the receipt of the written notice referred to in paragraph (2) for such advertisements shall be considered one violation. (B) On and after the date of the receipt of such a notice, all violations under this paragraph occurring in a single day shall be considered one violation. With respect to advertisements that appear in magazines or other publications that are published less frequently than daily, each issue date (whether weekly or monthly) shall be treated as a single day for the purpose of calculating the number of violations under this paragraph.

(2) A civil penalty under paragraph (1) shall be assessed by the Secretary by an order made on the record after providing written notice to the person to

be assessed a civil penalty and an opportunity for a hearing in accordance with this paragraph and section 554 of Title 5. If upon receipt of the written notice, the person to be assessed a civil penalty objects and requests a hearing, then in the course of any investigation related to such hearing, the Secretary may issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation, including information pertaining to the factors described in paragraph (3).

(3) The Secretary, in determining the amount of the civil penalty under paragraph (1), shall take into account the nature, circumstances, extent, and gravity of the violation or violations, including the following factors:

(A) Whether the person submitted the advertisement or a similar advertisement for review under section 379h-1 of this title.

(B) Whether the person submitted the advertisement for review if required under section 353c of this title.

(C) Whether, after submission of the advertisement as described in subparagraph (A) or (B), the person disseminated or caused another party to disseminate the advertisement before the end of the 45-day comment period.

(D) Whether the person incorporated any comments made by the Secretary with regard to the advertisement into the advertisement prior to its dissemination.

(E) Whether the person ceased distribution of the advertisement upon receipt of the written notice referred to in paragraph (2) for such advertisement.

(F) Whether the person had the advertisement reviewed by qualified medical, regulatory, and legal reviewers prior to its dissemination.

(G) Whether the violations were material.

(H) Whether the person who created the advertisement or caused the advertisement to be created acted in good faith.

(I) Whether the person who created the advertisement or caused the advertisement to be created has been assessed a civil penalty under this provision within the previous 1-year period.

(J) The scope and extent of any voluntary, subsequent remedial action by the person.

(K) Such other matters, as justice may require.

(4)(A) Subject to subparagraph (B), no person shall be required to pay a civil penalty under paragraph (1) if the person submitted the advertisement to the Secretary and disseminated or caused another party to disseminate such advertisement after incorporating each comment received from the Secretary.

(B) The Secretary may retract or modify any prior comments the Secretary has provided to an advertisement submitted to the Secretary based on new information or changed circumstances, so long as the Secretary provides written notice to the person of the new views of the Secretary on the advertisement and provides a reasonable time for modification or correction of the advertisement prior to seeking any civil penalty under paragraph (1).

(5) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which may be assessed under paragraph (1). The amount of such penalty, when finally determined, or

the amount charged upon in compromise, may be deducted from any sums owed by the United States to the person charged.

(6) Any person who requested, in accordance with paragraph (2), a hearing with respect to the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty, may file a petition for de novo judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 60-day period beginning on the date the order making such assessments was issued.

(7) If any person fails to pay an assessment of a civil penalty under paragraph (1)—

(A) after the order making the assessment becomes final, and if such person does not file a petition for judicial review of the order in accordance with paragraph (6), or

(B) after a court in an action brought under paragraph (6) has entered a final judgment in favor of the Secretary,

the Attorney General of the United States shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 60-day period referred to in paragraph (6) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

Case No. 14-cr-03024-2 (MWB-LTS)

UNITED STATES OF AMERICA,

Plaintiff,

v.

QUALITY EGG, LLC, *et al,*

Defendants.

Judge Mark W. Bennett

STIPULATIONS

In the interest of judicial efficiency and to narrow the scope of contested issues, Plaintiff United States of America and Defendants Quality Egg, LLC, Austin ("Jack") DeCoster, and Peter DeCoster, through their undersigned counsel, enter into the following stipulations, which relate to the below-referenced paragraphs of the U.S. Probation Office's Presentence Investigation Reports (Doc. Nos. 84, 85, 86) ("PSRs"):

1. The parties stipulate that neither Dr. Charles Hofacre nor Dr. Maxcy Nolan has a basis to testify that Quality Egg fully and effectively implemented all of Dr. Hofacre's and Dr. Nolan's recommendations. The parties further stipulate that a number of recommendations were implemented, but that the measures implemented were not effective in stopping

the outbreak of *salmonella* that occurred at Quality Egg. The parties stipulate that, beginning in about the late 1980s, Jack DeCoster's egg farms in Maine implemented *salmonella* prevention and control measures that were monitored by the State of Maine. Although the Maine layer barns did receive some positive environmental SE tests, for several years up to and including 2012, no eggs tested positive for SE and no *salmonella* outbreak occurred in Maine. The parties stipulate that in 2009, Quality Egg began working with a pest-control expert, Dr. Maxcy Nolan, and a poultry disease expert, Dr. Charles Hofacre, and started vaccinating some of its birds for *salmonella* strains. The parties further stipulate that the government's expert, Dr. Sherrill Davidson, would be unable to conclusively testify that, had there been strict adherence to Dr. Hofacre's and Dr. Nolan's advice—or to the measures advocated by Dr. Davidson, the *salmonella* outbreak in Iowa would have been prevented. (In reference to PSR ¶ 22 [¶ 21]).[1]

2. The parties stipulate that Jerry Crawford would testify that in April 2009, the FDA placed a courtesy call to Peter DeCoster to advise him that one of Quality Egg's customers (a diner restaurant in Minnesota) had an SE outbreak. The FDA indicated there were over 20 food suppliers to the diner and it would take several weeks to determine which supplier caused the illness. Peter DeCoster contacted Crawford to see what could be done. Crawford identified an independent testing lab in Louisville, Kentucky, which provided a methodology for collection of eggs from the farm for testing in Louisville. The eggs all tested

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[1] Paragraph references are to Quality Egg's PSR; bracketed paragraph references are to the individual defendants' PSRs.

negative for SE. The parties further stipulate that, other than this occasion, prior to July 2010, Quality Egg did not conduct SE tests on eggs or divert eggs from the market based upon the receipt of a positive environmental SE result. The parties also stipulate that, until adoption of the Egg Safety Rule in July 2010, there was no legal or regulatory requirement to do so. The parties further stipulate that, after implementation of the Egg Safety Rule, Quality Egg did have eggs tested after receipt of a positive environmental SE test result and none of these eggs tested positive for SE. The parties further stipulate that Quality Egg diverted eggs from the market after it issued a voluntary recall in August 2010. (In reference to PSR ¶ 23 [¶ 22] and PSR ¶ 26 [¶ 25]).

3. The parties stipulate that there is evidence that Quality Egg received positive environmental SE test results for some barns, and that Quality Egg dry cleaned these and other barns before placing a new flock in the barns. (In reference to PSR ¶ 26 [¶ 25] and PSR ¶ 37 [¶ 36]).

4. The parties stipulate that Allison Marshall, a clerical worker for Quality Egg, would testify that she believes she mailed a copy of the Walmart presentation to Jack DeCoster and that she emailed a copy to his wife. The parties further stipulate that there is no evidence of which version of the presentation was transmitted by Ms. Marshall and no evidence of whether Jack DeCoster reviewed the presentation. (In reference to PSR ¶ 24 [¶ 23]).

5. The parties stipulate that there is no evidence of whether Jack DeCoster reviewed any draft of the presentation prior to the Walmart meeting. The parties further stipulate that Jack DeCoster did not attend the Walmart meeting. The parties stipulate

that, pursuant to a subpoena that required the production of all versions of the Walmart presentation, Quality Egg produced only one version. The version produced by Quality Egg was bound on the left edge and contained inaccurate statements related to Quality Egg's "Flock Testing Policy," its HACCP and SQF programs, and the existence and benefits of independent audits by Guardian, the American Institute for Food Safety and Hygiene, and AIB. The parties further stipulate that a name tag label issued by Walmart for Peter DeCoster, bearing a date of August 25, 2008, is affixed to the last page of the version produced by Quality Egg. The parties further stipulate that, pursuant to a subpoena requiring the production of all versions of the Walmart presentation, Jerry Crawford produced a single version of the presentation from his digital records that did not contain inaccurate statements about Quality Egg's "Flock Testing Policy" and its SQF program. The parties further stipulate that Jerry Crawford would testify that he received only one draft of the presentation from Peter DeCoster. Further, Crawford would testify that he made three copies of that draft (the only draft then or now in his file) and sent it via Federal Express on behalf of Quality Egg and Peter DeCoster on August 18, 2008. They were signed as received by a Walmart representative on August 19, 2008, in advance of the presentation on August 25, 2008. The parties stipulate that Jerry Crawford would testify that, based upon a review of his records, he does not believe that the version of the presentation discussed during the meeting with Walmart contained inaccurate statements about Quality Egg's "Flock Testing Policy" and its SQF program. The parties further stipulate that, pursuant to a subpoena requiring the production of all versions of the Walmart presentation, Walmart was unable to

produce any version of the presentation. (In reference to PSR ¶ 25 ¶ 24]).

6. The parties stipulate that a Walmart employee present at the meeting would testify that, during the meeting, Peter DeCoster did most of the speaking on behalf of Quality Egg. The parties further stipulate that the Walmart witness would testify that Peter DeCoster discussed Quality Egg's "Flock Testing Policy," its HACCP and SQF programs, and the existence and benefits of independent audits such as the AIB audit. The parties further stipulate that Alison Marshall, who also attended the Walmart meeting, would testify that the version of the presentation presented at the meeting contained the inaccurate statements about Quality Egg's "Flock Testing Policy" and its SQF program. The parties stipulate that Jerry Crawford, who was present at the meeting, would testify that while he does not specifically recall what was discussed, he does not believe the "Flock Testing Policy" and SQF program were discussed. The parties additionally stipulate that handwritten notes taken by Jerry Crawford during the Walmart meeting include the words "SQF certified." (In reference to PSR ¶ 29 [¶ 28]).

7. The parties stipulate that Tony Wasmund had primary responsibility for creating the HACCP plan, for obtaining and distributing environmental test results and for implementing any follow up to a positive test result. The parties further stipulate that the evidence would show that "retesting" of the barn after cleaning did not occur. The parties stipulate that this was the case with all barns including those that had received a positive environmental SE test result. The parties stipulate that Jack DeCoster and Peter DeCoster often received copies of, or were made aware

of, positive SE environmental test results received by Tony Wasmund. (In reference to PSR ¶ 37 [¶ 36]).

8. The parties stipulate that there is no evidence in the record that Peter DeCoster made any affirmative misrepresentation to Hillandale, nor is there any evidence that Peter DeCoster was under an affirmative legal duty to disclose positive SE environmental test results to Hillandale. The parties further stipulate that Tony Wasmund would testify that he did not share information regarding positive environmental test results or information regarding the results of bird necropsies with Hillandale, and that although Hillandale asked Iowa State University to disclose the results of environmental SE tests, Iowa State University was not authorized by Quality Egg to share those results with Hillandale. The Government reserves the right to argue that, in the context of the ongoing relationship between the parties and in light of the other representations made by Quality Egg to Hillandale, the failure to share such information was, in fact, misleading. (In reference to PSR ¶ 41 [¶ 40]).

9. The parties stipulate that Anthony Murga would testify that Jack DeCoster instructed him that, consistent with Jack DeCoster's personal experience and results at his Maine and Ohio processing facilities, Quality Egg should be diverting no more than 1-2% of the eggs based upon "checks." The parties further stipulate that Anthony Murga and Scott Sorenson would testify that they did, on occasion, adjust the electronic check detectors so that eggs would "pass" the check detector with a greater number of checks than allowed under USDA regulatory requirements. The parties further stipulate that Anthony Murga and Scott Sorenson would testify that, on occasion, eggs that did not meet USDA grade standards were sold in

packaging that misidentified the eggs as meeting those standards. (In reference to PSR ¶ 43 [¶ 42]).

10. The parties stipulate that Tony Wasmund would testify that he does not recall reprimanding Murga for failing to move eggs in connection with an upcoming USDA audit or surveillance. The parties further stipulate that Anthony Murga would testify that he was reprimanded by Tony Wasmund and Jack DeCoster for failing to move eggs in advance of a USDA inspection. (In reference to PSR ¶ 45 [¶ 44]).

11. The parties stipulate that Anthony Murga would testify that he told Peter DeCoster about the first bribe after it occurred, and would testify that Peter DeCoster responded by telling him never to do it again. The parties stipulate that Anthony Murga would testify that he recalls Tony Wasmund telling him that Wasmund had told Jack DeCoster that Murga had "taken care of" some eggs that had been retained. The parties further stipulate that Murga would testify that, at some point soon after this conversation between Wasmund and Jack DeCoster, Jack DeCoster stated to Murga, "Way to get those eggs out the door." In addition, the parties stipulate that Anthony Wasmund would testify that he did not tell Jack DeCoster about the bribes and that he has no knowledge whether or to what extent Anthony Murga disclosed the bribes to Jack DeCoster or Peter DeCoster, (In reference to PSR ¶ 50 [¶ 49]).

12. The parties stipulate that Wasmund would testify that, about three days after he gave Murga cash to use for the second bribe, he overheard Peter DeCoster saying to Murga, "Be careful about what you are doing. This is a federal offense." (In reference to PSR ¶ 51 [¶ 50]).

13. The parties stipulate that Dr. Sherrill Davidson, Dr. Charles L. Hofacre, and Dr. Maxcy P. Nolan III would offer conflicting expert opinions regarding the expected efficacy of certain preventative measures and the actual cause of the *salmonella* outbreak at Quality Egg. To the extent the Court deems these issues relevant to sentencing, resolution of these issues would require weighing of the competing expert testimony as set forth in the submissions provided by the Probation Office, the Government, and the Defendants. (In reference to PSR ¶¶ 85-92 [¶¶ 73-80]).

14. The parties have jointly reviewed the records collected in response to the Government's extensive efforts to identify potential victims of the *salmonella* outbreak. The parties stipulate that the following individuals qualify as victims under 18 § 3664 and should be ordered to receive restitution in the amounts shown, if restitution is ordered by the Court. The parties further stipulate that, based upon evidence gathered as of the date of this stipulation, there are no other identifiable victims who have not already been compensated by defendants for all losses compensable as restitution, except that the parties make no stipulation with regard to the claim for restitution by H.I.C. and its members. (In reference to PSR ¶ 93 [¶ 81]).

Victim Name	Loss	
P.Q.	• Medical Bills	
	o Co-Pays	$315
	o Ins. Pd.	$262
	• Prescriptions	$15.11
	• Lost Wages	$531.30
	Total	$1123.41

A.T.	• Medical Bills – co-pay	$726.88
	• Lost Wages	$312.84
	Total	$1,039.72
L.L.	• Medical Bills – Ins Pd.	$80.33
	Total	$80.33
J.L.	• Medical Bills	
	o Co-pay	$356.56
	o Ins. Pd.	$38,201.74
	Total	$38,558.30
E.K.	• Lost Wages	$459.36
	Total	$459.36
G.H.T.	• Medical bills, prescript. & misc.	$300.00
	• Lost Wages	$520.00
	Total	$820.00
V.H.	• Medical Bills	$180.00
	Total	$180.00
M.M.	• Medical Bills	
	o Co-pay	$347.52
	o Ins. Co.	$835.98
	Total	$1,183.50
D.M.	• Lost income	
	o DM	$ $5883.57
	o Wife	$ $1680.00
	Total	$ $7563.57
J.T.	• Dental Work - $1000 per crown x 32 teeth	
	Total	$32,000.00
	Grand Total	$83,008.19

Dated: 3/19/15

/s/ Peter E. Deegan, Jr.

PETER E. DEEGAN, JR.
U.S. ATTORNEY'S OFFICE
Northern District of Iowa
111 7th Avenue S.E.
Box 1
Cedar Rapids, IA 52401
Tel: 319-363-6333
Fax: 319-363-1990
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Counsel for Plaintiff United States of America

/s/ Stuart J. Dornan

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Counsel for Defendants Quality Egg LLC and Austin DeCoster

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 14-CR-3024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

QUALITY EGG, LLC, (d/b/a Wright County Egg and Environ), AUSTIN DECOSTER (a/k/a Jack DeCoster), and PETER DECOSTER,

Defendants.

INFORMATION

Count 1
18 U.S.C. § 201(b)(1): Bribery of a Public Official

Count 2
21 U.S.C. §§ 331(a) and 333(a)(2): Introducing Misbranded Food Into Interstate Commerce with Intent to Defraud or Mislead

Count 3
21 U.S.C. §§ 331(a) and 333(a)(1): Introducing Adulterated Food Into Interstate Commerce

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Forfeiture Allegation

The United States Attorney charges:

Count 1
Bribery of a Public Official
(Quality Egg, LLC)

On at least two separate occasions in 2010, including on or about April 12, 2010, in the Northern District of Iowa, defendant QUALITY EGG, LLC did, directly and indirectly, corruptly give, offer, and promise a thing of value to a public official with intent to influence an official act, and to induce a public official to do an act and omit to do an act in violation of the public official's official duty. That is, defendant did corruptly offer, promise, and give money to a United States Department of Agriculture (USDA) Inspector at defendant's egg production facility in Wright County, Iowa, with intent to influence the USDA Inspector to release for sale shell eggs that had been retained by the USDA for failing to meet the standards of the Egg Products Inspection Act, 21 U.S.C. § 1031 *et seq*.

This was in violation of Title 18, United States Code, Section 201(b)(1).

Count 2
Introducing Misbranded Food Into Interstate Commerce with Intent to Defraud or Mislead
(Quality Egg, LLC)

Beginning no later than January 1, 2006, and continuing until approximately August 12, 2010, in the Northern District of Iowa and elsewhere, defendant QUALITY EGG, LLC, with intent to defraud and mislead, did introduce and cause to be introduced into interstate commerce food, that is shell eggs, that were misbranded. The shell eggs were misbranded within the meaning of 21 U.S.C. § 343(a)(1) in that their labeling was false and misleading in any particular

because it made the eggs appear to be not as old as they actually were.

This was in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2).

Count 3
Introducing Adulterated Food Into
Interstate Commerce
(All Defendants)

Between about the beginning of 2010 and in or about August 2010, in the Northern District of Iowa and elsewhere, defendants QUALITY EGG, LLC, AUSTIN DECOSTER and PETER DECOSTER did introduce and cause to be introduced into interstate commerce food, that is shell eggs, which were adulterated. The shell eggs were adulterated within the meaning of 21 U.S.C. § 342(a)(1) in that they contained a poisonous and deleterious substance, that is, *Salmonella Enteriditis*, that may have rendered them injurious to health. Between about the beginning of 2010 and in or about August 2010, AUSTIN DECOSTER and PETER DECOSTER were Responsible Corporate Officers of Quality Egg, LLC within the meaning of the Food, Drug and Cosmetic Act.

This was in violation of Title 21, United States Code, Sections 331(a) and 333(a)(1).

FORFEITURE ALLEGATION

The allegations contained in Count 1 of this Information are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C).

Upon conviction of the offense in violation of Title 18, United States Code, Section 201(b)(1) set forth in Count 1 of this Information, defendant QUALITY

EGG, LLC shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 981(a)(1)(C), any property, real or personal, which constitutes or is derived from proceeds traceable to such violation, including but not limited to the amount of $10,000, representing proceeds of the offense.

This is all pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

KEVIN W. TECHAU
United States Attorney

By: /s/ Peter E. Deegan, Jr.
PETER E. DEEGAN, JR.
Assistant United States Attorney

LISA K. HSIAO
CHRISTOPHER E. PARISI
Trial Attorneys
U.S. Department of Justice
Consumer Protection Branch

APPENDIX G

[Seal]

U.S. Department of Justice

United States Attorney
Northern District of Iowa

600 Fourth Street
Suite 670
Sioux City, IA 51101
712-255-6011
712-252-2034 (fax)
712-258-4761 (tty)

April 18, 2014

Stuart J. Dornan, Esq.
Dornan, Lustgarten & Troia, PC
1403 Farnam Street, Suite 232
Paxton Hotel Bldg., 2nd Floor
Omaha, NE 68102

Re: Peter DeCoster and Pending Investigation

Dear Mr Dornan:

This letter will serve as a REVISED memorandum of a proposed plea agreement between the United States Attorney's Office for the Northern District of Iowa and Peter DeCoster, defendant. All references to the "United States" or "government" in this proposed plea agreement refer to the United State's Attorney's Office for the Northern District of Iowa and to no other governmental entity. This plea offer will expire on April 22, 2014, unless otherwise extended by the government.

CHARGES AND PENALTIES

1. PAD Defendant will plead guilty to Count 3 of an Information that will charge defendant with selling adulterated food in violation of 21 U.S.C. §§ 331(a) and 333(a)(1), as a Responsible Corporate Officer.

2. PAD This offer is contingent upon Austin (Jack) DeCoster and Quality Egg, LLC accepting the plea proposals contained in letters from this office to their respective counsel dated April 18, 2014, and entering guilty pleas pursuant to those agreements in District Court.

3. PAD Defendant understands that Count 3 of the Information, which charges a violation of the Responsible Corporate Officer doctrine, is punishable by the following maximum penalties: (1) not more than 1 year imprisonment without the possibility of parole or a term of probation of not more than 5 years; (2) a fine equal to the greater of twice the gross gain resulting from the offense, twice the gross loss resulting from the offense, or $100,000; (3) a mandatory special assessment of $100; and (4) a term of supervised release of up to 1 year.

4. PAD Defendant understands restitution and a term of supervised release following incarceration may be imposed in addition to any other sentence. Defendant further acknowledges that, if defendant violates, at any time, any condition of supervised release, defendant could be returned to prison for the full term of supervised release and the Court is not required to grant credit for any amount of time defendant may have successfully completed on supervised release. Defendant also understands the

U.S. Sentencing Guidelines will provide advisory guidance to the Court in determining a sentence in this case.

5. PAD At the time the guilty plea is entered, defendant will admit that defendant is guilty of the charge specified in Paragraph 1 of this agreement. The U.S. Attorney's Office for this District will file no additional Title 21 adulterated or misbranded food-related, or Title 18 bribery or fraud-related, criminal charges based upon information now in our possession. The U.S. Attorney's Office for this District will bring no other actions against defendant, including civil or criminal forfeiture actions, based upon information now in our possession. If this office becomes aware of evidence of additional crimes warranting criminal prosecution, all information in our possession could be used in such a prosecution.

6. PAD Defendant understands and agrees defendant has the absolute right to plead guilty before a United States District Court Judge. However, if convenient to the Court, defendant agrees to waive and give up this right and to plead guilty before a United States Magistrate Judge. Defendant agrees to execute the attached consent to proceed before the United States Magistrate Judge.

STIPULATION OF FACTS

7. PAD By initialing each of the following paragraphs, defendant stipulates to the following facts. Defendant agrees these facts are true and may be used to establish a factual basis for defendant's guilty plea and sentence. Defendant has been advised by defendant's attorney of defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Defendant waives these rights

and agrees this stipulation may be used against defendant at any time in any proceeding should defendant violate or refuse to follow through on this plea agreement, regardless of whether the plea agreement has been accepted by the Court. Defendant agrees that the stipulation below is a summary of the facts against defendant and does not constitute all of the facts the government would be able to prove at trial and may be able to prove to the Court in accordance with this agreement.

a) PAD At all times relevant to the Information, defendant Peter DeCoster was the Chief Operating Officer of Quality Egg, LLC, also doing business as Wright County Egg, and Environ (hereinafter "Quality Egg"), and exercised some control over the production and distribution of shell eggs by Quality Egg and related entities and assets in Iowa. As such, defendant was one of the persons responsible for running the operations of Quality Egg and the various egg facilities in Iowa associated with Quality Egg.

b) PAD Between about the beginning of 2010 and in or about August 2010, Quality Egg introduced and caused to be introduced into interstate commerce food, that is shell eggs, that were adulterated. The shell eggs were adulterated in that they contained a poisonous and deleterious substance, that is, *Salmonella Enteriditis*, that may have rendered them injurious to health. Quality Egg produced, processed, held, and packed the contaminated eggs in Iowa and sold and caused the distribution of the eggs to buyers in states other than Iowa. At the time Quality Egg sold the contaminated eggs, if the

contamination of eggs had been known to the defendant, he was in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs.

c) PAD To date, the government's investigation has not identified any personnel employed by or associated with Quality Egg, including the defendant, who had knowledge, during the time frame from January 2010 through August 12, 2010, that eggs sold by Quality Egg were, in fact, contaminated with *Salmonella Enteriditis*.

SENTENCING PROVISIONS

8. PAD Defendant understands and agrees to be sentenced based on facts to be found by the sentencing judge by a preponderance of the evidence and agrees facts essential to the punishment need not be (1) charged in the Indictment or Information; (2) proven to a jury; or (3) proven beyond a reasonable doubt. Defendant agrees the Court will determine the appropriate sentence after considering a variety of factors, including; (1) the nature and circumstances of the offense and the history and characteristics of defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence to afford adequate deterrence to criminal conduct; (4) the need for the sentence to protect the public from further crimes of defendant; (5) the need for the sentence to provide defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (6) the need to avoid unwarranted sentencing disparities among defendants with similar criminal records who have been found guilty of similar conduct; and (7) the need

to provide restitution to any victims of the offense. Defendant understands the Court will also consider the kinds of sentence and the sentencing range established by the United States Sentencing Guidelines for the applicable category of offense(s) committed by defendant and will consider any pertinent policy statements issued as part of the Guidelines. The Court will consider relevant adjustments under the United States Sentencing Guidelines, which will include a review of such things as defendant's role in the offense, criminal history, acceptance or lack of acceptance of responsibility, and other considerations. The Court may also consider other information including any information concerning the background, character, and conduct of defendant.

9. PAD During plea negotiations the parties may have discussed how various factors could impact the Court's sentencing decision and the determination of the advisory sentencing guidelines range. The parties agree, however, that discussions did not result in any express or implied promise or guarantee concerning the actual sentence to be imposed by the Court. Defendant understands the Court is not bound by the stipulations of the parties, nor is it bound by the sentencing range as determined pursuant to the sentencing guidelines. This plea agreement provides for no guarantee concerning the actual sentence to be imposed. Defendant further understands defendant will have no right to withdraw defendant's guilty plea if the sentence imposed is other than defendant hoped for or anticipated.

10. PAD The parties stipulate and agree the United States Sentencing Guidelines should be applied as follows:

a) PAD Base Offense Level: Pursuant to USSG §2N2.1(a), the appropriate base offense level is 6.

b) PAD Acceptance of Responsibility (Chapter 3 adjustment): Based upon information available to the government and defendant's conduct as of the date of this agreement, defendant appears to qualify for a two-level downward adjustment for acceptance of responsibility under USSG §3E1.1(a). However, the government shall be free to contest the adjustment should it discover information showing defendant has not accepted responsibility or should the defendant subsequently fail to continue to accept responsibility by providing false information to the court, the probation office, or the government; by attempting to obstruct justice; by falsely denying or frivolously contesting relevant conduct; by breaching this plea agreement; or by acting in a way that is inconsistent with, or failing to act in any way that is consistent with, the granting of the adjustment under USSG §3E1.1(a).

c) PAD No Other Guideline Adjustments: The parties agree no other guidelines adjustments should apply.

11. PAD The parties agree the appropriate fine to be imposed is $100,000. No later than the close of business on the day defendant enters his guilty plea pursuant to this agreement, defendant agrees to deposit $100,000 with the Clerk of Court to be applied toward any fine imposed upon defendant at sentencing. Failure to deposit such funds will be deemed a material breach of this agreement.

12. PAD After presenting evidence and argument regarding aggravating and mitigating circumstances to the Court, the government agrees to leave to the Court's discretion whether to impose a sentence of incarceration, home confinement, or probation. The parties agree the government may advocate for specific conditions of probation and/or supervised release. In addition, the parties agree defendant may file a motion contending that a sentence of incarceration or other confinement in this case would be unconstitutional and defendant may appeal any adverse sentencing decision. The parties agree the government may oppose such a motion and defend any ruling of the Court on appeal and in any other post-conviction proceeding. If defendant appeals an adverse sentencing decision, and unless the government receives information indicating defendant poses a significant risk of non-appearance or danger to the community, the government agrees to leave to the discretion of the Court defendant's motion for a personal recognizance bond pending appeal. The parties agree the government may defend on appeal and in any other post-conviction proceeding any ruling of the Court regarding bond pending appeal.

13. PAD Defendant, defendant's attorney, and the United States may make whatever comment and evidentiary offer they deem appropriate at the time of the guilty plea, sentencing, or any other proceeding related to this case, so long as the offer or comment does not violate any other provision of this agreement. The parties are also free to provide all relevant information and controlling authority to the Probation Office and Court for use in preparing and litigating adjustments, enhancements, or departures scored in the presentence report, including offering statements made by defendant at any time.

14. PAD The parties are free to contest or defend any ruling of the Court, unless otherwise limited by this agreement, on appeal or in any other post-conviction proceeding.

15. PAD Defendant understands that, pursuant to the Victim and Witness Protection Act, Title I of the Justice for All Act, and the regulations promulgated under the Act by the Attorney General of the United States:

a) The victim of a crime is given the opportunity to comment on the offense and make recommendations regarding the sentence to be imposed. Defendant understands the victim's comments and recommendations may be different from those of the parties to this agreement.

b) The government is required to consult with victims of serious crimes to obtain their views regarding the appropriate disposition of the case against defendant and to make any such information regarding sentencing known to the Court. Defendant understands any victim's opinions and recommendations may be different from those presented by the government.

c) The government is required to "fully advocate the rights of victims on the issue of restitution unless such advocacy would unduly complicate the sentencing proceeding," and the Court is authorized to order restitution by defendant to victims of crime, including, but not limited to, restitution for property loss, personal injury, or death.

16. PAD The parties agree that restitution is neither mandatory under 18 U.S.C. § 3663A, nor authorized under 18 U.S.C. § 3663. Defendant understands that

defendant may be ordered to pay restitution as a condition of probation or supervised release. Defendant understands that, consistent with the government's obligations under the Victim and Witness Protection Act, Title I of the Justice for All Act, and the regulations promulgated under the Act by the Attorney General of the United States, the government will seek information from any victims of defendant's offense regarding, among other things, whether an order of restitution may be appropriate. The parties agree that any amount of money recovered by a particular victim as compensation for harm caused by defendant's offense should be credited against any restitution obligation to that victim. If the Court finds restitution appropriate under Count 3 of the Information, and if the Court further finds that Quality Egg, LLC or its guarantor(s) have sufficient funds immediately available to pay any such restitution obligation, the government will leave to the Court's discretion whether to apportion such liability solely against Quality Egg, LLC consistent with 18 U.S.C. § 3664(h).

CONDITIONS OF SUPERVISION

17. PAD If probation or a term of supervised release is ordered, the parties are free to seek whatever conditions they deem appropriate.

FINANCIAL MATTERS

18. PAD Defendant agrees to pay a special assessment of $25 as required by 18 U.S.C. § 3013. Defendant may pay the special assessment to the Clerk of Court by credit card or use the enclosed payment coupon. Defendant or defendant's representative will send or deliver the special assessment payment to the U.S. District Clerk of Court, 320 Sixth

Street, Room 301, Sioux City, Iowa 51101. If defendant does not pay the Clerk of Court by credit card, payment must be in the form of a *money order* made out to the "U.S. District Clerk of Court." The special assessment must be paid before this signed agreement is returned to the U.S. Attorney's Office. If defendant falls to pay the special assessment prior to the sentencing, defendant stipulates that a downward adjustment for acceptance of responsibility under USSG §3E1.1 is not appropriate unless the Court finds defendant has no ability to pay prior to the sentencing.

19. PAD Defendant agrees to fully complete the enclosed Authorization to Release Credit Information pursuant to 15 U.S.C. § 1681b(a)(2). Further, upon request, defendant agrees to provide the U.S. Attorney's Office with any supporting information or documentation in defendant's possession or control regarding the information contained in the consumer credit report. Defendant agrees to provide this information whenever requested until such time any judgment or claim against defendant, including principal, interest, and penalties, is satisfied in full. This information will be used to evaluate defendant's capacity to pay any claim or judgment against defendant. Defendant further understands and agrees the United States can and will release such information to the United States Probation Office for the Northern District of Iowa.

20. PAD Defendant agrees to fully and truthfully complete the enclosed financial statement form. Further, upon request, defendant agrees to provide the U.S. Attorney's Office with any information or documentation in defendant's possession or control regarding defendant's financial affairs and agrees to submit to a debtor's examination when requested. Defendant

agrees to provide this information whenever requested until such time any judgment or claim against defendant, including principal and interest, is satisfied in full. This information will be used to evaluate defendant's capacity to pay any claim or judgment against defendant.

GENERAL MATTERS

21. PAD Defendant shall not violate any local, state, or federal law during the pendency of this agreement. Any law violation, with the exception of speeding or parking violations, committed by defendant will constitute a breach of this agreement and may result in the revocation of the entire agreement or any of its terms. Defendant or defendant's attorney shall notify this office within 48 hours if defendant is questioned, charged, or arrested for any law violation.

22. PAD If defendant violates *any* term or condition of this plea agreement, in *any* respect, the entire agreement will be deemed to have been breached and may be rendered null and void by the United States. Defendant understands, however, the government may elect to proceed with the guilty plea and sentencing. These decisions shall be in the sole discretion of the United States. If defendant does breach this agreement, defendant faces the following consequences: (1) all testimony and other information defendant has provided at any time (including any stipulations in this agreement) to attorneys, employees, or law enforcement officers of the government, to the Court, or to the federal grand jury may and will be used against defendant in any prosecution or proceeding; (2) the United States will be entitled to reinstate previously dismissed charges and/or pursue additional charges against defendant and to use any information obtained directly or indirectly from defendant in those

additional prosecutions; and (3) the United States will be released from any obligations, agreements, or restrictions imposed upon it under this plea agreement.

23. PAD Defendant waives all claims defendant may have based upon the statute of limitations, the Speedy Trial Act, and the speedy trial provisions of the Sixth Amendment to the Constitution. Defendant also agrees any delay between the signing of this agreement and the final disposition of this case constitutes excludable time under 18 U.S.C. § 3161 *et seq*. (the Speedy Trial Act) and related provisions.

24. PAD Any dismissal of counts or agreement to forego filing charges is conditional upon final resolution of this matter. If this agreement is revoked or defendant's conviction is ultimately overturned, the United States retains the right to reinstate previously dismissed counts and to file charges that were not filed because of this agreement. Dismissed counts may be reinstated and uncharged offenses may be filed if: (1) the plea agreement is revoked, or (2) defendant successfully challenges defendant's conviction through a final order in any appeal, cross-appeal, habeas corpus action, or other post-conviction relief matter. A final order is an order not subject to further review or an order that no party challenges. The United States may reinstate any dismissed counts or file any uncharged offenses within 90 days of the filing date of the final order. Defendant waives all constitutional and statutory speedy trial rights defendant may have. Defendant also waives all statute of limitations or other objections or defenses defendant may have related to the timing or timeliness of the filing or prosecution of charges referred to in this paragraph.

ACKNOWLEDGMENT OF DEFENDANT'S UNDERSTANDING

25. PAD Defendant acknowledges defendant has read each of the provisions of this entire plea agreement with the assistance of counsel and understands its provisions. Defendant has discussed the case and defendant's constitutional and other rights with defendant's attorney. Defendant understands that, by entering a plea of guilty, defendant will be giving up the right to plead not guilty; to trial by jury; to confront, cross-examine, and compel the attendance of witnesses; to present evidence in defendant's defense; to remain silent and refuse to be a witness by asserting defendant's privilege against self-incrimination; and to be presumed innocent until proven guilty beyond a reasonable doubt. Defendant agrees defendant's attorney has represented defendant in a competent manner and has no complaints about that lawyer's representation. Defendant states defendant is not now on or under the influence of any drug, medication, liquor, or other substance, whether prescribed by a physician or not, that would impair defendant's ability to fully understand the terms and conditions of this plea agreement.

26. PAD Defendant acknowledges defendant is entering into this plea agreement and is pleading guilty freely and voluntarily because defendant is guilty and for no other reason. Defendant further acknowledges defendant is entering into this agreement without reliance upon any discussions between the government and defendant (other than those specifically described in this plea agreement), without promise of benefit of any kind (other than any matters contained in this plea agreement), and without threats, force, intimidation, or coercion of any kind. Defendant

further acknowledges defendant's understanding of the nature of each offense to which defendant is pleading guilty, including the penalties provided by law.

VERIFICATION

27. PAD This letter constitutes the entire agreement between the parties. No other promises of any kind, express or implied, have been made to defendant by the United States or its agents, No additional agreement may be entered into unless in writing and signed by all parties. The agreement will not be deemed to be valid unless and until all signatures appear where indicated below.

If this agreement is acceptable, please have your client indicate acceptance by placing initials an the line preceding each of the above paragraphs and by signing below where indicated. By initialing each paragraph and signing below, defendant acknowledges defendant has read, fully understands, and agrees to each paragraph of this agreement. Please return all enclosures, completed and signed, with this signed letter to the U.S. Attorney's Office.

Thank you for your cooperation.

Sincerely,

KEVIN W. TECHAU
United States Attorney

By, s/Peter Deegan
PETER E. DEEGAN, JR.
Assistant United States Attorney

ENCLOSURES:

Financial Statement Form
Special Assessment Payment Coupon
Copy of Proposed Information
Authorization to Release Credit Information
Consent to Proceed Before Magistrate Judge

The undersigned defendant, with advice of counsel, accepts the terms of this plea agreement. The undersigned Assistant United States Attorney accepts the terms of the executed plea agreement.

/s/ Peter DeCoster 4-22-14
PETER DECOSTER Date
Defendant

/s/ Peter E. Deegan, Jr. 4/28/14
PETER E. DEEGAN, JR. Date
Assistant United States Attorney

/s/ Stuart J. Dornan 4-22-14
STUART J. DORNAN Date
Attorney for Defendant

APPENDIX H

[Seal]

U.S. Department of Justice

United States Attorney
Northern District of Iowa

600 Fourth Street
Suite 670
Sioux City, IA 51101
712-255-6011
712-252-2034 (fax)
712-258-4761 (tty)

April 18, 2014

Thomas Green, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Re: Austin ("Jack") DeCoster and
Pending Investigation

Dear Mr. Green:

This letter will serve as a REVISED memorandum of a proposed plea agreement between the United State's Attorney's Office for the Northern District of Iowa and Austin ("Jack") DeCoster, defendant. All references to the "United States" or "government" in this proposed plea agreement refer to the United States Attorney's Office for the Northern District of Iowa and to no other governmental entity. This plea offer will expire on April 22, 2014, unless extended by the government.

CHARGES AND PENALTIES

1. TG AD Defendant will plead guilty to Count 3 of an Information that will charge defendant with selling adulterated food in violation of 21 U.S.C. §§ 331(a) and 333(a)(1), as a Responsible Corporate Officer.

2. TG AD This offer is contingent upon Peter DeCoster and Quality Egg, LLC accepting the plea proposals contained in letters from this office to their respective counsel dated April 18, 2014, and entering guilty pleas pursuant to those agreements in District Court.

3. TG AD Defendant understands that Count 3 of the Information, which charges a violation of the Responsible Corporate Officer doctrine, is punishable by the following maximum penalties: (1) not more than 1 year imprisonment without the possibility of parole or a term of probation of not more than 5 years; (2) a fine equal to the greater of twice the gross gain resulting from the offense, twice the gross loss resulting from the offense, or $100,000; (3) a mandatory special assessment of $100; and (4) a term of supervised release of up to 1 year.

4. TG AD Defendant understands restitution and a term of supervised release following incarceration may be imposed in addition to any other sentence. Defendant further acknowledges that, if defendant violates, at any time, any condition of supervised release, defendant could be returned to prison for the full term of supervised release and the Court is not required to grant credit for any amount of time defendant may have successfully completed on supervised release. Defendant also understands the U.S. Sentencing Guidelines will provide advisory guidance to the Court in determining a sentence in this case.

5. TG AD At the time the guilty plea is entered, defendant will admit that defendant is guilty of the charge specified in Paragraph 1 of this agreement. The U.S. Attorney's Office for this District will file no additional Title 21 adulterated or misbranded food-related, or Title 18 bribery or fraud-related, criminal charges based upon information now in our possession. The U.S. Attorney's Office for this District will bring no other actions against defendant, including civil or criminal forfeiture actions, based upon information now in our possession. If this office becomes aware of evidence of additional crimes warranting criminal prosecution, all information in our possession could be used in such a prosecution.

6. TG AD Defendant understands and agrees defendant has the absolute right to plead guilty before a United States District Court Judge. However, if convenient to the Court, defendant agrees to waive and give up this right and to plead guilty before a United States Magistrate Judge. Defendant agrees to execute the attached consent to proceed before the United States Magistrate Judge.

STIPULATION OF FACTS

7. TG AD By initialing each of the following paragraphs, defendant stipulates to the following facts. Defendant agrees these facts are true and may be used to establish a factual basis for defendant's guilty plea and sentence. Defendant has been advised by defendant's attorney of defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Defendant waives these rights and agrees this stipulation may be used against defendant at any time in any proceeding should defendant violate or refuse to follow through on this plea agreement, regardless of whether the plea agreement has

been accepted by the Court. Defendant agrees that the stipulation below is a summary of the facts against defendant and does not constitute all of the facts the government would be able to prove at trial and may be able to prove to the Court in accordance with this agreement.

a) TG AD At all times relevant to the Information, defendant Austin DeCoster (also known as Jack DeCoster) was the trustee of the DeCoster Revocable Trust, which owned Quality Egg, LLC, also doing business as Wright County Egg, and Environ (hereinafter "Quality Egg"), and exercised substantial control over the operations of Quality Egg and related entities and assets in Iowa. As such, defendant was the person ultimately responsible for the operations of Quality Egg and the various egg facilities in Iowa associated with Quality Egg.

b) TG AD Between about the beginning of 2010 and in or about August 2010, Quality Egg introduced and caused to be introduced into interstate commerce food, that is shell eggs, that were adulterated. The shell eggs were adulterated in that they contained a poisonous and deleterious substance, that is, *Salmonella Enteriditis*, that may have rendered them injurious to health. Quality Egg produced, processed, held, and packed the contaminated eggs in Iowa and sold and caused the distribution of the eggs to buyers in states other than Iowa. At the time Quality Egg sold the contaminated eggs, if the contamination of eggs had been known to the defendant, he was in a position of sufficient authority at Quality Egg to detect,

prevent, and correct the sale of the contaminated eggs.

c) TG AD To date, the government's investigation has not identified any personnel employed by or associated with Quality Egg, including the defendant, who had knowledge, during the time frame from January 2010 through August 12, 2010, that eggs sold by Quality Egg were, in fact, contaminated with *Salmonella Enteriditis*.

SENTENCING PROVISIONS

8. TG AD Defendant Defendant understands and agrees to be sentenced based on facts to be found by the sentencing judge by a preponderance of the evidence and agrees facts essential to the punishment need not be (1) charged in the Indictment or Information; (2) proven to a jury; or (3) proven beyond a reasonable doubt. Defendant agrees the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence to afford adequate deterrence to criminal conduct; (4) the need for the sentence to protect the public from further crimes of defendant; (5) the need for the sentence to provide defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (6) the need to avoid unwarranted sentencing disparities among defendants with similar criminal records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. Defendant understands the Court will

also consider the kinds of sentence and the sentencing range established by the United States Sentencing Guidelines for the applicable category of offense(s) committed by defendant and will consider any pertinent policy statements issued as part of the Guidelines. The Court will consider relevant adjustments under the United States Sentencing Guidelines, which will include a review of such things as defendant's role in the offense, criminal history, acceptance or lack of acceptance of responsibility, and other considerations. The Court may also consider other information including any information concerning the background, character, and conduct of defendant.

9. TG AD During plea negotiations the parties may have discussed how various factors could impact the Court's sentencing decision and the determination of the advisory sentencing guidelines range. The parties agree, however, that discussions did not result in any express or implied promise or guarantee concerning the actual sentence to be imposed by the Court. Defendant understands the Court is not bound by the stipulations of the parties, nor is it bound by the sentencing range as determined pursuant to the sentencing guidelines. This plea agreement provides for no guarantee concerning the actual sentence to be imposed. Defendant further understands defendant will have no right to withdraw defendant's guilty plea if the sentence imposed is other than defendant hoped for or anticipated.

10. TG AD The parties stipulate and agree the United States Sentencing Guidelines should be applied as follows:

a) TG AD Base Offense Level: Pursuant to USSG §2N2.1(a), the appropriate base offense level is 6.

b) TG AD Acceptance of Responsibility (Chapter 3 adjustment): Based upon information available to the government and defendant's conduct as of the date of this agreement, defendant appears to qualify for a two-level downward adjustment for acceptance of responsibility under USSG §3E1.1(a). However, the government shall be free to contest the adjustment should it discover information showing defendant has not accepted responsibility or should the defendant subsequently fail to continue to accept responsibility by providing false information to the court, the probation office, or the government; by attempting to obstruct justice; by falsely denying or frivolously contesting relevant conduct; by breaching this plea agreement; or by acting in a way that is inconsistent with, or failing to act in any way that is consistent with, the granting of the adjustment under USSG §3E1.1(a).

c) TG AD No Other Guideline Adjustments: The parties agree no other guidelines adjustments should apply.

11. TG AD The parties agree the appropriate fine to be imposed is $100,000. No later than the close of business on the day defendant enters his guilty plea pursuant to this agreement, defendant agrees to deposit $100,000 with the Clerk of Court to be applied toward any fine imposed upon defendant at sentencing. Failure to deposit such funds will be deemed a material breach of this agreement.

12. TG AD After presenting evidence and argument regarding aggravating and mitigating circumstances to the Court, the government agrees to leave to the Court's discretion whether to impose a sentence of

incarceration, home confinement, or probation. The parties agree the government may advocate for specific conditions of probation and/or supervised release. In addition, the parties agree defendant may file a motion contending that a sentence of incarceration or other confinement in this case would be unconstitutional and defendant may appeal any adverse sentencing decision. The parties agree the government may oppose such a motion and defend any ruling of the Court on appeal and in any other post-conviction proceeding. If defendant appeals an adverse sentencing decision, and unless the government receives information indicating defendant poses a significant risk of non-appearance or danger to the community, the government agrees to leave to the discretion of the Court defendant's motion for a personal recognizance bond pending appeal. The parties agree the government may defend on appeal and in any other post-conviction proceeding any ruling of the Court regarding bond pending appeal.

13. TG AD Defendant, defendant's attorney, and the United States may make whatever comment and evidentiary offer they deem appropriate at the time of the guilty plea, sentencing, or any other proceeding related to this case, so long as the offer or comment does not violate any other provision of this agreement. The parties are also free to provide all relevant information and controlling authority to the Probation Office and Court for use in preparing and litigating adjustments, enhancements, or departures scored in the presentence report, including offering statements made by defendant at any time.

14. TG AD The parties are free to contest or defend any ruling of the Court, unless otherwise limited by

this agreement, on appeal or in any other post-conviction proceeding.

15. TG AD Defendant understands that, pursuant to the Victim and Witness Protecti Act, Title I of the Justice for All Act, and the regulations promulgated under the Act by the Attorney General of the United States:

a) The victim of a crime is given the opportunity to comment on the offense and make recommendations regarding the sentence to be imposed. Defendant understands the victim's comments and recommendations may be different from those of the parties to this agreement.

b) The government is required to consult with victims of serious crimes to obtain their views regarding the appropriate disposition of the case against defendant and to make any such information regarding sentencing known to the Court. Defendant understands any victim's opinions and recommendations may be different from those presented by the government.

c) The government is required to "fully advocate the rights of victims on the issue of restitution unless such advocacy would unduly complicate the sentencing proceeding," and the Court is authorized to order restitution by defendant to victims of crime, including, but not limited to, restitution for property loss, personal injury, or death.

16. TG AD The parties agree that restitution is neither mandatory under 18 U.S.C. § 3663A, nor authorized under 18 U.S.C. § 3663. Defendant understands that defendant may be ordered to pay restitution as a condition of probation or supervised

release. Defendant understands that, consistent with the government's obligations under the Victim and Witness Protection Act, Title I of the Justice for All Act, and the regulations promulgated under the Act by the Attorney General of the United States, the government will seek information from any victims of defendant's offense regarding, among other things, whether an order of restitution may be appropriate. The parties agree that any amount of money recovered by a particular victim as compensation for harm caused by defendant's offense should be credited against any restitution obligation to that victim. If the Court finds restitution appropriate under Count 3 of the Information, and if the Court further finds that Quality Egg, LLC or its guarantor(s) have sufficient funds immediately available to pay any such restitution obligation, the government will leave to the Court's discretion whether to apportion such liability solely against Quality Egg, LLC consistent with 18 U.S.C. § 3664(h).

CONDITIONS OF SUPERVISION

17. TG AD If probation or a term of supervised release is ordered, the parties are free to seek whatever conditions they deem appropriate.

FINANCIAL MATTERS

18. TG AD Defendant agrees to pay a special assessment of $25 as required by 18 U.S.C. § 3013. Defendant may pay the special assessment to the Clerk of Court by credit card or use the enclosed payment coupon. Defendant or defendant's representative will send or deliver the special assessment payment to the U.S. District Clerk of Court, 320 Sixth Street, Room 301, Sioux City, Iowa 51101. If defendant does not pay the Clerk of Court by credit card,

payment must be in the form of a *money order* made out to the "U.S. District Clerk of Court." The special assessment must be paid before this signed agreement is returned to the U.S. Attorney's Office. If defendant fails to pay the special assessment prior to the sentencing, defendant stipulates that a downward adjustment for acceptance of responsibility under USSG §3E1.1 is not appropriate unless the Court finds defendant has no ability to pay prior to the sentencing.

19. TG AD Defendant agrees to fully complete the enclosed Authorization to Release Credit Information pursuant to 15 U.S.C. §1681b(a)(2). Further, upon request, defendant agrees to provide the U.S. Attorney's Office with any supporting information or documentation in defendant's possession or control regarding the information contained in the consumer credit report. Defendant agrees to provide this information whenever requested until such time any judgment or claim against defendant, including principal, interest, and penalties, is satisfied in full. This information will be used to evaluate defendant's capacity to pay any claim or judgment against defendant. Defendant further understands and agrees the United States can and will release such information to the United States Probation Office for the Northern District of Iowa.

20. TG AD Defendant agrees to fully and truthfully complete the enclosed financial statement form. Further, upon request, defendant agrees to provide the U.S. Attorney's Office with any information or documentation in defendant's possession or control regarding defendant's financial affairs and agrees to submit to a debtor's examination when requested. Defendant agrees to provide this information whenever requested until such time any judgment or claim against defendant, including principal and interest, is

satisfied in full. This information will be used to evaluate defendant's capacity to pay any claim or judgment against defendant.

GENERAL MATTERS

21. TG AD Defendant shall not violate any local, state, or federal law during the pendency of this agreement. Any law violation, with the exception of speeding or parking violations, committed by defendant will constitute a breach of this agreement and may result in the revocation of the entire agreement or any of its terms. Defendant or defendant's attorney shall notify this office within 48 hours if defendant is questioned, charged, or arrested for any law violation.

22. TG AD If defendant violates *any* term or condition of this plea agreement, in *any* respect, the entire agreement will be deemed to have been breached and may be rendered null and void by the United States. Defendant understands, however, the government may elect to proceed with the guilty plea and sentencing. These decisions shall be in the sole discretion of the United States. If defendant does breach this agreement, defendant faces the following consequences: (1) all testimony and other information defendant has provided at any time (including any stipulations in this agreement) to attorneys, employees, or law enforcement officers of the government, to the Court, or to the federal grand jury may and will be used against defendant in any prosecution or proceeding; (2) the United States will be entitled to reinstate previously dismissed charges and/or pursue additional charges against defendant and to use any information obtained directly or indirectly from defendant in those additional prosecutions; and (3) the United States will be released from any obligations,

agreements, or restrictions imposed upon it under this plea agreement.

23. TG AD Defendant waives all claims defendant may have based upon the statute of limitations, the Speedy Trial Act, and the speedy trial provisions of the Sixth Amendment to the Constitution. Defendant also agrees any delay between the signing of this agreement and the final disposition of this case constitutes excludable time under 18 U.S.C. § 3161 *et seq*. (the Speedy Trial Act) and related provisions.

24. TG AD Any dismissal of counts or agreement to forego filing charges is conditional upon final resolution of this matter. If this agreement is revoked or defendant's conviction is ultimately overturned, the United States retains the right to reinstate previously dismissed counts and to file charges that were not filed because of this agreement. Dismissed counts may be reinstated and uncharged offenses may be filed if: (1) the plea agreement is revoked, or (2) defendant successfully challenges defendant's conviction through a final order in any appeal, cross-appeal, habeas corpus action, or other post-conviction relief matter. A final order is an order not subject to further review or an order that no party challenges. The United States may reinstate any dismissed counts or file any uncharged offenses within 90 days of the filing date of the final order. Defendant waives all constitutional and statutory speedy trial rights defendant may have. Defendant also waives all statute of limitations or other objections or defenses defendant may have related to the timing or timeliness of the filing or prosecution of charges referred to in this paragraph.

ACKNOWLEDGMENT OF DEFENDANTS' UNDERSTANDING

25. TG AD Defendant acknowledges defendant has read each of the provisions of this entire plea agreement with the assistance of counsel and understands its provisions. Defendant has discussed the case and defendant's constitutional and other rights with defendant's attorney. Defendant understands that, by entering a plea of guilty, defendant will be giving up the right to plead not guilty; to trial by jury; to confront, cross-examine, and compel the attendance of witnesses; to present evidence in defendant's defense; to remain silent and refuse to be a witness by asserting defendant's privilege against self-incrimination; and to be presumed innocent until proven guilty beyond a reasonable doubt. Defendant agrees defendant's attorney has represented defendant in a competent manner and has no complaints about that lawyer's representation. Defendant states defendant is not now on or under the influence of, any drug, medication, liquor, or other substance, whether prescribed by a physician or not, that would impair defendant's ability to fully understand the terms and conditions of this plea agreement.

26. TG AD Defendant acknowledges defendant is entering into this plea agreement and is pleading guilty freely and voluntarily because defendant is guilty and for no other reason. Defendant further acknowledges defendant is entering into this agreement without reliance upon any discussions between the government and defendant (other than those specifically described in this plea agreement), without promise of benefit of any kind (other than any matters contained in this plea agreement), and without threats, force, intimidation, or coercion of any kind. Defendant

further acknowledges defendant's understanding of the nature of each offense to which defendant is pleading guilty, including the penalties provided by law.

VERIFICATION

27. TG AD This letter constitutes the entire agreement between the parties. No other promises of any kind, express or implied, have been made to defendant by the United States or its agents. No additional agreement may be entered into unless in writing and signed by all parties. The agreement will not be deemed to be valid unless and until all signatures appear where indicated below.

If this agreement is acceptable, please have your client indicate acceptance by placing initials on the line preceding each of the above paragraphs and by signing below where indicated. By initialing each paragraph and signing below, defendant acknowledges defendant has read, fully understands, and agrees to each paragraph of this agreement. Please return all enclosures, completed and signed, with this signed letter to the U.S. Attorney's Office.

Thank you for your cooperation.

Sincerely,

KEVIN W. TECHAU
United States Attorney

By, s/Peter Deegan
PETER E. DEEGAN, JR.
Assistant United States Attorney

ENCLOSURES:
Financial Statement Form
Special Assessment Payment Coupon
Copy of Proposed Information
Authorization to Release Credit Information
Consent to Proceed Before Magistrate Judge

The undersigned defendant, with advice of counsel, accepts the terms of this plea agreement. The undersigned Assistant United States Attorney accepts the terms of the executed plea agreement.

/s/ Austin DeCoster
AUSTIN DECOSTER Date
Defendant

/s/ Peter E. Deegan, Jr. 4/28/14
PETER E. DEEGAN, JR. Date
Assistant United States Attorney

/s/ Thomas Green 4/21/14
THOMAS GREEN, ESQ Date
Attorney for Defendant