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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

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PACKERS AND STOCKYARDS ACT

COURT DECISION

EXCEL CORPORATION v. USDA.
No. 04-9540.
Filed February 15, 2005.

(Cite as: 397 F.3d 1285).

P&S – Grading – Sanction – Civil penalty – Appropriate cease and desist order – Expiration date for cease and desist orders – Purpose of Packers and Stockyards Act – Impeding Competition – Standard of review – Substantial evidence, agency's action supported by – Intent, a showing of wrongful, not necessary.

The court upheld the Judicial Officer's (JO) determination that the formula used to estimate lean percent was a form of "grading" within the meaning of 9 C.F.R.§ 201.99 of the regulations and that Excel violated the regulations in that it failed to inform the sellers (hog producers) that the formula had changed prior to making purchases of their hogs. Proof by Grain Inspection, Packers and Stockyards Administration (GIPSA) that the producers actually suffered a loss was unnecessary to support the JO's decision.

United States Court of Appeals,
Tenth Circuit.

Petitioner Excel Corporation seeks review of a decision and order issued by respondent United States Department of Agriculture (USDA) finding that Excel violated § 202(a) of the Packers and Stockyards Act (P & S Act), 7 U.S.C. § 192(a), and an implementing regulation, 9 C.F.R. § 201.99(a), by failing to disclose to hog producers a change in Excel's formula for computing the "lean weight" of hog carcasses. Excel also challenges the decision and order to the extent it directs Excel to cease and desist from engaging in certain related practices. Exercising jurisdiction pursuant to 28 U.S.C. § 2342(2), we grant Excel's petition for review for the sole purpose of modifying the cease and desist language of the decision and order. As so modified, the decision and order is enforced.

I.

Factual background

Excel, a corporation based in Wichita, Kansas, is estimated to be the fourth or fifth largest hog slaughterer in the United States. ROA, Vol. V, Doc. 155 at 13, 82. Excel purchases hogs from numerous hog producers using one of two methods. First, Excel purchases some hogs on a "spot" market basis, meaning that it negotiates a specific price for a specific lot of hogs. *Id.* at 13. Second, Excel purchases other hogs through short-and long-term contracts with hog producers, pursuant to which the producers agree to sell a given number of hogs to Excel for a set base price. *Id.*

Most of the hogs purchased by Excel fall within its "carcass merit" program. *Id.* Under the carcass merit program, hog producers deliver hogs to Excel's buying stations where the hogs are placed into a holding pen, tattooed for identification, given a lot number, weighed, and inspected. *Id.* at 13-14. The hogs are then transported to one of Excel's three slaughtering facilities (located in Illinois, Iowa, and Missouri). There, the hogs are "killed, bled, eviscerated, de-haired, washed, and inspected...." *Id.* at 14. Afterwards, the carcasses are evaluated for their "estimated percentage of lean (red) meat." *Id.* Because hogs with a high percent of lean meat have a higher market value than hogs with a low percent of lean meat, Excel "applies th[ese] percentage figure[s] to a pricing table called the 'lean percent matrix' to determine whether the hog producer receives a discount for the carcass--a deduction from the base price--or a premium--an addition to the base price." *Id.*

Some of the producers who supply hogs to Excel also sell to other packers. *Id.* at 20. Generally speaking, these producers sell "trial lots" to various packers, including Excel, to determine where they can obtain the best price. *Id.* Because USDA no longer has in place an official grading system for hogs, *Id.* at 16, "[a]ll packers appear to base the prices they pay for hogs on base price, lean percent, and a matrix...." *Id.* at 20. However, no industry standard exists for estimating lean percent and it is generally impractical for slaughterers to dissect and examine each carcass for fat and lean meat percentages. *Id.* at 14. Thus, slaughterers use a variety of less accurate, but more practical, methods of estimating lean percent. *Id.* The result is that each packer "has a slightly different grading program," i.e., "[t]hey use slightly different

means of getting to the same point for the end value." *Id.* at 20.

Excel had used the "Fat-O-Meat'er" method for estimating lean percent for approximately ten years. *Id.* at 14. "The Fat-O-Meat'er," which was developed in Denmark from a study of European hogs, "is a hand-held device with a probe that is inserted in the carcass." *Id.* "A light measures the difference between the loin-eye and back fat depth." *Id.* "A regression formula or equation embedded in the Fat-O-Meat'er, commonly referred to as the 'Danish formula'.., then uses this measurement to estimate the lean percent of the carcass." *Id.* at 14-15. The device has been approved for use by the USDA and is used by approximately thirty-two packers in the United States. *Id.* at 15. It is unclear, however, how many of these packers rely solely on the Danish formula to estimate lean percent. *Id.*

After Excel determined the lean percent and weight of each carcass, those figures were applied to Excel's "Lean Value Matrix" to determine the "meat PX factor." Aplee. Br. at 12. The matrix generated a higher "meat PX factor" for standard-sized carcasses (163 to 206 pounds) with a higher lean percent. Conversely, the matrix produced a lower "meat PX factor" for non-standard-sized carcasses (greater than 206 pounds or less than 163 pounds) and for carcasses with a lower lean percent. *Id.* To determine the exact price to be paid for a particular carcass, Excel multiplied the "meat base" (i.e., the price per hundred weight quoted to the producer) by the "meat PX factor." *Id.*

The producers from whom Excel purchased hogs on a carcass merit basis were aware that Excel used the Fat-O-Meat'er to estimate lean percent and that the lean percentage figure was used by Excel to determine the price paid for each carcass. Generally speaking, however, Excel did not inform producers of the details of the formula utilized for estimating lean percent.

In 1997, Excel decided to switch from the Danish formula for estimating lean percent to "a formula developed by Purdue University and promoted by the National Pork Producers Council," i.e. "the Purdue formula." *Id.* at 17. "The Purdue formula uses hot carcass weight as a variable with the Danish formula to estimate lean percent...." *Id.* In contrast to the Danish formula, which was estimated to be 72-73 percent accurate, the Purdue formula was estimated to be approximately 90

percent accurate. *Id.*

At the time it adopted the Purdue formula, Excel knew that the "change could affect the price it paid for hogs," and thus "considered the" change's "economic effect on hog producers...." *Id.* Excel "concluded, based on a study of 1.5 million hogs, that there would be only a 'minimal impact' on hog producers...." *Id.* at 17-18. In turn, Excel "decided not to tell hog producers about the change in the formula because, while it was not a secret, company officials believed that the formula, like the process methods and technology it used, was not a factor that interested hog producers or formed a basis for whether they sold hogs to" Excel. *Id.* at 18. "Another consideration was the corporate belief that hog producers who received more because of a change to a more accurate formula would be unhappy because they had been selling in the past under an inaccurate formula, while hog producers who received less because of the change would be upset...." *Id.*

Although Excel concluded that none of its written contracts with hog producers required it to provide notification of the formula change, Excel nevertheless notified Tyson Foods, the main supplier of hogs for Excel's Missouri facility, of the formula change. *Id.* at 19. Tyson objected to the change. *Id.* In turn, Excel agreed not to use the Purdue formula to estimate the lean percent of Tyson's hogs. *Id.*

Excel implemented the formula change at its Iowa and Illinois slaughtering facilities in October 1997, and at its Missouri slaughtering facility (for all non-Tyson hogs) in April 1998. *Id.* at 20. Following implementation of the formula change, some hog producers noticed a difference in the prices they were receiving from Excel for hogs. *Id.* at 21. Some hog producers began asking managers at Excel's slaughtering facilities about the matter. *Id.* In response, Excel told these producers about the formula change. *Id.*

In April 1998, the Grain Inspection, Packers and Stockyards Administration (GIPSA), a division of the USDA, "initiated what appears to have been a routine investigation of [Excel's] use of the Fat-O-Meat'er." *Id.* at 22. During the course of this audit, GIPSA "found the prices that hog producers should have been paid using the Danish formula were not those that appeared on the kill sheets." *Id.* at 23. Excel then informed GIPSA that it had changed the formula for estimating lean percent. *Id.* As a result of the 1998 audit, GIPSA decided that Excel's "failure to disclose its change of the formula to hog

producers prior to the purchase of hogs from those producers" was a violation of the P & S Act and one of its implementing regulations. *Id.* at 25. Excel was informed of the alleged violation in June 1998. *Id.* In July 1998, Excel "sent a letter to hog producers notifying them that the formula had changed...." *Id.* Excel "also adjusted the matrix so that hog producers received the same price under the Purdue formula as they would have received had [Excel] used the Danish formula." *Id.*

Procedural background

On April 9, 1999, the Deputy Administrator of GIPSA instituted a disciplinary administrative proceeding against Excel by filing a complaint and notice of hearing. The complaint alleged that, between October 23, 1997, and June 1, 1998, Excel violated § 202(a) of the P & S Act, 7 U.S.C. § 192(a), and § 201.99 of the Act's implementing regulations, 9 C.F.R. § 201.99, by failing to make known to hog producers a change in the formula used by Excel to estimate lean percent in hogs that it purchased, which in turn changed the price paid by Excel for hogs. The complaint further alleged that, as a result of the change in formula, Excel paid hog producers approximately $1,839,000 less for approximately 19,942 lots of hogs than it would have paid if it had not changed the formula.[1]

USDA's Chief Administrative Law Judge (ALJ) conducted hearings on July 18-21, July 25-28, September 23-27, 2000, and March 27-29, 2001. On February 7, 2002, the Chief ALJ issued a Decision and Order finding that, as alleged in the complaint, Excel failed to notify hog producers of its changed formula for estimating lean percent and that such failure violated § 202(a) of the P & S Act, 7 U.S.C. § 192(a), and § 201.99 of the implementing regulations, 9 C.F.R. § 201.99. The Chief ALJ ordered Excel to cease and desist from failing to notify livestock sellers of any change in the formula used to estimate lean percent and further ordered Excel to submit to arbitration with the hog producers

[1]When Excel responded that it had refunded to producers $3,093,581.00 (including 5.85% interest) as the difference between the price it paid under the Purdue formula and the Danish formula, the complaint was amended to allege an underpayment to producers of $635,345.52. *Id.* at 26.

with whom they had not yet resolved the matter and who received less money for hogs sold to Excel between October 1997 and July 1998 under the revised formula than they would have received under the old formula. The Chief ALJ refused GIPSA's request, however, to impose a monetary sanction against Excel.

Excel and GIPSA each sought review of the Chief ALJ's decision by the Secretary of the USDA. On January 30, 2003, the Judicial Officer (JO) issued a decision and order on behalf of the USDA addressing the challenges to the Chief ALJ's order. The JO affirmed the decision that Excel violated the P & S Act and the implementing regulation by failing to make known to all hog producers its change in the formula used to estimate lean percent in hogs. The JO dismissed the arbitration requirement and modified the cease and desist order. The JO agreed with the Chief ALJ that a monetary sanction was not appropriate.

Both sides unsuccessfully sought reconsideration of the JO's decision and order. Excel has since filed a petition for review with this court.

II.
Standard of review

Our jurisdiction to review a final order issued by the USDA in a disciplinary action brought under the P & S Act arises under 28 U.S.C. § 2342(2). We review such final orders under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. *See JSG Trading Corp. v. USDA,* 176 F.3d 536, 541 (D.C.Cir.1999). "That is, we will uphold the JO's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *Id.* (citing 5 U.S.C. § 706(2)(A), (E)).

Excel's violations of the P & S Act

Before addressing Excel's specific arguments on appeal, we begin by briefly outlining the statute and regulation that the JO determined Excel had violated. Section 202 of the P & S Act, 7 U.S.C. § 192, entitled "Unlawful practices enumerated," provides in pertinent part as follows:

> It shall be unlawful for any packer or swine contractor with

> respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device....

7 U.S.C. § 192(a).

In turn, the USDA has promulgated regulations implementing the provisions of the P & S Act. Specifically, 9 C.F.R. § 201.99, entitled "Purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis," provides, in pertinent part, as follows:

> (a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, *grading to be used,* accounting, and any special conditions.
>
> * * *
>
> (e) *If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent.* * * *

9 C.F.R. § 201.99(a) and (e) (italics added).

Applying the statute and the regulation to the established facts, the JO concluded that a violation of both the regulation and the statute had occurred. In particular, the JO noted that "[t]he record [wa]s clear that all parties considered the Fat-O-Meat'er to be a form of grading." ROA, Vol. V, Doc. 155 at 41. In turn, the JO concluded that "[t]he formula [Excel] used to estimate lean percent was also a part of the 'grading' within the meaning of section 201.99 of the Regulations ... as it was an element of [Excel's] carcass evaluation process." *Id.* The JO further concluded that, because "[s]ection 201.99 of the Regulations ... explicitly provides that packers purchasing livestock on a carcass merit basis must make known to the seller the grading to be

used prior to purchase," Excel violated that provision by failing to inform hog producers of its change in formula for determining lean percent. *Id.* In addition, the JO concluded that the violation had a direct impact on the hog producers who sold hogs to Excel. According to the JO, "the purpose of section 201.99 of the Regulations ... is to provide some basic level of similarity to allow sellers to evaluate different purchase offers," *Id.* at 42 (internal quotations omitted), and Excel deprived hog producers of this opportunity by failing to disclose its change in formula. More specifically, the JO stated: "Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than [Excel's] price under its changed formula." *Id.* Ultimately, the JO concluded that Excel "violated section 202(a) of the [P & S] Act and section 201.99(a) of the Regulations ... when it failed to make known to hog producers that it was changing the formula to estimate lean percent, prior to purchasing hogs on a carcass merit basis from those producers." *Id.* at 83.

Was the JO's decision supported by "substantial evidence"?

In its appeal, Excel contends the "JO erred when he ruled that Excel violated the law by changing the lean percent equation without prior notice" because "the USDA never met its burden to demonstrate that there was substantial evidence for this finding." Aplt. Br. at 15. In support of this contention, Excel argues that (1) "the JO never cited to a single court case or prior agency decision that provides any precedential support," (2) "the JO did not and could not rely on any expert testimony because GIPSA provided none," and (3) "GIPSA failed to introduce any survey of hog producers that producers believed that Excel had committed an unfair or deceptive practice or that these producers cared that Excel had changed the lean percent equation without disclosing the change to producers." *Id.*

By raising these arguments, Excel is clearly attempting to reframe the nature of the JO's decision. Generally speaking, it is true that an agency's decision must be supported by "substantial evidence." *Trimmer v. United States Dept. of Labor,* 174 F.3d 1098, 1102 (10th

Cir.1999). Here, however, the JO expressly noted in his decision and order that "[t]he salient facts [of the case] [we]re not in dispute." DO at 27. In particular, the JO noted that "all parties considered the Fat-O-Meat'er to be a form of grading," *Id.* at 41, and "[t]he parties [we]re in agreement that [Excel] did not tell all hog producers when it changed the formula to estimate lean percent and did not disclose details of the formula to all hog producers." *Id.* Thus, the JO's decision ultimately was based on whether those established facts constituted a violation of § 201.99 (and, in turn, § 202(a) of the P & S Act). In other words, the JO's decision was based on his interpretation of § 201.99 and his application of that interpretation to the uncontroverted facts.

The absence of any true factual disputes is further highlighted by carefully examining Excel's specific arguments. As noted, Excel first complains that "the JO never cited to a single court case or prior agency decision that provides any precedential support" for his decision. Aplt. Br. at 15. Obviously, however, prior court cases or agency decisions are not "evidence" that would support or refute the JO's decision. Second, Excel complains that "the JO did not and could not rely on any expert testimony because GIPSA provided none...." *Id.* It is unclear, however, why any such expert testimony was necessary. To the contrary, the resolution of the USDA's complaint against Excel required the JO only to apply the provisions of § 201.99 to the uncontroverted facts developed during the evidentiary hearing. Lastly, Excel complains that "GIPSA failed to introduce any survey of hog producers that producers believed that Excel had committed an unfair or deceptive practice or that these producers cared that Excel had changed the lean percent equation without disclosing the change to producers." Again, no such evidence was necessary to support the JO's conclusion. Indeed, the JO rejected this identical argument in his decision and order:

> Finally, I find [Excel's] argument that, when hog producers learned about the formula change, they did not care that the change had been made or that [Excel] failed to inform them about the formula change, irrelevant to the issue of whether [Excel] violated the Packers and Stockyards Act. [Excel] cites no

> authority supporting its contention that the feelings of hog producers have a bearing on whether [Excel] engaged in an unfair or deceptive practice under section 202(a) of the Packers and Stockyards Act.., and I cannot find authority which supports [Excel's] contention. The determination as to whether [Excel] violated section 202(a) of the Packers and Stockyards Act ... is made by the administrative law judge, the judicial officer, and ultimately, the courts. The determination is not based on how livestock producers, who the Packers and Stockyards Act is designed to protect, view [Excel's] actions. Moreover, the record does not support [Excel's] assertion that hog producers did not care about [Excel's] change in the formula to estimate lean percent or [Excel's] failure to inform them about the formula change....

DO at 65-66.

For these reasons, we conclude there is no merit to Excel's assertion that the JO's decision was not supported by substantial evidence.

Did Excel violate the P & S Act?

In its opening appellate brief, Excel asserts a host of arguments concerning why, in its view, it did not violate the P & S Act by "[c]hang[ing] an [e]quation [u]sed to [e]stimate [l]ean [p]ercent...." Aplt. Br. at ii. In particular, Excel argues that (1) no prior decisions existed holding that an undisclosed equation change was violative of the P & S Act, (2) USDA does not have carte blanche authority to prohibit whatever practices it wants to stop, (3) practices are not violative where they are required by the exigencies of the business and are justified by business standards, (4) none of its contracts with hog producers required it to notify producers before implementing an equation change, (5) hog producers did not care about the equation change, (6) its failure to disclose the formula change did not impede competition or hog producers' choices, and (7) there was no evidence it acted with wrongful intent.

At the outset, it is clear that Excel's arguments do not relate to whether Excel violated § 201.99(a) of the regulations implementing the P & S Act. As discussed in greater detail below, the JO concluded that

Excel violated § 201.99(a) by failing to disclose to hog producers the change in formula. In other words, contrary to Excel's arguments, the conduct at issue that violated the regulation was Excel's failure to disclose its change in formula to producers, and not the mere change in formula itself. Further, the JO's focus was on the requirements of the implementing regulation. After first concluding Excel violated that regulation, the JO in turn necessarily concluded that Excel also violated the P & S Act. Thus, the critical focus in this case is on the language of the regulation and its applicability to Excel's conduct.

In any event, it is apparent that none of the specific arguments asserted by Excel have merit. First, Excel has cited no authority, and we have found none, holding that the USDA is precluded from finding a violation in this case simply because it has not previously found a similar violation in the past. Indeed, such a rule would be nonsensical, for it would effectively preclude the USDA from applying the P & S Act and its implementing regulations to new techniques and tools utilized by slaughterers for grading livestock carcasses. Second, although the USDA does not have "carte blanche authority" to prohibit whatever practices it wants to stop, it is clear that Congress granted the USDA authority to implement and enforce the P & S Act. And, as noted, the critical issue in this case is whether Excel's failure to disclose its formula change to hog producers violated the USDA's implementing regulation. Third, and relatedly, it is clear that Congress and the USDA are the arbiters of what practices will impede competition. Thus, contrary to Excel's assertion, the fact that a particular act is "required by the exigencies of the business," or is not violative of a contractual obligation, has no impact on whether that act is violative of the P & S Act and the implementing regulations. Indeed, in the instant case, the USDA concluded that Excel's failure to disclose its formula change was violative of § 201.99(a) of the implementing regulations, even though Excel did not have a contractual obligation to disclose that change to hog producers and was otherwise justified in changing its formula to better estimate the lean percent of hog carcasses.

Fourth, Excel is incorrect when it suggests that hog producers did not care about the equation change. Indeed, the JO specifically found that some hog producers did care about the equation change, and that finding appears to be adequately supported by the record on appeal. DO at

65-66. In any event, nothing in the P & S Act or the implementing regulations provides that a violation thereof hinges on the opinions of the persons affected by the practice at issue. Although Excel cites to *Ferguson v. United States Department of Agriculture,* 911 F.2d 1273, 1281-82 (9th Cir.1990), in support of its assertion that customers' opinions are critical, a review of *Ferguson* undercuts Excel's arguments. To begin with, *Ferguson* involved a different type of violation (incorrect invoicing), and thus a different provision of the P & S Act (7 U.S.C. § 213(a)), than is at issue here. Further, although the court in *Ferguson* did consider the testimony of customers, that testimony had no effect on the conclusion that a violation of the P & S Act had occurred; rather, the customer testimony was considered solely for purposes of determining whether the sanction imposed was proper.[2] *Id.* at 1282- 83.

Fifth, Excel contends its actions did not impede competition or hog producers' choices. The JO, however, specifically concluded otherwise:

> Hog producers can compare prices and choose to continue to sell to [Excel] or sell to [Excel's] competitors. However, [Excel] impeded that choice when it made an unannounced change in the formula. [Excel] thereby altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than [Excel's] price under its changed formula. [Excel's] failure to notify hog producers of the change in the formula to estimate lean percent impeded competition. As [GIPSA] states, the purpose of section 201.99 of the Regulations ... "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91). The assessment of harm to hog producers of the change would therefore have been whatever higher market price they might have been able to

[2]In a related point, Excel complains that the Chief ALJ precluded Excel from calling six producer witnesses (the Chief ALJ apparently ruled that only four of Excel's producer witnesses could testify, and that the remaining six would merely provide cumulative testimony). This is clearly a red herring that has no impact on the propriety of the JO's decision.

> obtain from [Excel's] competitors. Therefore, I find [Excel's] violation of section 201.99(a) of the Regulations ... grave.

DO at 57.

Although Excel attempts to undercut these conclusions (e.g., by arguing that other packers did not inform hog produces about their equations to estimate lean percent), a review of the record on appeal demonstrates that they are reasonable inferences drawn from the evidence presented to the JO.

Lastly, Excel is simply wrong in asserting that, "to show an impediment to competition, GIPSA would have had to show Excel acted with wrongful intent." Aplt. Br. at 32. Nothing in the language of § 192(a) of the P & S Act or § 201.99(a) of the regulations requires a showing of wrongful intent. To the contrary, the focus is solely on the acts committed or omitted.

Did the JO err in interpreting 9 C.F.R. § 201.99(a)?

Excel next directly challenges the JO's interpretation of § 201.99(a). Specifically, Excel contends that, contrary to the conclusion reached by the JO, its failure to notify hog producers of the change in formula did not violate § 201.99(a). According to Excel, the "regulation does not mention: (1) lean percent; (2) equations; or (3) a change to either of them." Aplt. Br. at 34. Indeed, Excel contends that the key phrase in the regulation, i.e., "grading to be used," is ambiguous and thus it is unclear whether or not the actual formula employed by Excel in determining lean percent fell within the scope of this phrase. To support its assertion of ambiguity, Excel contends that, prior to the complaint being filed against it, the USDA never consistently or clearly interpreted § 201.99(a) in a manner that would have given Excel notice that it had to disclose to hog producers the change in formula. Excel also contends the JO failed to offer a sound explanation of the interplay between § 201.99(a) and § 201.99(e). Lastly, Excel contends that USDA has effectively sought "to rewrite the regulation in this proceeding to fit conduct that is simply not covered." Aplt. Br. at 44.

In determining whether the USDA (through the JO) committed any errors of law in interpreting § 201.99, we owe "substantial deference" to

the USDA's interpretation of that regulation. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994). That is because the USDA has been charged by Congress with administering the P & S Act, *see* 7 U.S.C. § 228 (outlining the authority of the Secretary of the USDA with regard to the P & S Act), and § 201.99 is one of the regulations intended by the USDA to implement the P & S Act. *See generally Mainstream Marketing Serv., Inc. v. FTC,* 358 F.3d 1228, 1236 (10th Cir.2004) (noting "that the courts owe deference to a federal agency's interpretation of a statute it administers"). Our "task is not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson,* 512 U.S. at 512, 114 S.Ct. 2381. "Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotations omitted). "In other words," we "must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Id.* (internal quotations omitted).

The JO in this case interpreted § 201.99(a) in the following manner. First, the JO concluded that "[s]ection 201.99(a) ... provides that each packer purchasing livestock on a carcass merit basis shall, prior to the purchase, make known to the seller the details of the purchase contract." DO at 67. Second, the JO concluded that "[t]he regulation [i.e., § 201.99(a)] explicitly provides that those details include the 'grading to be used.' " *Id.* Citing Merriam Webster's Collegiate Dictionary, the JO concluded that the term "grade" "[g]enerally ... refers to quality and [the term] 'grading' is an action or process of sorting (hogs) into categories according to quality." *Id.* at 67 and n. 28. Applying that definition to the circumstances before him, the JO concluded that "a formula to estimate lean percent is part of the grading process." *Id.* at 68. Thus, the JO concluded that "[t]he Fat-O-Meat'er and the formula and the change in the formula [we]re all 'grading to be used' within the meaning of" § 201.99(a). *Id.* at 82. In sum, the JO concluded that § 201.99(a) requires a packer such as Excel, prior to the purchase of a hog carcass, to make known to the seller the formula used in estimating the lean percent of the carcass and to make known any changes in that formula.

Excel asserts, and we agree, that the key phrase in § 201.99(a), i.e., "grading to be used," is ambiguous. In his decision and order, the JO

noted the word "grading" is defined in the dictionary to mean "[t]he action or process of sorting ... into grades according to quality." Oxford English Dictionary Online (2004). In turn, the word "grade" is defined, in pertinent part, as "[a] degree of comparative quality or value," "[a] class of things, constituted by having the same quality or value." *Id.* Thus, the phrase "grading to be used," as employed in § 201.99(a), clearly appears to refer to the process a particular packer will employ for sorting livestock carcasses into grades or classes according to quality. Nevertheless, the phrase is ambiguous in that it could reasonably be construed in one of at least two ways under the circumstances presented here: (1) to require Excel merely to inform hog producers that it grades carcasses according to lean percent, or (2) to require Excel not only inform hog producers that it grades carcasses according to lean percent, but also to inform hog producers that it uses a particular mathematic formula, programmed into the Fat-O-Meat'er, to estimate lean percent, and to inform hog producers when and if it implements a change in that formula.[3]

Importantly, we must "defer to both formal and informal agency interpretations of an ambiguous regulation unless those interpretations are 'plainly erroneous or inconsistent with the regulation.' " *Soltane v. U.S. Dept. of Justice,* 381 F.3d 143, 148 (3d Cir.2004) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)); *see Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (holding that an agency's interpretation of its own regulation is entitled to deference). Here, the JO concluded that "[t]he Fat-O-Meat'er and the formula and the change in the formula [we]re all 'grading to be used' within the meaning of" § 201.99(a).[4] DO

[3]The phrase "grading to be used" could also arguably be interpreted to require Excel to either (a) reveal only that it uses a mathematic formula programmed into the Fat-O-Meat'er for purposes of estimating lean percent, or (b) reveal the precise details of that mathematic formula, as well as all the details of its matrix.

[4]The uncontroverted facts of this case readily establish that, because the USDA had no official grades in place for hog carcasses, Excel adopted and used its own grading (continued...)

at 82. In our view, this conclusion is neither plainly erroneous nor inconsistent with the language of the regulation. Indeed, interpreting the phrase "grading to be used" to require revelation of the specific formula utilized to estimate lean percent appears to us to be entirely reasonable. Thus, we are bound to uphold the JO's interpretation.

Excel complains that the JO failed to rationally explain the interplay between §§ 201.99(a) and (e). As previously noted, § 201.99(e) provides, in pertinent part: "If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent." In Excel's view, the JO's interpretation of § 201.99(a) renders superfluous the language of § 201.99(e). We find it unnecessary to address Excel's arguments on this point, however, because there is no indication in the record on appeal that Excel presented these arguments to the JO. Thus, we consider the arguments waived. *See United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952) ("Simple fairness ... requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

Lastly, Excel argues that the USDA, through the JO, has effectively rewritten § 201.99(a) to encompass conduct that is otherwise not encompassed by its plain language. We disagree. As discussed above, the phrase "grading to be used," as employed in § 201.99(a), can reasonably be interpreted in at least two ways. Simply because the JO adopted one of those interpretations does not mean that the JO effectively rewrote the regulation. In other words, the JO's interpretation

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[4](...continued)
system for hog carcasses which focused primarily on lean percent. The uncontroverted facts further establish that Excel's calculation of lean percent was based on a mathematic formula programmed into the Fat-O-Meat'er. More specifically, the uncontroverted facts indicate that Excel physically employed the Fat-O-Meat'er and its embedded mathematic formula to estimate the lean percent of each hog carcass, and that the lean percent estimate, along with the carcass's overall weight, effectively resulted in a grade on Excel's matrix.

cannot be considered to be so far afield of the regulation's text as to "create *de facto* a new regulation." *Christensen v. Harris County,* 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

Propriety of the JO's Cease and Desist Order

Based upon his finding that Excel violated the P & S Act and the implementing regulation, the JO included the following cease and desist order in his decision and order:

> Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its purchases of livestock on a carcass merit basis, shall cease and desist from:
>
> (a) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the factors that affect Respondent's estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent; and
>
> (b) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

ROA, Vol. V, Doc. 155 at 83.

On appeal, Excel challenges the cease and desist order, arguing it (a) was imposed without fair notice, (b) should expire after no longer than three years, (c) is vague, overbroad and otherwise improper, and (d) places Excel at a competitive disadvantage. For the reasons discussed below, we reject all but Excel's assertion that the cease and desist order was overly broad.

a) Fair notice

Broadly speaking, "the requirement of notice" is "[e]ngrained in our concept of due process...." *Lambert v. People of State of California,* 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). "Notice is required

before property interests are disturbed" and "before penalties are assessed." *Id.* In short, "[n]otice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Id.* In the context of agency proceedings, an agency "may fail to give sufficient fair notice to justify a penalty if the regulation [at issue] is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, must therefore look to the agency for guidance, and the agency failed to articulate its interpretation before imposing a penalty." *United States v. Lachman,* 387 F.3d 42, 57 (1st Cir.2004).

Here, however, there is no indication in the record, and indeed no assertion by Excel, that the JO's cease and desist order infringed upon any of Excel's protected liberty or property interests. In other words, there is no basis for concluding that the JO's cease and desist order amounts to a penalty. *Cf. Exxel/Atmos, Inc. v. NLRB,* 28 F.3d 1243, 1248 (D.C.Cir.1994) ("Cease and desist orders are remedial; they require only that the employer 'conform his conduct to the norms set forth in the Act.' "); *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 67 (2d Cir.1979) (noting that cease and desist order was "clearly remedial" rather than punitive); *Benrus Watch Co. v. FTC,* 352 F.2d 313, 322 (8th Cir.1965) ("Cease and desist orders are not punitive...."). Thus, we reject Excel's "fair notice" arguments.

b) Duration of cease and desist order

Excel argues that the cease and desist order, however it is written, should expire after no longer than three years pursuant to 28 U.S.C. § 530D(a)(1)(C)(ii).[5] The JO addressed this precise argument in his order

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[5]The statute cited by Excel, entitled "Report on enforcement of laws," provides in pertinent part as follows:
(a) Report.--
(1) In general.--The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice--
* * *
(C) approves ... the settlement or compromise ... of any claim, suit, or other action--
(continued...)

rejecting Excel's petition for reconsideration. We agree with the JO that the statute cited by Excel does not apply here because the parties did not settle or compromise this proceeding. Rather, the record makes clear that the proceeding was resolved by the JO only after the parties fully litigated the issues.

c) Vague and overbroad

Excel argues that the cease and desist order is unduly vague and overbroad. In particular, Excel notes that the cease and desist order covers its purchase of all "livestock," rather than just hogs, and requires disclosure of all "factors that affects [its] estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent." Aplt. Br. at 52. According to Excel, this language goes beyond the violation found by the JO and beyond the requirements of § 201.99(a) as interpreted by the JO. Thus, Excel argues, there is "no way [it] can possibly know what is required" by the cease and desist order. *Id.* at 53.

Generally speaking, we must uphold an agency's cease and desist order so long as "the remedy selected" bears a "reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 394- 95, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); *see generally NLRB v. Express Publ'g Co.,* 312 U.S. 426, 435, 61 S.Ct. 693, 85 L.Ed. 930 (1941) (noting that a federal court may "restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past."). We may, however, "narrow [an agency's] orders ... by deleting those portions for which a reasonable relationship to the offending

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[5](...continued)
* * *
(ii) by the United States (including any agency or instrumentality thereof) pursuant to an agreement, consent decree, or order ... that provides injunctive or other nonmonetary relief that exceeds, or is likely to exceed, 3 years in duration....
28 U.S.C. § 530D(a)(1)(C)(ii).

conduct is lacking." *ITT Continental Baking Co. v. FTC,* 532 F.2d 207, 220-21 (2d Cir.1976) (modifying cease and desist order issued by Federal Trade Commission); *see Encyclopedia Britannica, Inc. v. FTC,* 605 F.2d 964, 970 (7th Cir.1979) (same).

Here, we agree with Excel that portions of the cease and desist order fail to bear a reasonable relationship to the conduct which the JO found had violated the regulation and statute at issue. As noted, the primary violative conduct identified by the JO was Excel's failure, in connection with its purchase of hogs, to disclose to sellers the change in the formula used to estimate lean percent. The cease and desist order, however, unreasonably exceeds the scope of this violation in three respects. First, the cease and desist order broadly refers to "purchases of livestock," even though it is uncontroverted that Excel's violation was limited to the purchase of hogs. Second, the cease and desist order prohibits Excel from "[f]ailing to make known" not only "any change in the formula used to estimate lean percent," but virtually all "*the factors* that affect [its] estimation of lean percent...." Third, the cease and desist order broadly prohibits Excel from "[f]ailing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions." Although this language generally tracks the requirements of 9 C.F.R. § 201.99(a), there is simply no evidence in this case that Excel failed to comply with those requirements, other than with respect to the formula used in the Fat-O-Meat'er for estimating lean percent and the change in that formula. In sum, we conclude the burdens imposed on Excel by these three aspects of the JO's cease and desist order are not justified by the violation the JO found.

To narrow the cease and desist order to reflect and address the violation found by the JO, (1) the reference to "livestock" in the opening sentence of the order is changed to "hogs," (2) the language of paragraph (a) is changed to refer solely to "any change in the formula used to estimate lean percent," and (3) paragraph (b) is deleted entirely. As modified, the cease and desist order will now read as follows:

Respondent, 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.

d) Competitive disadvantage

Finally, Excel argues that the cease and desist order places it at a competitive disadvantage because a violation of the order will subject it and its employees, but not its competitors, to criminal prosecution. Aplt. Br. at 46. Excel further argues that this "threat of criminal sanctions could lead to Excel employees leaving Excel to work for packers who are not subject to such penalties." *Id.* Ultimately, Excel argues, these factors could "impact [its] decision to stay in the pork business." *Id.* at 47.

Having modified the cease and desist order to tailor it to the specific violation found by the JO, we conclude there is no merit to Excel's arguments. Simply put, the requirements imposed by the modified cease and desist order are narrow and clear. Moreover, by reason of the USDA's action against Excel, Excel's competitors are on notice that they are also subject to the same regulatory requirements. Thus, we fail to see how compliance with the modified cease and desist order could reasonably place Excel at a competitive disadvantage.

The petition for review is GRANTED for the sole purpose of modifying the Judicial Officer's decision and order in accordance with this opinion. As so modified, the decision and order is enforced.

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

In re: WILLIAM CHANDLER d/b/a BILL CHANDLER CATTLE.
P. & S. Docket No. D-03-0020.
Decision and Order.
Filed January 3, 2005.

P&S – Payments to sellers, late – Funds, insufficient bank – Willful violation.

Decision and Order filed by Administrative Law Judge Victor J. Palmer.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.; the "Act") initiated by a complaint filed on September 2, 2003, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration. The complaint alleges that Respondent, a registered livestock dealer, committed numerous violations of the Act and the regulations issued pursuant thereto (9 C.F.R. § 201.1 *et seq*. and 9 C.F.R. § 203.1 *et seq*.; the "regulations").

Specifically, the complaint alleges that during the period June 30, 2001 through September 30, 2001, Respondent operated while insolvent in that Respondent's current liabilities exceeded his current assets, and thereby willfully violated the Act (7 U.S.C. §204 and §213(a)). The complaint additionally alleges that, during the period June 25, 2001, through August 6, 2001, Respondent purchased livestock from 13 sellers in the amount of $378,638.69 and paid them with checks that were returned unpaid by the bank because of insufficient funds, in further willful violation of the Act (7 U.S.C. §213(a)). The complaint also alleges that Respondent failed to pay on time these 13 sellers from whom Respondent purchased livestock on September 10, 2001, for $235,526.78, in willful violation of the Act and the regulations (7 U.S.C. §§ 213(a), 228b and 9 C.F.R. § 201.43(b)). Finally, the complaint alleges that Respondent also willfully violated the Act by failing to keep

such records as fully and correctly disclosed all transactions involved in his business because he did not maintain necessary documentation showing his costs of purchasing, feeding and caring for cattle he purchased and preconditioned for Supreme Cattle Feeders, LLC, Boise, Idaho (7 U.S.C. § 221). The complaint alleged that previous administrative orders and warning letters had been issued against Respondent. Complainant requested the suspension of Respondent's registration and/or the imposition of a civil penalty. Respondent filed an answer, generally denying liability.

An oral hearing was held and transcribed on May 11 and 12, 2004, in Tallahassee, Florida. The hearing transcript shall be referred to as "Tr." followed by the page reference. Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Bruce P. Anderson, Esquire, Broad and Cassel, Destin, Florida. At the hearing, five witnesses testified for Complainant. No witnesses testified on behalf of Respondent. Documentary evidence was received from both Complainant (CX 1-5, 7-22, 24-26) and Respondent (RX 3-13). Pertinent statutory provisions and regulations are set forth in an Addendum following the Order.

Upon consideration of the record evidence and the arguments of the parties, I have concluded that an Order should be entered requiring Respondent to cease and desist from engaging in business while insolvent, issuing insufficient checks for livestock purchases and failing to pay the full amount for livestock purchases within the time period required by the Act and the Regulations. Respondent is also being suspended for a period of six (6) years from being a registrant under the Act.

Findings of Fact

1. Respondent, William Chandler d/b/a Bill Chandler Cattle, is an individual whose business mailing address is 5791 County Line Road, Pelham, Georgia 31779. See Complaint, page 1, paragraph I (a)); Answer, page 1, paragraph I (a)); CX 1, pages 2, 7.

2. Respondent was at all times material herein engaged in the business of a dealer, buying and selling livestock for his own account and the accounts of others, and registered with the Secretary of

Agriculture as a dealer to buy or sell livestock in commerce for his own account and the accounts of others and a market agency, to buy on commission. See Complaint, page 1, paragraph I (b)); Answer, page 1, paragraph I (b); CX 1, pages 2, 7. At all times material herein, Respondent was bonded in the amount of $50,000.00 (Tr. at 27). Respondent filed for chapter 11 bankruptcy in the United States Bankruptcy Court for the Middle District of Georgia, Thomasville Division, Case No. 02-10715-JTL (RX 7) (Tr. at 193).

3. On February 11, 1982, a Consent Decision was issued in an administrative disciplinary proceeding Complainant filed against Respondent (*In re*: *William "Bill" Chandler d/b/a Chandler Cattle Company and conducting business through C&N Cattle Corporation*, P.& S. Docket No. 5976). In the Consent Decision, Respondent agreed to cease and desist from engaging in business for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations; issuing checks or drafts in payment for livestock purchased without having and maintaining sufficient funds to pay such checks available in the bank account from which such checks or drafts are to be paid; and failing to pay, when due, the full purchase price of livestock. CX 2, pages 18-20.

4. On November 22, 1996, a Consent Decision was issued in an administrative disciplinary proceeding Complainant had filed against Respondent and others (*In re: Southeast Livestock Order Buyers, Inc., Jefferson County Stockyards, Inc., Jacquelyn A. Chandler and William Chandler*, P. & S. Docket No. D-96-0028). In the Consent Decision, Respondent and the others agreed to cease and desist from failing to reimburse, when due, their clearor with funds received from the sale of the livestock for which the clearor had made payment. In addition, Respondent's registration was suspended for 180 days. CX 2, pages 11-15.

5. On November 9, 1999, Complainant sent a certified letter to Respondent, which was signed for by "J. Chandler",[1] that advised Respondent he was failing to comply with section 201.49 of the regulations (9 C.F.R. § 201.49) by failing to maintain his records of

[1] Respondent's wife's name is Jacqueline Chandler (Tr. at 138).

scale tickets as required by the regulations. Complainant also advised Respondent the he was failing to comply with section 409(a) of the Act (7 U.S.C. § 228b) and section 201.43(b)(2)(i) of the regulations (9 C.F.R. § 201.43(b)(2)(i)) by failing to pay when due for livestock purchases. CX 2, pages 4-6.

6. On May 23, 2001, Complainant sent a certified letter to Respondent, which Respondent received, advising Respondent that he was failing to comply with sections 409(a) and (c) of the Act (7 U.S.C. §§ 228b(a) and (c)) regarding the requirement of making timely payment for livestock purchases. Respondent was instructed to take immediate steps to come into compliance. CX 2, pages 1-3.

7. On approximately July 9, 2001, Complainant's Atlanta, Georgia Regional office received a telephone call from Respondent, who advised that he had been notified that his bank had returned approximately 15 checks drawn on Respondent's checking account for insufficient funds (Tr. at 20-21). At that point, Nilsa Ramos Taylor, a Resident Agent employed by Complainant, was assigned to conduct an investigation of Respondent concerning the 15 returned checks mentioned by Respondent and to explore any other possible payment problems Respondent may be having (Tr. at 21-22). James Hood, a marketing specialist employed by Complainant, was assigned to conduct the investigation with Ms. Ramos Taylor. Mr. Ramos Taylor was the lead investigator and was involved in every activity engaged in by Mr. Hood (Tr. at 22-23).

8. Ms. Ramos Taylor and Mr. Hood arrived at Respondent's place of business to conduct their investigation on July 11, 2001 (Tr. at 37). Respondent's controller, Gene Rice, provided them with all of Respondent's records concerning possible insufficient funds checks and payment problems (Tr. at 38-39). These records included purchase invoices, copies of checks, check registers and other documents (Tr. at 39). Ms. Ramos Taylor and Mr. Hood returned to Respondent's place of business on July 30, 2001, to obtain additional records regarding the possible insufficient funds checks and payment problems (Tr. at 40).

9. Respondent's records reviewed by Ms. Ramos Taylor and Mr. Hood, as well as some information obtained from livestock sellers, indicated that during the period June 25 through September 10, 2001, Respondent made 15 purchases of livestock from 14 sellers (CX 7-22).

10. With respect to 14 purchases from 13 of the sellers referred to in Finding of Fact 9 (excluding one seller, Jack and Earl O'Dell), Respondent issued 14 checks in purported payment for the livestock, which were returned by the bank upon which they were drawn due to insufficient funds in Respondent's account (CX 7-21, (Tr. at 54-78).

11. With respect to 12 of the 13 sellers referred to in Finding of Fact 10 (excluding one seller, James Whiten Livestock, Inc.), Respondent eventually issued replacement checks for 12 purchases and wired funds for one purchase, in full payment to these 12 sellers. The period of time between Respondent's original purchase and the issuance date of the replacement checks and the wiring of funds ranged from 14 days for Ocala Livestock Market (CX 8) to 38 days for Okeechobee Livestock Market, Inc. (CX 20). The original livestock amount for these purchases, $321,217.17, was paid but not in the timely manner required by the Act.

12. James Whiten Livestock, Inc., who sold livestock to Respondent on June 27, 2001, in the amount of $49,470.50, received only a $5,000 cashier's check issued on August 8, 2001 (CX 21, page 4) and a February 2, 2002, check for $33,372.90 resulting from a bond claim which James Whiten Livestock, Inc. filed against Respondent (CX 21, page 5) (Tr. at 78). The $38,372.90 that was paid to James Whiten Livestock, Inc. was paid long after payment was due under the Act. No further payments were received by James Whiten Livestock, Inc., and as of May 10, 2004, $11,097.60 remained unpa*Id.* Tr. at 63.

13. On September 10, 2001, Jack and Earl O'Dell sold 468 head of livestock to Respondent pursuant to a contract they had entered into several months earlier (Tr. at 159). The livestock was in two lots, one containing 220 head, for the amount of $117,624.34 (CX 22, page 1) (Tr. at 161), and one containing 248 head, for the amount of $117,908.44 (CX 22, pages 2-3) (Tr. at 161), for a total of $235,526.78. On May 31, 2001, Respondent had paid $17,500 for a down payment (RX 10) (Tr. at 160). After deducting Respondent's down payment and a dollar per head, or $468, for the beef check-off, Respondent owed $217,558.08 (Tr. at 164). On September 10, 2001, Respondent gave Jack O'Dell two checks, one for $217,558.08 and another for $21,755.00 (Tr. at 159 and 187). Jack O'Dell testified that Respondent asked him to hold off cashing the big check for three months and cash the little one as advance interest on what would be a three month loan.

Jack O'Dell testified that he told Respondent he was not interested but that Respondent persisted and asked him to take the two checks home and discuss the matter with his brother. Jack O'Dell then testified "Bill, I will take it home and I will call you tomorrow, but the answer will be the same as today" (Tr. at 159-160). The next day, O'Dell deposited the check for $217,558.08 for the livestock, but Respondent stopped payment on the check (CX 22, pages 8-11) (Tr. at 168). On October 2, 2002, and November 2, 2002, Respondent issued checks to Jack and Earl O'Dell pursuant to bankruptcy court proceedings, for $2,874.67 each, or $5,749.34 (RX 4, 5). The $5,749.34 was paid long after full payment was due under the Act and $211,808.74 remains unpa*Id.*[2]

14. In the course of a lawsuit filed by Jack O'Dell and Earl O'Dell against Respondent in the United States Bankruptcy Court for the Middle District of Georgia, Thomasville Division, Case No.: 02-10715-JTL, Adversary Proceeding File No.: 02-1018, Respondent filed an Answer on July 3, 2002, in which he admitted that he owed the Plaintiffs $217,558.08 and that the transaction was a sale (CX 25, 26). On August 28, 2002, an order was issued by the United States Bankruptcy Court for the Middle District of Georgia (RX 7) in which Jack and Earl O'Dell were given judgment against Respondent in the amount of $217,558.78 and Respondent was ordered to make monthly payments of $2,874.67 over a seven year period. Respondent made two such payments (RX 4, 5).

15. On July 30, 2001, Ms. Karen D. Johnson, an auditor employed by Complainant's Atlanta Regional Office, arrived at Respondent's place of business (Tr. at 44). Ms. Johnson's purpose was to determine whether Respondent was solvent (Tr. at 209). Ms. Johnson did not begin her investigation until Complainant's Atlanta Regional Office received a balance sheet from Respondent, that showed Respondent was insolvent as of July 13, 2001, as in that he had total current assets of $2,398,595.14 and total current liabilities of $3,155,709.74 (RX 20) (Tr. 210). In conducting her investigation, Ms. Johnson was assisted by Ms. Ramos Taylor, who analyzed Respondent's bank reconciliations (Tr. at

[2] Jack and Earl O'Dell also received a check for approximately $6,000 for interest, pursuant to a Bankruptcy Court ruling (Tr. at 174).

214) and Mr. Hood, who examined Respondent's accounts receivable (*Id.*). Ms. Johnson supervised the work done by Ms. Ramos Taylor and Mr. Hood (*Id.*). Ms. Johnson was provided with Respondent's financial records by Respondent's controller, Mr. Rice (Tr. at 214-15).

16. Ms. Johnson returned to Respondent's place of business on August 27, 2001, to obtain additional financial information (Tr. at 218-219). Ms. Johnson was accompanied by Mr. Hood, who was under Ms. Johnson's supervision (Tr. at 219). Ms. Johnson was provided with documents by Mr. Rice and Linda Solana, a certified public accountant who was working for Respondent (Tr. at 220). Ms. Solana gave Ms. Johnson a worksheet so Ms. Johnson could determine Respondent's inventory (CX 24, pages 8-10) (Tr. at 220). Ms. Johnson noted that six lots of cattle set forth in Ms. Solana's worksheet (CX 24, pages 8-10), were described as "missing", consisting of lots 5051, 5055, 5059, 5101, 5103, 5110 (Tr. at 221). When Ms. Johnson requested documentation for the six lots of cattle (Tr. at 221), Ms. Solana and Mr. Rice directed Ms. Johnson to speak to Respondent about them (Tr. at 221-222). Ms. Johnson asked Respondent for documentation supporting these lots and Respondent stated that he did not have any documentation (Tr. at 225). However, the six lots of cattle were jointly owned by Respondent and Supreme Cattle Feeders, LLC; and Supreme Cattle Feeders performed the recordkeeping for the cattle (Tr. at 399-404).

17. While examining Respondent's financial records, Ms. Johnson requested that Mr. Rice provide a June 30, 2001, balance sheet (Tr. at 222). In response to this request, Mr. Rice, on August 30, 2001, provided Ms. Johnson with Respondent's June 30, 2001, balance sheet (CX 24, pages 3-7) (Tr. at 222). Respondent's June 30, 2001, balance sheet showed the lot numbers of the "missing" cattle under current liabilities as "Supreme Cattle Feeders Payable". Respondent's June 30, 2001, balance sheet also showed Respondent's total current assets as $4,158,438.71 and Respondent's total current liabilities as $6,779,032.37.

18. During Ms. Johnson's investigation, Respondent informed her that he was insolvent and that he would sign a document stating that he was insolvent as of June 30, 2001 (Tr. at 226).

19. After Ms. Johnson concluded her investigation of Respondent, she prepared a balance sheet for Respondent, as of June 30, 2001, based largely on documentation she had obtained from Respondent. Ms.

Johnson determined that Respondent's total current assets were $4,892,752.29 and Respondent's total current liabilities were $7,485,097.13 (CX 3) (Tr. at 227).

20. Respondent prepared a balance sheet as of September 30, 2001 (RX 2). Respondent's balance sheet showed total current assets of $155,594.60 and total current liabilities of $2,645,054.61

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CONCLUSIONS

1. Respondent's financial condition did not meet the requirements of the Act, in that Respondent was insolvent as of June 30, 2001, and September 30, 2001.

Complainant presented extensive evidence, through the testimony of Karen D. Johnson, Auditor with Complainant's Atlanta Regional Office (Tr. at 205-447) and the submission of numerous documents (CX 3, 4, 5 and 24, pages 1, 3-13), which show that, as of June 30, 2001, and September 30, 2001, Respondent was insolvent and that his total current liabilities vastly exceeded his current assets. Respondent presented no witnesses to rebut Ms. Johnson's testimony. It is apparent from the evidence that Respondent's financial condition did not comply with the requirements of the Act.

The Act, at 7 U.S.C. § 204, provides that, if the Secretary of Agriculture finds that:

> any registrant is insolvent . . . he may issue an order suspending such registrant for a reasonable specified period.

According to section 203.10 of the Statements of General Policy (9 C.F.R. § 203.10) the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets.

The Secretary's test for insolvency was upheld in *Blackfoot Livestock Commission Company v. Department of Agriculture, Packers and Stockyards Administration*, 810 F.2d 916 at 921 (9th Cir. 1987), where the court stated:

> The Act prohibits operating a stockyard while insolvent. 7 U.S.C. § 204; *Bowman v. United States Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966). Insolvency is defined as current

> liabilities exceeding current assets. *Bowman*, 363 F.2d at 84-85. The Secretary defines current assets and current liabilities by regulation. 9 C.F.R. § 203.10(b)(1)(1982)(assets); 9 C.F.R. § 203.10(b)(2)(1982) (liabilities).

Also *See In re*: *Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511 (1993), appeal dismissed, No. 94- 9505 (10th Cir., Apr. 29, 1994).

As is reflected by the balance sheet prepared by Ms. Johnson for Respondent for June 30, 2001, Respondent's total current assets were $4,892,752.29 and Respondent's total current liabilities were $7,485,097.13 (CX 3) (Tr. at 227), for an excess of total current liabilities over total current assets of $2,592,344.84.

Although Respondent's counsel extensively questioned Ms. Johnson during the hearing and took issue with her conclusions, Respondent has presented neither testimony nor documentation contradicting Ms. Johnson's investigative findings. Respondent's own balance sheet for June 30, 2001, provided to Ms. Johnson by Respondent's controller, Gene Rice, on August 30, 2001, (CX 24, pages 3-7) (Tr. at 222), shows that Respondent's total current assets were $4,158,438.71 and Respondent's total current liabilities were $6,779,032.37, for an excess of total current liabilities over total current assets of $2,620,593.66. Further, during the course of the investigation, Respondent admitted to Ms. Johnson that he was insolvent and offered to sign a document stating that he was insolvent as of June 30, 2001 (Tr. at 226).

Respondent was still insolvent on September 30, 2001. The balance sheet which Respondent prepared for that date (RX 2) shows Respondent's total current assets were $155,594.60 and his total current liabilities were $2,745,054.61, for an excess of total current liabilities over total current assets of $2,589,460.01.

Unquestionably, Respondent was insolvent on June 30, 2001, and on September 30, 2001. Respondent therefore was in violation of the requirements of the Act.

2. Respondent operated while insolvent, in willful violation of the Act.

During the period June 30, 2001, through September 30, 2001, while Respondent was insolvent, he conducted business subject to the Act. As shown by the testimony and documentary evidence provided by Nilsa

Ramos Taylor, a Resident Agent employed by Complainant, on August 6, 2001, Respondent purchased108 head of livestock from Okeechobee Livestock Market, Inc., Okeechobee, Florida, for $40,018.40 (CX 7, 20), (Tr. at 55). Further, as Jack O'Dell, a livestock producer located in Wildwood, Florida, testified, Jack and Earl O'Dell sold 468 head of livestock to Respondent, which were delivered on September 10, 2001 (CX 22) (Tr. at 158-166). Respondent presented no witnesses to attempt to rebut the testimony of Ms. Ramos Taylor and Mr. O'Dell.

Operating as a market agency or dealer subject to the Act while insolvent is an unfair and deceptive practice, in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)). *See In re: Syracuse Sales Co.* (Decision as to John Knopp), *supra* at 1522; *In re: Jeff Palmer d/b/a Palmer Cattle Company*, 50 Agric. Dec. 1762, 1771-72 (1991).

Further, it has been held in numerous decisions that a violation is willful for administrative law purposes if a respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements[3]. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir.1980), *cert. denied*, 450 U.S. 997 (1981); *Silverman v. CFTC*, 549 F.2d 28, 31 (7th Cir.1977); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir.1961). When Respondent bought livestock from Okeechobee Livestock Market, Inc. on August 6, 2001, and from Jack and Earl O'Dell on September 10, 2001, Respondent knew or should have known that he was insolvent. This is evident by the fact that Respondent prepared and sent to Complainant a balance sheet as of July 13, 2001, which showed Respondent to be insolvent, since his total current assets were $2,398,595.14 while his total current liabilities were $3,155,709.74 (RX 20) (Tr. 210).

Therefore, Respondent willfully violated section 312(a) of the Act by operating while he was insolvent.

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[3] Except for cases in the 4th and 10th Circuits, where the respondent's actions must have been either intentional or grossly negligent. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 81 (4th Cir. 1991); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78 79 (10th Cir. 1965).

3. Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing 14 insufficient funds checks to 13 livestock sellers and failing to pay the full amount of the purchase price for livestock, within the time period required by the Act.

a. Respondent's issuance of insufficient funds checks.

Respondent issued 14 checks to 13 livestock sellers during the period June 26, 2001, through August 6, 2001, in purported payment for livestock purchases, which were returned by the bank upon drawn because Respondent did not have sufficient funds to pay the checks (CX 7-21) (Tr. at 54-78). Respondent argues on brief, that when he issued the checks he was unaware that his bank was holding back a deposit he had made of $242,605.46.

However, this defense is not acceptable. As stated in *In re: George Durflinger*, 58 *Agric. Dec*. 940, 942 (1999):

> It is Respondent's responsibility to ensure that there are sufficient funds in the applicable account as long as there are checks outstanding on that account.

Even if a respondent has mistakenly relied upon an over-draft protection arrangement with his bank, this does not excuse the issuance of insufficient funds checks. As stated in *In re: Ozark County Cattle Company, Inc.*, 49 Agric. Dec. 336, 351 (1990), quoting from *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1094-1095 (1986) *aff'd*, *Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988):

> Respondent . . . argues that his relationship with the bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's overdraft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.
>
> A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally

> terminated his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail.

Respondent's issuance of 14 checks dishonored for insufficient funds constitutes an unfair and deceptive practice and the willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). *See In re: George Durflinger*, supra; *In re: Tiemann*, 47 Agric. Dec. 1573, 1579-1580 (1988); *In re Richard N. Garver*, *supra*.

b. Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act.

As shown by the evidence presented through the testimony of Ms. Ramos Taylor and Mr. O'Dell (CX 22, 25, 26) (Tr. at 157-182), Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act and currently owes approximately $222,906.34 to livestock sellers. Respondent chose to present no witnesses to attempt to rebut Complainant's evidence.

Section 409 of the Act states that:

> "[e]ach packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price."

When asked when payment for livestock is due, Ms. Ramos Taylor testified that the date on the invoice is considered the date of purchase, and payment is due by the close of the next business day (Tr. at 119-120). Ms. Ramos Taylor stated that sometimes, when livestock is purchased, markets will keep the livestock until the buyer picks them up (Tr. at 119). Creig Stephens, Resident Agent Supervisor with Complainant's Atlanta Regional Office, who worked at his family's auction market all his life and has investigated numerous auction markets during his career with Complainant (Tr. at 451), testified that when livestock is purchased at a market, the purchaser sometimes requests the market to hold the livestock on the purchaser's behalf (Tr. at 453) but, when that happens, the purchaser is responsible for paying

any yardage and fees incurred by the market in caring for the purchased livestock (Tr. at 453-454). This is because title to the livestock passes to the buyer when the animal is purchased in the ring (Tr. at 455). *See In re: Embry Livestock Co., Inc., et al*, 48 Agric. Dec. 972, 989 (1989) ("Embry Livestock paid for and took title to the hogs it purchased, and bore the risk of loss on those hogs from the time the hogs came off the stockyard's scales"). Similarly, in this case, title passed from the sellers to Respondent when Respondent purchased the livestock. Once title passed, Respondent became the owner of the livestock and was required to pay for the livestock by the close of the next business day, and not 14 to 38 days after the date of purchase as Respondent did in this case.

Respondent issued 14 insufficient funds checks for 14 livestock purchases from 13 sellers (CX 7-21, (Tr. at 54-78). Respondent eventually issued replacement checks for 12 of the purchases and wired replacement funds for one purchase. However, the period of time between Respondent's purchases and the issuance dates of the 12 replacement checks and the wiring of replacement funds ranged from 14 days for replacement checks issued to Ocala Livestock Market (CX 8) to 38 days for the wiring of replacement funds to Okeechobee Livestock Market, Inc. (CX 20). Even though these 12 sellers eventually received full payment for their purchases, the payment took place long after the close of the next business day after purchase and transfer of possession that was the time when payment was due under the Act.

With respect to one seller who received an insufficient funds check from Respondent, James Whiten Livestock, Inc., Respondent did not issue a replacement check in full payment for his purchase. Respondent had purchased livestock from James Whiten Livestock, Inc. in the amount of $49,470.50 on June 27, 2001 (CX 21, page 1). The only payments received by James Whiten Livestock, Inc., for the livestock were a $5,000 cashier's check issued on August 8, 2001 (CX 21, page 4) and a February 2, 2002, check for $33,372.90 resulting from a bond claim which James Whiten Livestock, Inc. had filed against Respondent (CX 21, page 5) (Tr. at 78). The $38,372.90 that was paid to James Whiten Livestock, Inc. was paid long after payment was due under the Act. No further payments were received by James Whiten Livestock, Inc. and as of May 10, 2004, $11,097.60 remained unpaid. (Tr. at 63)

In addition to the 13 sellers to whom Respondent issued insufficient funds checks, Respondent also purchased from Jack and Earl O'Dell,

Wildwood, Florida, a total of 468 head of livestock, delivered to Respondent on September 10, 2001, based on a contract several months earlier (Tr. at 159). Mr. Jack O'Dell gave testimony at the hearing concerning this transaction (Tr. at 157-203). The livestock was purchased in two lots. One lot contained 220 head purchased for $117,624.34 (CX 22, page 1) (Tr. at 161). The second lot contained 248 head purchased for $117,908.44 (CX 22, pages 2-3) (Tr. at 161). The combined purchase price for the two lots of livestock was $235,526.78. On May 31, 2001, Respondent gave Jack and Earl O'Dell $17,500 as a down payment for the livestock (RX 10) (Tr. at 160). Upon delivery of both lots totaling 468 head of livestock on September 10, 2001, Respondent gave Jack O'Dell two checks, one for $217,558.08 and another for $21,755. Respondent asked Mr. O'Dell to cash the smaller check and hold off for three months before cashing the larger one which the parties agreed constituted the remaining amount owed after deducting Respondent's down payment and a dollar per head, or $468, for the beef check-off (Tr. at 164). However, Respondent stopped payment on the check (CX 22, pages 8-11) (Tr. at 168).Mr. O'Dell testified that he rejected Respondent's proposal that he accept the smaller check as an interest payment for advancing Respondent a three month loan. The next day Mr. O'Dell deposited the larger check and Respondent stopped payment on it. The O'Dell's had no obligation to forbear from being paid in full when the checks were given and Respondent had no right to stop payment. Later, pursuant to bankruptcy proceedings, Respondent issued two checks to Jack and Earl O'Dell for $2,874.67 each, or $5,749.34, on October 2, 2002, and November 2, 2004 (RX 4, 5), long after payment was due under the Act, leaving $211,808.74 unpaid. As of the date of the hearing, Respondent had not made any additional payments (Tr. at 176). Mr. O'Dell testified (Tr. at 176) that, as a result of not receiving full payment for the 468 head of livestock, he was almost forced to go out of business (Tr. at 176).

Respondent's counsel argues that Mr. O'Dell accepted the loan arrangement. However, the only evidence Respondent provided to support this was a note from Mr. O'Dell to Respondent on November 6, 2002, concerning a proposal by Mr. O'Dell to withdraw a criminal complaint he had filed against Respondent if Respondent would make payments on the amount owed (RX 3). In the note, Mr. O'Dell makes

reference to the "end of the loan". Mr. O'Dell explained that he used the word "loan" based on instructions from his attorney but that the transaction was a sale, not a loan (Tr. at 200-203).

This transaction involved the sale of 468 head of livestock and there is documentary evidence showing that Respondent acknowledged his failure to pay Jack and Earl O'Dell for the livestock. The record contains a complaint filed by Jack O'Dell and Earl O'Dell against Respondent in the United States Bankruptcy Court for the Middle District of Georgia, Thomasville Division, Case No.: 02-10715-JTL, Adversary Proceeding File No. 02-1018, in which the O'Dells claimed $217,558.08 owed them for their livestock. (CX 25). Respondent's Answer to the complaint admitted that there had been a sale of cattle and that he owed the Plaintiffs $217,558.08 (CX 26). On August 28, 2002, the Bankruptcy Court ordered Respondent to pay Jack and Earl O'Dell the $217,558.78 he owed them for the cattle by making monthly payments of $2,874.67 over a seven year period (RX 7). Respondent has made two payments under the Order in October and November 2002 (RX 4, 5), leaving an indebtedness of $211,808.74. Moreover, even though Respondent agues on brief that this transaction involved a loan, he never took the witness stand to give supporting testimony. The evidence is overwhelming that Jack and Earl O'Dell sold 468 head of livestock to Respondent and are still owed $211,808.74.

Failing to pay the full amount of the purchase price for livestock within the time required by the Act is a very serious violation and constitutes an unfair and deceptive practice, in willful violation of the Act (7 U.S.C. §§ 213(a), 228b). Respondent's actions were willful, because he knew or should have known that he did not have sufficient funds in the account upon which the checks were drawn and he also knew or should have known when he purchased livestock that he could not make full and prompt payment in accordance with the requirements of the Act. *In re*: *George Durflinger*, *supra*; *In re*: *Richard N. Garver, supra*; *In re*: *George County Stockyard, Inc*., 45 Agric. Dec. 2342, 2350 (1986); *In re*: *Farmers & Ranchers Livestock Auction, Inc., supra; In re Donald Hageman*, 43 Agric. Dec. 531 (1983).

Based on the overwhelming evidence in the record, Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act in the amounts of $321,217.17 for 13 purchases from 12 sellers, $49,470.50 for a purchase from James

Whiten Livestock, Inc., and $217,558.78 for a purchase from Jack and Earl O'Dell, for a total of $588,246.45. Further, Respondent still owes James Whiten Livestock $11,097.60 and Jack and Earl O'Dell $211,808.74, for a total of $222,906.34. Respondent's failures to pay the full amount of the purchase price for livestock within the time period required by the Act are willful violations of the Act (7 U.S.C. §§ 213(a), 228b).

4. Respondent has not failed to keep records required by the Act respecting "missing cattle" jointly owned with Supreme Cattle Feeders.

Section 401 of the Act (7 U.S.C. § 221) requires a registrant to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business." The failure to keep such records violates section 401 of the Act. *See In re Shield Livestock Co., Inc.*, 49 Agric. Dec. 455, 470-471 (1990). However, the so-called "missing cattle" for which Respondent did not have records were owned by Respondent jointly with Supreme Cattle Feeders, LLC, Boise, Idaho and recordkeeping respecting these cattle that they owned 50-50, was performed by Supreme Cattle. Supreme Cattle did supply Complainant with the records it sought and no recordkeeping violation by Respondent is therefore found.

5. Sanction.

Complainant supplied testimony respecting its recommended sanction through the testimony of Branard England, auditor with Complainant's Washington, D.C. office. Mr. England testified (Tr. at 501-503), that in light of Respondent's numerous severe violations of the Act and history of noncompliance with the Act, an order should be issued containing the following provisions: (a) that Respondent cease and desist from operating while insolvent, issuing insufficient funds checks, failing to pay when due for livestock and failing to pay for livestock; (b) that Respondent keep records that fully and correctly disclose all transactions involved in his business, including records reflecting his purchases of livestock and his expenses for feeding and

caring for livestock; and (c) that Respondent's registration be suspended for 10 years and thereafter until Respondent demonstrates solvency. With respect to the suspension, Complainant recommends that, upon application to Packers and Stockyards Programs, a supplemental order may be issued as follows: (1) terminating the suspension at any time after two years upon demonstration to the satisfaction of Packers and Stockyards Programs of circumstances warranting modification of the order, which circumstances would include full payment of all livestock sellers or shippers and proof that Respondent is no longer insolvent; and (2) modifying the suspension to permit Respondent's salaried employment by another registrant or packer after two years upon demonstration of circumstances warranting modification of the order, which circumstances would include Respondent's adoption and compliance with a payment plan to fully pay all unpaid sellers, the selection of a proposed employer who is properly registered and bonded and has not been placed on notice or been the respondent in a disciplinary action for violations of the Packers and Stockyards Act during the previous five years, and a proposed employment arrangement that is not an attempt to circumvent the order.

Respondent's violations in operating while insolvent, issuing checks drawn on accounts having insufficient funds, failing to pay for cattle purchases within the time required and leaving a total of $222,906.34 still unpaid are indeed very serious violations of the Act.

The fact that Respondent operated while he was insolvent subjected cattle sellers to the very real risk of being paid late or not being paid at all. In fact this is exactly what happened. Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act in the amounts of $321,217.17 for 13 purchases from 12 sellers, $49,470.50 for a purchase from James Whiten Livestock, Inc, and $217,558.78 for a purchase from Jack and Earl O'Dell, for a total of $588,246.45. Moreover, Respondent still owes James Whiten Livestock $11,097.60 and Jack and Earl O'Dell $211,808.74, for a total of $222,906.34.

Respondent's issuance of insufficient funds checks and his failure to pay the full amount of the purchase price for livestock within the time period required by the Act are actions that must be construed as willful violations of the Act.

Mr. England testified that Complainant ordinarily seeks a five year

suspension of registration for payment violations of the kind found in this case (Tr. at 503). A longer suspension was requested due to Respondent's past history of similar violations (Tr. at 503-504).

Complainant introduced two prior consent orders to demonstrate the need for an increased period of suspension. In each consent order, Respondent neither admitted nor denied having violated the Act. No adverse inference of guilt may therefore be drawn from the consent orders nor may the allegations of wrongdoing that underlay the orders constitute the basis for enhanced sanctions. *Spencer Livestock Commission v. Department of Agriculture*, 841 F.2d 1451, 1458 (9th Cir. 1988). On the other hand, the fact that the consent orders were violated may be used to determine what kind of sanction is needed to deter Respondent from conduct prohibited by the Act. *Spencer, supra*.

Respondent consented to two orders. On February 11, 1982, (*In re: William "Bill" Chandler d/b/a Chandler Cattle Company and conducting business through C&W Cattle Corporation*, P. & S. Docket No. 5976), Respondent agreed to cease and desist from, among other things, issuing checks or drafts in payment for livestock purchased without having and maintaining sufficient funds to pay such checks available in the bank account from which such checks or drafts are to be paid, and failing to pay, when due, the full purchase price of livestock (CX 2, pages 18-20). His present violations violate that consent order. On November 22, 1996, Respondent entered into a second consent order (*In re: Southeast Livestock Order Buyers, Inc., Jefferson County Stockyards, Inc., Jacquelyn A. Chandler and William Chandler* P. & S. Docket No. D-96-0028)) (CX 2, pages 11-15) in which Respondent and the other parties agreed to cease and desist from failing to reimburse, when due, their clearor with funds received by the parties from the sale of the livestock for which the clearor had made payment and Respondent's registration was suspended for 180 days. Respondent's present violations do not involve a clearor and therefore he has not violated that consent order.

Complainant also sent notices to Respondent advising Respondent that he appeared to be violating the Act. On November 9, 1999, Complainant sent a certified letter to Respondent, which was signed for by "J. Chandler", who is most probably Jacqueline Chandler, Respondent's wife (Tr. at 138), advising Respondent that, among other

purported violations, he was failing to comply with the Act (7 U.S.C. § 228b) and the regulations (9 C.F.R. § 201.43(b)(2)(i)) respecting timely payment for livestock purchases. On May 23, 2001, Respondent received a certified letter advising him that he was failing to comply with the Act's requirement to pay on time for livestock purchases (CX 2, pages 1-3). In sum, Respondent has violated a prior consent order and has been given ample prior instructions on the Act's timely payment requirements and his legal obligations to comply with them as a registrant.

I agree with Complainant that appropriate cease and desist provisions should be made part of the Order issued against Respondent. I am not, however, including a provision imposing recordkeeping requirements since I have not found such a violation by Respondent. I also agree with Complainant that a suspension of Respondent's registration for more than the usual sanction of five years is warranted in this case in light of the gravity of the offenses, the size of the business involved and the need to effectively deter Respondent from future violations. However, ten years would be too long even with the provision that P& S may conditionally allow Respondent to be employed by another registrant. Instead I am imposing a six year suspension of Respondent's registration under the Act. Extending the suspension to a six year period of time recognizes the aggravating factors in this case without going so far as to empower Complainant to be able to effectively preclude Respondent from ever again operating his own business as the proposed ten year suspension would do. The purpose of an administrative sanction is not to punish one who may have violated governmental regulations; the purpose is instead to take such steps as are necessary to deter the Respondent from future conduct prohibited by the Act. *See Spencer, supra*, at 1458.

Accordingly, the following ORDER is being issued.

Order

Respondent, William Chandler d/b/a Bill Chandler Cattle, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while insolvent, i.e. while current liabilities exceed current assets
2. Issuing insufficient funds checks in payment for livestock purchases; and
3. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Respondent is suspended as a registrant under the Act for a period of six (6) years and thereafter until he has demonstrated that he is no longer insolvent. Provided, however, that upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension at any time after two (2) years, upon demonstration of circumstances warranting modification of the order. Provided, further, that this order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or packer after the expiration of two (2) years of this suspension term and upon demonstration of circumstances warranting modification of the order.

This Decision and Order shall become effective and final thirty-one (31) days after receipt thereof by Respondent unless either party shall appeal the Decision within thirty (30) days after receiving it in accordance with 7 CFR 1.145.

* * *

ADDENDUM

Pertinent Provisions of the Packers and Stockyards Act
7 U.S.C. § 204

> ….whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter, he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction….

7 U.S.C. § 213(a)

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock

7 U.S.C. § 221

Every packer, any swine contractor, and any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

7 U.S.C. § 228(b)

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized

representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is no present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act.

Pertinent Regulatory Provisions

9 C.F.R. § 201.43(b)

Prompt payment for livestock and live poultry - terms and conditions.

(1) No packer, market agency, or dealer shall purchase livestock for which payment is made by a draft which is not a check, unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft. (In cases of packers whose average annual purchases exceed $500,000, and market agencies and dealers acting as agents for such packers, see also 201.200).

(2)(i) No packer, market agency, or dealer purchasing livestock for cash and not on credit, whether for slaughter or not for slaughter, shall mail a check in payment for the livestock unless the check is placed in an envelope with proper first class postage prepaid and properly addressed to the seller or such person as he may direct, in a post office, letter box, or other receptacle regularly used for the deposit of mail for delivery, from which such envelope is scheduled to be collected (A) before the close of the next business day following the purchase of livestock and transfer of possession thereof, or (B) in the case of a purchase on a "carcass" or "grade and yield" basis, before the close of the first business day following determination of the purchase price.

(ii) No packer, market agency, or dealer purchasing livestock for slaughter, shall mail a check in payment for the livestock unless (A) the check is made available for actual delivery and the seller or his duly authorized representative is not present to receive payment, at the point of transfer of possession of such livestock, on or before the close of the next business day following the purchase of the livestock and transfer of possession thereof, or, in the case of a purchase on a "carcass" or "grade and yield" basis, on or before the close of the first business day following determination of the purchase price; or unless (B) the seller expressly agrees in writing before the transaction that payment may be made by such mailing of a check.

(3) Any agreement referred to in paragraphs (b)(1)or(2) of this section shall be disclosed in the records of any market agency or dealer selling such livestock, and in the records of the packer, market agency, or dealer purchasing such livestock, and retained by such person for such time as is required by any law, or by written notice served on such person by the Administrator, but

not less than two calendar years from the date of expiration thereof.

(4) No packer, live poultry dealer, market agency, or livestock dealer shall as a condition to its purchase of livestock or poultry, impose, demand, compel or dictate the terms or manner of payment, or attempt to obtain a payment agreement from a seller through any threat of retaliation or other form of intimidation.

Pertinent Statements of General Policy

Section 203.10 (9 C.F.R. § 203.10):

Statement with respect to insolvency; definition of current assets and current liabilities.

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq*.), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. United States Department of Agriculture*, 363 F. 2d 81 (5th Cir. 1966).

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) Current assets means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) Current liabilities means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) Cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if

collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accrued interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) land and other natural resources; and (6) depreciable assets.

(e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; (5) accruals such as taxes, wages, social security, unemployment compensation, etc., due and payable as of the date of the balance sheet; and (6) all other liabilities whose regular and ordinary liquidation is expected to occur within one year

* * *.

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In re: LITTLE JOE LIVESTOCK MEATS, INC., AND JOSEPH PAGLIUSO, JR.
P & S Docket No. D-04-0005.
Decision and Order.
Filed January 3, 2005.

P&S – Insufficient funds – Failure to pay when due – Untimely settlement.

Ruben Rudolph, for Complainant.
Unrepresented Respondent, (not present).
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This is the third action was brought by the Grain Inspection Packers and Stockyards Administration (GIPSA) against the Respondents for violations of the provisions of the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. § 181, *et seq*.) hereinafter referred to as the "Act" and the Regulations issued pursuant to the Act. [1] The Respondents have generally denied the allegations of the Complaint and a hearing was held in New York City, New York on November 8, 2005. The Complainant was represented by Ruben Rudolph, Esquire, Office of the General Counsel, United States department of Agriculture, Washington, D.C.

The Complaint alleges that between May 24, 2000 and January 8, 2001, the corporate Respondent, Little Joe Livestock Meats, Inc. and Respondent Joseph Pagliuso, Jr., its President and sole shareholder willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §213(a) and 7 U.S.C. § 228b) by issuing checks in payment for livestock without having sufficient funds on deposit and available in the account upon which to pay such checks when presented, and by failing to pay, when due, the full purchase price of the purchased livestock. The Respondents are also alleged to have violated section 401 of the Act (7 U.S.C. § 221) by failing to maintain adequate records that fully and correctly disclose all transactions involved in its business.

7 U.S.C. § 213(a) provides:

[1] CX 4 and CX 5.

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

7 U.S.C. § 228b requires payment of the full purchase price of livestock before the close of the next business day:

> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price.....

The record keeping requirements for licensees involved in the business of purchase and sale of livestock are contained in 7 U.S.C. § 221:

> Every packer, any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business....

The Respondents failed to appear at the hearing, either in person or by counsel,[2] and although a default decision could have been entered,

[2] The Respondents' Answer was submitted by Paul Aloi, an attorney who entered his appearance as counsel for the Respondents. After filing the Answer, he raised the possibility of settlement with government counsel. Thereafter, he failed to return telephone calls from the Administrative Law Judge's Secretary concerning his availability for participation in a Pre Hearing Conference or from government counsel concerning either settlement or dates for a hearing, he failed to comply with the Order concerning the filing of witness and exhibit lists with the Hearing Clerk and available dates with the Administrative Law Judge and Hearing Clerk, (Docket Entry No. 10, Notice of Exchange Dates entered July 18, 2005, modified by Docket Entry No. 13, Order entered on August 17, 2005), he failed to provide a witness or exhibit list or

(continued...)

the Complainant elected to introduce the testimony of witnesses and produced documentary evidence which amply support the general allegations of both issuing checks which were returned unpaid by the bank upon which they were drawn as a result of insufficient funds being on deposit and failing to pay for cattle in a timely manner as alleged in the Complaint.[3] The transcript of the November 8, 2005 hearing (hereafter "Tr.") was filed on November 23, 2005. The Respondents were advised of their opportunity to inspect the transcript or to secure a copy from the Hearing Reporter, as well as being given an opportunity to respond to a Proposed Decision submitted by the Complainant; however no response has been received. A brief summary of the evidence introduced at the hearing follows.

The Complainant called Cindy J. Bertoli, a Resident Agent with the Packers and Stockyards Program, (hereinafter "P & SP") who testified concerning her investigation of the Respondents. Agent Bertoli testified that the investigation was initiated after her office received information that the Respondents had issued a number of checks which had been returned for insufficient funds. (Tr. at 12). She identified Exhibits CX 1-6 as information obtained from the records maintained by P & SP and the Respondents pertaining to Little Joe's Livestock Meats, Inc. (hereinafter "Little Joe") and Joseph Pagliuso, Jr. (hereinafter

[2](...continued)
copies of any exhibits to government counsel and only in the late afternoon on the day before the hearing (after the Administrative Law Judge had departed for New York) without filing a Motion for a Continuance or Postponement of the hearing advised the Administrative Law Judge's office of his inability to appear based upon oral surgery which apparently had been performed on November 3, 2005. Under these circumstances, the hearing was conducted as scheduled without postponement. Even though no Order was entered granting a continuance or postponement of the hearing, neither of the Respondents nor anyone else appeared on their behalf.

[3] As will be discussed, the documentary evidence does not fully support all of the allegations of the Complaint as there is some disparity in the proof as to the dates that NSF checks were issued; however, the general nature of the violations was clearly established. The evidence actually demonstrates that there were more instances of NSF checks being issued than were alleged.

"Pagliuso").[4] As part of her investigation, she went to Pagliuso's business office and requested information concerning his cattle transactions. Pagliuso was able to provide the Cattle Transactions Logbook mandated by the State of New York and some of the requested information, but was unable to produce all of the records requested. Agent Bertoli was referred to Pagliuso's accountant who provided additional records but again not all of the information which had been requested. She then proceeded to contact the livestock exchanges where the Respondents had transacted business, Finger Lakes Livestock Exchange, Inc. (hereinafter "Finger Lakes") and the two locations of Empire Livestock Marketing, LLC. (Bath, New York and Pavilion, New York) (hereinafter "Empire"). (Tr. at 12-17).

At Finger Lakes, Agent Bertoli interviewed the office manager, Barbara Parker. (Tr. at 15). Ms. Parker produced additional records which were pertinent to the Respondents' transactions and explained the handwritten notations which had been made on the records. (Tr. at 15-16). Agent Bertoli also went to the locations of Empire and interviewed Robin Cross, the senior accountant and the two office managers at the two locations who provided records concerning their transactions with the Respondents and explained the notations on their records. (Tr. at 16-17). After obtaining the additional records from Finger Lakes and Empire, Agent Bertoli prepared two summaries, Exhibit CX 7, which summarized the instances of issuing Not Sufficient Funds ("NSF") checks for the purchases of cattle and Exhibit CX 14 which summarizes

[4] Included in those records were CX 1 which was described as the PS & P Business Report which was downloaded from the P & SP records database and a copy of the original Application for Registration for Little Joe's Livestock Meats, Inc. dated June 17, 1972 which reflected that Joseph Pagliuso, Jr. owned 100% of the stock of the corporation. CX 2 consists of copies of annual reports filed by the Respondent corporation for the year ended December 31, 1996, 2001, 2002 and 2004. (Tr. at 20). CX 3 included a copy of information downloaded from the New York State Department of State, identifying the entity information on file with the New York Department of State and copies of the stock certificates reflecting ownership of the corporation by Joseph Pagliuso, Jr. obtained from Mr. Pagliuso and his accountant. (Tr. at 23-24). CX 4 and 5 are copies of the prior Consent Decisions entered on May 15, 1987 and November 14, 1996. (Tr. at 22). CX 6 is a copy of the certified letter dated October 6, 1997 sent to the Respondents following a visit to them on September 10, 1997 to determine compliance with the Consent Decision and to determine whether the Respondents were eligible to request the modification of the suspension imposed by the Consent Decision dated November 14, 1996. (Tr. at 27).

the instances of failure to pay for the purchases of cattle in a timely manner. (Tr. at 28, 69-70). Exhibits CX 8-13 contain copies of the documents supporting the summary in Exhibit CX 7, including copies of the deposit slips reflecting a deposit of check(s) from the Respondents, copies of the bank statements reflecting charge backs of the amounts of the checks with the handwritten notations referencing that the charge backs were those written by the Respondents as well as copies of the NSF checks themselves bearing the bank stamps reflecting that the checks had been returned for insufficient funds.

In Paragraph II (a) of the Complaint, the Complainant identified purchases made on five dates for which the Respondents issued checks in payment for livestock purchases which were returned unpaid by the Respondents' bank. At the hearing, the Complainant entered into evidence copies of five checks issued by Respondents (CX 11, pgs 5, 8; CX 12 pgs 2, 7: CX 13 pg 2) and the corresponding bank statements from the parties that deposited those checks (CX 11; CX 12; CX 13) demonstrating that Respondents' checks were dishonored by the bank upon which they were drawn. During her investigation, Agent Bertoli was able to locate physical copies of five dishonored checks issued by the Respondents in payment for cattle; however, the bank records of the Finger Lakes indicate that Respondents' payments for livestock were dishonored for insufficient funds many additional times. (Tr. at 32-43, 50-62, 64-67; CX 11; CX 12; CX 13).

The proof adduced at the hearing differs slightly from the allegations contained in the complaint to the extent that the evidence reflects a single aggregate check in the amount of $3,612.99 written for the transactions for the purchase of livestock on May 24, 2000, May 31, 2000 and June 7, 2000. (CX 8, 9, 10). There is no evidence as to the date when the first check purporting to pay for these purchases might have been written or whether other checks were written for these three transactions; however, the evidence does reflect $3,612.99 being deposited by Finger Lakes as early as June 15, 2000 and Finger Lakes being advised by their bank that $3,612.99 was charged back against their account as being returned unpaid on June 23, 2000 due to

insufficient funds in the Respondents' account.[5] Agent Bertoli testified that based upon information provided by Finger Lakes, the payment in the amount of $3,612.99 was for the three transactions dated May 24, 2000, May 31, 2000 and June 7, 2000, (Tr. at 33-34), and that amount is the sum of the three invoices.

Similarly, the evidence reflects Check Number 4696 dated July 5, 2000 in the amount of $3,014.16 for a purchase of livestock made by the Respondents on June 28, 2000. (CX 12-2).[6] Last, Check Number 4911 dated October 24, 2000 in the amount of $2,295.88 was issued by the Respondents in payment of a purchase of livestock made on October 18, 2000. It was deposited on October 24, 2000 by Finger Lakes (Exhibit CX 13-2) and Finger Lakes was advised of its charge back on November 8, 2000. (Exhibits CX 13-3 and 13-4).[7] The evidence additionally reflected multiple other instances of NSF checks being issued by the Respondents for purchases of livestock; however, as they are not alleged in the Complaint, Complainant has requested no findings as to those transactions.

Agent Bertoli then turned to the documents supporting the allegations concerning the failure of the Respondents to pay, when due, the full purchase price of the livestock they purchased. As previously noted, Exhibit CX 14 is a summary of those ten transactions where livestock were not paid for in a timely manner. For each such transaction, she identified the sales invoice(s) and the corresponding documents

[5] The evidence reflects that Finger Lakes attempted to deposit $3,612.99 eleven times by the notation on Exhibits CX 11-2 and 11A-2 before being satisfied on November 29, 2000. Of the eleven deposits, the documentary evidence reflects ten charge backs of $3,612.99. (Exhibits CX 11-3, 11-4, 11-6, 11-7, 11-9, 11-10, 11-11, 11-12 and 12-17, 11-13 and 11-14). Although the check deposited on June 15, 2000 was not introduced into evidence, two later checks in that amount dated July 5, 2000 and July 26, 2000 (Check Numbers 4695 and 4812) bearing the stamps denoting being returned for NSF were admitted. (Exhibits CX 11-5 and 11-8).

[6] The documentary evidence reflects that Finger Lakes deposited $3,014.16 on July 6, 2000 (Exhibit CX 12-3) and again on July 17, 2000 (Exhibit CX 12-5) and was advised of charge backs being made by their bank on their account for the checks being returned on July 12, 2000 (Exhibit CX 11-6) and again on July 20, 2000. (Exhibit CX 11-7). The check (Exhibit CX 12-2 and 18-2) bears the NSF stamp.

[7] The check bearing the NSF stamp was admitted as Exhibit 13-2.

demonstrating how and when the purchase price was ultimately pa*Id.* (Exhibits CX 15-24).

The foregoing evidence, with the pattern of NSF checks and untimely settlement of the obligations for the purchase of livestock amply demonstrate that the Respondents abjectly failed to maintain anything even remotely resembling minimally adequate records that fully and correctly disclose all transactions involved in its business.

The following Findings of Fact and Conclusions of Law are made:

Findings of Fact

1. The Respondent, Little Joe Livestock Meats, Inc., is a corporation organized and existing under the laws of the state of New York and has a mailing address of 6808 Slocum Road, Ontario, New York 14519. (CX 1).

2, Little Joe Livestock Meats, Inc. has been registered with the Secretary of Agriculture since December 15, 1972 to buy and sell livestock for its own account as a dealer of livestock in commerce and at all times material to the Complaint that has been filed was engaged in the business of buying and selling for its own account as a dealer of livestock in commerce. (CX 1).

3. The Respondent, Joseph Pagliuso, Jr., is an individual whose business mailing address is identical to that of Little Joe Livestock Meat, Inc. at 6808 Slocum Road, Ontario, New York 14519. (CX 1; CX 2).

4. Joseph Pagliuso, Jr. is the President, Manager and the sole shareholder of Little Joe Livestock Meat, Inc. and is solely responsible for the day to day management, direction and control of the corporation. (Tr. at 20; CX 1; CX 2; CX 3; CX 5).

5. Little Joe and Pagliuso have been disciplined for violations of the Act on two prior occasions and on each such prior occasion entered into a Consent Decision, the first being entered on May 15, 1987 and the second on November 14, 1996.[8]

6. On or about the dates indicated below, Little Joe issued checks to

[8] On the first occasion, the Respondents were suspended for a twenty-one day period. On the second, they were suspended for a period of five years. (CX 4 and CX 5).

Finger Lakes in the amounts set forth below in payment of livestock purchased on the dates indicated, which checks were returned to Finger Lakes unpaid due to insufficient funds in the Respondents' account:

a. A check in the amount of $3,612.99 dated on or about June 15, 2000 for the payment of livestock purchased on May 24, 2000, May 31, 2000 and June 7, 2000 with replacement checks dated July 5, 2000 and July 26, 2000 in the same amount, all of which were returned unpaid to Finger Lakes (a total of at least 10 times) due to insufficient funds in the Respondents' account. (CX 7; CX 8; CX 9; CX 10; CX 11).

b. A check in the amount of $3,014.16 dated July 5, 2000 for the payment of livestock purchased on June 28, 2000 which was returned unpaid to Finger Lakes on July 6, 2000 and July 17, 2000 due to insufficient funds in the Respondents' account. (CX 12).

c. A check in the amount of $2,295.88 dated October 24, 2000 for the payment of livestock purchased on October 18, 2000 which was returned unpaid to Finger Lakes on November 8, 2000 due to insufficient funds in the Respondents' account. (CX 13).

7. On or about the dates and in the transactions listed below, the Respondents failed to pay when due the full purchase price of such livestock:

Purchase Date	Seller	No. Head	Invoice Amount	Date Due	Date Paid	Days Late
05-24-00	Finger Lakes	5	$1,384.49	05-25-00	11-29-00	189
05-11-00	Finger Lakes	1	306.80	06-01-00	11-29-00	182
06-07-00	Finger Lakes	6	1,921.70	06-08-00	11-29-00	174
06-28-00	Finger Lakes	8	3,014.16	06-29-00	09-27-00	91
10-18-00	Finger Lakes	9	2,295.88	10-19-00	01-10-01	83
11-09-00	Empire	5	2,072.12	11-10-00	11-16-00	6
11-27-00	Empire	7	2,469.80	11-28-00	12-11-00	13
11-30-00	Empire	11	2,986.68	12-01-00	12-07-00	6
12-07-00	Empire	2	595.60	12-08-00	12-21-00	13
01-08-01	Empire	13	2,724.58	01-09-01	01-15-01	6

(CX 11A; CX 14; CX 15; CX 17; CX 18; CX 19; CX 20; CX 21; CX 22; CX 23; CX 24).

8. From May 24, 2000 through January 8, 2001, Respondents failed

to maintain adequate records that fully and correctly disclosed all transactions in its business, specifically, failed create invoices for all of its purchases, failed to maintain records of cash transactions and failed to maintain records of returned checks and subsequent payment of such checks. (Tr. at 12-14, 19).

Conclusions of Law

1. Respondent Joseph Pagliuso, Jr. is the *alter ego* of the Respondent Little Joe Livestock Meats, Inc.

2. Respondents willfully violated sections 312 (a) and 409 of the Act (7 U.S.C. § 213(a) and 228(b) by issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented, and by failing to pay, when due, the full price of such livestock.

3. Respondents willfully violated section 312 (a) of the Act (7 U.S.C. § 213(a)) by failing to maintain adequate records that fully and correctly disclose all transactions involved in its business, as required by section 401 of the Act. (7 U.S.C. § 221).

Order

1. Respondent Little Joe and Respondent Joseph Pagliuso, Jr., their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

a. Issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

b. Failing to pay, when due, the full purchase price of livestock.

2. Respondents shall maintain adequate records of account as fully and correctly disclose all transactions involved in its business. Specifically, the Respondents shall create invoices for all transactions; shall maintain records of all cash transactions; shall maintain records of its checking and other bank account information to determine when funds for outstanding checks have been presented and disbursed and the debts paid such that Respondents fully and correctly disclose all

transactions involved in its business.

3. In accordance with section 312 (b) of the Act (7 U.S.C. § 213(b)), Respondents are jointly and severally assessed a civil penalty of Six Thousand Six Hundred Dollars ($6,600.00).

The provisions of this **ORDER** shall become effective on the sixth (6th) day after service of the same upon the Respondents.

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: WAYNE W. COBLENTZ, d/b/a COBLENTZ & SONS LIVESTOCK.
P. & S. Docket No. D-01-0013.
Order Lifting Stay Order.
Filed March 22, 2005.

Charles E. Spicknall, for Complainant.
Bruce H. Wilson, Akron, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On May 30, 2002, I issued a Decision and Order concluding Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock [hereinafter Respondent], violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229).[1]

On July 23, 2002, Respondent requested a stay of the Order in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), pending the outcome of proceedings for judicial review, and on July 29, 2002, I granted Respondent's request for a stay.[2]

On December 18, 2003, the United States Court of Appeals for the Sixth Circuit affirmed *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002).[3] On December 21, 2004, the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], filed a motion to lift the July 29, 2002, Stay Order on the

[1] *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002).

[2] *In re Wayne W. Coblentz*, 61 Agric. Dec. 786 (2002) (Stay Order).

[3] *Coblentz v. United States Dep't of Agric.*, 89 Fed. Appx. 484, 2003 WL 23156647 (6th Cir. 2003).

ground that proceedings for judicial review have been concluded.[4] On March 14, 2005, Respondent filed a response to Complainant's Motion to Lift Stay.[5] On March 16, 2005, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent states in an affidavit accompanying his response to Complainant's Motion to Lift Stay that for at least 150 days from December 18, 2003, until the present, he has not bought or sold livestock in commerce either as a dealer for his own account or as a market agency buying livestock on a commission basis. Based on these facts, Respondent requests that I credit him with having served 150 days of the 5-year suspension as a registrant under the Packers and Stockyards Act imposed in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330, 345 (2002).

A stay order issued by the Judicial Officer pending the outcome of judicial review is not automatically lifted upon the conclusion of judicial review. Instead, action must be taken to lift a stay order.[6] Moreover, the July 29, 2002, Stay Order specifically states "[t]his Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction."[7] The July 29, 2002, Stay Order has not previously been lifted by the Judicial Officer and has not been vacated by a court of competent jurisdiction. Therefore, I deny Respondent's request that I credit him with having served 150 days of the 5-year suspension as a registrant under the Packers and Stockyards Act imposed in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330, 345 (2002).

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[4]Complainant's Motion to Lift Stay.

[5]Respondent's Reply to Complainant's 'Motion to Lift Stay'.

[6]*In re Darrall S. McCulloch*, 63 Agric. Dec. 265, 266-67 (2004) (Order Lifting Stay as to Phillip Trimble); *In re Cecil Jordan*, 56 Agric. Dec. 758, 760 (1997) (Order on Recons. of Order Lifting Stay Order); *In re Jackie McConnell*, 55 Agric. Dec. 336, 339 (1996) (Order Modifying Order Lifting Stay Order).

[7]*In re Wayne W. Coblentz*, 61 Agric. Dec. 786, 787 (2002) (Stay Order).

I issued the July 29, 2002, Stay Order to postpone the effective date of the Order issued in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), pending the outcome of proceedings for judicial review. Proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired.

For the foregoing reasons, Complainant's Motion to Lift Stay is granted; the July 29, 2002, Stay Order is lifted; and the Order issued in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), is effective, as set forth in the following Order.

ORDER

Paragraph I

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

Paragraph II

Respondent is suspended as a registrant under the Packers and Stockyards Act for a period of 5 years; *Provided, however*, That, upon application to the Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of Respondent as a registrant under the Packers and Stockyards Act at any time after the expiration of the initial 150 days of the 5-year period of suspension upon demonstration by Respondent that the livestock sellers identified in the Complaint have been paid in full; *And provided further*, That this Order may be modified upon application to the Packers and Stockyards Programs to permit Respondent's salaried employment by another

registrant or a packer after the expiration of the initial 150 days of the 5-year period of suspension and upon demonstration of circumstances warranting modification of the Order, such as a reasonable and current schedule of restitution.

The registration-suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

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In re: WAYNE W. COBLENTZ, d/b/a COBLENTZ & SONS LIVESTOCK.
P. & S. Docket No. D-01-0013.
Ruling Denying Respondent's Motion for Stay Pending Review.
Filed June 21, 2005.

Charles E. Spicknall, for Complainant.
Bruce H. Wilson, Akron, Ohio, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

I issued a Decision and Order concluding Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock [hereinafter Respondent], violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act].[1] Respondent requested a stay of the Order in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), pending the outcome of proceedings for judicial review, and on July 29, 2002, I granted Respondent's request.[2]

The United States Court of Appeals for the Sixth Circuit affirmed *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002),[3] and the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of

[1]*In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (202).

[2]*In re Wayne W. Coblentz*, 61 Agric. Dec. 786 (2002) (Stay Order).

[3]*Coblentz v. United States Dep't of Agric.*, 89 Fed. Appx. 484, 2003 WL 23156647 (6th Cir. 2003).

Agriculture [hereinafter Complainant], filed a motion to lift the July 29, 2002, Stay Order on the ground that proceedings for judicial review had been concluded.[4] On March 14, 2005, Respondent filed a response opposing Complainant's Motion to Lift Stay.[5] On March 22, 2005, I granted Complainant's Motion to Lift Stay.[6]

On May 27, 2005, Respondent filed a motion for stay pending judicial review of the March 22, 2005, Order Lifting Stay Order.[7] On June 9, 2005, Complainant filed an opposition to Respondent's Motion for Stay Pending Review, and on June 21, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay Pending Review.

CONCLUSION BY THE JUDICIAL OFFICER

The Administrative Procedure Act provides if justice so requires, an agency may postpone the effective date of an order, as follows:

> **§ 705. Relief pending review**
>
> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

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[4]Motion to Lift Stay.

[5]Respondent's Reply to Complainant's 'Motion to Lift Stay'.

[6]*In re Wayne W. Coblentz*, 64 Agric. Dec. 911(2005) (Order Lifting Stay Order).

[7]Motion for Stay Pending Review.

Respondent has exhausted avenues for judicial review of this administrative proceeding. I have fully considered and addressed Respondent's request that I credit him with having served 150 days of the 5-year suspension as a registrant under the Packers and Stockyards Act imposed in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330, 345 (2002).[8] Under these circumstances, I do not find that justice requires that I disturb the March 22, 2005, Order Lifting Stay Order.

For the foregoing reasons, the following Ruling should be issued.

RULING

Respondent's Motion for Stay Pending Review, filed May 27, 2005, is denied.

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[8]See *In re Wayne W. Coblentz*, 64 Agric. Dec. 911, 912 - 13 (2005) (Order Lifting Stay Order).

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: TOM "TOMMY" TUCKER.
P&S Docket No. D-03-0008.
Decision and Order.
Filed December 3, 2004.

P&S - Default.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq*.). A copy of the complaint was served on Respondent by certified mail on April 8, 2003, pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice"). Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is entered pursuant to section 1.139 of the Rules of Practice. (7 C.F.R. § 1.139).

Findings of Fact

1. Tom "Tommy" Tucker, hereinafter referred to as Respondent, is an individual whose business mailing address is 2251 Jayhawk Road, Fort Scott, Kansas 66701.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock on commission in commerce; and

(b) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent was served with a letter of notice on April 14, 2000, informing him that the bond or its equivalent maintained by James A. Smith, in connection with Respondent's registration removed Respondent as a clearee. The notice further informed Respondent that in order for Respondent to continue his livestock operations subject to the Act, he must obtain an adequate bond or its equivalent. Notwithstanding such notice, Respondent has continued to engage in the business of a market agency buying on commission without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in Finding of Fact 3, Respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.39 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Order

Respondent Tom "Tommy" Tucker, his agents and employees,

directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When Respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is hereby assessed a civil penalty in the amount of one thousand dollars ($1,000).

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 4, 2005.-Editor]

In re: JOSHUA L. MARTIN d/b/a MARTINS LIVESTOCK.
P&S Docket No. D-03-0019.
Decision and Order.
Filed January 11, 2005.

P&S - Default

Ann Parnes, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. §181 *et. seq*.) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq*.). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.), hereinafter the Rules of Practice, were mailed to Respondent by certified mail on August 14, 2003, and were received on August 16, 2003.

Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. §1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, are issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

(1) Joshua L. Martin is an individual doing business as Martins Livestock, hereinafter referred to as Respondent. His business mailing address is 17223 Reiff Church Road, Hagerstown, Maryland 21740.

(2) The Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account, and as a market agency buying livestock on a commission basis.

(3) The Respondent, at all times material herein, was registered with the Secretary of Agriculture as a dealer and as a market agency to buy livestock on a commission basis.

(4) Respondent purchased livestock, and in purported payment thereof, issued checks that were returned unpaid by the bank upon which

they were drawn because Respondent did not have sufficient funds available in the account upon the checks were drawn to pay the checks when presented.
that a stop payment was issued.
Footnote 4: Respondent sold livestock at Four States on July 31, 2002, and the proceeds from this sale were applied to Respondent's outstanding balance.

[See following table – Editor]

(5) Respondent failed to remit, when due, the full price of the livestock that Respondent purchased.

(6) Respondent failed to remit the full price of livestock that Respondent purchased. A total of $85,401.70 for livestock purchases remains unpaid.

Order

By reason of the facts set forth in Findings of Fact 4, 5 and 6, Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213,228(b)).

Joshua L. Martin, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;
2. Failing to remit, when due, the full purchase price of livestock; and
3. Failing to remit the full purchase price of livestock.

Respondent is hereby suspended as a registrant under the Act for a period of five (5) years; provided, however, that upon application to Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of the Respondent at any time after 150 days upon demonstration of circumstances warranting modification of the order. Further, this order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment

by another registrant or a packer after the expiration of the 150 day period of suspension, upon demonstration of circumstances warranting modification of the order.

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final February 14, 2005.-Editor]

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Seller	Purchase Date	Date Due Per §409	Invoice Amount	Check No.	Check Date	Check Amount	Date Returned NSF	Balance Due
Lynchburg Livestock Market, Inc.	7/01/02	7/02/02	$51,593.29	11585	7/01/02	$51,593.29	7/8/02	(Note 1)
Pmt. from sale 7/8/02						(10,569.85)		(Note 2)
Pmt. from sale 7/8/02						(10,569.88)		(Note 2)
Wire Transfer 8/02/02						(2,000.00)		$28,453.56
Four States' Livestock Sales	7/18/02	7/19/02	$18,971.61	11622	7/23/02	$18,971.61	N/A	(Note 3)
				11633	7/31/02	15,341.37	8/01/02	
Pmt. from sale 7/31/02						(3,630.24)		(Note 4)
								$15,341.37
Four States' Livestock Sales	7/24/02	7/25/02	$21,439.37	11635	7/31/02	$21,439.37	8/01/02	$21,439.37
Westminster Livestock Auction	7/23/02	7/24/02	$13,517.40	11634	7/31/02	$13,517.40	8/01/02	$13,517.40

Seller	Purchase Date	Date Due Per §409	Invoice Amount	Check No.	Check Date	Check Amount	Date Returned NSF	Balance Due
Rockridge 4-H Livestock Advisory Committee	7/24/02	7/26/02	$8,785.25					
			1,115.70					
		Total	9,900.95		Check	Issued		
		Less		No				
		Cash & other	($3,250.95)					
		Cattle	$6,650.00					$6,650.00

Footnote 1: Respondent issued check number 11585 in payment for livestock. This check was returned NSF.
Footnote 2: Respondent sold livestock at Lynchburg on July 8, 2002 and the proceeds from this sale were applied toRespondent's outstanding balance.
Footnote 3: Payment was stopped on this check, however, Respondent was unable to provide proof

CONSENT DECISIONS

(Not published herein - Editor)

PACKERS AND STOCKYARDS ACT

William Chandler d/b/a Bill Chandler Cattle. P&S Docket No. D-03-0020. 1/3/05.

Richard Armstrong, d/b/a Richard Armstrong Cattle Co. P&S Docket No. D-03-0018. 1/12/05.

Leo E. Buchheit. P&S Docket No. D-04-0008. 3/11/05.

Lakeview Packing Company, Inc. and Jacob T. Turnage. P&S Docket No. D-05-0006. 4/20/05.

Tim Cherry. P&S Docket No. D-04-0013. 5/5/05.

Donald W. Hallmark and Donald R. Hallmark, d/b/a Hallmark Meat Packing Company. P&S Docket No. D-05-0008. 5/25/05.

Hughey P. (Bobby) Weyandt, III, d/b/a Morrison's Cove Livestock Auction. P&S Docket No. D-05-0012. 6/8/05.

Dennis V. Chavez, Dennis V. Chavez, L.L.C., and Southwest Livestock Auction, L.L.C. P&S Docket No. D-04-0010. 6/28/05.

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