

# AGRICULTURE DECISIONS

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

## AGRICULTURE DECISIONS

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

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**PACKERS AND STOCKYARDS ACT**

**COURT DECISION**

**USDA v. NOUR HALAL MEAT DISTRIBUTOR, INC., d/b/a  
NOUR HALAL MEATS, NOURA HALAL MEATS, INC.,  
HAMDY FARAG, AND GEHAD M. MAGOUB.**

**Civil Action No. 3:06-182.**

**Court Decision.**

**Filed August 23, 2007.**

**(Cite as 505 F.Supp. 2d 275).**

**PS – Failure to report – Refusal to report – Subpoena power – Failure to comply  
with subpoena – Forfeitures, daily – Abuse of process, when not – Civil power to  
compel discovery.**

Meat Distributor was assessed a CMP of \$14,700 for failure to comply with a duly issued administrative subpoena issued by court to aid in the collection of records of Distributer. Certain records required under P&S Act were not forthcoming. Under *United States v. Powell* (379 U.S. 48), a “showing” is made if the Government demonstrates that the need for administrative subpoena meets a three part test: (1) the agency has the authority to inquire into this issue; (2) the subpoenaed information is not indefinite; and (3) the information sought is reasonably relevant to the investigation which the agency has authority to conduct. Defendant has heavy burden to show in that they must factually oppose the Government's allegations by affidavit. Legal conclusions and memoranda of why the subpoena should not be issued will not suffice.

**United States District Court  
W.D. Pennsylvania**

***MEMORANDUM OPINION & ORDER***

GIBSON, District Judge.

Now before the Court is Plaintiff United States' Motion for Assessment of Forfeitures. Document No. 18. This matter arose after Defendants failed to timely provide a special report that the Secretary

of Agriculture ordered, in violation of Section 6 of the Federal Trade Commission Act (hereinafter “FTC Act”), 15 U.S.C. § 46. Defendants also failed to comply with an administrative subpoena *duces tecum* duly issued and served under the provisions of the Packers and Stockyards Act of 1921 (hereinafter “P&S Act”), as amended, 7 U.S.C. § 181 *et seq.* This Court has jurisdiction pursuant to Section 9 of the FTC Act, 15 U.S.C. § 49, which is made applicable to this action by Section 402 of the P&S Act, 7 U.S.C. § 222.

### I. STATEMENT OF FACTS

Pursuant to Section 6 of the FTC Act, 15 U.S.C. § 46, the Grain Inspection, Packers and Stockyards Administration (hereinafter “GIPSA”) of the United States Department of Agriculture conducted a study in order to provide information for the use of Congress.<sup>1</sup> The study sought to collect data regarding marketing practices in the livestock and meat industries. Document No. 1-3, p. 2. In accordance with that objective, the Secretary of Agriculture (hereinafter “Secretary”), through his GIPSA representative, issued special orders requiring various businesses, including lamb packers, to furnish information concerning livestock and meat purchases made between October 6, 2002 and March 31, 2005. *Id.* at 7. Federal law required subject entities to maintain proper records of the information sought in the GIPSA study. *See* 7 U.S.C. § 221 (detailing the records that meat packers must keep).

On April 3, 2003, Defendant Hamdy Farag purchased the entire stock of Nour Halal, a Pennsylvania business engaged in buying livestock, manufacturing and preparing meat, and selling the same in interstate commerce. Document No. 16, p. 3; Document No. 1-6, p. 5-6. Defendant Gehad Magoub, the wife of Hamdy Farag, is a vice-president and co-owner of Nour Halal. Document No. 1-6, p. 6. As a meat packer,

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<sup>1</sup> 15 U.S.C. § 46 applies to the jurisdiction, powers, and duties of the Secretary of Agriculture under Section 402 of the P&S Act, 7 U.S.C. § 222.

Nour Halal is subject to the requirements of both the P&S Act and the Department of Agriculture's study. *Id.* GIPSA Administrator James Link (hereinafter "Link") issued Defendants' special order on February 15, 2006, which gave Defendants until April 14, 2006, to comply. Document No. 1-3.

After Defendants failed to meet that deadline, Link issued a notice of default and subpoena *duces tecum* (hereinafter "the Subpoena") on May 10, 2006. Document No. 1-4. The notice and Subpoena were sent via Federal Express and certified mail and required Defendants to file its special report by May 18, 2006. *Id.* Delivery of both the notice and Subpoena was made to Defendants' business on May 11, 2006. Document No. 1-5. After Defendants failed to comply with the Subpoena, the Government filed on August 17, 2006, a Petition for Order to Show Cause Why its Administrative Subpoena *Duces Tecum* Should Not Be Enforced. Document No. 1.

At an October 23, 2006, hearing on the Petition, the Parties represented to the Court that efforts to amicably resolve this issue were ongoing and that Defendants had submitted records indicating some good-faith effort to comply with the Subpoena. The Government therefore agreed to toll the period during which any civil penalties were accruing as of that day, and the Court granted the Parties additional time to review those records Defendants had provided. Document No. 9, pp. 7-8. During a February 1, 2007, Status Conference, the Government indicated that the parties had not achieved compliance with the Subpoena and requested that the Court reconvene the Show Cause Hearing in March. Document No. 11. The Government stated that it would accept inability as a complete defense, but requested the opportunity to pursue civil penalties in that event. *Id.* When the show cause hearing reconvened on March 16, 2007, the Government accepted that Defendants could not possibly produce records which were created prior to the April 2003 purchase of Nour Halal. Document No. 16, p. 4. The Government also accepted for review additional records that Defendants brought to the hearing. *Id.* at 3-4. The Court therefor granted

the Government ten days to provide notice whether or not the Subpoena had been fully complied with. *Id.* at 11. The Court further ordered the Government to file a brief within thirty days as to the matter of civil penalties. *Id.* Defendants were granted thirty days beyond the filing of the Government's brief to submit their response.

On March 29, 2007, the Government indicated to the Court that Defendants had failed to fully comply with the Subpoena and that the United States would “not seek any further action to compel compliance” but would “petition this Court by a subsequent filing to assess daily forfeitures.” Document No. 17. On May 17, 2007, the Government again noticed the Court of Defendants' noncompliance and filed the motion *sub judice* seeking \$14,850.00 in forfeitures. Document Nos. 17 & 18. Accordingly, Defendants had until June 18, 2007, to respond to the motion for forfeitures; to date no such response has been filed.

## II. LEGAL STANDARD

Under 15 U.S.C. § 49 and 7 U.S.C. § 222, this Court has the power and authority to enforce administrative subpoenas in the event of a failure to comply. “Judicial review of an administrative subpoena is limited and is to be handled summarily and with dispatch.” *In re Office of Inspector Gen.*, 933 F.2d 276, 277 (5th Cir.1991). *See also F.T.C. v. Scientific Living, Inc.*, 150 F.Supp. 495, 498 (M.D.Pa.1957) (noting that a “summary proceeding ... is the approved method” of enforcement). Nonetheless, the United States is not entitled to enforcement; Plaintiff must first make the *prima facie* showing set forth in *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964).

According to the United States, the *Powell* showing is made if the Government demonstrates that the Subpoena meets “a three part test: (1) the agency has the authority to inquire into this issue; (2) the subpoenaed information is not indefinite; and (3) the information sought is reasonably relevant to the investigation which the agency has

authority to conduct.” Document No. 2, p. 7 (citations omitted). The Court finds that applicable precedent is not so clear, however. The Government's proposed test was initially formulated to ensure that an administrative subpoena comports with the Fourth Amendment's prohibition on illegal seizures. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950). In *Powell*, however, the Court had before it only a matter of statutory interpretation and held that the Internal Revenue Service was entitled to enforcement of its administrative subpoenas upon a showing that the “investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the [internal Revenue] Code have been followed.” *Powell*, 379 U.S. at 57-58, 85 S.Ct. 248. Although Justice Harlan's formulation of the *prima facie* showing was originally tailored for the Internal Revenue Code, lower courts have subsequently fit the test to other agencies.<sup>2</sup> *See, e.g., Univ. of Med. & Dentistry v. Corrigan*, 347 F.3d 57, 64 (3d Cir.2003) (Department of Health and Human Services); *In re Admin. Subpoena*, 253 F.3d 256, 263 (6th Cir.2001) (Department of Justice); *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir.1995) (Federal Deposit Insurance Corporation); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir.1980) (National Institute for Occupational Safety and Health). The federal judiciary is not unanimous, however, and some courts apply the *Morton Salt* test in the absence of any Fourth Amendment objection. *See, e.g., Chao v. Koresko*, ---Fed.Appx. ---, ---, 2005 WL 2521886, at \*1, 2005 U.S.App. LEXIS 22025, at \*4 (3d Cir.2005) (nonprecedential opinion); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir.1981).

In light of this ambiguity, the Court will analyze the United States'

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<sup>2</sup> The Supreme Court perhaps prompted this conflation when it noted a certain convergence in the statutory regimes that control the Internal Revenue Service and the Federal Trade Commission. *Church of Scientology v. United States*, 506 U.S. 9, 15-18, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

petition under both standards. If the United States meets its obligation, the burden then shifts to Defendants to show that the Subpoena is overly broad, burdensome, or that its enforcement would constitute an abuse of the court's process. *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166-67 (3d Cir.1986); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (3d Cir.1981). An abuse of process would be issuing an administrative subpoena “ ‘for an improper purpose, such as to harass the respondent or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.’ ” *Chao*, ---Fed.Appx. at ---- - ----, 2005 WL 2521886, at \*1, 2005 U.S.App. LEXIS 22025, at \*\*4-5 (nonprecedential opinion) (quoting *Powell*, 379 U.S. at 58, 85 S.Ct. 248).

Defendants' burden is a heavy one, for they must “factually oppose the Government's allegations by affidavit. Legal conclusions and memoranda will not suffice.” *United States v. Balanced Fin. Management, Inc.*, 769 F.2d 1440, 1444 (10th Cir.1985). *See also Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 218, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (requiring that sufficient reason for not enforcing an administrative subpoena must be set forth affirmatively in affidavits); *Wheeler v. United States*, 459 F.Supp.2d 399, 402, 406 (W.D.Pa.2006). Moreover, “expense alone does not constitute burdensomeness, where it is a concomitant of a broad, but valid, investigation.” *F.T.C. v. Carter*, 464 F.Supp. 633, 641 (D.D.C.1979). Further, that a substantial number of subject entities complied with the terms of an agency's special order is evidence that the order is not overly burdensome. *United States v. W.H. Hodges Company, Inc.*, 533 F.2d 276, 278 (5th Cir.1976) (finding that because twenty-one of the thirty-eight firms required to file special reports complied with the order, the order must not have been overly burdensome). If Defendants fail to carry their burden, it is the Court's duty to enforce the terms of the Subpoena. *FTC v. Standard Am., Inc.*, 306 F.2d 231, 234-35 (3d Cir.1962).

### III. ANALYSIS

**A. The Subpoena is Enforceable**

According to the *Powell* test, the Court must enforce the Subpoena “if the agency can show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by the statute have been followed.” *Univ. of Med. & Dentistry v. Corrigan*, 347 F.3d 57, 64 (3d Cir.2003) (citation omitted). In support of its petition, the United States has filed the affidavits of Gary McBryde (hereinafter “McBryde”), Director of GIPSA's Industry Analysis Division, Packers and Stockyards Programs (Document No. 1-6), and Sheryl Cates (hereinafter “Cates”) of RTI International, a private firm that contracted to collect data for GIPSA's Livestock and Meat Marketing Study (Document No. 1-7). This evidence establishes both that the study was conducted with a legitimate purpose and that the inquiry into Nour Halal's business records was relevant. McBryde's description of the Livestock and Meat Marketing Study and his account of the statutory procedure followed in designing the study also establish that GIPSA's request for Defendants' business records was validated by adherence to the proper administrative steps. Document No. 1-6, ¶¶ 3-5. Although neither affiant expressly indicates that the information requested was not already in GIPSA's possession, the Court, cognizant of the summary nature of these proceedings and Plaintiff's minimal burden, finds that the Government has circumstantially satisfied this element of the *Powell* test. The data sought pertains to private transactions, and the Court's research reveals no regulation requiring that entities such as Nour Halal record with any agency information regarding individual transactions in lamb or weekly profit-and-loss statements. *See* Document No. 1-3, p. 6 (describing the information requested from Nour Halal). Indeed, 7 U.S.C. § 221 requires only that packers and stockyard owners “keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business,” not that such records be regularly divulged to the Government. Moreover, the scope of GIPSA's study and the lengths to which the Government has gone in pursuing the

claim *sub judice* also suggest that the relevant information is not already at Plaintiff's disposal. Lastly, Defendants' concession that they are not in possession of at least some of the subpoenaed records indicates that the appropriate records may have simply never existed.

The Government has also met its burden under the *Morton Salt* standard, according to which administrative subpoenas are enforceable if the Court finds that “(1) the inquiry [was] within the authority of the agency, (2) the demand for production [was not] too indefinite, and (3) the information sought [was] reasonably relevant to the authorized inquiry.” *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir.1980). First, it is clear that the Secretary had authority to issue the Subpoena by virtue of 15 U.S.C. § 49, which provides that “the [Federal Trade Commission] shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.”<sup>3</sup> The Secretary then delegated this authority to the GIPSA Administrator pursuant to Section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, 7 U.S.C. § 6912(a)(1), 7 C.F.R. §§ 2.22(a)(3)(iii) and 2.81(a)(3). Second, GIPSA provided Defendants with sufficiently specific requests that were not too indefinite. The investigation targeted specific information regarding meat transactions and the requests were accompanied by detailed instructions. Document No. 1-3. Lastly, the data on meat sales and purchases, as well as information regarding meat packers' weekly profits and losses was clearly relevant to an investigation of “the use and economic effects of various methods for transferring cattle, hogs, lambs, and meat between successive stages of the livestock and meat marketing system.” Document No. 1-6.

The Court also notes that the overwhelming responsiveness of targeted meat packers indicates that the investigation was not overly burdensome. *United States v. W.H. Hodges & Co.*, 533 F.2d 276, 278

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<sup>3</sup> Section 49 is applicable to the P&S Act through 7 U.S.C. § 222.

(5th Cir.1976) (affirming a grant of summary judgment where the lower court had found the information requests were not overly burdensome, in part because 21 of 38 respondents timely filed their special reports). According to the Government, 133 of the 136 plants involved in GIPSA's Livestock and Meat Marketing Study filed their reports without apparent difficulty and without recourse to the Courts. Document No. 18, p. 9. There is therefore little plausible argument that GIPSA's request was overly burdensome.

The Court thus finds that the United States has met its obligations under both *Morton Salt* and *Powell*, shifting to Defendants the burden of demonstrating that the Subpoena was “ ‘issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.’” *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (3d Cir.1981) (quoting *Powell*, 379 U.S. at 58, 85 S.Ct. 248). Although this list is not exhaustive, *Powell*, 379 U.S. at 58, 85 S.Ct. 248, Defendants' failure to offer any opposition to the Government's petition does nothing to undermine the Subpoena's validity. The Court is therefore left with no choice but to enforce the Subpoena and calculate the extent of daily forfeitures for which Defendants may be liable.

#### **B. The Court Must Assess Daily Forfeitures**

According to Section 10 of the FTC Act, 15 U.S.C. § 50, when a company fails to file a required special report “within the time fixed by the Commission for filing the same, and such failure ... continue[s] for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure...” Pursuant to 7 C.F.R. § 3.91(b)(6)(vi), the “[c]ivil penalty for a failure to file required reports, codified at 15 U.S.C. § 50, has a maximum of \$110.” Because Defendants never fully complied with the terms of the special order, they began to accrue the applicable daily forfeitures thirty days after GIPSA served notice of

their default. GIPSA issued a notice of default on May 10, 2006, which was served on Defendants the next day. Document Nos. 1-4 & 1-5.<sup>4</sup> Daily forfeitures therefore began accruing on June 11, 2006. Excluding October 23, 2006, the date on which the Government voluntarily tolled the accrual period, Defendants were in default for 134 days.

Absent some flaw in the Subpoena or the procedures followed, the Government's right to the 134 days of forfeitures appears indelible. In *United States v. St. Regis Paper Co.*, the Second Circuit suggested that district courts are without discretion to deny the Government those penalties that have previously attached under the FTC Act. *United States v. St. Regis Paper Co.*, 285 F.2d 607, 614-16 (2d Cir.1960). Upon review of that decision, the Supreme Court apparently agreed, holding that “[t]his Court cannot forgive statutory penalties once they legally attach” *St. Regis Paper Co. v. United States*, 368 U.S. 208, 227, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961). In the wake of *St. Regis*, GIPSA brought suit against various Louisiana stockyard marketing agencies that failed to comply with orders compelling special reports. *United States v. W.H. Hodges & Co.*, 533 F.2d 276, 278-79 (5th Cir.1976). After the noncompliance extended thirty days beyond service of the notice of default, the Government sought daily forfeitures under 15 U.S.C. § 50. *Id.* at 278. The district court tolled the accrual of the forfeitures during the pendency of the suit and, after granting the Government summary judgment on the merits of its claim, retroactively denied recovery of those forfeitures that had accrued prior to the tolling. The Fifth Circuit reversed, citing *St. Regis* for the proposition that “such a retroactive denial of these forfeitures which had already accrued was beyond the power of the district court.” *Id.* at 278-79. Those respondents that chose

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<sup>4</sup> Addressing the sufficiency of service, one court has held that “under the circumstances of [the FTC’s] practical operations registered mail is a method which in itself is ‘reasonably certain to inform’ those persons affected by the action of the Commission.” *United States v. San Juan Lumber Co.*, 313 F.Supp. 703, 709 (D.Colo.1969). The Court thus finds that the Government met its obligation when it served notice of default on Defendants’ place of business via Federal Express and certified mail. Document Nos. 1-4 & 1-5.

not to attack the legality of forfeitures under the Declaratory Judgments Act could not rely on the discretion of the district court to reduce their § 50 liability. *Id. See also U.S. v. The Riley Company, Inc.*, 474 F.Supp. 181, 184 (N.D.Ill.1979) (“Once the statutory penalty attaches [under § 50], this court is without authority or discretion to waive any portion of the forfeiture.”).

The Court therefore concludes that it is obligated to impose on Defendants forfeitures in the amount of \$110 per day for a period of 134 days, for a total of \$14,740. An appropriate Order follows.

**AND NOW**, this 22nd day of August, 2007, upon consideration of the Motion of the United States for Assessment of Forfeitures (Document No. 18), **IT IS HEREBY ORDERED** that the Motion is **GRANTED**. Accordingly, the Court assesses forfeitures against Defendants in the amount of \$110.00 for each of the 134 days that Defendants were in default of their obligations under the Grain Inspection, Packers and Stockyards Administration's administrative subpoena duces tecum. Forfeitures therefore total \$14,740.00.

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**PACKERS AND STOCKYARDS ACT****DEPARTMENTAL DECISIONS**

**In re: TODD SYVERSON, D/B/A SYVERSON LIVESTOCK BROKERS.**

**P. & S. Docket No. D-05-0005.**

**Decision and Order.**

**Filed August 31, 2007.**

**PS – Failure to pay promptly – Order buyer – Dealer.**

Charles Spicknall, for GIPSA.

E. Lawrence Oldfield, for Respondent.

*Decision and Order issued by Administrative Law Judge Jill S. Clifton.*

**Decision Summary**

1. I decide that in every sale of cows to Lance Quam during 2002 and 2003 at issue here, Respondent Todd Syverson, doing business as Syverson Livestock Brokers (frequently herein “Respondent Syverson,” “Syverson” or “Respondent”): (a) was *not* acting as a market agency or “order-buyer” who had bought those cows for Lance Quam but was instead acting as a cattle dealer who had bought those cows for his own account; (b) did *not* disclose to Lance Quam when he, Respondent Syverson, had twice bought the cows, the second time from his own consignment (from himself); (c) would *not* have been required to make such disclosure had he not represented his higher, second, purchase price as his price for the cows (which was the truth but not the whole truth); and (d) did violate the fair dealing requirements of Section 312(a) of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 213(a), on those occasions when he represented to Lance Quam that his higher, second, purchase price was his price for the cows but failed to disclose to Lance Quam his (Respondent Syverson’s) lower, initial, “arm’s length”

purchase price, at times one day earlier.

2. Further, I decide that Respondent Syverson failed without good cause to produce for examination within a reasonable time when asked by Packers and Stockyards, all of the accounts, records, and memoranda as are required to be kept under Section 401 of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 221, that would have fully and correctly disclosed his 2002 and 2003 transactions with Lance Quam.

### **Introduction**

3. Lance Quam became angry with Respondent Syverson in February 2003, because Lance Quam mistakenly came to believe that Respondent Syverson had included cull cows (cows that were meant to go to slaughter) (Tr. 49-50) among the 62 cows that Lance Quam had bought from Respondent Syverson during the summer of 2002 (June through August, RX 3) and the eight cows that Lance Quam had bought from Respondent Syverson in February 2003. RX 6.

4. In truth, none of the cows Lance Quam bought from Respondent Syverson was a slaughter cow, as confirmed by veterinary examination at the auction (required before the cow could be auctioned on Tuesday). Tr. 368-71, 374-77, 456-57. Being auctioned on a Monday at the Zumbrota Livestock Auction Market did not make a cow a slaughter cow; and wearing a four-digit yellow back tag (*see* CX 21 as an example) did not make a cow a slaughter cow either. Tr. 368-71.

5. The testimony of a fully credible and very valuable witness, Tom Webster, employee and part owner of Zumbrota Livestock Auction Market (“Zumbrota”), established without doubt that the Monday auctions at Zumbrota included all sorts of cows - - including cull cows, yes, but also cows that are *not* sick or maimed: cows that are open (not pregnant), cows that “didn’t fit that producer’s breeding schedule,” feeder cattle, baby calves, market cattle, fat cattle. Tr. 373, 362, 366.

6. Mr. Webster’s testimony established without doubt that the marketplace had other uses in 2002 and 2003 for the four-digit tags like CX 21 (commonly referred to as a “slaughter tag,” Tr. 373), in addition

to the purpose originally intended by the U. S. Government. Tom Webster described the reality (that is, that Monday's auctions included all sorts of cows, and that the four-digit tag had much wider application), that existed in 2002 and 2003. Tr. 366-71.

Mr. Oldfield: Were there different kinds of cattle that were sold at Monday's auction?

Mr. Webster: Yes, all basically from the baby calves to market cattle.

Mr. Oldfield: And from out of state as well as from in state, is that right?

Mr. Webster: Yes. We were a federally-approved market at that time and we could accept cattle from anywhere.

Mr. Oldfield: And that would include feeder cattle, fat cattle, right?

Mr. Webster: Yes.

Mr. Oldfield: Would you use a back tag on Monday's cattle?

Mr. Webster: Yes.

Mr. Oldfield: Would that be a four-digit number?

Mr. Webster: Yes.

Mr. Oldfield: Okay. And would back tags be placed on different varieties of cattle coming in?

Mr. Webster: Yes.

Mr. Oldfield: Would you say because a four-digit number was on a particular cow that it was a slaughter cow just because it was a four-digit number slapped on the back?

Mr. Webster: The intent of the four-digit tag, if I have got the right tag in my mind, you're talking about the oval tag that has some -- do you have one that you're looking for? There it is. Just so you understand that tag, --

....

Mr. Webster: [looking at a sample tag later marked as CX 21] Yeah, this tag is a tag that's issued by the federal government. It is specific to a location on the very, very top line. There's a number which is a state code and a letter or a group of letters that indicates where that tag is being applied.

So when that animal ends up at a slaughter establishment they can trace that animal back to its farm of origin. The bar coding is a way to be able to identify that animal back to the farm of origin by coming through the livestock barn.

And that tag, its intent as it comes from the government is to be applied to slaughter livestock. But in reality and in practice it gets used more widely. If that tag is applied to any animal, be it a slaughter cow if that's the term we're using, if it's applied to a slaughter cow I think it says Do Not Remove on the side of it or something like that or --

....

[Mr. Ball approaches Mr. Webster with the sample tag later marked as CX 21.]

Mr. Webster: It's oval, approximately four inches long, two and a half, three inches wide, has a big bold black number bar codes, and it has a statement on it that says State and Federal Do Not Remove.

Judge Clifton: Now, what color is it?

Mr. Webster: It's yellow.

Judge Clifton: Are all of them the same color?

Mr. Webster: Typically I think most of what we used were yellow, although we did see some white ones that came across once in a while.

Judge Clifton: All right. Go ahead. Thank you.

Mr. Webster: This tag's intent, as I said, was to be placed on slaughter livestock. In practice it got used more widely. But for this tag to be removed from an animal, that animal had to be taken out of the slaughter channel by a veterinarian.

So if an animal with this tag was purchased, before that tag could be removed that animal had to go through the veterinary inspection I previously mentioned, which would require all of the current health regulations, both state and federal, and the practice, the market practice that was in place at the time in order to make it eligible for the next step if it was reconsigned to the auction.

If a buyer decided to process that animal through the veterinary chute, find its status out and take it out of the auction, take it home, he could do that when it was deemed worthy by the veterinarian. Not all cattle that would have been purchased out of say a slaughter-type auction, not all of those cattle necessarily went back through the Tuesday auction. Some of those cattle would go back home. They wouldn't all automatically be through the veterinarian reconsigned to the auction.

And I think the one point I want to make and get away from the tag is that it was a public auction. Anybody could buy them. And as long as they were taken out of the slaughter channel via veterinary inspection they could move and go and do anything else. This did not -- this does not seal their doom. All this does is identify them for future reference if she ends up at slaughter.

Mr. Oldfield: So if I understand your testimony, Mr. Webster, because a cow at Monday's sale has a four-letter back tag similar to what you've just identified doesn't mean that it's a cow that's only good for slaughter, is that right?

Mr. Webster: That's right.

Tr. 366-71.

7. On May 9, 2003, Lance Quam provided a statement to Packers and Stockyards indicating that a truck driver named Mr. Klecker, while loading cattle on Lance Quam's farm on February 18, 2003, suggested to Mr. Quam that he (Mr. Quam) was getting ripped off. Tr. 57, CX 15. Mr. Quam testified that Mr. Jim Klecker said, "Oh, you're the one, and meaning that the scuffle down in Zumbrota that Todd [Respondent Syverson] was buying these cattle on Monday and turning around and running them up on Tuesday and selling them to somebody and they didn't know who. It was sort of interesting during the summer of the conversation when I was talking to Mr. Syverson he just said, Well, just keep it quiet about who we tell about where we got cattle there. Nobody else needs to know this so --" Tr. 57.

8. After Lance Quam heard what truck driver Jim Klecker had to say, he felt he had been made a fool. Lance Quam began to blame

Respondent Syverson for cows he had bought from Respondent Syverson that had died or showed symptoms of Johnes disease. Lance Quam tried to get Respondent Syverson's purchase records from Zumbrota but was not successful (Tr. 59, 68). Lance Quam was successful in getting veterinary records (Tr. 71) which showed that some of the cows Respondent Syverson had bought at Zumbrota on Tuesday, he had previously bought at Zumbrota on Monday. After Packers and Stockyards obtained documentation of Respondent Syverson's transactions, including Respondent Syverson's Monday purchases, Lance Quam was given access to such documentation. Tr. 71. Lance Quam's complaint to Packers and Stockyards began this litigation.

#### **Procedural History**

9. The Complainant is the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (frequently herein "Packers and Stockyards" or "Complainant"). The Complaint, filed on December 14, 2004, alleged violations of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*) (frequently herein the "Packers and Stockyards Act" or the "Act"), and especially Section 312(a) of the Act, 7 U.S.C. § 213(a), which broadly prohibits any unfair or deceptive practice by a livestock dealer or market agency. 10. Packers and Stockyards is represented by Charles E. Spicknall, Esq. and Gary F. Ball, Esq., each with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250.

11. Respondent Syverson is also known as Todd C. Syverson. The Answer, filed on January 19, 2005, denied the allegations of the Complaint and stated affirmatively, among other things, that "there was no obligation on either party for cattle to change hands on a first cost basis or on any basis;" and that "at no time was Mr. Syverson hired to fill an order for or purchase cattle on an at cost plus commission basis for (Mr. Quam)."

12. Respondent Syverson is represented by E. Lawrence Oldfield, Esq., Oldfield & Fox, P.C., 2021 Midwest Road, Suite 201, Oak Brook, Illinois 60523.

13. The case was assigned to me, Jill S. Clifton, on October 24, 2005, and I held the hearing in Red Wing (Goodhue County), Minnesota on April 4-5, 2006. The record includes two transcript volumes, prepared by Neal R. Gross & Co., Inc., Court Reporters. Volume I (April 4) contains pages 1- 267 “Tr. 1-267”; Volume II (April 5) contains pages 268-584 “Tr. 268-584”.

14. The following exhibits were admitted into evidence:

Complainant’s Exhibits (Packers and Stockyard’s)

EX 1; CX 1, p. 1; CX 2, pp. 1-2; CX 3; CX 4 (limited purposes); CX 5 (limited purposes); and CX 6 through CX 21.

Respondent’s Exhibits (Respondent Syverson’s)

RX 1 through RX 9.

15. Four witnesses were called by Packers and Stockyards; and four witnesses were called by Respondent Syverson. The eight who testified were: Lance Quam (Tr. 38-117); William Arce (Tr. 178-264), 272-322; Robert Merritt (Tr. 324-355); Tom Webster (Tr. 356-411); Marilyn Syverson (Tr. 414-435); Sterling Sibley (Tr. 435-450); Respondent Syverson (Tr. 450-552); Branard England (Tr. 554-570).

16. The parties’ post-hearing briefs were timely filed on July 12, 2006.

### **Discussion**

17. Credibility of the witnesses is important in this case. Findings I make which impact the conclusions and affect the severity of the remedies to be imposed come from evidence in which the testimony of Lance Quam is opposite from the testimony of Respondent Syverson. Their testimony conflicts on several issues, including what Lance Quam said to Respondent Syverson in April or May 2002 to describe the type of cows Lance Quam hoped to buy from Respondent Syverson; whether cows Respondent Syverson eventually sold to Lance Quam met that description; whether Lance Quam, prior to each delivery of cows from Respondent Syverson’s farm, chose the cows to be delivered to him;

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whether Respondent Syverson knew, when he was bidding for cows out of his own consignment, that Lance Quam would be paying the price; whether Lance Quam complained to Respondent Syverson about the condition of any of the cows; and whether Lance Quam provided his cattle adequate feed.

18. Lance Quam's testimony is not fully credible. Lance Quam's May 9, 2003, statement to Packers and Stockyards (CX 15), includes, in part, the following:

On May 8 (2003) I talked to Zumbrota Livestock in Zumbrota and they told me that he (Syverson) was selling and buying is (*sic*) own livestock. Buying on Monday Slaughter and selling and running the price up on Tuesday dairy sale. I feel Todd Syverson owes me the difference from what he paid for them on Monday and what I paid for them on Tuesday.

s/ Lance Quam  
43550 40 Acre Trail  
Wanamingo MN 55983

CX 15, p. 2.

Upon careful consideration of all the evidence as a whole, I believe that Lance Quam, in the foregoing excerpt of his statement to Packers and Stockyards, attributed statements to Zumbrota Livestock on May 8 that did not come from Zumbrota Livestock. The name that Lance Quam gave (to Packers and Stockyards investigator Robert Merritt), was "Tom Webster" (Tr. 346-47), as the person from Zumbrota Livestock who told Lance Quam on May 8 that Syverson was selling and buying his own livestock, buying on Monday Slaughter and selling and running the price up on Tuesday dairy sale. Based both on Tom Webster's testimony (Tr. 361, 380-81, 400-401) and Lance Quam's testimony (Tr. 59-60), I find that the foregoing description of Respondent Syverson's activities came not from Tom Webster, but from Lance Quam's own understanding. I find it likely that Lance Quam attributed to Tom Webster what Lance Quam wanted Packers and Stockyards to believe, thereby increasing the power of his complaint (aggrandizing). I find

that Lance Quam had a tendency to aggrandize throughout the events beginning in February 2003 and continuing through the hearing in April 2006. CX 19 is a good example: Lance Quam included many more specifics in his Declaration about the cows he wanted than he ever articulated to Respondent Syverson back in April or May 2002.

19. I find that the misfortunes of Lance Quam's cows in 2002 and 2003 cannot be blamed on their condition when Respondent Syverson delivered them to Lance Quam's farm. I cannot comprehend how cows that were delivered in June, July, and August of 2002, could suddenly become so unsatisfactory to Lance Quam on February 18, 2003, following truck driver Jim Klecker's comments, after Lance Quam had all along behaved as if the cows had been satisfactory. Not only had Lance Quam continued to buy cows from Respondent Syverson all summer long in 2002, he *again* bought cows from Respondent Syverson in February 2003.

20. Mr. Quam was understandably upset when, beginning on February 18, 2003, he thought he got slaughter cows. Lance Quam has interpreted the events of 2002 and thereafter through the filter of belief that Lance Quam got slaughter cows. I find to the contrary, that the cows that Respondent Syverson bought at Zumbrota's Monday's auctions and resold at Zumbrota's Tuesday auctions were *not* slaughter cows, as confirmed by veterinary examination, and as explained in the testimony of both Tom Webster of Zumbrota and Respondent Syverson. Tr. 548-50. Sterling Sibley testified credibly that the cattle he delivered from Mr. Syverson's farm to Mr. Quam's pasture appeared to be healthy livestock. Tr. 440.

21. Lance Quam testified that for each delivery of cows (and there were ten such deliveries during the summer of 2002, RX 3), Respondent Syverson had shown him the Zumbrota purchase invoices. Tr. 47.

Mr. Quam: Yes, he would show me what he had paid for them and that was what I was to pay him.

Tr. 47.

Lance Quam testified that he then went to Respondent Syverson's farm to "pick up the receipt" (unless Respondent Syverson had already given it to him) and to "write a check and

leave it there” but denies that he ever went to Respondent Syverson’s farm to select cattle that he wanted to purchase. Tr. 46-47.

Mr. Spicknall: Did Mr. Syverson have cattle at his farm at that time?

Mr. Quam: Yes.

Mr. Spicknall: Did you ever go to Mr. Syverson’s farm and select cattle that you wanted to purchase?

Mr. Quam: Never, no.

Mr. Spicknall: Did he ever offer to sell you cattle that were on his farm?

Mr. Quam: No. I was there that day we were talking [in April or May 2002, a month or two before Lance Quam’s first purchase]. He was showing me some of his cattle that he owned but never offered them for sale. They were - - he just said, well, he got this for this and they were there. Never offered them to me.

Tr. 46-47.

22. Respondent Syverson testified that after Lance Quam had visited him in April or May 2002 (which was before Lance Quam had arranged his financing to buy cows), Lance Quam came to Respondent Syverson’s farm to buy cattle, beginning June 12, 2002; that the invoice dates (RX 3) are the dates that Mr. Quam was at Respondent Syverson’s place and purchased cattle. Tr. 460-61. Respondent Syverson testified, after examining CX 7 through CX 14, that none of those transactions was an order-buying situation on behalf of Mr. Quam. Tr. 486. Respondent Syverson’s testimony on direct concluded as follows. Tr. 486.

Mr. Oldfield: In each of those occasions were you approached by Mr. Quam after you bought the cattle and had them shipped to your farm regarding their purchase?

Mr. Syverson: Yes.

Tr. 486.

23. Lance Quam’s testimony describing his cows that had Johnes disease or viruses and describing his cows that died (Lance Quam claims that about one-third of the cows he bought from Respondent

Syverson died), was remarkably vague as well as remarkably unreported and undocumented (such as by veterinary records) to Respondent Syverson. Lance Quam and Respondent Syverson were neighbors who lived three miles from one another. Tr. 123. They had done cattle business with one another for close to 15 years. Tr. 452. With each delivery of cows to Lance Quam by Respondent Syverson, they were at one another's farms. If the cows had been noticeably defective, I would expect Lance Quam to have acted accordingly (stopped buying more of them, for example) and to have communicated to Respondent Syverson that he had a problem. Even Lance Quam testified that his only complaint to Respondent Syverson prior to the Jim Klecker statement, was, a couple of times, that some of the cows were skinny. Tr. 55, 124.

Mr. Quam: Some of the cattle were coming in skinny. Asked Mr. Syverson about them and he just said, Well, they just need to be grained and things and they will come out of it.

Tr. 55.

24. On the issue of the whether Lance Quam complained about the cows' condition when Respondent Syverson sold them, Respondent Syverson's testimony is found at Tr. 463-65.

Mr. Oldfield: Okay. Did Mr. Quam ever complain about the condition of the cattle that you sold him?

Mr. Syverson: No.

Mr. Oldfield: Did Mr. Quam ever call you or talk to you about cattle being too skinny?

Mr. Syverson: No.

Mr. Oldfield: Did Mr. Quam ever call you or talk to you about you selling him cull cattle?

Mr. Syverson: No.

Mr. Oldfield: When Mr. Quam would buy cattle during the summer of 2002 from you who would truck the cattle to Mr. Quam's pasture?

Mr. Syverson: 90 percent of the time it was me or I would hire Sterling Sibley.

Mr. Oldfield: Okay. And did you ever see Mr. Quam when you delivered cattle there to his pasture?

Mr. Syverson: Yes.

Mr. Oldfield: And would Mr. Quam watch you off-load the cattle?

Mr. Syverson: Watch what?

Mr. Oldfield: Watch you take the cattle off the truck?

Mr. Syverson: Yes. Yes.

Mr. Oldfield: Did he ever complain about the cattle then?

Mr. Syverson: No.

Mr. Oldfield: After the summer of 2002 did you have occasion to sell anymore cattle to Mr. Quam?

Mr. Syverson: After the summer of 2002?

Mr. Oldfield: Yes, sir.

Mr. Syverson: Yes, in February of 2003.

Mr. Oldfield: Okay. I want you to take a look at what has been marked as RX-6. There are three pages. Please identify those.

Mr. Syverson: These are my invoices to Mr. Lance Quam for three cows on February 1 of 2003, three cows on February 11th of 2003, two cows on February 18th of 2003. These were cattle that were sold to Mr. Quam.

Mr. Oldfield: Were you ever paid for these cattle?

Mr. Syverson: No, I wasn't.

Mr. Oldfield: Did Mr. Quam ever tell you there was anything wrong with these cattle?

Mr. Syverson: No.

Mr. Oldfield: Nothing was said about their health or condition?

Mr. Syverson: No.

Mr. Oldfield: Do you know what happened to these cattle?

Mr. Syverson: These particular eight head of cattle?

Mr. Oldfield: Yes, sir.

Mr. Syverson: These eight cattle I never was paid for and I don't know what the circumstances of it was, but they [four of the eight cows, see Tr. 465-68] ended up at a later date being sold back at the Zumbrota Livestock Market under the name of Terry LaCanne.

Tr. 463-65.

25. I find Lance Quam's failure to pay for the eight cows he bought in February 2003 without even a letter of explanation, and his overall failure to communicate in a business-like fashion, to be irresponsible. Lance Quam's behavior accompanying his failure to pay Respondent Syverson for the eight cows adds to my distrust of Lance Quam's version of events, where Lance Quam's version conflicts with other evidence. Even after Respondent Syverson's attorney sent a demand letter, dated March 6, 2003 (RX 7), which included an option of having Respondent Syverson come to pick up the cows if Lance Quam was unable to pay for them, Lance Quam failed to respond<sup>1</sup> (Tr. 473) and "declined" to let Respondent Syverson take the cattle back and call it even. Tr. 467.

26. Respondent Syverson's testimony is also not fully credible, but for the most part I find Respondent Syverson to be the more trustworthy witness compared to Lance Quam. Respondent Syverson testified that he had mistakenly put his invoices to Mr. Quam (RX 3) in his farm account records, rather than with his dealer account records, and that he did not discover them until he had talked to Mr. Oldfield about the complaint in this case. Tr. 482-83. Thus the invoices to Mr. Quam (RX 3) had not been turned over to Mr. Arce of Packers and Stockyards in September 2003, with Respondent Syverson's other dealer records. CX 17. Respondent Syverson's explanation is possibly true, but I don't believe it; I believe Respondent Syverson intentionally withheld from Mr. Arce of Packers and Stockyards the invoices to Mr. Quam.

27. In another instance where I find Respondent Syverson's testimony to be less than credible, I find that Lance Quam probably did comment to Respondent Syverson that some of the cattle were coming in skinny. Tr. 55. Lance Quam testified that Mr. Syverson just said, Well, they just need to be grained and things and they will come out of

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<sup>1</sup> In a small claims court action initiated by Respondent Syverson (CX 20), Lance Quam won. Lance Quam "counter-sued". Tr. 62. Lance Quam testified that he was not required to pay for the eight cows (\$4,776.10), and in addition, "the judge had awarded me the winnings of (\$) 7,500". Tr. 62. No transcript is available. Tr. 65. I am mindful that the judge of that court had evidence different from that before me and apparently reached a conclusion opposite mine on credibility.

it (Tr. 55), which is consistent with Respondent Syverson's testimony describing the conditioning of cows, adding value to them. Tr. 459-60.

Mr. Oldfield: Do you believe that the processing of these animals from Monday to Tuesday and then giving them shots after Tuesday's sale would add value to them?

Mr. Syverson: By finding out the sound, well-uddered young animals that the vet had gone through and you did their check health would considerably add value to the animals and that would increase their value considerably the next day or down the road if you, of course, bred them, fed them right, took care of them and, depending on the market conditions, of course, that yes, they would be animals that would increase in value considerably.

Mr. Oldfield: If any of these cattle that you consigned to the Tuesday dairy auction would have received what you thought was a fair market value price, would you have sold them?

Mr. Syverson: Yes.

Mr. Oldfield: And you did in fact sell some of those cattle, is that right?

Mr. Syverson: Yes.

Tr. 459-60.

28. Respondent Syverson testified that Lance Quam viewed the cows at Respondent Syverson's farm before the cows were delivered to Lance Quam's farm. Tr. 528.

Mr. Ball: Is it your position, Mr. Syverson, that every time Mr. Quam bought cattle from you he came to your place to view the animals?

Mr. Syverson: That's correct.

Mr. Ball: And you never sent them directly from the auction market to Mr. Quam's?

Mr. Syverson: No.

Tr. 528.

Lance Quam denied that he ever went to Respondent Syverson's farm to select the cattle that he wanted to purchase. Tr. 46. Marilyn Syverson credibly corroborated Respondent Syverson's testimony that

Lance Quam did come to Respondent Syverson's farm to observe and apparently select cattle; she observed Lance Quam do that on four to six occasions during the summer of 2002. Tr. 417-18, 425.

29. I find that Lance Quam either viewed or had the opportunity to view at Respondent Syverson's farm, and either selected or had the opportunity to select at Respondent Syverson's farm, every cow he purchased from Respondent Syverson during June, July, and August 2002, and during February 2003.

30. Lance Quam testified he fed his animals adequately. Tr. 56. Respondent Syverson testified that Lance Quam did not feed his animals adequately, which was one reason the Sheriff alerted the Humane Society. RX 9. Illustrative is the conflict in testimony about Respondent Syverson's bull, which he rented to Lance Quam from the summer of 2002 until about late February 2003. Tr. 475-76.

Mr. Oldfield: Do you recall the condition that your bull was in when you first lent or rented it to Mr. Quam?

Mr. Syverson: When I rented the bull to Mr. Quam?

Mr. Oldfield: Yes.

Mr. Syverson: Yes, the bull was a two-year-old Holstein bull that I had purchased at a sale that was a young Holstein bull weighing approximately at that time 1,400 pounds. He was out of a herd of dairy cows that I was familiar with at one time that had very good milk records and he was out of a good breeding.

Mr. Oldfield: And when you got it back in late February 2003 what was the condition of that bull?

Mr. Syverson: The bull probably from the time that Mr. Quam got him until the time I picked him up I would say had lost an easy 300 pounds of weight. The bull was -- I wouldn't say emaciated but he was in very poor health and shape. And the majority of the problem was the lack of feed for the animals, including my bull.

Tr. 475-76.

31. Lance Quam claimed Respondent Syverson's bull weighed about 2,000 pounds (when the Humane Society person inspected in February 2003) (Tr. 75); that Mr. Syverson never complained about Lance

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Quam's care of the bull (Tr. 78); and that the bull was well taken care of and probably put on extra weight (Tr. 78).

### **Findings of Fact and Conclusions**

32. Paragraphs 33 through 61 contain intertwined Findings of Fact and Conclusions.

33. The Secretary of Agriculture has jurisdiction.

34. Respondent Syverson is an individual who, during 2002 and 2003, farmed in Minnesota and was a livestock dealer who did business as Syverson Livestock Brokers. Respondent Syverson's mailing address is P.O. Box 1, Wanamingo, Minnesota 55983.

35. Lance Quam is an individual who, during 2002 and 2003, bought and sold real estate and had apartment rentals and a car lot plus car repair shop and a farm side business concerned primarily with dairy cattle. Tr. 43, 44, 117, 420. He also drove a school bus. Tr. 420. Mr. Quam's address is 307 N. Main Street, Pine Island, Minnesota 55963. Mr. Quam's place was "approximately three miles from Mr. Syverson's and about seven miles from Zumbrota Livestock barn." Tr. 123.

36. A subpoena was issued for James Klecker, 10263 SE 24th Ave, Owatonna, Minnesota 55060, to appear, to testify on April 5, 2006; Mr. Klecker was not, however, called as a witness.

Tr. 57-58.

Mr. Spicknall: You mentioned Mr. Klecker was a trucker. Is that what he does for a living is trucks cattle?

Mr. Quam: Yes, he also farms family farm.

Mr. Spicknall: Do you know if he was at the Zumbrota auction frequently in 2002?

Mr. Quam: Yes, he usually goes down there and buys cattle for himself.

Tr. 57-58.

37. After hearing Mr. Klecker's comments, about February 18, 2003, Lance Quam stopped buying cattle from Respondent Syverson and began pondering whether Respondent Syverson should pay him damages for selling him cattle that were in poor condition, sick with

Johnes.<sup>2</sup>

Tr. 55-56. [One of the cows had Johnes (CX 12 at 8), according to veterinary records in evidence. Johnes is aggravated by stress. Inadequate food is a stressor.]

38. Mr. Quam had begun to believe that Respondent Syverson had been cheating him: Tr. 54.

Mr. Quam: No. I guess I found out right at that time that he had deliberately misled me and I felt very took at that point.

Mr. Spicknall: Did you pay Mr. Syverson for the animals that he had delivered to you in early 2003?

Mr. Quam: No, I did not.

Mr. Spicknall: When you say you felt that he misled you, what do you mean by that?

Mr. Quam: I had been informed that the cattle that I had bought came from the Monday sale and -- which was the cull slaughter cow sale, and was repurchased again on the Tuesday sale, so basically I got slaughter cows.

Tr. 54.

39. Paragraphs 3 through 8 are hereby incorporated into Findings of Fact and Conclusions by this reference. Lance Quam thought Respondent Syverson had sold him cull cows (slaughter cows), but Respondent Syverson had not sold him slaughter cows, as confirmed by veterinary examination at the auction; the cows may have been open (not pregnant); they may have been bred but not in accordance with the producer's timetable; they may have been skinny and in need of good nutrition; but they were not slaughter cows.

40. Paragraphs 17 through 31 are hereby incorporated into Findings of Fact and Conclusions by this reference. For the cows he was interested in buying, Lance Quam specified to Respondent Syverson neither the type of sale nor the day of the sale those cows were to come from. The cows Respondent Syverson delivered to Lance Quam met Lance Quam's description, including Lance Quam's price range and the

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<sup>2</sup> Johnes is a cattle disease that affects the digestive system and weakens the (cow's) condition over time. Tr. 394.

purpose he had for the cows.

41. Tom Webster recalled Lance Quam asking him about Respondent Syverson's transactions. Tr. 380-81.

Mr. Spicknall: And when Mr. Quam came to see you, do you have any recollection of what was discussed?

Mr. Webster: I don't remember that conversation in any detail at all. I remember him requesting some records, and my recollection is that the records were already being gathered by some agency, I'm not sure who, but I was aware that something was in the works, but he wasn't the customer that the name was on the paperwork so he wasn't going to get it.

Mr. Spicknall: And you testified earlier that's your practice. If someone comes in asking for someone else's records you wouldn't give them to them.

Mr. Webster: I wouldn't give them over the counter, no.

Mr. Spicknall: And that's just your policy.

Mr. Webster: That was our business policy.

Tr. 380-81.

42. Respondent Syverson knew Lance Quam wanted to buy cows that could bear calves, and Respondent Syverson was willing to buy such cows and to sell them to Lance Quam, but Respondent Syverson had no guarantee that Lance Quam would buy what Respondent Syverson had bought.

43. Every cow that Respondent Syverson sold to Lance Quam in 2002 and 2003 came from Respondent Syverson's farm, that is, was trucked from Respondent Syverson's farm to Lance Quam's place. Tr. 528, 439, 463-64.

44. Every cow that Respondent Syverson sold to Lance Quam in 2002 and 2003 had first been billed to Respondent Syverson by Zumbrota; none of those cows was billed to Lance Quam by Zumbrota.

45. Tom Webster testified credibly that in an order-buying situation, the cows would probably have been billed to the customer (such as Lance Quam, had this had been an order-buying situation) rather than the buyer (such as Respondent Syverson). Tr. 363-64.

46. In his transactions with Lance Quam in 2002 and 2003,

Respondent Syverson was *not* operating as a marketing agency or “order-buyer”; he was operating as a cattle dealer. Lance Quam was not locked into buying any of the cows Respondent Syverson offered to sell him. Lance Quam chose which cows to buy, and whether he wanted to buy any cows, *after* he had an opportunity to inspect the cows and after he knew what the price would be. Lance Quam had no claim on any of the animals Respondent Syverson brought home until Respondent Syverson sold them to him. Respondent Syverson had other customers besides Lance Quam. The cattle Respondent Syverson owned could have been kept by Respondent Syverson and could have been sold to customers other than Lance Quam.

47. During 2002 and 2003, when Respondent Syverson bought the cows at issue here, he was *not* buying them for his neighbor Lance Quam; he was buying them for himself. Respondent Syverson certainly must have formed the expectation that Lance Quam would buy the cows, based on the fact that Lance Quam did keep buying the cows, but there was no guarantee.

48. Even if the form Respondent Syverson used to commemorate his sales of cows to Lance Quam made the sales to Lance Quam *appear* to be market agency transactions, that is, transactions in which Respondent Syverson bought the cows on Lance Quam’s behalf, as Lance Quam’s agent, owing Lance Quam a fiduciary duty, such was not the case; Respondent Syverson bought the cows on his own behalf, as a cattle dealer.

49. The use of the word “commission” on Respondent Syverson’s invoices (RX 3, RX 7) is one factor to consider in evaluating whether each of Respondent Syverson’s transactions with Lance Quam was a market agency transaction. I conclude that each such transaction lacks the attributes of market agency transactions. Respondent Syverson was buying for himself, not for Lance Quam. Lance Quam was not obligated to buy any cows from Respondent Syverson’s inventory. No cow went from Respondent Syverson’s place to Lance Quam’s place until and unless Lance Quam said so or at least had the opportunity to say “yea” or “nay.” A more accurate description of the \$15 per head that Respondent Syverson added would be “service charge” rather than

“commission.”

50. The buy-sell contract between Lance Quam and Respondent Syverson was not formed *before* Respondent Syverson acquired the cows that he ultimately sold to Lance Quam, but *after*. After Respondent Syverson bought cows and brought them home, Lance Quam bought them. The price Respondent Syverson offered to sell the cows for, was the price on the invoice he showed Lance Quam, plus veterinarian costs, plus trucking charges, plus a \$15 per head service charge (labeled “commission” on the form but not truly a commission); the price Lance Quam agreed to buy the cows for, was the price on the invoice Lance Quam was shown, plus veterinarian costs, plus trucking charges, plus a \$15 per head service charge.

51. The Zumbrota invoices Respondent Syverson showed Lance Quam were true. There was nothing false about the invoices. The invoices showed truly the prices that Respondent Syverson paid at auction. For cows that Respondent Syverson had bought from himself, he had added value to the cows by obtaining evaluations of the cows by the veterinarian, thus ruling out certain defects that would have been detected in such evaluations, and getting shots for the cows.

What Respondent Syverson failed to disclose to Lance Quam, were those Zumbrota invoices showing that Respondent Syverson had earlier paid an even lower price at auction for the same cow, sometimes only the day before. How much value did a cow gain in one day? - - quite a bit, actually, by being evaluated by a veterinarian and having some potential problems ruled out.

52. Tom Webster testified credibly to explain how value can be added to a cow by replacing some of the unknowns. Tr. 372-80.

Mr. Spicknall: Now, Mr. Webster, a question about your appearance here today. Are you here voluntarily today or pursuant to subpoena?

Mr. Webster: Voluntarily.

Mr. Spicknall: Why did you want to voluntarily come and give testimony today?

Mr. Webster: I think that it's important that we protect the public auction as we know it. People can come and purchase livestock

out of consignment and it makes for a healthy auction.

Mr. Spicknall: So you understand the government's case to be that no one can purchase livestock at their own consignment?

Mr. Webster: No.

Mr. Spicknall: Okay. What do you understand this case to be about?

Mr. Webster: I understand this case to be about the ability to purchase cattle and resell them or take them home and background them or do whatever you want to do with them, but it comes down to my understanding is that you can -- whether you can buy cattle, add value, resell them, make a profit and go about your business.

Mr. Spicknall: Okay. And when you say buy cattle and add value, what do you mean by that?

Mr. Webster: If you buy cattle and increase their value as in taking -- if we're talking about these cows, you take a cow that is of an unknown quality, she's not been represented in any form or fashion, she's sold with no guarantees, warranties, et cetera, you buy that cow, have her pregnancy-examined, have her brucellosis-tested and find that that cow is only open, she was consigned to the auction because she was open, she didn't fit that producer's breeding schedule, not because she was sick, not because she was maimed, only because she was open, you buy that cow, you determine that that is the reason that she was for sale, which makes her more desirable to another buyer, thus increasing her value.

Mr. Spicknall: So, as I understand what you're saying, for instance, someone might bring a cow to the Monday sale where it would be tagged with a slaughter tag but it could be an open animal, is that sort of along the lines of what you're suggesting?

Mr. Webster: Yes, she could be. She wouldn't have to be. She could be bred in five months too. She wouldn't have to be open. She could be -- but at the time she's had this tag applied she's of an unknown quantity.

Mr. Spicknall: And does the majority of cattle have that tag

applied to simply get them through for slaughter?

Mr. Webster: They go through an auction that it's not specifically for slaughter. Those cattle can be bought. It's a public auction. They can be bought by anybody.

Mr. Spicknall: No, I understand that. All right, let me ask you this: When you see those cattle that come in that someone consigned for the Monday sale, do you ever suggest as the consignee that they hold those cattle over to the Tuesday sale because it would improve their return on those animals?

Mr. Webster: It wouldn't be a common practice because it requires much more time and effort than I guess than we could put in. We would take the producer's request. If he said that the cow be sold in the market sale or as an unknown quantity, we did that.

Mr. Spicknall: So you mentioned taking the animal home and putting it out in pasture would probably increase its value if it was open and bred and that it would become more valuable as a dairy animal, is that --

Mr. Webster: You didn't have to take her home to do that. You could increase her value overnight if she was -- if she became a known commodity that had more value. You could increase her value overnight. You didn't have to take her home.

But you could increase her value maybe additionally by taking her home. Maybe she goes home and gets sick and dies. I don't know. We don't know that.

But one point I want to make before we get off the subject too is all cattle consigned to a dairy auction are not destined for the milk department tomorrow. Those cattle -- there's a whole large industry or large segment of the industry which Mr. Quam was part of, Mr. Syverson is part of, that does purchase cattle out of the dairy auction and increase their value additionally. They also buy open heifers, small calves and grow them up.

I don't want the perception that a dairy auction includes only cattle that are destined for the milk department tomorrow and these are an oddity. These are not. These are a part of the dairy

industry, a very viable part and a very well-attended segment of that industry.

Mr. Spicknall: So what would be the qualifications for an animal to go into the dairy sale would be, as I believe you stated earlier, that a veterinarian would have to qualify them as a dairy animal?

Mr. Webster: He would have to brucellosis-test them, he would have to pregnancy-examine them, and he would have to confirm the condition of the udder. Then it becomes the owner, that person, it becomes the owner's choice as to whether that animal is consigned to the dairy auction or not.

The veterinarian has deemed that she qualifies, but does the owner wish to consign her to the dairy auction or does he wish her to go back to market or does he wish to take her home? That's the current owner's decision.

Mr. Spicknall: You mentioned the udder. So if someone purchased a cow with a four-digit number at the Monday sale, had the vet look at it, turned out it was open or somewhere along in pregnancy and thought the value was better and they reconsigned it to the Tuesday sale and purchased it from themselves at the Tuesday sale, ownership would have never changed hands for that animal, is that correct?

Mr. Webster: I would say technically, no, but there was a service fee assessed to that animal by the market. Whether it was purchased back or not, there was a commission yardage service fee put on those cattle or a no-sale charge or whatever the fee might have been at the time would have been assessed to them technically whether ownership changed or not. I don't really know that. But she did have a service fee attached to her in between.

....

Mr. Spicknall: Mr. Webster, you mentioned there's a risk that something could happen pretty much at any time, is that correct?

Mr. Webster: Yeah.

Mr. Spicknall: So if someone consigned an animal on Monday, well, let's say someone purchased an animal at the Monday sale,

it happened to die Monday night, the intent was to reconsign it for the Tuesday sale, who bears the risk of loss for that?

Mr. Webster: The buyer.

Mr. Spicknall: The person who owned it as a result of purchasing it at the Monday sale . . .

Mr. Webster: Yup.

Mr. Spicknall: Okay. In the summer of 2002 were you aware of Mr. Syverson's practice of purchasing cattle at the Monday sale and reconsigning the animals to the Tuesday sale and repurchasing them from his own consignment?

Mr. Webster: Yes.

Mr. Spicknall: What was your understanding of what he was doing with those animals?

Mr. Webster: I had no idea what he was doing with the animals. I produced a buyer invoice for him and I did not know where he was taking the cattle.

Mr. Spicknall: At some point did you learn what he was doing with at least some of those animals in the summer of 2002?

Mr. Webster: I don't think I would have known in the summer of 2002 but I found out when the cattle or a portion of the cattle came back to the auction at a later time. From Mr. Quam I found out that that's -- that he had purchased them from Mr. Syverson and had them in his possession for the summer and reconsigned them back to the auction.

Tr. 372-80.

53. Respondent Syverson's purchase price for cattle at auction, even when he was the seller as well as the buyer, was not shown to be inflated or higher than a fair market price for those cattle. There is no credible evidence that Respondent Syverson bid up the price of the cows he bought at auction to a price that was higher than reasonable fair market value.

54. Respondent Syverson operated to maintain some control over the price his cows brought at auction, bidding them in himself if they were bringing a lower price than what he considered to be fair market value. There is nothing wrong with this technique, which is used in all kinds

of auctions, not just livestock auctions. Respondent Syverson testified credibly that he used the technique for his own business purposes. Tr. 524. Packers and Stockyards criticizes Respondent Syverson for this method of operating, suggesting sinister motives and that Respondent Syverson should instead have just “no saled” his livestock, as he did on occasion. Packers and Stockyards Brief at p. 11-12. I conclude that Packers and Stockyards, to ensure fair dealing, need not dictate the livestock dealer’s choice between buying out of his own consignment or “no sale-ing.”

55. Tom Webster testified that it was neither unusual nor uncommon for sellers to buy back their own livestock if they didn’t get the price they wanted. Tr. 363.

56. Lance Quam did not get the cows he bought from Respondent Syverson at as low a price as he might have paid had he gone to the auction himself. The price Respondent Syverson paid was higher than any other bidder was willing to bid (obviously; otherwise the higher bidder would have gotten the cow instead of Respondent Syverson), and that is true whether Respondent Syverson bought the cow on Monday or whether Respondent Syverson bought the cow on Tuesday, either out of his own consignment or from another, but there is no credible evidence that the price Respondent Syverson paid was higher than a fair market price.

57. Whether Lance Quam got the cows he bought from Respondent Syverson at a good price, or a fair market price, is not at issue here. Lance Quam was required to exercise his own judgment as to what he was willing to pay for each cow offered to him. Lance Quam had been in the cattle industry before. Tr. 54. What is at issue regarding cows Respondent Syverson sold to Lance Quam, is whether, on those occasions when Respondent Syverson twice bought cows (buying them from himself after he first bought them), Respondent Syverson’s disclosure of his second purchase of the cows, while not disclosing his first purchase of the cows, constitutes a violation of the fair dealing requirements of the Packers and Stockyards Act. A cattle dealer is not required to disclose his purchase price for cows he is selling. Respondent Syverson could have set his price for each cow without

giving any basis or explanation for it. Respondent Syverson chose to show Lance Quam his Zumbrota invoice, though, and to base Lance Quam's price on it. For some of the transactions there was an earlier Zumbrota invoice, Respondent Syverson's first purchase invoice, which Respondent Syverson did not disclose to Lance Quam.

58. Roughly 2/3 of the cows Respondent Syverson sold to Lance Quam had been "twice bought" by Respondent Syverson, although that fraction cannot be calculated with precision. Packers and Stockyards Brief at pp. 41-42. Respondent Syverson's Brief at p. 13.

59. When Respondent Syverson showed Lance Quam Respondent Syverson's Zumbrota invoices from his second purchase, leaving the impression that the second purchase was an arm's length transaction without revealing that he, Respondent Syverson, was both buyer and seller in the second purchase, and without revealing that Respondent Syverson had already made a first purchase of the same cows, sometimes the day before, Respondent Syverson was not being deceitful (what he showed was true), but he was being unfair because he failed to disclose the whole truth.

60. The Packers and Stockyards Act prohibits unfair *or* deceptive practice by a livestock dealer or market agency. Section 312(a) of the Act, 7 U.S.C. § 213(a). On those occasions when Respondent Syverson did what is described in paragraphs 57 and 59, he violated the Packers and Stockyards Act by engaging in an unfair practice.

61. Respondent Syverson breached no fiduciary duty; he was not Lance Quam's agent. Respondent Syverson did not engage in fraud, deceit or deception, or misrepresentation (what he presented was true, but he did not present the whole truth). Respondent Syverson did not violate the prior cease and desist order from "In re Todd Syverson, d/b/a Syverson Livestock Brokers," P&S Docket No. D-99-0011 (June 12, 2001). CX-5, at pp. 2 -3. Respondent Syverson did engage in an unfair practice. Considering the evidence as a whole, suspension is not warranted, but a civil penalty is warranted. The following Order provides an appropriate, reasonable, and sufficient remedy.

### **Order**

62. The following **cease and desist** provisions of this Order (paragraphs 62 and 63) shall be effective on the day after this Decision becomes final. [See paragraph 67.]

63. Respondent Syverson, individually or through any corporate or other device, in connection with his operations as a market agency or dealer subject to the Act, shall cease and desist from failing to comply with the fair dealing requirements of Section 312(a) of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 213(a), and specifically Respondent Syverson shall not represent to any buyer that his higher, second, purchase price was his price for livestock while failing to disclose that he bought from his own consignment or failing to disclose his lower, initial, purchase price within the previous 90 days.

64. Respondent Syverson, individually or through any corporate or other device, in connection with his operations as a market agency or dealer subject to the Act, shall cease and desist from failing without good cause to produce for examination within a reasonable time when asked by Packers and Stockyards, all of the accounts, records, and memoranda as are required to be kept under Section 401 of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 221, including, but not limited to, a purchase journal (recording, at minimum, the date of purchase; seller; number of head; description of livestock; purchase price(s); date(s) received; commission charges, if any; other fees or charges (optional); whether the livestock were purchased for the account of another, and if so, the identity of that person or firm); together with all invoices, buyer bills, consignment sheets and other records associated with individual livestock purchases and sales.

65. Respondent Syverson is assessed a civil penalty of **\$ 5,000.00**, in accordance with Section 312(b) of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 213(b), which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States,**" **within 90 days** after this Decision becomes final.

66. Respondent Syverson shall reference **P&S Docket No. D-05-**

Dane Fine, d/b/a Dane Fine Meat Packing Co. 1353  
66 Agric. Dec. 1353

**0005** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties **shall be sent by a commercial delivery service, such as FedEx or UPS**, to, and received by, Charles E. Spicknall, Esq., at the following address:

United States Department of Agriculture  
Office of the General Counsel, Trade Practices Division  
Attn.: Charles E. Spicknall, Esq., South Building  
1400 Independence Avenue, S.W.  
Washington, D.C. 20250

### **Finality**

67. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A)

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.  
Done at Washington, D.C.

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**In re: DANE FINE, d/b/a DANE FINE MEAT PACKING.  
P. & S. Docket No. D-07-0042.  
Decision and Order.  
Filed October 30, 2007.**

**P. & S. – Packers and Stockyards Act – Failure to file timely answer – Default decision – Proof of service by certified mail – Cease and desist order – Civil penalty.**

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding Dane Fine violated the Packers and Stockyards Act by purchasing livestock and failing to pay, when due, the full purchase price of the livestock. The Judicial Officer found Mr. Fine failed to file a timely answer to the Complaint and held, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), Mr. Fine was deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing.

Mr. Fine asserted he was not served with the Complaint. The Judicial Officer rejected Mr. Fine's assertion stating the record contains a United States Postal Service Domestic Return Receipt, which was attached to the envelope containing the Complaint, signed by Mr. Fine and indicating the United States Postal Service delivered the Complaint to Mr. Fine's mailing address. The Judicial Officer concluded Mr. Fine was served with the Complaint. The Judicial Officer ordered Mr. Fine to cease and desist from failing to pay, when due, the full purchase price of livestock and assessed Mr. Fine a \$1,500 civil penalty.

Gary F. Ball for Complainant.

Respondent, Pro se.

Initial Decision issued by Administrative Law Judge Peter M. Davenport.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

### PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint and Notice of Hearing [hereinafter Complaint] on December 14, 2006. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges Dane Fine willfully violated sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b) during the period May 25, 2005, through December 11, 2005, by purchasing livestock and failing to pay, when due, the full purchase price of the livestock (Compl. ¶¶ II-III). The Hearing Clerk served Mr. Fine with the Complaint, the Rules of Practice, and a service letter on December 19, 2006.<sup>1</sup> Mr. Fine failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a)

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<sup>1</sup>United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0004 4085 8547.

of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Mr. Fine a letter dated January 11, 2007, informing him that he had not filed a timely response to the Complaint. Mr. Fine failed to file a response to the Hearing Clerk's January 11, 2007, letter.

On March 22, 2007, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Deputy Administrator filed a Motion for Decision Without Hearing by Reason of Default [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Dane Fine with the Deputy Administrator's Motion for Default Decision and the Deputy Administrator's Proposed Default Decision on April 18, 2007.<sup>2</sup> Mr. Fine failed to file objections to the Deputy Administrator's Motion for Default Decision and the Deputy Administrator's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Mr. Fine a letter dated May 8, 2007, informing him that he had not filed timely objections to the Deputy Administrator's Motion for Default Decision. Mr. Fine failed to file a response to the Hearing Clerk's May 8, 2007, letter.

On June 12, 2007, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision]: (1) concluding Dane Fine willfully violated sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b) during the period May 26, 2005, through June 27, 2005; (2) ordering Mr. Fine to cease and desist from failing to pay, when due, the full purchase price of livestock; and (3) assessing Mr. Fine a \$1,500 civil penalty (Initial Decision at 2).

On August 2, 2007, Dane Fine filed three documents: (1) an invoice from the United States Department of Agriculture, Grain Inspection, Packers and Stockyards Administration, for the \$1,500 civil penalty assessed by the ALJ; (2) page 2 of the ALJ's Initial Decision; and (3) a document showing details of four purchases of livestock and meat by

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<sup>2</sup>Memorandum to the File, dated April 18, 2007, signed by Leslie E. Whitfield, Legal Technician, Office of the Hearing Clerk.

Dane Fine Meat Packing during the period May 26, 2005, through June 27, 2005. In response to Mr. Fine's August 2, 2007, filing, Administrative Law Judge Jill S. Clifton issued a document entitled "Fine Letter Acknowledgment" stating Mr. Fine's documents had been received and advising Mr. Fine of his opportunity to appeal the ALJ's Initial Decision to the Judicial Officer.

On September 14, 2007, Dane Fine appealed the ALJ's Initial Decision to the Judicial Officer. On October 5, 2007, the Deputy Administrator filed a response to Mr. Fine's appeal petition. On October 9, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision, except, for the reason discussed in this Decision and Order, *infra*, I conclude Mr. Fine willfully violated the Packers and Stockyards Act during the period May 25, 2005, through December 11, 2005.

## **DECISION**

### **Statement of the Case**

Dane Fine failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

Dane Fine, d/b/a Dane Fine Meat Packing Co. 1357  
66 Agric. Dec. 1353

1. Dane Fine is an individual doing business in the Commonwealth of Pennsylvania as Dane Fine Meat Packing.

2. Dane Fine's mailing address is 1080 Butler Road, Saxonburg, Pennsylvania 16056.

3. Dane Fine, at all times material to this proceeding, was engaged in the business of buying livestock in commerce for the purpose of slaughter.

4. Dane Fine, at all times material to this proceeding, was a packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.

5. Dane Fine, during the period May 25, 2005, through December 11, 2005, purchased 611 head of livestock and failed to pay, when due, \$105,885.46 associated with these livestock purchases.

#### **Conclusions of Law**

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

2. Dane Fine willfully violated sections 202(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 192(a), 228b).

#### **Dane Fine's Appeal Petition**

Dane Fine raises two issues in his September 14, 2007, filing [hereinafter Appeal Petition]. First, Mr. Fine indicates the ALJ erroneously found Dane Fine's violations of the Packers and Stockyards Act occurred during the period May 26, 2005, through June 27, 2005 (Appeal Pet. and Attachments).

The ALJ found Dane Fine violated the Packers and Stockyards Act during the period May 26, 2005, through June 27, 2005 (Initial Decision at 2). The Deputy Administrator alleges Dane Fine violated the Packers and Stockyards Act during the period May 25, 2005, through December 11, 2005 (Compl. ¶ II). The ALJ offers no explanation for his conclusion that Dane Fine violated the Packers and Stockyards Act only during the period May 26, 2005, through June 27, 2005. Dane Fine is deemed by his failure to file a timely answer to have admitted the

violations in the Complaint; therefore, I reject the ALJ's finding that Dane Fine violated the Packers and Stockyards Act only during the period May 26, 2005, through June 27, 2005. I find Dane Fine's violations of the Packers and Stockyards Act occurred during the period May 25, 2005, through December 11, 2005, as alleged in the Complaint.

Second, Dane Fine indicates he was not served with the Complaint (Appeal Pet.).

The Rules of Practice provide that a certified mail receipt returned by the United States Postal Service with a signature showing service is deemed to be accurate.<sup>3</sup> The record contains a United States Postal Service Domestic Return Receipt, which was attached to the envelope containing the Complaint, signed by Mr. Fine and indicating the United States Postal Service delivered the Complaint to Mr. Fine's mailing address on December 19, 2006. Under these circumstances, I must conclude the Hearing Clerk served Mr. Fine with the Complaint on December 19, 2006. Mr. Fine was required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer within 20 days after service of the Complaint; namely, no later than January 8, 2007. The Hearing Clerk received Mr. Fine's first filing in this proceeding on August 2, 2007, 6 months 3 weeks 4 days after Mr. Fine was required to file an answer. As Mr. Fine has failed to file a timely answer, he is deemed to have admitted the material allegations of the Complaint.

For the foregoing reasons, the following Order is issued.

### **ORDER**

1. Dane Fine, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from failing to pay, when due, the full purchase price of livestock, in violation of the Packers and Stockyards Act.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Mr. Fine.

2. Dane Fine is assessed a \$1,500 civil penalty. The civil penalty

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<sup>3</sup>7 C.F.R. § 1.147(e).

Dane Fine, d/b/a Dane Fine Meat Packing Co. 1359  
66 Agric. Dec. 1353

shall be paid by certified check or money order made payable to the  
Treasurer of the United States and sent to:

Assistant General Counsel  
United States Department of Agriculture  
Office of the General Counsel  
Trade Practices Division  
1400 Independence Avenue, SW  
Room 2309 South Building  
Washington, DC 20250

Payment of the civil penalty shall be sent to the Assistant General  
Counsel within 60 days after service of this Order on Mr. Fine.  
Mr. Fine shall state on the certified check or money order that payment  
is in reference to P. & S. Docket No. D-07-0042.

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**PACKERS AND STOCKYARDS ACT****MISCELLANEOUS ORDERS**

**In re: EXCEL CORPORATION.**

**P. & S. Docket No. D-99-0010.**

**Order Lifting Stay Order.**

**Filed October 1, 2007.**

**PS.**

Patrice H. Harps and Eric Paul, for Complainant.  
John R. Fleder, Philip C. Olsson, and Brett T. Schwemer, Washington, DC, and Jeff P. DeGraffenreid, Wichita, KS, for Respondent.  
*Order issued by William G. Jenson, Judicial Officer.*

On January 30, 2003, I issued a Decision and Order concluding Excel Corporation violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act], and the regulations issued under the Packers and Stockyards Act (9 C.F.R. §§ 201.1-.200), and ordering Excel Corporation to cease and desist from violating 9 C.F.R. § 201.99(a).<sup>1</sup> Harold W. Davis, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], and Excel Corporation each filed a timely petition for reconsideration, both of which I denied.<sup>2</sup>

On March 31, 2004, Excel Corporation filed a motion for stay pending the outcome of proceedings for judicial review. On April 6,

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<sup>1</sup>*In re Excel Corporation*, 62 Agric. Dec. 196 (2003).

<sup>2</sup>*In re Excel Corporation* (Order Denying Pets. for Recons.), 63 Agric. Dec. 317 (2004).

2004, I issued a Stay Order *nunc pro tunc* effective March 31, 2004.<sup>3</sup>

On February 15, 2005, the United States Court of Appeals for the Tenth Circuit issued a decision affirming my finding that Excel Corporation violated the Packers and Stockyards Act and 9 C.F.R. § 201.99(a), but modifying my January 30, 2003, cease and desist order.<sup>4</sup> On September 6, 2007, the Deputy Administrator filed a motion to lift the April 6, 2004, Stay Order. On September 27, 2007, Excel Corporation informed the Office of the Hearing Clerk, by telephone, that Excel Corporation did not oppose the Deputy Administrator's motion to lift the April 6, 2004, Stay Order. On September 27, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Deputy Administrator's motion to lift the April 6, 2004, Stay Order.

Proceedings for judicial review are concluded and Excel Corporation has no objection to the Deputy Administrator's motion to lift the stay order. Therefore, the April 6, 2004, Stay Order is lifted; and the Order issued in *In re Excel Corporation*, 62 Agric. Dec. 196 (2003), as modified by *Excel Corporation v. U.S. Dep't of Agric.*, 397 F.3d 1285 (10th Cir. 2005), is effective as follows.

### ORDER

Excel Corporation, its agents and employees, directly or indirectly through any corporate or other device, in connection with its purchases of hogs on a carcass merit basis, shall cease and desist from failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, any change in the formula used to estimate lean percent.

The Order in this Order Lifting Stay Order shall become effective on the day after service of this Order Lifting Stay Order on Excel Corporation.

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<sup>3</sup>*In re Excel Corporation* (Stay Order), 63 Agric. Dec. 335 (2004).

<sup>4</sup>*Excel Corporation v. U.S. Dep't of Agric.*, 397 F.3d 1285 (10th Cir. 2005).

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**In re: MICHAEL CLAUDE EDWARDS, d/b/a MICHAEL CLAUDE EDWARDS LIVESTOCK.**

**P. & S. Docket No. D-06-0020.**

**Order Denying Late Appeal.**

**Filed October 30, 2007.**

**P. & S. – Packers and Stockyards Act – Late appeal.**

The Judicial Officer denied Michael Claude Edwards' appeal petition stating the Judicial Officer has no jurisdiction to hear Michael Claude Edwards' appeal petition filed 6 days after Administrative Law Judge Peter M. Davenport's decision had become final

Leah C. Battaglioli and Andrew Y. Stanton, for Complainant.

Respondent, Pro se.

Decision issued by Peter M. Davenport, Administrative Law Judge.

*Order issued by William G. Jenson, Judicial Officer.*

### **PROCEDURAL HISTORY**

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this administrative proceeding by filing a Complaint on June 12, 2006. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges Michael Claude Edwards violated the Packers and Stockyards Act. On July 3, 2006, Michael Claude Edwards filed a response to the Complaint. On February 21, 2007, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] presided over a hearing in Winston-Salem, North Carolina. Leah C. Battaglioli and Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented the Deputy

Administrator. Michael Claude Edwards appeared pro se.

On May 3, 2007, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order: (1) concluding Michael Claude Edwards violated the Packers and Stockyards Act; (2) ordering Michael Claude Edwards to cease and desist from violating the Packers and Stockyards Act; and (3) suspending Michael Claude Edwards as a registrant under the Packers and Stockyards Act (Decision and Order at 10-12). The Hearing Clerk served Michael Claude Edwards with the ALJ's Decision and Order on May 18, 2007.<sup>1</sup>

On June 12, 2007, Michael Claude Edwards filed a request to appeal the ALJ's May 3, 2007, Decision and Order. I found Michael Claude Edwards' June 12, 2007, request to appeal the ALJ's May 3, 2007, Decision and Order constitutes a request for an extension of time within which to file an appeal petition and extended the time for filing Michael Claude Edwards' appeal petition to September 24, 2007 (Informal Order Extending Time for Filing Appeal Petition; Order Denying Complainant's Motion for Dismissal of Respondent's Appeal Petition). On October 1, 2007, Michael Claude Edwards filed an appeal petition. On October 15, 2007, the Deputy Administrator filed Complainant's Response to Respondent's Appeal Petition. On October 18, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

#### **CONCLUSION BY THE JUDICIAL OFFICER**

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an administrative law judge's written decision must be appealed to the Judicial Officer within 30 days after service. I found Michael Claude Edwards' June 12, 2007, request to file an appeal petition to be a timely request for an extension of time within which to file an appeal petition and granted Michael Claude Edwards an extension to September 24, 2007, within which to file his appeal

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<sup>1</sup>United States Postal Service Domestic Return Receipt for Article Number 7004 2510 0003 7121 7121.

petition. Michael Claude Edwards did not file his appeal petition until October 1, 2007.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.<sup>2</sup> The ALJ's Decision and Order became final on September 25, 2007. Michael Claude Edwards filed his appeal petition on October 1, 2007, 6 days after the ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Michael Claude Edwards' appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Michael Claude Edwards' filing an appeal petition after the ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act

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<sup>2</sup>See, e.g., *In re Tung Wan Co.*, 66 Agric. Dec. 939 (2007) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *In re Tim Gray*, 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); *In re Jozset Mokos*, 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re David Gilbert*, 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); *In re Ross Blackstock*, 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final).

(“Hobbs Act”). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act (“Hobbs Act”) requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.<sup>3</sup>

Accordingly, Michael Claude Edwards’ appeal petition must be denied, since it is too late for the matter to be further considered. For the foregoing reasons, the following Order is issued.

### ORDER

1. Michael Claude Edwards’ appeal petition, filed October 1, 2007, is denied.
2. Administrative Law Judge Peter M. Davenport’s Decision and Order, filed May 3, 2007, is the final decision in this proceeding.

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<sup>3</sup>*Accord Jem Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court’s baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant’s petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

**PACKERS AND STOCKYARDS ACT**

**DEFAULT DECISIONS**

**In re: COLORADO CITY LIVESTOCK MARKET, LLC, AND  
JAMES W. "JIM" CALVERT.**

**P. & S. Docket No. D-07-0073.**

**Default Decision.**

**Filed October 16, 2007.**

**Decision and Order By Reason of Default**

**P&S – Default.**

Eric Paul, for GIPSA.

Respondent, Pro se.

*Default Decision by Administrative Law Judge Jill S. Clifton.*

The Complaint, filed on March 5, 2007, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) (“the Act” or “the Packers and Stockyards Act”).

**Parties and Counsel**

The Complainant is the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (“GIPSA”), United States Department of Agriculture (frequently herein “Complainant” or “Packers and Stockyards”). Eric Paul, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue, SW, Washington, D.C. 20250-1413, represents the Complainant.

The Respondents are Colorado City Livestock Market, LLC, a Texas Limited Liability Company (frequently herein “Respondent” or “Respondent Colorado City”), and James W. “Jim” Calvert, an individual (frequently herein “Respondent” or “Respondent Calvert”). Respondent Colorado City and Respondent Calvert are collectively referred to as “Respondents.”

No answer to the Complaint has been received. The time for filing answers expired in late March 2007.

The Complainant's Motion for Decision Without Hearing by Reason of Default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

#### **Findings of Fact**

1. Colorado City Livestock Market, LLC, is a Texas Limited Liability Company whose business address, until it ceased operations on or about August 22, 2006, was 1630 West Point, Colorado City, TX 79512.

2. Respondent Colorado City at all times material herein was:

- (a) Engaged in the business of selling livestock in commerce on a commission basis; and
- (b) Registered with the Secretary of Agriculture as a market agency to sell livestock on commission.

3. James W. "Jim" Calvert is an individual whose address is 11214 South Highway 208, Dunn, TX 79516.

4. Respondent Calvert is and at all times material herein was:

- (a) President and one hundred percent owner of Respondent Colorado City;
- (b) The individual who managed, directed, and controlled the daily operations of Respondent Colorado City;
- (c) A market agency selling livestock in commerce on a commission basis; and
- (d) Not individually registered with the Secretary of Agriculture

in any capacity under the Act.

5. The Respondents failed to maintain and use properly their custodial accounts for shippers' proceeds, endangering the faithful and prompt accounting therefor and the payment of portions thereof due the owners and consignors of livestock, in that:

(a) As of May 31, 2005, Respondents had outstanding checks drawn on the custodial account in the amount of \$210,518.00, and had to offset those checks a balance in the custodial account in the amount of \$67,439.37 and proceeds receivable in the amount of \$19,411.92, resulting in a deficiency of \$123,666.71 in funds available to pay shippers their proceeds;

(b) As of July 31, 2005, Respondents had outstanding checks drawn on the custodial account in the amount of \$198,173.22 and a negative \$32,918.43 balance in the custodial account, and had to offset these checks and negative balance proceeds receivable in the amount of \$34,829.80, resulting in a deficiency of \$196,261.85 in funds available to pay shippers their proceeds; and

(c) As of August 22, 2005, Respondents had outstanding checks drawn on the custodial account in the amount of \$195,978.49, and had to offset those checks a zero balance in the closed custodial account, resulting in a deficiency of \$195,978.49 in funds available to pay shippers their proceeds.

6. Such deficiencies were due, in part, to Respondents' failure to deposit in the custodial account for shippers' proceeds, within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of livestock consigned to the market on a commission basis.

7. On or about the dates and in the transactions set forth below, the Respondents willfully misused the custodial account, and proceeds received from the sale of consigned livestock, in that they permitted the American State Bank to take NSF check charges and other fees from the custodial account as follows:

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Date	Custodial Account Shortage	Monthly Service Charge	NSF Check Fees	Wire Transfer Charge	Total Monthly Charges
5/31/05	-\$123,666.71				
6/03/05 6/10/05 6/30/05		\$417.73	\$500.00	\$10.00	[on June Statement] \$927.73
7/05/05 7/06/05 7/07/05 7/08/05 7/11/05 7/12/05 7/13/05 7/18/05 7/20/05 7/26/05 7/27/05 7/28/05 7/31/05			\$325.00 \$275.00 \$325.00 \$350.00 \$325.00 \$100.00 \$175.00 \$325.00 \$ 50.00 \$ 25.00 \$275.00 \$350.00		[on July Statement] \$3,903.15
	-\$196,261.85	\$1,003.15			
7/29/05 8/01/05 8/02/05 8/03/05 8/09/05 8/10/05 8/31/05			\$350.00 \$275.00 \$175.00 \$125.00 \$ 50.00 \$175.00		\$1,150.00
	-\$195,978.49				
3 Month Totals		\$1,420.88	\$4,550.00	\$10.00	\$5,980.88

8. Respondents failed to maintain and use properly the custodial account on and about the dates set forth in Findings of Fact 5 and 6

above, and misused the custodial account on or about the dates set forth in Finding of Fact 7 above, despite having been placed on notice by a certified mail letter dated January 26, 2005, that shortages found in the custodial accounts were due to (1) failures to reimburse the account for owner and market support purchases by the close of the next business day, and for proceeds receivable not collected from other buyers within seven days of the sale; and (2) for NSF check charges and other bank fees. Respondents were notified that operating with shortages in the custodial account and failure to timely reimburse the custodial account are considered unfair trade practices in violation of Sections 307(a) and 312(a) of the Act, and section 201.42(c) of the regulations; and that section 201.42(d) of the regulations does not permit NSF check and bank fees to be paid using custodial account funds.

9. On or about the dates and in the transactions set forth below, Respondents issued custodial account checks in purported payment of the net proceeds from the sale of consigned livestock to the shippers of such livestock which were returned unpaid because Respondents failed to maintain sufficient funds in the custodial account for shippers' proceeds to pay such checks when presented, and because the custodial account on which such checks were drawn was closed before checks were presented for payment.

Sale Date/ Check Date	Livestock Con- signor/ Payee	No. of Head	Check No.	Net Proceeds/ Check Amount	Bond Claim Distrib.	Unpaid Balance
5/18/05	Borden Spade Ranch	35	5951	\$ 25,296.83	no claim	\$25,296.83
6/01/05	Henry Hoyle	1	6074	704.71	no claim	704.71
7/13/05	Tom Willingham	2	6517	1,048.33	\$562.78	485.55
7/13/05	Gaylon Sorrells	2	6521	1,290.32	692.69	597.63

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7/20/05	Bobby Nobles	1	6566	847.51	454.98	392.53
7/27/05	W. T. Henderson	5	6649	2,999.76	1,610.39*	1,389.37*
	* Unpaid seller W. T. Henderson	will	receive this bond	distribution as soon	as he executes	a bond claim release.
8/03/05 8/10/05	Tulia Feedlot Tulia Feedlot	1 2	6699 6824	547.39 997.83 1,545.22	829.53	715.69
8/03/05	Max Drum	7	6705	5,423.56	2,911.58	2,511.98
8/03/05 sale 8/08/05 ck	J. C. Stroman, Jr.	1	6780	768.00	412.29	355.71
8/10/05	Hontas Hines	2	6788	1,521.80	816.96	704.84
8/10/05	Bullard Ranch	1	6789	210.22	no claim	210.22
8/10/05	Waldon Millican	5	6796	3,134.48	1,682.71	1,451.77
8/10/05	C & Y Cattle	3	6799	1,314.64	705.75	608.89
8/10/05	Shot Branham	1	6815	** 377.13	375.79	** 1.34
8/10/05	Roddy Harrison	145	6844	90,427.84	48,545.22	41,882.62
8/10/05	Powell Ranch	47	6847	28,724.23	15,420.30	13,303.93
8/10/05	Larry Wilson	25	6848	14,876.62	7,986.35	6,890.27
	Total:	286		\$180,511.20	\$83,007.32	\$97,503.88

\*\* Unpaid seller Shot Branham filed a \$700.00 bond claim for proceeds from the sale of a 600 lb. bull. Respondents issued the \$377.13 dishonored check to remit proceeds from the sale of a 475 lb. bull. The unpaid balance stated is the undisputed minimum amount owed.

10. Respondents' failure to remit net proceeds from the sale of consigned livestock to shippers in the above transactions was reduced to \$97,503.88 by bond proceed distributions.

11. Respondents failed to keep such accounts, records, and memoranda that fully and correctly disclosed all transactions involved in their business subject to the Act, in that they failed to: (1) issue checks in numerical sequence; (2) prepare reconciled sale summaries for given sale days; (3) fully document the voiding of checks and the issuance of replacement or correcting checks; (4) maintain a record of the identity of the livestock owner for all livestock sold; and (5) maintain full documentation for livestock transactions, and for balance sheet accounts and general ledger accounts. Respondents also failed to keep such records as they did prepare for the required two year record retention period.

### **Conclusions**

1. Respondent Calvert is the alter ego of Respondent Colorado City. *See Findings of Fact Nos. 1 through 4.*

2. Respondents have wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a) and section 201.42 of the regulations (9 C.F.R. § 201.42). *See Findings of Fact Nos. 5 through 10.*

3. Respondents have failed to keep records required by section 401 of the Act (7 U.S.C. § 221) and have wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)). *See Finding of Fact No. 11.*

### **Order**

1. Respondent Colorado City Livestock Market, LLC, its officers,

directors, agents and employees, successors and assigns, directly or through any corporate or other device, and Respondent James W. "Jim" Calvert, his agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

a. Failing to deposit in the Custodial Account for Shippers' proceeds within the times prescribed in section 201.42 of the regulations (9 C.F.R. § 201.42) amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

b. Failing to otherwise maintain the Custodial Account for Shippers' proceeds in strict conformity with section 201.42 of the regulations (9 C.F.R. § 201.42);

c. Failing to reimburse the Custodial Account for Shippers' Proceeds by the close of the next business day for purchases made by the Individual Respondent;

d. Using funds received from the sale of consigned livestock for the payment of NSF check charges and other bank fees, or for any purpose other than payment to consignors of the amount due from the sale of their livestock and the payment of lawful marketing charges;

e. Issuing checks in payment of net proceeds from the sale of consigned livestock without having sufficient funds on deposit and available in the custodial accounts for shippers' proceeds upon which the checks were drawn to pay the checks when presented for payment.

2. Respondents, in connection with the operations of Respondent Colorado City or any other market agency selling livestock on a commission basis that they may subsequently operate, shall keep and maintain such accounts, records, and memoranda as fully and correctly disclose their transactions subject to the Act and the regulations, including but not limited to those required to be kept under Section 401 of the Packers and Stockyards Act, 7 U.S.C. § 221, and including: (a) checks issued in numerical sequence; (b) reconciled sale summaries for given sale days; (c) full documentation of the voiding of checks and the issuance of replacement or correcting checks; (d) a record of the identity of the livestock owner for all livestock sold; and (e) full documentation

for livestock transactions, and for balance sheet accounts and general ledger accounts. Respondents shall keep all records prepared for the required two year record retention period.

3. Respondent Colorado City Livestock Market, LLC, and Respondent James W. "Jim" Calvert as its *alter ego*, are suspended as registrants under the Act for a period of five (5) years, and thereafter until they demonstrate that any custodial account for shippers' proceeds required to operate as a market agency selling on commission is in conformity with section 201.42 of the regulations, *provided*, the five (5) year definite period of suspension may be terminated by the issuance of a supplemental order at any time after the first 210 days of the suspension have been served upon demonstration that full payment of unpaid balances of net proceeds has been made to livestock consignors.

#### **Finality**

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

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**PACKERS AND STOCKYARDS ACT**

PM Beef Holdings, LLC, PS-D-07-0009, 07/10/07.

Joplin Regional Stockyards, Inc., PS-D-07-0098, 7/13/07.

Gainesville Livestock Market, Inc. and Milton Ward, PS-D-07-0057, 08/14/07.

Bruce H. Compton, PS-D-06-0019, 09/10/07.

Jim L. Leslie, PS-D-07-0049, 09/20/07.

Moyer Packing Company, PS-D-07-0053, 10/11/07.

Dustin Lewis a/k/a Dusty Lewis, PS-D-07-0178, 10/12/07.

Cargill Meat Solutions Corporation, PS D-07-0085, 10/19/07.

Michael V. Bott and Tony Bott, PS-D-07-0173, 10/30/07.

Lynn Bint d/b/a KO Cattle Co., PS-D-07-0124, 10/30/07.

Swift & Company d/b/a Swift Beef Company, PS-D-07-0192, 11/06/07.

Ewald Freidrich, Jr., PS-D-07-0203, 11/9/07.

Bobby L. Brotherton d/b/a B&B Cattle Company, PS-D-04-0012, 11/14/07.

North Texas Horse Sales, LLP, PS-D-07-0071, 11/14/07.

SouthWest Livestock Exchange, Inc., PS-D-07-0086, 11/29/07.

Ty Wayne McMurtry, PS-D-07-0099, 12/07/07.

Fox Creek Cattle, Inc. and Carolyn Sorrell, PS-07-0074, 12/07/07.

Landon Livestock, LLC, PS-D-07-0199, 12/21/07.

Joe W. Cooper, PS-D-08-0017, 12/28/07.