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AGRICULTURE DECISIONS

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PACKERS AND STOCKYARDS ACT

COURT DECISION

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MISCELLANEOUS ORDERS

DEFAULT DECISIONS

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SWIFT & CO. v. ELIAS FARMS INC., STAN TURBES, AND WILLIAM JOHNSON.
Civil Nos. 05-2775, 2776, 2777.
May 9, 2007.

(Cite as: 2007 WL 1364691).

PS – Choice of law – Termination as affirmative act – Termination adjustments– USDA market reporting system – Unconscionable terms – Adhesive contract – Consumer fraud.

Swift entered into hog purchase contract(s) with defendant hog producers. During the course of the contract, a change in the USDA market reporting system (part of contract pricing terms) required a unilateral change in the price paid to hog producers such that at the conclusion of the contract, there was over $900,000 in their collective accounts. Swift did not affirmatively terminate the contracts but allowed them to expire. However, Swift demanded the monies in the hog producers' accounts. The court evaluated conflict of laws substantive and procedural matters as between Nebraska and Minnesota and resolved the case per the contract terms such that only upon the affirmative act of termination (not merely the lapse) of the contract did Swift have a contractual right to the monies in the hog producer's account .

United States District Court,D. Minnesota

MEMORANDUM AND ORDER

PAUL A. MAGNUSON, United States District Court Judge.

This matter is before the Court on cross-Motions for Summary Judgment. For the reasons that follow, the Court grants in part and denies in part all Motions.

BACKGROUND

A. The Parties

Plaintiff Swift & Co. is a Delaware corporation with its principal place of business in Colorado. Its primary business is beef and pork processing. Defendant Elias Farms, Inc. is a Minnesota corporation engaged in the

business of raising hogs in Adrian, Minnesota. Defendant Stan Turbes operates a hog production farm in Hanska, Minnesota. Defendant William Johnson operates a hog production farm in Comfrey, Minnesota.

B. The Original Hog Purchase Contracts

On January 1, 1998, Swift and Defendants entered into separate, but nearly identical, Hog Purchase Contracts ("Contracts") under which Defendants were required to supply varying numbers of hogs to Swift.

1. *Pricing Provisions*

Article 6 of the Contracts, which described how the price of the hogs would be calculated, linked the price to United States Department of Agriculture (USDA) price reports. In particular, Section 6.01 explained that the price equaled the "Base Price" plus or minus an adjustment based on the percentage of meat to fat in the hog carcass. The "Base Price" was based on the "Market Price" set by the USDA's daily market news service live weight report for hogs.[1](Corey-Edstrom Aff. Exs. 1-3 ¶ 6.01.)

Section 6.02 set the Base Price floor at $40.00 per hundred pounds of live animal weight and the ceiling at $45.00 per hundred pounds of live animal weight. Thus, if the Market Price for hogs was between $40.00 and $45.00 per hundred pounds of live animal weight, Swift would pay Defendants that Base Price. If the Market Price was lower than $40.00, Swift paid the Base Price of $40.00 per hundred pounds of live animal weight and debited an adjustment account "by the amount equal to the live cwt.[2] of Market Hogs delivered on that date multiplied by the amount by which $40.00 exceeds the Market Price on such date."(*Id.* ¶ 6.02.) If the Market Price exceeded $45.00 and if there was a debit balance in the adjustment account, Swift would pay the Base Price of $45.00 but would

[1] Section 6.01 also provided that the base price would be determined by the USDA's live weight report "or any replacement thereof or successor thereto."(Corey-Edstrom Aff. Exs. 1-3 § 6.01 .)

[2] "Cwt." is an abbreviation for one hundred pounds of live animal weight.

credit the adjustment account "by an amount (not to exceed the then existing debit balance in the Adjustment Account) equal to the product of ... the live cwt. of Market Hogs delivered on such date, multiplied by ... the "Price Adjustment." "[3] (*Id.*)

Finally, Section 6.02 provided: "If, at the termination of this Agreement, there is a debit balance in the Adjustment Account," the hog producer would be required to pay Swift a cash amount equal to the debit balance. (*Id.*)

2. Termination Provisions

The Contracts were to "continue and remain in full force and effect through December 31, 2004, unless otherwise extended by the parties hereto or unless terminated in accordance with the terms hereof."(*Id.* ¶1.01.) Article 9 of the Contracts provided that either party could terminate the Contracts by providing written notice to the other party if the other party defaulted. (*Id.* ¶¶ 9.03-.04.) A default occurred when: (1) a party failed to perform its contractual obligation and failed to cure the default within ninety days following receipt of written notice of the default from the other party; (2) a party was adjudged bankrupt; (3) a party made an assignment for the benefit of its creditors or ceased to carry on business; or (4) a party appointed a receiver or trustee for its business or affairs. (*Id.* ¶¶ 9.01-.02.)

3. Choice of Law Provision

Section 16.03 of the Contracts provided:

> Seller and Buyer shall use their best efforts to settle any dispute, claim, question or disagreement arising out of or relating to this Contract or any alleged breach of this Contract. This Agreement and the legal relations among the parties hereto shall be governed by and construed in accordance with the laws of the State of Nebraska applicable to contracts

[3]The Price Adjustment varied depending on the Market Price. If the Market Price fell between $45.00 and $47.99, the Price Adjustment equaled $0.50. If the Market Price equaled $48.00 or greater, the Price Adjustment equaled $1.00.

made and performed in Nebraska. Any and all disputes arising between the parties in respect to this Agreement shall be brought in the state or federal courts located in Nebraska. The parties submit to the jurisdiction of, and do hereby agree to voluntarily appear in such court.

(*Id.* at ¶16.03.)

C. Price Modifications to the Contracts

During the 1998-2004 term of the Contracts, Swift changed how the Base Price would be calculated. Defendants contend that the changes resulted in Swift paying Defendants less than what the original Contracts required.

1. *1999 Modification to the Base Price Calculation*

On March 1, 1999, the USDA changed its price reporting system. The new report system changed from live weight price reporting to carcass weight price reporting. Because the USDA's live weight price report was no longer available, Swift determined that it needed to modify the pricing provisions of the Contracts.

On February 27, 1999, Swift notified Defendants that it was modifying Article 6 of the Contracts to change the method by which it calculated Market Price. (Corey-Edstrom Aff. Exs. 12-14.) The modification linked the Base Price to the USDA daily market report for the weighted average carcass price and established a price range of $54.05 to $60.81. Thus, if the Market Price was less than $54.05 carcass weight, Swift would pay a Base Price of $54.05 per hog but would debit the adjustment account by an amount equal to the carcass weight of the hogs multiplied by the amount by which $54.05 exceeded the Market Price. If the Market Price exceeded $60.81 and there existed a debit balance in the adjustment account, Swift would decrease the Base Price and credit the adjustment account "by an amount (not to exceed the then existing debit balance in the Adjustment Account) equal to the product of (i) the carcass cwt. of Market Hogs

delivered on such date, multiplied by (ii) the "Price Adjustment." "[4] The letters explaining the modifications reiterated that if a debit balance existed in the adjustment account at the termination of the Contracts, then the hog producer was required to pay Swift a cash amount equal to the debit balance.

2. *2000 Modifications*

Swift made two more changes to the pricing provisions in 2000. In January 2000, Swift notified Defendants that it would temporarily add $0.40 per hundred pounds of carcass weight to the Market Price effective January 24, 2000. (Corey-Edstrom Aff. Exs. 16-18.) In July 2000, Swift proposed that Market Price would be calculated as the average of:

> (a) Weighted average carcass price for the Base Market Hog, 49-51% Lean ..., reported by the USDA Market News Service at mid-season the day of delivery (the "Weighted Average Price"), and
>
> (b) The highest reported price in the range of prices comprising the Weighted Average Price.

(Corey-Edstrom Aff. Exs. 20-22.) Each Defendant agreed in writing to the July 2000 modification.

Swift has submitted an economic analysis report completed by Marvin L. Hayenga. Hayenga opined that Swift "made reasonable efforts to take changes in government reporting and industry practices into account, even though all of those had not been anticipated and built into the original contract."(Corey-Edstrom Aff. Ex. 33 at 9.) He further concluded that the 1999 modification, which converted live weight prices to carcass weight prices, resulted in prices that were at least equal to or higher than the prices for Defendants than would have been the case with the live weight prices defined by the original Contracts. (*Id.* at 9-10.)Finally, he concluded that

[4]The Price Adjustment varied depending on the Market Price. If the Market Price fell between $60.81 and $64.85, the Price Adjustment equaled $0.68. If the Market Price equaled $64.86 or greater, the Price Adjustment equaled $1.35.

the modifications in 2000 likely resulted in higher prices to Defendants than what the original Contracts called for. (*Id.*) He summarized:

> In my professional opinion, despite the impossibility of a clear statistical comparison of the old and new pricing systems, *it is highly like the Swift changes in the pricing system (required due to the loss of the USDA report specified in the contract) led to higher prices, and not to any economic loss, to Defendants over the life of these Contracts.*

(*Id.* at 10 (emphasis in original).)

D. Demand for Payment of Adjustment Account Balances

Each Contract ended on December 31, 2004. On January 3, 2005, Swift demanded that each Defendant pay the balance in their adjustment accounts. The adjustment account for Defendant Elias Farms equaled $265,489.18. The adjustment account for Defendant Turbes equaled $434,727.00. The adjustment account for Defendant Johnson equaled $244,187.00. Defendants disputed the balances and refused to pay, causing Swift to commence these actions.

DISCUSSION

Swift asserts three claims against each Defendant: breach of contract, unjust enrichment, and account stated. Defendants deny liability and contend that the modifications that Swift made to the Contracts resulted in payments lower than required by the initial Contracts. They counterclaim for breach of contract, violation of the Minnesota Prevention of Consumer Fraud Act, and unjust enrichment.

Defendants move for summary judgment on all of Swift's claims, as well as their breach of contract and fraud counterclaims. Swift seeks summary judgment on its breach of contract claims and on all of Defendants' counterclaims.

A. Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enter. Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996). However, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action."*Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.*Enter. Bank,* 92 F.3d at 747. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

B. Swift's Breach of Contract Claims

Swift alleges that Defendants breached the Contracts by failing to pay the adjustment account balances. The parties have filed cross-motions on Swift's breach of contract claims. Defendants advance three arguments in support of dismissing the claims. First, they argue that the Contracts are void under Minnesota law because they do not contain mediation or arbitration provisions. Second, they argue that the Contracts are contracts of adhesion and are unconscionable. Third, they argue that Swift's breach of contract claims fail because Swift failed to terminate the Contracts before the Contracts expired.

1. *Lack of Arbitration or Mediation Provisions in the Contracts*

Defendants argue that the Contracts are void because they fail to contain mediation or arbitration provisions, as required by Minnesota Statute ¶ 17.91, which provides:

> A contract for an agricultural commodity between a contractor and a producer must contain language providing for resolution of contract disputes by either mediation or arbitration. If there is a contract dispute, either may make a written request to the commissioner for mediation or arbitration services as specified in the contract, to facilitate resolution of the dispute.

Nebraska law has no such requirement. Thus, the first issue relating to this defense is whether Nebraska or Minnesota law applies. If the Court determines that Minnesota law applies, the second issue is whether the Contracts are void under Minnesota law because they do not contain the provisions.

a. *Choice of Law*

The parties dispute whether Nebraska or Minnesota substantive law applies. Although Swift ignored part of Section 16.03 that required it to bring its actions in a Nebraska court, it now relies on the part of Section 16.03 that requires all contractual disputes to be "governed by and construed in accordance with the laws of the State of Nebraska applicable to contracts made and performed in Nebraska."(Corey-Edstrom Aff. Exs. 1-3 § 16.03.)

Defendants argue that application of Nebraska law would be unconstitutional because no party has a connection to Nebraska and because all events relating to the Contracts occurred in Minnesota. They also argue that Minnesota Statute ¶ 336.1-501 requires that there be a "reasonable relation" between the transaction and state before the choice-of-law provisions in a contract will be enforced.

As a federal court sitting in diversity, the Court must apply Minnesota law, including Minnesota's choice-of-law rules, to the breach of contract claims. *Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 595-96 (8th Cir.2007). Minnesota courts generally recognize and apply choice-of-law clauses in contracts requiring the application of a foreign state's law. *See id.* at 596 (citing *Milliken & Co. v. Eagle Packaging Co.*,

295 N.W.2d 377, 380 n. 1 (Minn.1980)). The choice-of-law provisions in the Contracts require the application of Nebraska law to disputes arising under the Contracts.

However, even when a general choice-of-law provision exists in a contract, Minnesota courts apply Minnesota law regarding matters of procedure and remedies. *Id.* (citing *U.S. Leasing v. Biba Info. Processing Servs., Inc.,* 436 N.W.2d 823, 825-26 (Minn.Ct.App.1989)); *see also Danielson v. Nat'l Supply Co.,* 670 N.W.2d 1, 5 (Minn.Ct.App.2003) ("Traditionally when a conflict-of-law issue arises, the preliminary step is to decide whether the question is substantive or procedural."). Indeed, Minnesota courts generally apply their own state's procedure and remedies in all cases involving conflicts of laws, whether the parties have a choice-of-law agreement or not. *Schwan's Sales Enters., Inc.,* 476 F.3d at 596 (citing *Davis v. Furlong,* 328 N .W.2d 150, 153 (Minn.1983)); *see also Nesladek v. Ford Motor Co.,* 46 F.3d 734, 736 (8th Cir.1995) (the first question is whether the law at issue is procedural or substantive; if the law is procedural, the court applies the law of the forum state); *Zaretsky v. Molecular Biosys., Inc.,* 464 N.W.2d 546, 548 (Minn.Ct.App.1990) ("In Minnesota, the well-settled rule is that matters of procedure and remedies are governed by the law of the forum."). If the parties wish for the application of another state's law concerning procedural and remedial matters, they must expressly state it in their agreement. *Schwan's Sales Enters., Inc.,* 476 F.3d at 596 (citing *U.S. Leasing,* 436 N.W.2d at 826).

Thus, the issue is whether ¶ 17.91 is procedural or substantive. Minnesota law governs this determination. *Nesladek,* 46 F.3d at 736;*Zaretsky,* 464 N.W.2d at 548. The Minnesota Supreme Court has not addressed whether ¶ 17.91 is procedural or substantive. However, it has defined substantive law as "that part of law which creates, defines, and regulates rights," as opposed to procedural or remedial law, "which prescribes method of enforcing the rights or obtaining redress for their invasion."*Meagher v. Kavli,* 88 N.W.2d 871, 879-80 (Minn.1958).

Section 17.91 requires parties to resolve their contract disputes by either mediation or arbitration. As such, it defines how the parties will enforce their substantive rights under the contract. The law does not determine the

outcome of a contract dispute-it defines where the dispute will be resolved. Thus, the Court finds ¶ 17.91 applies to the case at hand.

b. *Whether the Contracts Are Void*

Because the Court finds that ¶ 17.91 applies, the Court must determine whether the Contracts are void because they do not contain mediation or arbitration provisions. Entering a contract in violation of a statute does not void the contract per se. *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 92-93 (Minn.2006). Rather, the Court must examine the Contracts to determine whether the illegality has "so tainted the transaction" that enforcement of the Contracts would violate public policy. *Id* . Generally, "a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society."*Id.*

Categorically voiding the Contracts would not serve public policy. There is no indication that the legislature intended that a violation of 17.91 should void a contract. Moreover, allowing a party to avoid their contractual obligations does little to promote the efficiency of litigation or the interests of justice. Finally, the record does not demonstrate that the parties knowingly and intentionally failed to abide by Minnesota law or that illegality permeated the transaction. Thus, the violation of ¶ 17.91 does not void the Contracts. Defendants' argument on this point fails.

2. *Whether the Contracts Are Unconscionable or Contracts of Adhesion*

Defendants argue that the Contracts are void because they are contracts of adhesion and unconscionable. A contract of adhesion is one "drafted unilaterally by the business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere."*Vierkant by Johnson v. AMCO Ins. Co.*, 543 N.W.2d 117, 120 (Minn.Ct.App.1996) (quoting *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn.1982)). A contract is unconscionable if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."*Id.* (citations omitted).

The record does not support Defendants' contentions. Swift provided Defendants a copy of the Contracts several days to weeks before Defendants signed the Contracts. Indeed, William Elias, the majority shareholder of Defendant Elias Farms, had an attorney review his Contract. Moreover, Defendants were longtime hog producers who had specialized knowledge of the industry-including knowledge of the hog markets and Swift's competitors. Defendants had an opportunity to request changes in the Contracts, turn to one of Swift's competitors, or rely on the market for their prices.

Notably, a similar unfairness and adhesion argument was rejected in *Schoenrock v. John Morrell & Co., Inc.,* Nos. 03-848, 03-849, 03-853, 03-854, 2003 WL 21639161, at (D.Minn.2003) (Tunheim, J.). In that case, the hog producers argued that the contract was presented as "take it or leave it" and that the unsophisticated hog producers could not negotiate certain provisions. The court emphasized that there was no evidence that the hog producers attempted to negotiate the provisions or of bad faith. The same is true here. Defendants' argument on this point fails.

3. *Whether Defendants Breached the Contracts*

The crux of Swift's breach of contract claim involves interpretation of Section 6.02 of the Contracts, which states: "If, *at the termination of this Agreement,* there is a debit balance remaining in the Adjustment Account, Seller shall pay to Buyer a cash amount equal to such debit balance."(Corey-Edstrom Aff. Exs. 1-3 ¶ 6.02 (emphasis added).) Swift argues that Section 6.02 requires Defendants to pay Swift the balance due under the adjustment accounts at termination of the Contracts-whether that termination was due to a lapse in time or an affirmative act by a party. Defendants argue that termination could only occur by the affirmative act of a party-and not by the mere lapse in time.

a. *Choice of Law*

As an initial matter, a choice-of-law determination is made on an issue-by-issue basis. *Zaretsky,* 464 N.W.2d at 548. Thus, although

Minnesota law applies to the issue of whether the Contracts were void, it does not follow that Minnesota law will necessarily apply to the substantive breach of contract claim. *Id.* To determine whether a choice of law is necessary, the Court must first determine whether there is an actual conflict between the substantive law of the states. *Jepson v. Gen. Cas. Co.*, 513 N.W .2d 467, 469 (Minn.1994). Where choosing one state's law is "outcome determinative," an actual conflict of law exists. *Id.*

Minnesota and Nebraska courts apply the same general rules of contract interpretation. *Cf., e.g., Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn.1974) ("Where the language used in a contract is plain and unambiguous, there is no opportunity for interpretation of construction"), *with Gast v. Peters*, 671 N.W.2d 758, 763 (Neb.2003) ("When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as to the ordinary or reasonable person would understand them."). Because no conflict of law exists, there is no choice-of-law issue and the Court will apply Minnesota law to Swift's breach of contract claims. *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 356 F.3d 850, 854 (8th Cir.2004) (citing *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521-22 (Minn.1997)).

b. *Contract Interpretation*

The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn.2003). Where there is a written agreement, the intent of the parties is determined from the plain language of the agreement itself. *Metro. Sports Facilities Comm'n v. Gen.* Mills, 470 N.W.2d 118, 123 (Minn.1991). The Court must construe the contract as a whole and give every part effect. *Country Club Oil Co. v. Lee*, 58 N.W.2d 247, 249 (Minn.1953) ("It is an elementary principle of law that a contract must be construed as a whole. The intention of the parties must be gathered from the entire instrument and not from isolated clauses. As far as is reasonably possible it is to be construed so as to harmonize all of its parts.").

Whether a contract is ambiguous is a question of law. *Blackburn, Nickels, & Smith, Inc. v. Erickson,* 366 N.W.2d 640, 643 (Minn.Ct.App.1985). An ambiguous contract is one that, based solely on the plain language, is reasonably susceptible of more than one construction. *Hous. & Redev. Auth. of Chisholm v. Norman,* 696 N.W.2d 329, 337 (Minn.2005). If the contract language is ambiguous, the interpretation of the contract becomes a question of fact and extrinsic evidence may be considered to determine the intent of the parties.*Id.;Trondson v. Janikula,* 458 N.W.2d 679, 681 (Minn.1990).

The Court recognizes that the ordinary definition of "termination" includes an ending by an affirmative act as well as by a lapse in time. For example, Black's Law Dictionary defines "termination" as "(1) the act of ending something; extinguishment ...; (2) the end of something in time or existence; conclusion or discontinuance."*Black's Law Dictionary* 1511 (8th ed.2006); *see also Webster's Third New Int'l Dictionary* 2359 (1986) (defining "termination" as "the act of determining" or "end in time or existence").

However, the plain and clear language of the Contracts, read as a whole and providing full effect to all provisions, limits "termination" to an affirmative act by a party, precipitated by the other party's default. Section 1.01 states that the Contracts "shall continue and remain in full force and effect through December 31, 2004, unless otherwise extended by the parties hereto or unless *terminated in accordance with the terms hereof.*" Sections 9.03 and 9.04 define the "termination rights" of the parties as the right to terminate by providing written notice to the other party in the event of a default. These sections unequivocally limit when and how termination could occur. It is undisputed that Swift did not exercise its termination rights under the Contracts. Rather, the Contracts expired on December 31, 2004. Thus, Section 6 .02, which applies only at the "termination" of the Contracts, does not apply.

Moreover, Swift's reliance on *Carvel Corp. v. Eisenberg,* 692 F.Supp. 182 (S.D.N.Y.1998) and *Illinois Bell Telephone Co. v. Donnelley Corp.,* 595 F.Supp. 1192 (N.D.Ill.1984) is unavailing. *Carvel* involved a license

agreement that contained a non-compete provision prohibiting the licensees from engaging in certain business activities "in the event this License is terminated for any reason."692 F.Supp. at 184. The agreement also stated that the non-compete provision survived "termination, abandonment, or other cancellation" of the agreement. *Id.* After the agreement expired, the licensees continued to operate the store. The licensor sued to enjoin the licensees, arguing that the agreement had terminated by expiration and thus the licensees were restricted from operating the store. The licensees argued that they were not restricted because the agreement had only expired and had not been terminated by an action of a party. *Id.*

The court concluded that the parties intended the non-compete provision to apply in the event of termination by expiration as well as by any other form of termination. *Id.* The court further emphasized that the purpose of the provision was to protect the licensor's trademark and trade secrets once the license relationship had been severed. *Id.* at 185.Thus, there was no reason to conclude that the parties intended to provide the licensor with less protection from competition in the event of termination by expiration than in the event of some earlier termination of the license agreement. *Id.*

Carvel is unpersuasive for two reasons. First, *Carvel* is factually distinguishable, since the agreement in that case contained a clause that required the licensees to discontinue use of the licensor's name and trademark upon "expiration or any earlier termination" of the agreement. *Id.* at 185.The *Carvel* court relied on this provision to infer that the parties understood "expiration" to be a form of "termination." *Id.* There is no such provision in the Contracts at issue. Second, Defendants aver that payment of the adjustment accounts was meant to be a penalty if Defendants defaulted and Swift terminated the Contracts before the contract term expired. Thus, there is a basis for determining that the parties understood that the adjustment account balances would disappear at the expiration of the Contracts. *Carvel* provides little help to Swift.

Illinois Bell Telephone provides even less assistance. In that case, the court found that the plain and ordinary meaning of the phrase "upon termination" "is at termination, or at the end, or when the contract

ends."595 F.Supp. at 1197. However, the contract in Illinois Bell Telephone required the defendant to *assign all un-expired contracts to the plaintiff if termination occurred. Id.* at 1196; *see also id.* at 1199-1200 (requiring the defendant to turn over "all unexpired" contracts on the termination date). Moreover, the specific performance the plaintiff sought included *immediate assignment of all unexpired contracts to the plaintiff. Id.* at 1195.This indicates that the parties contemplated a difference between termination and expiration.

Moreover, the *Illinois Bell Telephone* court merely determined that "upon termination" meant when the contract ends and not when a party gives notice of its intent to terminate. *Id.* at 1197.Indeed, the court expressly distinguished between the "natural expiration of the contract" and a "termination date." *Id.* at 1198;*see also id.*(noting that the plaintiff used "the device of the notice to terminate a little over a month before expiration"). Thus, *Illinois Bell Telephone* actually supports the distinction between contract termination and contract expiration .[5]

The Contracts, interpreted as a whole, unequivocally limited "termination" to affirmative acts by one party, precipitated by the other party's default. Section 6.02 only applied after the Contracts were terminated. It is undisputed that no party exercised its termination rights under the Contracts. Consequently, Section 6 .02 does not apply. The Court grants Defendants summary judgment on Swift's breach of contract claims.

C. Swift's Unjust Enrichment Claims

Swift asserts an unjust enrichment claim against each Defendant. Defendants argue that the claims fail as a matter of law because the rights of

[5]In addition, at least one Minnesota court has distinguished between contract interpretation and contract expiration. *See Upper Midwest Sales Co. v. EcoLab, I*nc., 577 N. W.2d 236, 243 (Minn.Ct.App.1998) (rejecting a Minnesota Franchise Act claim because the statute referred to "termination during their term of the contract, ... which is not the situation in this case [because] the agreements expired by their own terms."); *see also In re Morgan*, 181 B.R. 579, 583-84 (N.D.Ala.1994) (explaining the difference between "expiration" and "termination" of a contract). These decisions highlight the distinction between contract expiration and contract termination.

the parties are governed by the Contracts. "Equitable relief cannot be granted where the rights of the parties are governed by a valid contract."*In re Air Transp. Excise Tax Litig.*, 37 F.Supp.2d 1133, 1143 (D.Minn.1999) (citing *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn.1981). Thus, where the rights of the parties are governed by a valid contract, a claim for unjust enrichment must fail. *N.W. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1392 n. 4 (8th Cir.1997) (citing *Sharp v. Laubersheimer*, 347 N.W .2d 268, 271 (Minn.1984)); *Colangelo v. Norwest Mortg., Inc.*, 598 N.W.2d 14, 19 (Minn.Ct.App.1999). Because unjust enrichment claims concern the same subject matter raised in the breach of contract claims, the Court grants summary judgment to Defendants on Swift's unjust enrichment claims.

D. Swift's Account Stated Claims

Defendants move for summary judgment on Swift's account stated claims."An account stated is a manifestation of assent by a debtor and creditor to a stated sum as an accurate computation of an amount due the creditor."*Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn.Ct.App.1984)."A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent."*Id.* (citing Restatement (2d) Contracts § 282(1) (1981); *Meagher v. Kavli*, 88 N.W.2d 871, 879 (1958)). Undisputed evidence shows that Defendants seasonably disputed the amount they owed under the Contracts. Thus, the Court grants Defendants summary judgment on the account stated claims.

E. Defendants' Breach of Contract Claims

Defendants assert that Swift breached the Contracts by unilaterally modifying the pricing formula from live weight to carcass weight. Both parties move for summary judgment on the breach of contract claims. Swift submits that the changes were made pursuant to the provision that defined Market Price as "the daily bulk top plant-delivered price per live cwt .... as reported by the U.S.D.A. Market News Service ... or any replacement thereof or successor thereto."(Corey-Edstrom Aff. Exs. 1-3 § 6.01.) Because

the USDA live weight price report was not available after March 1, 1999, Swift had to adjust the price paid under the Contracts.

Swift presents expert testimony that Swift made reasonable efforts to address the change in the USDA daily price report from a live weight report to a carcass weight report, and that the changes resulted in prices that were at least equal to or higher than the prices under the original live weight contract prices. Defendants do not present contrary expert testimony. Instead, they argue that the expert report is inconclusive because the expert could not opine with exact certainty due to the lack of evidence in the hog markets and USDA reports. Neither Federal Rule of Evidence 702 nor *Daubert v. Merrell Dow Pharmaceuticals,* Inc., 509 U.S. 579 (1993) and its progeny require that an expert opinion "resolve an ultimate issue of fact to a scientific absolute in order to be admissible."*Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir.2001) (citations omitted). Rather, the relevant inquiry is whether the evidence is sufficiently reliable and relevant to assist the jury's determination of a disputed issue. *Id.* (citations omitted). Defendants' challenges go to the weight of the expert's testimony-not the admissibility. *Clark v. Hendrick,* 150 F.3d 912, 915 (8th Cir.1998) (courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility); *see also Arcoren v. United States,* 929 F.2d 1235, 1239 (8th Cir.1991) (noting that Rule 702 clearly "is one of admissibility rather than exclusion"). Thus, their argument on this point fails.[6]

[6] Defendants also contend that Swift admitted that the Contracts could be modified only by a written agreement and that Swift should have paid an amount to Defendants. They base their contention on Swift's failure to respond timely to their requests for admissions and therefore ask the Court to deem the requests admitted. Generally, a matter is admitted unless the party responding to the request for admissions serves a written answer or objection within thirty days. Fed.R.Civ.P. 36(a). However, the Court "may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits."Fed.R.Civ.P. 36(b)."It does not further the interests of justice to automatically determine all the issues in a lawsuit and enter summary judgment against a party because a deadline is missed." *American Petro, Inc. v. Shurtleff,* 159 F.R.D. 35, 36-37 (D.Minn.1994) (Erickson, Chief Mag. J.) (citation omitted). Moreover, Defendants have failed to point to any way in which they were prejudiced by the untimely responses. Thus, the untimely responses do not warrant the draconian measure that Defendants suggest.

The Contracts linked the prices to the USDA Market News Service "or any replacement thereof or successor thereto." The record shows that Swift modified the price structure only after the USDA ceased issuing the live weight reports on which the parties initially relied. Although the conversion from live weight prices to carcass weight prices was not precise, Defendants present no evidence that the modifications were unreasonable. Moreover, Swift continued to modified the price structure to benefit Defendants, and undisputed expert testimony states that those modifications resulted in higher prices to Defendants over the term of the Contracts. Accordingly, the Court grants Swift summary judgment on Defendants' breach of contract claims.

F. Defendants' Minnesota Prevention of Consumer Fraud Act Claims

Defendants argue that Swift violated the Minnesota Prevention of Consumer Fraud Act, Minnesota Statute § 325F.69, in two ways. First, when Swift notified Defendants that it was unilaterally changing the pricing scheme under the Contracts, Swift quoted the calculation for pricing as "the daily plant-delivered price per live cwt." The original Contracts defined Market Price as based on the "daily bulk top plant-delivered price per live cwt." Defendants surmise that Swift omitted the "top" term because it wished to mislead Defendants into believing their Contract prices were lower so that the new weighted average price would seem similar to the original contract price. Second, Defendants argue that Swift hid from Defendants the fact that it offered a different type of contract to other hog producers-a contract that did not carry an adjustment account.

Defendants do not have standing to bring their § 325F.69 claims. To bring a cause of action under § 325F.69, Defendants must satisfy the requirements of the Private Attorney General Statute, Minnesota Statute § 8.31. *Davis v. U.S. Bancorp,* 383 F.3d 761, 767-68 (8th Cir.2004). Specifically, Defendants must show that their claims benefit the public. *Id.* at 768."Litigation over an alleged misrepresentation that was made only to one person does not advance state interests and enforcement has no public benefit."*Id.* (citations and internal quotations omitted). The Contracts were

executed during one-on-one business transactions. Moreover, Defendants seek compensatory damages-remedies for their exclusive benefit. Thus, the Court grants Swift summary judgment on the § 325F .69 claims.

G. Defendants' Unjust Enrichment Claims

Defendants assert unjust enrichment counterclaims against Swift. However, like the unjust enrichment claims by Swift, the counterclaims are based on rights governed by the Contracts. Thus, the Court grants summary judgment to Swift on the unjust enrichment counterclaims. *N.W. Airlines, Inc.*, 111 F.3d at 1392 n. 4 (citing *Sharp,* 347 N.W.2d at 271);*Colangelo,* 598 N.W.2d at 19.

CONCLUSION

For the foregoing reasons, and based upon all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Summary Judgment (Docket No. 32 in Civil No. 05-2775) is GRANTED in part and DENIED in part;

2. Defendant Elias Farm's Motion for Summary Judgment (Docket No. 27 in Civil No. 05-2775) is GRANTED in part and DENIED in part;

3. Defendant Stan Turbes's Motion for Summary Judgment (Docket No. 26 in Civil No. 05-2776) is GRANTED in part and DENIED in part;

4. Defendant William H. Johnson's Motion for Summary Judgment (Docket No. 26 in Civil No. 05-2777) is GRANTED in part and DENIED in part; and

5. All claims and counterclaims asserted in these cases are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: MICHAEL CLAUDE EDWARDS, D/B/A MICHAEL CLAUDE EDWARDS LIVESTOCK.
P. & S. DOCKET NO. D-06-0020.
Decision and Order.
Filed May 3, 2007.

PS – Custodial account, non-segregated – Prompt payment, failure to make – Records, failed to keep accurate.

Andrew Y. Stanton and Leah C. Battaglioli for GIPSA.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport .

DECISION AND ORDER

This is the second action brought by the Grain Inspection Packers and Stockyards Administration (GIPSA) against the Respondent 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 Respondent filed his Answer on July 3, 2006, claiming that the he purchased the livestock for another individual in the livestock business, Bert Smith, IV[2], and that Smith was liable for the purchase price of the livestock.

A hearing was held in Greensboro, North Carolina on February 21, 2007.3 The Complainant was represented by Andrew Y. Stanton, Esquire,

[1] A consent decision was previously entered against Michael C. Edwards and others in *In re Narrows Livestock Auction Market, Inc*. P & S Docket No. 6880 (March 18, 1988). CX 3 at 15-16

[2] Bert Smith IV has a prior case under this Act. See 61 Agric. Dec. 794 (2002).

[3] At the hearing, four witnesses testified for the Complainant and Exhibits CX 1-42 were

and Leah C. Battaglioli, Esquire, both of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The Respondent who appeared after the hearing had commenced was not represented by counsel.

The Complaint alleged that Respondent violated the Act as follows:

1. In three separate transactions occurring on September 20, 2003, September 26, 2003, and September 29, 2003, respectively, the Respondent purchased livestock from two sellers, for a total of $1,155,967.16, and failed to pay the full amount of the purchase price for the livestock within the time period required by the Act, with the total amount remaining unpaid of $550,325.75,[4] in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

2. On July 8, 2004, Respondent filed an Annual Report of Dealer or Market Agency Buying on Commission (hereinafter "Annual Report") covering the calendar year 2003 that did not accurately reflect the total cost of livestock that Respondent purchased as a dealer during 2003 in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)) and definitions of "dealer" at 7 U.S.C.§ 201(d).

3. The Respondent failed to keep such records as fully and correctly disclosed all transactions involved in his business as required by section 401 of the Act (7 U.S.C. § 221) in that Respondent failed to maintain a separate custodial account in a bank and failed to retain copies of the third-party checks that he used to pay for his livestock purchases in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)).

The Respondent had previously entered into a Consent Decision with the Secretary[5] agreeing to cease and desist from failing to make timely payment for livestock purchases and had been sent a warning letter from Complainant concerning his failure to keep records that fully and correctly disclosed all transactions involved in his business. As a result of Respondent's violations, the Complaint requested that an order be issued

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admitted into evidence. The Respondent testified, but did not submit any documentary evidence at the hearing.

[4] To conform to the proof, this amount was changed at the hearing to at least $520,000.00.

[5] *See* 47 *Agric. Dec.* 650 (1988).

requiring Respondent to cease and desist from the violations of the Act found to exist and suspending Respondent as a registrant[6] under the Act.

The Complainant called Karen Collins, a Senior Auditor with the Packers and Stockyards Program, United States Department of Agriculture in Atlanta, Georgia as the first witness. Her testimony established that in October of 2003, based upon information received by the Program that the Respondent had failed to pay for livestock purchases, she conducted an investigation. Tr. 20-26. After assembling documents from the Packers and Stockyards Program Access Database,[7] Ms. Collins attempted to contact the Respondent, both by mail and telephone, first reaching his ex-wife and eventually the Respondent. A meeting with the Respondent was arranged in Absher, North Carolina, where Ms. Collins hand delivered a second appointment letter which set forth a list of records that she needed for the investigation. CX 41, Tr. 42-45. The Respondent advised her that he only had records from May of 2003 to November of 2003, that he no longer maintained a checking account due to problems with his ex-wife and that many of the requested records had been burned by his ex-wife. Tr. 45. The records that were produced by the Respondent were copied and returned to him and an affidavit was taken from him. CX 8, 10-15, 19-23, 25, 29, 32, 34, 38, Tr. 46-55.

Ms. Collins then proceeded to contact the livestock markets where the Respondent had made purchases,[8] obtained their records of the Respondent's transactions[9] and prepared a summary of those transactions.[10]

The Complainant next introduced the testimony of Rick Barrett, the manager of Abingdon Stockyard and Tri-State Livestock Market who testified concerning his market's transactions with the Respondent and indicated that Abingdon Stockyard had eventually been paid for the

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[6] A dealer must be a registrant under the Act . See 7 U.S.C. § 203.

[7] CX 1-3

[8] CX 6 and CX 7.

[9] CX 5-7, 11, 16-18, 24, 26-28, 30-31, 33, 35-37, 38-40.

[10] CX 9

livestock purchased by the Respondent, but that Tri-State Livestock Market was still owed in excess of $520,000.00. Tr. 111-12. He went on to testify that as a result of the Respondent's failure to pay for his purchases in a timely manner, the markets had to change banks and borrow $1.2 million to cover amounts paid to consigners. Tr. 112-13.

Lloyd Franklin Blair was also called and testified that he used to run the Abingdon market, that he had known the Respondent for 25 or 30 years and that as a disinterested party he had witnessed the Respondent's re-signature on a document on December 11, 2003. Tr. 118-122; CX 8.

The Respondent also testified, reiterating his position that he didn't owe money for the livestock purchases he made, but rather Bert Smith IV was responsible "because he took all of the cattle and all of the money and I didn't get nothing." Tr. 125. He also admitted filing a false Annual Report of Dealer, explaining that he didn't think he had to include the purchases he made for Smith "because I though[t] you had to get a commission to be a dealer." Tr. 127-28, 140.

On the basis of the testimony at the hearing, the documentary evidence received into evidence and the entire record, the allegations contained in the Complaint are amply supported and the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Respondent, Michael Claude Edwards d/b/a Michael Claude Edwards Livestock (hereinafter "Respondent"), is an individual whose address is P.O. Box 783, Jefferson, North Carolina 28640-0783. (Compl. ¶ I(a); Answer ¶ I; CX 1 at 1.) Respondent has been working in the livestock industry for 30 years. CX 2 at 11.

2. Respondent is, and at all times material herein was, engaged in the business of a dealer, buying and selling livestock for his own account and/or the account of others. Compl. ¶ I(b)(1); CX 1 at 1; CX 8 at 2.

3. Respondent is registered with the Secretary of Agriculture as a dealer, buying and selling livestock for his own account. Compl. ¶ I(b)(2); CX 1 at 1; CX 8 at 2. At all times material herein, Respondent had a trust fund agreement, in lieu of a bond, in the amount of $10,000.00. Tr. 29-30.

4. On March 18, 1988, a Consent Decision with Respect to Michael C. Edwards was issued in an administrative disciplinary proceeding which

Complainant had filed against a livestock market and several individuals, including Respondent. *In re: Narrows Livestock Auction Market, Inc.* (P. & S. Docket No. 6880); Compl. ¶ II(a); CX 3 at 14-16. Respondent signed the Consent Decision and agreed to cease and desist from, among other things, failing to pay, when due, the full purchase price of livestock. Compl. ¶ II(a); Answer ¶ II(a); CX 3 at 15-16. Respondent was also suspended as a registrant for three months and assessed a civil penalty in the amount of $5,000.00. Comp. ¶ II(a); Answer ¶ II(a); CX 3 at 16.

5. In a certified letter dated January 26, 2000, served upon Respondent on February 12, 2000, John D. Barthel, Assistant Regional Supervisor of Complainant's Atlanta, Georgia regional office, informed Respondent that a recent investigation of Respondent's records disclosed that Respondent was failing to keep records that fully and correctly disclosed all transactions involved in Respondent's livestock business, in violation of section 401 of the Act (7 U.S.C. § 221). Compl. ¶ II(b); CX 3 at 1-2. Respondent was advised in the certified letter that if he continued to fail to keep and maintain adequate records, he could be subject to formal disciplinary action. Compl. ¶ II(b); CX 3 at 1.

6. In August or early September 2003, Rick Barrett, president, manager, and part-owner of Abingdon Stockyard Exchange, Inc. (hereinafter "Abingdon") and Tri-State Livestock Market (hereinafter "Tri-State"), both located in Abingdon, Virginia (Tr. 105-106), had a meeting in Abingdon's barn with Respondent and Bert Smith IV. Tr. 107. Respondent had asked Mr. Barrett for two separate bid numbers for his purchases; the first bid number would be for Respondent's own livestock purchases and the second bid number would be for livestock purchases that Respondent made for Mr. Smith. Tr. 107-08. Mr. Barrett agreed to the arrangement because Respondent said "[h]e was going to be sure that we got paid for our cattle." Tr. 109. Mr. Barrett would not have agreed to the arrangement with Mr. Smith alone, because Mr. Smith "beat a lot a people out of money in the cattle business. Got a bad reputation." Tr. 109. At the time of the meeting, Respondent had a clearing arrangement with Mr. Smith, which meant that Respondent agreed to be responsible for Mr. Smith's purchases of livestock. Tr. 135-36.

7. In August 2002, by order of the Secretary, Mr. Smith was suspended

as a registrant for a period of 10 years for failing to make payment for livestock purchases. Tr. 148-49; CX 42.

8. In October 2003, Ms. Karen D. Collins, senior auditor with the Atlanta, Georgia regional office of the Packers and Stockyards Program, was assigned by her supervisor, Mr. Robert Schmidt, to investigate whether Respondent had failed to make timely payment for livestock purchases. Tr. 20-21, 25-26.

9. Ms. Collins prepared an appointment letter and mailed it to Respondent. Tr. 39. The appointment letter requested that Respondent make bank records, invoices, and all other records related to Respondent's livestock business available to Ms. Collins. Tr. 42-43; CX 41 at 1.

10a. On or about November 3, 2003, Ms. Collins traveled to Absher, North Carolina, to the place designated by Respondent as the location where his business records were kept. Tr. 43-44. Upon arrival, Ms. Collins hand-delivered the appointment letter to Respondent. Tr. 44; CX 41. Ms. Collins requested that Respondent provide the records set forth in the appointment letter. Tr. 44-45.

10b. Respondent only had records from May 2003 through November 2003. Tr. 45; CX 8 at 7. Respondent gave Ms. Collins some buyers' and sellers' invoices, but Respondent did not have all of the requested records.[11] Tr. 46. In particular, Respondent did not have a checking account or copies of the third-party checks that he used to pay for his livestock purchases. Tr. 45, 142-44; CX 8 at 8; CX 41 at 2. Ms. Collins made copies of the records Respondent did have and returned them to Respondent. Tr. 46.

11. In November and December 2003, Ms. Collins contacted several auction markets to obtain copies of records relating to purchases made by Respondent. Tr. 55-56. Ms. Collins obtained records of Respondent's livestock purchases during the year 2003 from Kilby's Livestock Market, Inc., North Wilkesboro, North Carolina, and CV Livestock, Inc., Woodlawn, Virginia. Tr. 56. Ms. Collins also obtained livestock purchase invoices and banking records from 2003 from Abingdon and Tri-State. Tr. 76, 88.

12. On December 11, 2003, Respondent signed a written statement, witnessed by Lloyd Blair, former manager of Abingdon, in which Respondent acknowledged that he did not disclose to Tri-State that the

[11] *Infra* at page 3.

livestock purchases he made on September 26, 2003, and September 29, 2003, were made for Mr. Smith. Tr. 118-22; CX 8 at 11.

13. On September 20, 2003, Respondent purchased livestock from Abingdon in the total amount of $500,343.22. CX 5 at 1-59. The livestock was purchased for "Oak Grove Cattle Company." CX 5 at 1-59. Respondent uses the name "Oak Grove Cattle Co." when he purchases livestock for Mr. Smith. Tr. 84; CX 5 at 1-59; CX 8 at 4. Respondent used two third-party checks to pay for the livestock. Tr. 81-82; CX 5 at 60-62. The checks were returned for insufficient funds on October 3, 2003. Tr. 81-82; CX 5 at 60-62. Wire transfers to Abingdon from B4 Cattle Company, a name used by Mr. Smith (Tr. 84), were made in various amounts totaling $495,641.41 on October 8, 9, 15, and 22, 2003, November 19, 26, and 28, 2003, December 23, 2003, February 20, 2004, and March 2, 2004, in payment for the September 20, 2003 purchase. Tr. 82-87; CX 4 at 1; CX 5 at 63-106. The balance owed by Respondent for the September 20, 2003, purchase was paid to Abingdon subsequent to March 2004. Tr. 115.

14. On September 26, 2003, Respondent purchased livestock from Tri-State in the total amount of $362,239.80. CX 4 at 1; CX 6 at 1-46. Tri-State was partially paid for the September 26, 2003, purchase with three separate cashier's checks from B4 Cattle Company dated August 20, 2004, August 27, 2004, and September 8, 2004, totaling $110,000.00. Tr. 90-91; CX 4 at 1; CX 6 at 47-55. Tri-State has not received the balance of the purchase price for Respondent's September 26, 2003, purchase. Tr. 111-12.

15. On September 29, 2003, Respondent purchased livestock from Tri-State in the total amount of $293,384.14. CX 4 at 1; CX 7 at 1-18. Tri-State has not received any payment for Respondent's September 29, 2003, purchase. Tr. 93, 111-12.

16. Abingdon and Tri-State did not have a written agreement with Respondent authorizing Respondent to pay for livestock purchases on credit, in excess of the time period set forth in section 409(a) of the Act (7 U.S.C. § 228b(a)). Tr. 110-11.

17. As of the date of the hearing, February 21, 2007, Respondent still owed Tri-State at least $520,000.00 for Respondent's September 26 and 29, 2003, livestock purchases. Tr. 111-12.

18. Abingdon and Tri-State experienced significant financial problems as

a result of Respondent's failure to make timely payment for his livestock purchases. Tr. 112-13. Abingdon and Tri-State were forced to borrow money to cover the approximately $1.2 million worth of checks that they were required to issue to pay the consignors for the livestock purchases Respondent made in September of 2003 for which Respondent did not make timely payment. Tr. 113-14. As a result of Respondent's failure to make timely payment, the bank with which Abingdon and Tri-State had their custodial accounts gave them 30 days to close their accounts and find a new bank. Tr. 113.

19. Respondent submitted an Annual Report to GIPSA covering the calendar year 2003. Tr. 30-32; CX 2 at 1-4. Section 2(a) of the Annual Report seeks information regarding the "total cost of livestock purchased on a dealer basis for registrant's account." CX 2 at 2. In section 2(a) of the Annual Report, Respondent indicated that over the course the year, he had purchased livestock for his own account for a cost of $2,609,963.61. Section 2(b) of the Annual Report seeks information regarding the "total cost of livestock purchased for the accounts of others" and includes the following explanatory language: "Include livestock purchased by registrant but, which was billed directly to customer by seller and paid for by customer to seller." CX 2 at 2. In section 2(b), Respondent indicated that over the course of the year, he had purchased livestock for the accounts of others for a cost of $1,217,858.03, for a total cost of $3,827,821.60.[12] The Annual Report contains Respondent's signature under a statement which reads: "I certify that this report has been prepared by me or my direction, and to the best of my knowledge and belief, this report correctly reflects the operation of the reporting firm." CX 2 at 1.

20. During the approximately three month period from August 1, 2003, through October 27, 2003, Respondent purchased livestock, on a dealer basis, in the amount of $6,635,643.69. Tr. 95-100; CX 9-40.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. In three separate transactions occurring on September 20, 2003, September 26, 2003, and September 29, 2003, respectively, the Respondent

[12] The amounts included by Respondent actually total $3,827,821.64.

purchased livestock from two sellers for a total of $1,155,967.16, and failed to pay the full amount of the purchase price for the livestock within the time period required by the Act, with the total amount remaining unpaid of $550,325.75 (subsequently amended at the hearing to "at least $520,000.00" to conform to the proof) in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

3. On July 8, 2004, Respondent filed an Annual Report of Dealer or Market Agency Buying on Commission (hereinafter "Annual Report") covering the calendar year 2003 that did not accurately reflect the total cost of livestock that Respondent purchased on a dealer basis during 2003 in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)).

4. The Respondent failed to keep such records as fully and correctly disclosed all transactions involved in his business as required by section 401 of the Act (7 U.S.C. § 221) in that Respondent failed to maintain a separate custodial account in a bank and failed to retain copies of the third-party checks that he used to pay for his livestock purchases in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)).

ORDER

1. Respondent, Michael Claude Edwards d/b/a Michael Claude Edwards Livestock, 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:

a. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act; and

b. Filing any false information or report, including any false Annual Report.

2. Respondent shall keep accounts, records, and memoranda which fully and correctly disclose all transactions conducted subject to the Act; specifically Respondent shall maintain a checking account and retain copies of the third-party checks that Respondent uses to pay for his livestock purchases.

3. Respondent is suspended as a registrant under the Act for a period of five (5) years; provided, however, that upon application to the Packers and

Stockyards Program, a supplemental order may be issued terminating the suspension at any time after one year of the suspension term, upon demonstration of circumstances warranting modification of the Order; provided, further, that this Order may be modified upon application to the Packers and Stockyards Program to permit Respondent's salaried employment by another registrant or packer after the expiration of one year of the suspension term and upon demonstration of circumstances warranting modification of the Order.

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

Done at Washington, D.C.

APPENDIX

Pertinent Statutory and Regulatory Provisions

1. Section 301(c) of the Packers and Stockyards Act (7 U.S.C. § 201(c)):

> The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.

2. Section 301(d) of the Packers and Stockyards Act (7 U.S.C. §201(d)):

> The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

3. Packers and Stockyards Act, 7 U.S.C. § 204 (in pertinent part):

> [A]nd whenever, after due notice and hearing the Secretary finds any registrant is insolvent or has violated any provisions of said Act 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.

4. Section 312(a) of the Packers and Stockyards Act (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.

5. Section 401 of the Packers and Stockyards Act (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.

6. Section 409 of the Packers and Stockyards Act (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 not 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.

Section 201.97 (9 C.F.R. § 201.97):

Every packer, live poultry dealer, stockyard owner, market agency, and dealer (except a packer buyer registered to purchase livestock for slaughter only) shall file annually with the

Administration a report on prescribed forms not later than April 15 following the calendar year end or, if the records are kept on a fiscal year basis, not later than 90 days after the close of his fiscal year. The Administrator on good cause shown, or on his own motion, may grant a reasonable extension of the filing date or may waive the filing of such reports in particular cases.

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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: SA HALLAL MEAT, INC., AND MOHAMMED ARSHAD.
P. & S. Docket No. 0-04-0011.
Miscellaneous Order.
March 6, 2007.

PS – Dismissal – Inactivity.

Christopher Young Morales for GIPSA.
Respondent Pro se.
Order by Administrative Law Judge Peter M. Davenport.

ORDER

On January 31, 2007 following a review of the docket, the Complainant was ordered to show cause why this action should not be dismissed for failure to effect service upon the Respondent. On February 28, 2007, counsel for the Complainant filed a Status Update and Response to the Order to Show Cause. As noted in the Order, this is a disciplinary case which was initiated by the filing of a Complaint on July 31, 2004.[1] The Status Update filed by the Complainant acknowledges that all prior service efforts have been unsuccessful, but indicates that efforts are now being made to obtain a current address through the Financial Crimes Information Network in the Department of the Treasury and advise that 2-3 months might be required and that it is possible that additional requests for more time might be required if circumstances beyond counsel's control preclude service before the currently projected target date.

Being sufficiently advise, given the length of time which has passed since the filing of this action and the lack of certainty in obtaining a more current address at which the respondent might be served, it is ORDERED this action is DISMISSED. Copies of this Order will be served upon the Complainant by the hearing Clerk.

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[1] The underlying violations occurred between 1999 and 2000. Notice of the trust fund requirement was given on January 24, 2001.

In re: BERT L. HOOSE, JR., d/b/a HOOSE LIVESTOCK.
P. & S. Docket No. D-04-0018.
Miscellaneous Order.
Filed March 6, 2007.

PS – Dismissal – Non service.

Christopher Young Morales for GIPSA.
Respondent Pro se.
Miscellaneous Order by Administrative Law Judge Peter M. Davenport.

ORDER

On January 31, 2007 following a review of the docket, the Complainant was ordered to show cause why this action' should not be dismissed for failure to effect service upon the Respondent. On February 28, 2007, counsel for the Complainant filed a Status Update and Response to the Order to Show Cause. As noted in the Order, this is a disciplinary case which was initiated by the filing of a Complaint on September 29, 2004. The Status Update filed by the Complainant acknowledges that all prior service efforts have been unsuccessful, but indicates that efforts are now being made to obtain a current address through the Financial Crimes Information Network in the Department of the Treasury and advise that 2-3 months might be required and that it is possible that additional requests for more time might be required if circumstances beyond counsel's control preclude service before the currently projected target date.

Being sufficiently advised, given the length of time which has passed since the filing of this action and the lack of certainty in obtaining a more current address at which the Respondent might be served, it is

ORDERED this action is **DISMISSED,** without prejudice, in the event the Complainant is able to obtain sufficient information in the future to effectuate service upon the Respondent.

Copies of this Order will be served upon the Complainant by the hearing Clerk.

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: LONDON AUCTION BARN, INC.
P. & S. Docket No. D-05-0015.
Default Decision.
Filed February 1, 2007.

PS – Default.

Mary Hobbie for GIPSA.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This proceeding was instituted by the filing of a Complaint under the Packers and Stockyards Act , (7 U.S.C. § 181 *et seq.* hereinafter "the Act") on May 26, 2005, by the Deputy Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent continued to operate as a market agency subject to the requirements of the Act.

A copy of the Complaint was mailed by the Hearing Clerk's Office to the Respondent by certified mail, return receipt requested, which was returned by the United States Postal Service on June 27, 2005, with the notation "unclaimed." The Complaint was then re-mailed by the Hearing Clerk's Office to the Respondent on June 28, 2005, by regular mail as provided by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, hereinafter referred to as the Rules of Practice (7 C.F.R. § 1.147 *et seq*.). Respondent was informed in the accompanying letter of service that an Answer to the Complaint should be filed pursuant to the Rules of Practice and that a failure to answer any allegation in the Complaint would constitute an admission of that allegation. The Respondent failed to file an Answer within the time prescribed in the Rules of Practice; thus the material facts alleged in the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as Findings of Fact and this Decision and Order

is issued pursuant to section 1.139 of the Rule of Practice, 7 C.F.R. §1.139.

FINDINGS OF FACT

1. London Auction Barn, Inc., hereinafter referred to as Respondent, is a corporation organized and existing under the laws of the State of Arkansas. Respondent's business mailing address is 11096 Highway 64 West, London, Arkansas 72847-0277.

2. Respondent was at all times material herein:

(a) Engaged in the business of conducting and operating as a market agency selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis.

3. Respondent was notified by certified letter dated June 28, 2004, that its practice of operating without a bond or bond equivalent constituted a violation of the Packers and Stockyards Act and was instructed to take immediate action to bring its operation into compliance with the Act.[1] Further, Respondent was notified that, if it continued its operations as a market agency under the Act after that date without providing adequate bond coverage or its equivalent, Respondent would be in violation of 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, 201.30). Notwithstanding this notice, Respondent continued to engage in the business of selling livestock on a commission basis without maintaining an adequate bond or its equivalent.

4. On or about the date and in the transactions listed below, Respondent engaged in the business of selling livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent.

[1] On July 01, 2004, Respondent signed and dated a return receipt for the certified letter.

Seller	Purchase Date	No. of Live-stock	Invoice Amount	Check Amount
Jim Bearden	11/13/04	1	$75.00	$50.50
Steve Crossno	11/13/04	3	$315.00	$167.50
James Tharen	11/13/04	1	$700.00	$610.50
Terry Bestal	11/13/04	3	$230.00	$95.00
Belva Crouch	11/13/04	5	$1,370.00	$1,067.00
Jack Dwyer	11/13/04	1	$1,050.00	$923.00
Larry Hard-Castle	11/13/04	1	$370.00	$316.00
Chris Hicks	11/13/04	1	$435.00	$349.50
Bill Jeffrey	11/13/04	1	$430.00	$370.00
Pat Knight	11/13/04	1	$200.00	$138.00
Brenda Maness	11/13/04	2	$330.00	$270.00
Gary	11/13/04	1	P/O	N/A

Seller	Purchase Date	No. of Live-stock	Invoice Amount	Check Amount
Miller				
Tammy Miller	11/13/04	2	$160.00	$117.00
Bill Mitchell	11/13/04	1	$300.00	$253.00
Justin Nalls	11/13/04	5	$1,110.00	$908.00
Fred Parker	11/13/04	8	$1,210.00	$950.50
Charlotte Sayers	11/13/04	2	$760.00	$602.50
DonSmith	11/13/04	1	$475.00	$410.50
Jane Stapleton	11/13/04	2	$835.00	$670.00
Bobby Wagoner	11/13/04	3	$815.00	$640.00
Bonnie Williams	11/13/04	2	$155.00	$60.50

Buyer	Purchase Date	No. Of Livestock	Invoice Amount	Check No.
Snowball	11/13/04	3	$980.70	Unlisted

Buyer	Purchase Date	No. Of Livestock	Invoice Amount	Check No.
Sylvia	11/13/04	2	$450.00	Unlisted
Billy	11/13/04	2	$1,144.55	8864
Daryl	11/13/04	1	$500.00	Paid by
Gary & April	11/13/04	1	$553.00	1053
Justin	11/13/04	2	$489.00	Unlisted
No.2000	11/13/04	5	$1,665.00	Unlisted
Jack	11/13/04	5	$816.50	2594
No.1500	11/13/04	3	$275.00	Unlisted
Pat	11/13/04	1	$292.00	5864
No. 408	11/13/04	1	$120.00	Unlisted
Michael	11/13/04	1	$1,050.00	537
Jim	11/13/04	1	$1,030.25	1014
Dean Baker	11/13/04	1	$574.86	3400
No. 115	11/13/04	1	$130.00	Unlisted
Chuck	11/13/04	1	$95.00	Paid by
Aaron	11/13/04	1	$200.00	1761
No. 142	11/13/04	1	$150.00	Unlisted
Chad	11/13/04	1	$75.00	Illegible

CONCLUSIONS OF LAW

By reason of the above Findings Of Fact, Respondent is found to have willfully violated Section 312(a) (7 U.S.C. § 213(a)) and Sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30).

ORDER

1. The Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its operation subject to the Act, shall **CEASE** and **DESIST** from engaging in business in any capacity for which bonding is required under the Act and the Regulations promulgated thereunder, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the Regulations.

2. The Respondent is suspended as a registrant under the Act until such time as it complies with the bonding requirements under the Act and the Regulations. When and at such time as the Respondent demonstrates that it is in full compliance with such bonding requirements, an appropriate Order may be issued terminating this suspension.

3. In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b), the Respondent is assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00), which shall be paid by certified check or money order made payable to the Treasurer of the United States.

4. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondent, if not appealed to the Judicial Officer in accordance with the Rules of Practice (7 C.F.R. § 1.145).

In re: SAMMY AND WENDY SIMMONS, d/b/a PEOPLES LIVESTOCK OF CARTERSVILLE.
P. & S. Docket No. D-05-0018.
Default Decision (CORRECTED COPY).
Filed April 18, 2007.

PS – Default.

Christopher Young-Morales for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport .

DEFAULT DECISION AND ORDER

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq*.), (hereinafter "the Act"). On July 14, 2005, a Complaint was issued against Respondents alleging that Respondents sold livestock on a commission basis, and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

The Complaint further alleged that Respondents failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43), in the amount of $ 5,902.20, in violation of section 312(a) (7 U.S.C. §§ 213(a)) and section 201.43 of the regulations (9 C.F.R.§ 201.43).

On August 15, 2005, Respondents' Answer was filed. Respondents stated in their Answer, *inter alia*, that:

> We do operate People Livestock of Cartersville as a sole proprietorship in the state of Georgia and have done so since October 2000. We are a market agency registered with the Dept. Of Agriculture and sell livestock on a commission basis. We do admit our previous bank, Unity National Bank, returned the nine checks listed on page 2 of the complaint totaling $5,902.20 unpaid.

Based on the admissions contained in Respondents' Answer,[1] Complainant has moved for a decision without hearing or further procedure in this case pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (the "Rules of Practice"). *See* 7 C.F.R. § 1.130 *et seq.* *See In re: Pryor Livestock Market, Inc., Jim W. Deberry and Douglas A. Landers*, 56 Agric. Dec. 843, 845 (January 7, 1997).

Respondents have admitted in their Answer the material allegations of the Complaint, specifically that Respondents sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented. Respondents further admitted in their answer that they failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43), in the amount of $5,902.20, the exact dollar amount listed in the disciplinary complaint filed against Respondents on July 14, 2005.

In proceedings before the Secretary, it is unnecessary to hold a hearing when there is no material fact in dispute, and no valid defense is presented. *See, e.g., Veg-Mix, Inc. v. United States Department of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987). No material fact is at issue in this case, and the Secretary has consistently held that both the issuance of insufficient funds checks in purported payment, and failure to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis within the time period required by Section 201.43 of the regulations, are unfair and deceptive practices in violation of 312 (a). *In re: Joshua L. Martin d/b/a Martin Livestock*, 64 Agric. Dec. 919 (January 11, 2005)*; In re: Sarcoxie Community Sales, Inc.*, 47 Agric. Dec. 1290, 1300 (1988); *In re: C.J. Edwards*, 37 Agric. Dec. 1880 (1978).

Respondents' primary defenses to the factual allegations in this case are

[1]Sammy and Wendy Simmons both signed the answer.

that the violations were not willful and that the violations were outside of Respondents' control. These defenses are without merit.

Under the Administrative Procedure Act (APA) when license suspension or termination is a sanction, the violator must have notice and an opportunity to cure except in cases in which the violating action is willful. 5 U.S.C. § 558(c). Notice is not required in this proceeding because Complainant does not seek the suspension or termination of Respondents' registration; however, assuming, *arguendo*, that Complainant did seek suspension or termination of Respondents' registration in this case, notice of the violations is not required here because Respondents have previously received notice in writing of the violations with opportunity to demonstrate or achieve compliance. *See* 5 U.S.C. § 558(c)*; In re: Jeff Palmer*, 50 Agric. Dec. 1762, 1780 (1991). There, the Judicial Officer wrote:

> It is clear that only one notice is required by section 9(b) of the Administrative Procedure Act [(5 U.S.C. § 558(c)], that is, once a licensee has been adequately warned, if he subsequently violates the Act, the agency may proceed to suspend his license without any further warning, notice, or opportunity to demonstrate informally that he did not violate the Act.

In re: Jeff Palmer 50 Agric. Dec. at 1782.

In a prior case, Respondent Sammy Simmons consented to the entry of a cease and desist order that restrained Respondent from paying for livestock with checks returned for non-sufficient funds. *See In re: Samuel Gail Simmons d/b/a Sammy Simmons Livestock*, P&S Docket No. D-94-15 (August 31, 1995). This prior order serves as notice to Respondents of the violation.[2]

Given the prior history of violation as evidenced by the above Consent Decision, Respondents' violations will be found willful within the meaning of that term in USDA precedent. *In re: D.W. Produce*, 53 Agric. Dec. at 1678 (a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute). The Respondents knew or should have known that they had insufficient funds to

[2] In re: Jeff Palmer, 50 Agric. Dec. at 1782.

write checks in purported payment for the net proceeds due from the sale price of livestock on a commission basis and accordingly constitute violations that were willful. *See In re: D.W. Produce*, 53 Agric. Dec. at 1678.

Respondents Answer suggests that they issued insufficient funds checks and failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations, because "they did not receive checks from the buyers quickly enough." As the damage done to livestock producers is the same regardless of the reasons underlying Respondent's payment violations, their claim is immaterial. *In re Great American Veal*, 48 Agric. Dec. 183, 211 (1989). The Judicial Officer has addressed similar excuses for non-payment under the Perishable Agricultural Commodities Act: "[e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered . . willful." *In re: The Caito Produce Co.*, 48 Agric. Dec. 602, 614 (1989).

Under the admitted facts of this case, Respondents have committed serious violations of the Act by issuing insufficient funds checks and failing to remit, when due, the amount of the net proceeds due from the sale price of livestock on a commission basis for livestock in nine transactions. *In re: Joshua L. Martin d/b/a Martin Livestock*, 64 Agric. Dec. 919 (January 11, 2005); *In re: Sarcoxie Community Sales, Inc*, 47 Agric. Dec. 1290, 1300 (1988); *In re: C.J. Edwards*, 37 Agric. Dec. 1880 (1978).

Accordingly, Complainant's motion will be granted and the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Sammy and Wendy Simmons, d/b/a Peoples Livestock of Cartersville (hereinafter "Respondents"), are partners in a partnership organized and existing under the laws of Georgia, doing business in the State of Georgia. Its business mailing address is P.O. Box 964, Cartersville, Georgia 30120. Respondents' full names are Samuel Gail Simmons and Wendy Dawn Simmons.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of conducting and operating Peoples Livestock of Cartersville, a posted stockyard subject to the provisions of the Act;

(b) Engaged in the business of a market agency selling livestock on a commission basis;

(c) Registered with the Secretary of Agriculture as a market agency selling livestock on a commission basis.

3. Respondents, between the dates October 25, 2003 and November 1, 2003, sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

4. Respondents failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis in the transactions described in paragraph 3, above, in the amount of $ 5,902.20, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43).

5. Respondent Sammy Simmons previously consented to the entry of a Consent Decision which contained cease and desist provisions from further violations of the Act.

6. Respondents operate a relatively sizeable business, selling at least 200 head of livestock per week according to their Answer.

CONCLUSIONS OF LAW

1 The Secretary has jurisdiction in this matter.

2 For the reasons set forth in the above Findings of Fact, the Respondents willfully violated the provisions of the Act.

ORDER

1. The Respondents Sammy and Wendy Simmons, their agents and employees, directly or through any corporate or other device, in connection with all their activities subject to the Act, shall cease and desist from 1)

issuing checks to consignors or shippers of such livestock which are returned unpaid by the bank upon which they were drawn because Respondents does not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented, and 2) failing to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43).

2. Pursuant to Section 312 (b) of the Act (7 U.S.C. § 213(b)), Respondents are assessed a civil penalty in the amount of $6,000.00, payable to the United States Treasury within 60 days of the effective date of this Order. Such amount should be paid by certified check or money order and mailed to:

Christopher Young-Morales, Esquire
Office of the General Counsel
Room 2309 South
1400 Independence Avenue, SW
Washington, D.C. 20250

The payment should indicate that it is in reference to P & S Docket D-05-0018.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

In re: BOBBY T. TINDEL.
P. & S. Docket No. D-07-0030.
Default Decision.
Filed April 24, 2007.

PS – Default.

Leah C. Battagiolio. for GIPSA.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson

Decision Without Hearing by Reason of Default

This disciplinary proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.; hereinafter "Act"), by a Complaint filed on November 21, 2006, by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (hereinafter "Complainant"), alleging that the Respondent willfully violated the Act.

The Complaint and a copy 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") were served on Respondent by certified mail on November 29, 2006. Respondent was informed in a letter of service 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 the material allegations contained in the Complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period prescribed 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 issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Bobby T. Tindel (hereinafter "Respondent"), is an individual whose mailing address is P.O. Box 53, Chandler, Texas, 75758.

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

(a) Engaged in the business of buying and selling livestock in commerce as a dealer for his own account; and

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

3. Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions described below, purchased livestock and failed to pay, when due, the full purchase price of the livestock.

Purchase Date	Seller	No. of Head	Due Date	Amount Due	Date Paid	Check No.	Check Amount	Days Late
1/18/06	Anderson County Livestock	9	1/19/06	$4,705.40	1/25/06	2917	$4,705.40	6
1/25/06	Anderson County Livestock	3	1/26/06	$2,604.10	2/1/06	2920	$2,604.10	6
2/1/06	Anderson County Livestock	4	2/2/06	$2,320.95	2/8/06	2927	$2,320.95	6
2/8/06	Anderson County Livestock	3	2/9/06	$1,818.00	2/15/06	2942	$1,818.00	6
2/15/06	Anderson County Livestock	15	2/16/06	$8,441.80	2/22/06	2947	$8,441.80	6
2/22/06	Anderson County Livestock	10	2/23/06	$5,195.95	3/1/06	2953	$5,195.95	6
3/1/06	Anderson County Livestock	10	3/2/06	$6,594.60	3/15/06	2960	$6,594.60	13
3/15/06	Anderson County Livestock	1	3/16/06	$420.00	4/5/06	2966	$420.00	20
3/22/06	Anderson County Livestock	2	3/23/06	$855.00	4/5/06	2976	$855.00	13
4/5/06	Anderson County Livestock	7	4/6/06	$3,751.80	4/12/06	2987	$3,751.80	6
4/12/06	Anderson County Livestock	8	4/13/06	$3,700.20	4/19/06	2993	$3,700.20	6
1/6/06	Athens Comm'n Co.	28	1/9/06	$14,876.43	1/13/06	2906	$14.876.43	4
1/13/06	Athens Comm'n Co.	14	1/17/06	$6,855.80	1/20/06	2911	$6,855.80	3
1/20/06	Athens Comm'n Co.	6	1/23/06	$3,210.25	1/27/06	2916	$3,210.25	4

Purchase Date	Seller	No. of Head	Due Date	Amount Due	Date Paid	Check No.	Check Amount	Days Late
1/27/06	Athens Comm'n Co.	5	1/30/06	$2,441.15	2/3/06	2924	$2.441.15	4
2/17/06	Athens Comm'n Co.	6	2/21/06	$3,463.00	2/24/06	2948	$4,817.65	3
2/17/06	Athens Comm'n Co.	2	2/21/06	$1,354.65	2/24/06	2948	$4,817.65	3
2/24/06	Athens Comm'n Co.	10	2/27/06	$7,002.50	3/3/06	2956	$7,002.50	4
3/3/06	Athens Comm'n Co.	13	3/6/06	$7,404.70	3/10/06	2961	$7,404.70	4
3/24/06	Athens Comm'n Co.	1	3/27/06	$749.00	4/14/06	2949	$749.00	18
3/31/06	Athens Comm'n Co.	2	4/3/06	$1,192.20	4/7/06	2982	$1,192.20	4
4/7/06	Athens Comm'n Co.	9	4/10/06	$5,098.85	4/14/06	2989	$5,098.85	4
4/14/06	Athens Comm'n Co.	16	4/17/06	$8,502.33	4/21/06	2996	$8,502.33	4

Conclusions

By reason of the facts found in Findings of Fact 3, Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent, 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 failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

Pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is assessed a civil penalty in the amount of One Thousand Five Hundred dollars ($1,500.00).

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, D.C.

In re: DANE FINE, d/b/a DANE FINE MEAT PACKING.
P. & S. Docket No. D-07-0042.
Default Decision.
Filed June 12, 2007.

PS – Default.

Gary F. Ball for GIPSA.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*; hereinafter the "Act"), instituted by a Complaint filed on December 14, 2006 by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent violated the Act. The Complaint alleged that Respondent failed to pay, when due, for 611 head of livestock involving twenty-five livestock transactions.

A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on December 15, 2006 and was received by the Respondent on December 19, 2006. The time for filing an Answer to the

Complaint expired on January 8, 2007. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant, the following Findings of Fact, Conclusions of Law and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.131 *et seq*; hereinafter the "Rules of Practice").

FINDINGS OF FACT

1. Dane Fine, doing business as Dane Fine Meat Packing, hereinafter referred to as "Respondent," is an individual doing business in the Commonwealth of Pennsylvania whose mailing address is 1080 Butler Road, Saxonburg, Pennsylvania 16056.

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

(a) Engaged in the business buying livestock in commerce for the purpose of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Respondent, during the period May 26, 2005 through June 27, 2005, purchased 611 head of livestock and failed to pay, when due, $105,885.46 associated with such livestock purchases.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. By reason of the foregoing Findings of Fact, Respondent has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192, 228b).

ORDER

1. Respondent Dane Fine, his agents and employees, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

2. In accordance with section 203(b) of the Act (7 U.S.C. § 193),

Respondent Dane Fine is assessed a civil penalty of One Thousand Five Hundred Dollars ($1,500.00).

3. This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 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.

Done at Washington, DC

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PACKERS AND STOCKYARDS ACT

Consent Decisions

Tim Dietzler, PS D-06-0015, 01/17/07.

Atlantic Veal and Lamb Inc. Philip Peerless and Maretin Weiner, PS D-07-0029, 2/7/07.

Charles Ronald Powell d/b/a Ronnie Powell Livestock, PS D-07-0031, 2/7/07.

Choate's Stockyard, Inc. and Garry E. Richerson, PS-D-05-0010, 02/13/07.

Pork King Packing, Inc. and Thomas Mileski, PS- D-06-0023, 2/20/07.

Herman W. (Billy) Schwertner, PS-D-07-0055, 2/27/07.

Wharton Livestock Auction, Inc. and Herman W. Billy) Schwertner PS-D-07-0055, 02/28/07.

Central Livestock Corporation; and Russell M. Frederick, an individual, d/b/a Atlas Cattle Company, PS - D-07-0052, 03/15/07.

Edward M. Baker d/b/a Baker & Baker Livestock, PS D-07-0032, 03/16/07.

J. Edward Diehl, PS D-07-0043, 03/20/07.

Aplington Sales Commission, Inc., PS - D-06-0022, 03/21/07.

Leroy Keaton and Todd Keaton d/b/a Keaton Cattle Co., PS D-07-0034, 04/05/07.

United Producers, Inc., PS D-07-0079, 06/01/07.

Gary Goldberger, PS D-06-0016, 06/19/07

Madison Livestock Sales, LLC, PS D-06-0024, 06/12/07.

Randall Bond, PS D-07-0087, 6/27/07.