

Sammy Simmons and Wendy Simmons
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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

**In re: SAMMY SIMMONS AND WENDY SIMMONS, D/B/A
PEOPLE'S LIVESTOCK OF CARTERSVILLE.**

Docket No. D-12-0131.

Decision and Order.

Filed September 20, 2012.

PS-D—Sanctions.

Jonathan D. Gordy, Esq. for Complainant.

Respondents, pro se.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 21, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) Sammy Simmons and Wendy Simmons violated the cease and desist order issued in *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007); (2) during the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and, in purported

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payment of the net proceeds of those sales, issued at least 50 checks to consignors for livestock consigned to Sammy Simmons and Wendy Simmons' market for sale which checks were returned unpaid by the bank upon which the checks were drawn because Sammy Simmons and Wendy Simmons did not have and maintain sufficient funds on deposit and available, in the accounts upon which those checks were drawn, to pay the checks when presented, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.43; (3) during the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and failed to remit, when due, the net proceeds from the sale price of those livestock, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.43; and (4) as of January 31, 2009, Sammy Simmons and Wendy Simmons had a deficiency in their custodial account of \$104,710.11, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.42.¹

The Hearing Clerk served Sammy Simmons and Wendy Simmons with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 25, 2012.² Neither Sammy Simmons nor Wendy Simmons filed an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated February 27, 2012, to Sammy Simmons and Wendy Simmons informing them that an answer to the Complaint had not been filed within the time prescribed by the Rules of Practice. Neither Sammy Simmons nor Wendy Simmons responded to the Hearing Clerk's February 27, 2012, letter.

On March 27, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which he provided the parties 15 days within which to show cause why a default decision should not be entered. On April 12, 2012, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing by Reason of Default and a proposed Decision Without Hearing by Reason of Default. On May 8, 2012, Sammy Simmons and Wendy Simmons filed a response to

¹ Compl. ¶¶ II-V.

² Hearing Clerk's Memorandum To The File, dated January 25, 2012, regarding service on Wendy Simmons; Hearing Clerk's Memorandum To The File, dated January 25, 2012, regarding service on Sammy Simmons.

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the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default stating they were no longer in the business of selling livestock on commission and they were unable to pay the \$58,000 civil penalty requested in the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default.

On May 30, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Sammy Simmons and Wendy Simmons willfully violated 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. §§ 201.42-43, as alleged in the Complaint; (2) ordering Sammy Simmons and Wendy Simmons to cease and desist from violations of the Packers and Stockyards Act and the Regulations; (3) suspending Sammy Simmons and Wendy Simmons as registrants under the Packers and Stockyards Act for 5 years; and (4) assessing Sammy Simmons and Wendy Simmons a \$58,000 civil penalty.³

On August 8, 2012, Sammy Simmons and Wendy Simmons appealed the Chief ALJ's Default Decision and Order to the Judicial Officer. On September 7, 2012, the Deputy Administrator filed Complainant's Response to Respondent's [sic] Appeal Petition. On September 14, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Default Decision and Order as the final agency decision.

DECISION

Statement of the Case

Neither Sammy Simmons nor Wendy Simmons filed a timely answer to the Complaint. Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139,

³ Chief ALJ's Default Decision and Order at 4-5.

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the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Sammy Simmons is an individual residing in Cartersville, Georgia.
2. At all times material to this proceeding, Sammy Simmons:
 - (a) was a 51% owner and operator in the general partnership of People's Livestock of Cartersville;
 - (b) was registered, with Wendy Simmons, with the United States Department of Agriculture as a market agency selling livestock on commission;
 - (c) was responsible, with Wendy Simmons, for the day-to-day management, operation, and control of People's Livestock of Cartersville;
 - (d) purchased and sold livestock;
 - (e) sold livestock on commission; and
 - (f) was a market agency and dealer within the meaning of the Packers and Stockyards Act and the Regulations.
3. Wendy Simmons is an individual residing in Cartersville, Georgia.
4. At all times material to this proceeding, Wendy Simmons:
 - (a) was a 49% owner and office manager in the general partnership of People's Livestock of Cartersville;

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(b) was registered, with Sammy Simmons, with the United States Department of Agriculture as a market agency selling livestock on commission;

(c) was responsible, with Sammy Simmons, for the day-to-day management, operation, and control of People's Livestock of Cartersville; and

(d) was a market agency within the meaning of the Packers and Stockyards Act and the Regulations.

5. In *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007), Sammy Simmons and Wendy Simmons were ordered to cease and desist from:

(a) issuing checks to consignors or shippers of livestock that are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have or maintain sufficient funds on deposit and available, in the account upon which the checks are drawn, to pay the checks when presented; and

(b) failing to remit the full amount of the net proceeds due from the sale price of livestock sold on commission within the time period required by 9 C.F.R. § 201.43.

6. During the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and, in purported payment of the net proceeds of those sales, issued at least 50 checks to consignors for livestock consigned to Sammy Simmons and Wendy Simmons' market for sale which checks were returned unpaid by the bank upon which the checks were drawn because Sammy Simmons and Wendy Simmons did not have and maintain sufficient funds on deposit and available, in the accounts upon which those checks were drawn, to pay the checks when presented.

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7. Sammy Simmons and Wendy Simmons, in the transactions described in Finding of Fact number 6, failed to remit, when due, the net proceeds due from the sale price of livestock sold on commission.

8. As of January 31, 2009, Sammy Simmons and Wendy Simmons had outstanding checks drawn on their custodial account in the amount of \$125,019.33, and had to offset those checks, a balance in their custodial account of negative \$3,205.13, proceeds receivable of \$8,485.75, and deposits in transit in the amount of \$15,028.60, resulting in a deficiency of \$104,710.11.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Sammy Simmons and Wendy Simmons willfully violated 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. §§ 201.42-.43.
3. Sammy Simmons and Wendy Simmons willfully violated the cease and desist order issued in *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007).

Sammy Simmons and Wendy Simmons' Appeal Petition

Sammy Simmons and Wendy Simmons raise one issue in their appeal petition. Sammy Simmons and Wendy Simmons request that I reduce or eliminate the \$58,000 civil penalty assessed by the Chief ALJ because they are not able to pay a civil penalty of \$58,000.

The Secretary of Agriculture's sanction policy is as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

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In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993). Pursuant to 7 U.S.C. § 213(b), the Secretary of Agriculture must also consider “the gravity of the offense, the size of the business involved, and the effect of the penalty on the person’s ability to continue in business.”

Sammy Simmons and Wendy Simmons assert they no longer own or manage People’s Livestock of Cartersville, and they no longer sell livestock on commission;⁴ therefore, when reviewing the \$58,000 civil penalty assessed by the Chief ALJ, I do not consider the size of Sammy Simmons and Wendy Simmons’ business or the effect of the civil penalty on Sammy Simmons and Wendy Simmons’ ability to continue in business.

As for the gravity of Sammy Simmons and Wendy Simmons’ violations of the Packers and Stockyards Act and the Regulations, I find their violations were serious. Sammy Simmons and Wendy Simmons were market agencies who had a duty to remit to livestock consignors the net proceeds due from the sales price of livestock sold on commission. Sammy Simmons and Wendy Simmons were in a position of trust and the funds they held were trust funds.⁵ In addition, Sammy Simmons and Wendy Simmons’ failure, as market agencies, to maintain their custodial account in accordance with 9 C.F.R. § 201.42 is an unfair and deceptive practice in violation of the Packers and Stockyards Act.⁶ Sammy Simmons and Wendy Simmons violated the trust of livestock sellers by (1) issuing at least 50 insufficient funds checks, (2) failing to remit, when due, the net proceeds due from the sale price of livestock sold on commission, and (3) allowing a \$104,710.11 deficiency in their custodial account.

⁴ Sammy Simmons and Wendy Simmons’ Appeal Pet.; Sammy Simmons and Wendy Simmons’ response to the Deputy Administrator’s Motion for Decision Without Hearing by Reason of Default.

⁵ 9 C.F.R. § 201.42.

⁶ *In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 398 (1989); *In re Harry C. Hardy*, 33 Agric. Dec. 1383, 1400 (1974).

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Moreover, Sammy Simmons violated two previously issued cease and desist orders and Wendy Simmons violated one previously issued cease and desist order. In *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007), Sammy Simmons and Wendy Simmons were ordered to cease and desist from: (1) issuing checks to consignors or shippers of livestock that are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have or maintain sufficient funds on deposit and available, in the account upon which the checks are 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 sold on commission within the time period required by 9 C.F.R. § 201.43. In that 2007 proceeding, Sammy Simmons and Wendy Simmons were assessed a \$6,000 civil penalty for their issuance of nine non-sufficient funds checks. In *In re Samuel Gail Simmons*, 54 Agric. Dec. 1209 (1995), Sammy Simmons was ordered to cease and desist from paying for livestock with checks returned for non-sufficient funds.⁷

In light of the number and gravity of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act and the Regulations, Sammy Simmons and Wendy Simmons' violations of previously issued cease and desist orders, and the Deputy Administrator's recommendation that the Chief ALJ assess Sammy Simmons and Wendy Simmons a \$58,000 civil penalty,⁸ I conclude the \$58,000 civil penalty assessed by the Chief ALJ is justified by the facts. Moreover, the civil penalty is warranted in law. The maximum civil penalty that the Secretary of Agriculture may assess for each of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act is \$11,000.⁹ Therefore, I reject Sammy Simmons and

⁷ See *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731, 734 (2007) (discussing the cease and desist order issued in *In re Samuel Gail Simmons*, P&S Docket No. D-94-15 (Aug. 31, 1995)).

⁸ Deputy Administrator's Motion for Decision Without Hearing by Reason of Default at second unnumbered page.

⁹ The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) is \$10,000 (7 U.S.C. § 213(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of

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Wendy Simmons' request that I reduce or eliminate the \$58,000 civil penalty assessed by the Chief ALJ.

For the foregoing reasons, the following Order is issued.

ORDER

1. Sammy Simmons and Wendy Simmons, their agents and employees, directly or indirectly through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

a. failing to pay the full amount of the net proceeds due from the sale price of livestock sold on commission, within the time period required by 9 C.F.R. § 201.43;

b. issuing checks to consignors or shippers of livestock which are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have and maintain sufficient funds on deposit and available, in the accounts upon which the checks are drawn, to pay the checks when presented; and

c. failing to maintain a Custodial Account for Shippers' Proceeds in conformity with 9 C.F.R. § 201.42.

Paragraph 1 of this Order shall become effective 5 days after service of this Order on Sammy Simmons and Wendy Simmons.

2. Sammy Simmons and Wendy Simmons are suspended as registrants under the Packers and Stockyards Act for a period of 5 years.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Sammy Simmons and Wendy Simmons.

Agriculture. During the period December 1, 2008, to January 31, 2009, when Sammy Simmons and Wendy Simmons violated the Packers and Stockyards Act and the Regulations, the maximum civil penalty for each violation of 7 U.S.C. § 213(a) was \$11,000 (7 C.F.R. § 3.91(b)(6)(iv) (2010)).

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3. Sammy Simmons and Wendy Simmons are assessed a \$58,000 civil penalty. Payment of the civil penalty shall be made by certified check or money order, made payable to the “Treasurer of the United States,” and sent to:

USDA-GIPSA
PO Box 790335
St. Louis, Missouri 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Sammy Simmons and Wendy Simmons who shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0131.

RIGHT TO JUDICIAL REVIEW

Sammy Simmons and Wendy Simmons have the right to seek judicial review of this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.¹⁰ The date of entry of the Order in this Decision and Order is September 20, 2012.

¹⁰ 28 U.S.C. § 2344.

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**In re: GOLDEN WEST CATTLE CO., LLC AND MICHAEL
KASTNER.**

Docket No. D-12-0206.

Decision and Order.

Filed December 18, 2012.

PS-D.

Ciarra Toomey, Esq. for Complainant.

Michael Newman, Esq. for Respondents.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 26, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) on or about June 28, 2010, Golden West Cattle Co., LLC [hereinafter Golden West], under the direction, management, and control of Michael Kastner, in connection with its operations subject to the Packers and Stockyards Act, issued checks in payment for livestock purchases that were returned unpaid by the bank upon which the checks were drawn because Golden West did not have and maintain sufficient funds on deposit and available in the

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account upon which the checks were drawn to pay the checks when presented, in willful violation of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43; and (2) on or about June 21, 2010, and June 28, 2010, Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, purchased livestock and failed to pay the full amount of the purchase price for the livestock within the period required by the Packers and Stockyards Act, in willful violation of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43.¹

The Hearing Clerk served Golden West and Mr. Kastner with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on March 30, 2012.² Neither Golden West nor Mr. Kastner filed an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated May 16, 2012, to Golden West and Mr. Kastner informing them that an answer to the Complaint had not been filed within the time prescribed by the Rules of Practice. Neither Golden West nor Mr. Kastner responded to the Hearing Clerk's May 16, 2012, letter.

On May 18, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which he provided the parties 15 days within which to show cause why a default decision should not be entered. On June 4, 2012, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing By Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing By Reason of Default [hereinafter Proposed Default Decision]. Neither Golden West nor Mr. Kastner filed a response to the Chief ALJ's Show Cause Order.

The Hearing Clerk served Golden West and Mr. Kastner with the Deputy Administrator's Motion for Default Decision, the Deputy Administrator's Proposed Default Decision, and the Hearing Clerk's

¹ Compl. ¶¶ II-III.

² United States Postal Service Track & Confirm for label number 7005 1160 0002 7836 3755.

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service letter on July 10, 2012.³ Neither Golden West nor Mr. Kastner filed objections to the Motion for Default Decision and Proposed Default Decision within 20 days after the Hearing Clerk served them with the Motion for Default Decision and Proposed Default Decision, as required by 7 C.F.R. § 1.139.

On September 25, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Golden West and Mr. Kastner willfully violated 7 U.S.C. §§ 192(a) and 228b, as alleged in the Complaint; (2) ordering Golden West and Mr. Kastner to cease and desist from violations of the Packers and Stockyards Act; and (3) assessing Golden West and Mr. Kastner a \$10,500 civil penalty.⁴

On November 1, 2012, Golden West and Mr. Kastner filed Petition To Vacate Or In The Alternative Appeal With A Request For Pardon Or Lesser Sanction [hereinafter Appeal Petition]. On November 26, 2012, the Deputy Administrator filed Complainant's Opposition To Respondents' Petition to Vacate or in the Alternative Appeal with a Request for Pardon or Lesser Sanction. On November 30, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Default Decision and Order as the final Decision and Order.

DECISION

Statement of the Case

Neither Golden West nor Mr. Kastner filed a timely answer to the Complaint. Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the Complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the

³ Memorandum To The File, dated July 12, 2012, signed by L. Eugene Whitfield, Hearing Clerk.

⁴ Chief ALJ's Default Decision and Order at 3-4.

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material allegations of fact contained in the Complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Golden West is a Colorado corporation actively registered to do business within the State of New Jersey.
2. Golden West has a mailing address in Teaneck, New Jersey.
3. Golden West was, at all times material to this proceeding:
 - (a) Engaged in the business of buying livestock in commerce for the purpose of slaughter; and
 - (b) A packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.
4. Mr. Kastner is an individual whose home address is in the State of New Jersey.
5. Mr. Kastner was, at all times material to this proceeding:
 - (a) One hundred percent owner of Golden West;
 - (b) President of Golden West;
 - (c) Responsible for the direction, management, and control of Golden West; and
 - (d) A packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.
6. Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, on or about the date and in the transaction described in this Finding of Fact, issued a check in payment for livestock purchases,

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which check was returned unpaid by the bank upon which the check was drawn because Golden West did not have and maintain sufficient funds on deposit and available in the account upon which the check was drawn to pay the check when presented.

| Purchase Date | Seller's Name | No. of Head | Livestock Amount | Due Date | Check Date | Check No. | Check Amount |
|---------------|---------------|-------------|------------------|----------|------------|-----------|--------------|
| 6/28/10 | Greg Kroupa | 48 | \$14,673 | 6/29/10 | 7/9/10 | 2114 | \$14,673 |

7. Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, in the transactions described in this Finding of Fact, purchased livestock and failed to pay the full amount of the purchase price for the livestock within the time period required by the Packers and Stockyards Act.

| Seller's Name | Purchase Date | No. of Head | Livestock Amount | Due Date | Payment Instrument No. | Date Paid | Days Late |
|---------------|---------------|-------------|------------------|----------|------------------------|-----------|-----------|
| Jim Bamford | 6/21/10 | 40 | \$16,562.75 | 6/22/10 | 1105 | 8/24/10 | 63 |
| Greg Kroupa | 6/28/10 | 48 | \$14,673 | 6/29/10 | 2114 | 8/23/10 | 55 |

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Golden West and Mr. Kastner willfully violated 7 U.S.C. §§ 192(a) and 228b.

Golden West and Mr. Kastner's Appeal Petition

Golden West and Mr. Kastner raise seven issues on appeal. First, Golden West and Mr. Kastner contend their Appeal Petition was timely filed (Appeal Pet. ¶¶ 3-10).

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The Hearing Clerk served Golden West and Mr. Kastner with the Chief ALJ's Default Decision and Order on October 3, 2012.⁵ The Rules of Practice provide that a party must file an appeal from an administrative law judge's written decision with the Hearing Clerk within 30 days after the Hearing Clerk serves that party with the administrative law judge's decision.⁶ Thus, Golden West and Mr. Kastner were required to file their Appeal Petition with the Hearing Clerk no later than November 2, 2012. Golden West and Mr. Kastner filed their Appeal Petition with the Hearing Clerk on November 1, 2012; therefore, I agree with Golden West and Mr. Kastner that their Appeal Petition was timely filed.

Second, Golden West and Mr. Kastner contend they were not served with the Complaint on March 30, 2012 (Appeal Pet. ¶¶ 2(a)(i); 11-17).

United States Postal Service Track & Confirm for label number 7005 1160 0002 7836 3755 establishes that the Hearing Clerk served Golden West and Mr. Kastner with the Complaint on March 30, 2012. Golden West and Mr. Kastner offer nothing to show this United States Postal Service record, placed in the docket file by the Hearing Clerk, inaccurately states the date of delivery of the Complaint to Golden West and Mr. Kastner. Therefore, I reject Golden West and Mr. Kastner's contention that they were not served with the Complaint on March 30, 2012.

Third, Golden West and Mr. Kastner contend they were never notified of their default (Appeal Pet. ¶ 2(a)(ii)).

The record establishes that the Chief ALJ filed a Default Decision and Order on September 25, 2012, and, contrary to Golden West and Mr. Kastner's contention that they were never notified of their default, Golden West and Mr. Kastner assert they were served with the Chief ALJ's Default Decision and Order on October 3, 2012 (Appeal Pet. ¶ 3). Moreover, Golden West and Mr. Kastner appealed the Chief ALJ's Default Decision and Order by filing their Appeal Petition with the Hearing Clerk on November 1, 2012. In light of Golden West and

⁵ Appeal Pet. ¶ 3.

⁶ 7 C.F.R. § 1.145(a).

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Mr. Kastner's assertion that the Hearing Clerk served them with the Chief ALJ's Default Decision and Order on October 3, 2012, and Golden West and Mr. Kastner's November 1, 2012, Appeal Petition, I reject Golden West and Mr. Kastner's contention that they were never notified of their default.

Fourth, Golden West and Mr. Kastner contend the Chief ALJ's findings of fact are error (Appeal Pet. ¶¶ 2(a)(iii)-(vii), (b)(i), (iv); 21-24).

The Hearing Clerk served Golden West and Mr. Kastner with the Complaint on March 30, 2012.⁷ Golden West and Mr. Kastner failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Rules of Practice provide that the failure to file a timely answer to the Complaint is deemed, for purposes of the proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing.⁸ The Chief ALJ adopted the material allegations of fact alleged in the Complaint as the findings of fact in his Default Decision and Order based upon Golden West and Mr. Kastner's deemed admission of the allegations in the Complaint. Therefore, I reject Golden West and Mr. Kastner's contention that the Chief ALJ's findings of fact are error.

Fifth, Golden West and Mr. Kastner contend their violations of the Packers and Stockyards Act were not "unfair practices" because the livestock sellers, Mr. Kroupa and Mr. Bamford, expressly agreed to payment for the livestock in question in a manner other than required by 7 U.S.C. § 228b(a) (Appeal Pet. ¶¶ 2(a)(viii)-(ix), (b)(ii)-(iii); 25-31).

Golden West and Mr. Kastner correctly point out that the prompt payment provisions in 7 U.S.C. § 228b(a) may be modified by the parties to the purchase and sale of livestock, as follows:

⁷ See note 2.

⁸ 7 C.F.R. §§ 1.136(c), .139, .141(a).

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.....

(b) Waiver of prompt payment by written agreement; disclosure requirements

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) of this section. 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.

7 U.S.C. § 228b(b). However, Golden West and Mr. Kastner have not offered any evidence of their express written agreements with Messrs. Kroupa and Bamford. Instead, Golden West and Mr. Kastner failed to file a timely response to the Complaint and are deemed to have admitted that they failed to make prompt payment for the purchase of livestock. As a matter of law, a packer's delay in payment for livestock is an unfair practice:

§ 228b. Prompt payment for purchase of livestock

.....

(c) Delay in payment or attempt to delay deemed unfair practice

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 chapter. Nothing in this

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section shall be deemed to limit the meaning of the term “unfair practice” as used in this chapter.

7 U.S.C. § 228b(c). Therefore, I reject Golden West and Mr. Kastner’s contention that their failure to make full payment promptly for livestock, in willful violation of 7 U.S.C. § 228b(a), is not an “unfair practice,” as that term is used in the Packers and Stockyards Act.

Sixth, Golden West and Mr. Kastner contend the civil penalty assessed by the Chief ALJ is not warranted in law and is without justification in fact (Appeal Pet. ¶¶ 2(c)(i)-(vi); 41-51).

The Chief ALJ assessed Golden West and Mr. Kastner, jointly and severally, a \$10,500 civil penalty.⁹ The maximum civil penalty that the Secretary of Agriculture may assess for each of Golden West and Mr. Kastner’s violations of the Packers and Stockyards Act is \$11,000.¹⁰ The Chief ALJ could have assessed Golden West and Mr. Kastner a civil penalty of \$33,000 each. Therefore, I reject Golden West and Mr. Kastner’s contention that the \$10,500 civil penalty assessed by the Chief ALJ is not warranted in law.

Moreover, the civil penalty assessed by the Chief ALJ is justified in fact. When determining the amount of the civil penalty, the Secretary of Agriculture must consider three factors: (1) the gravity of the offense; (2) the size of the business involved; and (3) the effect of the civil penalty on the person’s ability to continue in business (7 U.S.C. § 193(b)).

⁹ Chief ALJ’s Default Decision and Order at 4.

¹⁰ The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 192(a) is \$10,000 (7 U.S.C. § 193(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 192(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. When Golden West and Mr. Kastner violated the Packers and Stockyards Act, the maximum civil penalty for each violation of 7 U.S.C. § 192(a) was \$11,000 (7 C.F.R. § 3.91(b)(6)(i)).

PACKERS AND STOCKYARDS ACT

Golden West and Mr. Kastner, in two transactions, purchased 88 head of livestock for \$31,235.75 from two livestock sellers and failed to pay, when due, the full purchase price of the livestock. These two transactions occurred within a week of each other; namely, on June 21, 2010, and June 28, 2010. Golden West and Mr. Kastner's payment to Mr. Bamford was 63 days late and their payment to Mr. Kroupa was 55 days late. After considering the number of violative transactions, the number of livestock sellers involved, the number of livestock involved, the total amount of the transactions, the period of time during which the violative transactions commenced, and the length of time that Golden West and Mr. Kastner delayed payment, I find Golden West and Mr. Kastner's violations of the Packers and Stockyards Act sufficiently grave to support the Chief ALJ's assessment of a \$10,500 civil penalty against Golden West and Mr. Kastner.

The only indication of the size of Golden West and Mr. Kastner's business and the effect of assessment of a \$10,500 civil penalty on Golden West and Mr. Kastner's ability to continue in business are assertions contained in Golden West and Mr. Kastner's Appeal Petition. Golden West and Mr. Kastner assert Golden West is a small business and Mr. Kastner is now unemployed (Appeal Pet. ¶ 50). Golden West and Mr. Kastner further assert they have exited the industry and will not be returning to the industry in the future (Appeal Pet. ¶ 2(c)(v)). Therefore, for the purpose of determining the amount of the civil penalty in this proceeding, I find the size of Golden West and Mr. Kastner's business is small and the amount of the civil penalty has no effect on Golden West and Mr. Kastner's ability to continue in business as Golden West and Mr. Kastner are no longer packers and will not become packers in the future.

After consideration of the gravity of Golden West and Mr. Kastner's violations of the Packers and Stockyards Act, the size of Golden West and Mr. Kastner's business, and the effect of assessment of a \$10,500 civil penalty on Golden West and Mr. Kastner's ability to continue in business, I find the Chief ALJ's assessment of a \$10,500 civil penalty against Golden West and Mr. Kastner, jointly and severally, justified in fact.

Golden West Cattle Co., LLC and Michael Kastner
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Seventh, Golden West and Mr. Kastner contend a finding of actual or likely harm to competition is a necessary prerequisite to the conclusion that a violation of the Packers and Stockyards Act has occurred, and the Chief ALJ failed to find that actual or likely harm to competition resulted from Golden West and Mr. Kastner's actions or inaction (Appeal Pet. ¶¶ 35-40).

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is to assure proper handling and transmission of a livestock seller's funds, including prompt payment.¹¹ The requirement that a livestock purchaser make timely payment effectively prevents sellers from being forced to finance transactions.¹² Golden West and Mr. Kastner contravened the timely payment requirement and their violations directly thwart one of the primary purposes of the Packers and Stockyards Act.¹³ I do not find that the Chief ALJ's failure to find actual or likely harm to competition resulting from Golden West and Mr. Kastner's actions or inaction, error.

Golden West and Mr. Kastner's Request for Oral Argument

Golden West and Mr. Kastner's request for oral argument, which the Judicial Officer may grant, refuse, or limit,¹⁴ is refused because the issues are not complex and oral argument would serve no useful purpose.

For the foregoing reasons, the following Order is issued.

¹¹ *Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966).

¹² *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); *In re Robert Morales Cattle Co.*, ___ Agric. Dec. ___, slip op. at 19 (Mar. 6, 2012) (same); *In re Richard L. Reece* (Order Denying Pet. to Reconsider), ___ Agric. Dec. ___, slip op. at 7 (Nov. 4, 2011) (same); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (1998) (same).

¹³ *See Mahon v. Stowers*, 416 U.S. 100, 111 (1974) (per curiam) (dictum) (stating regulations requiring prompt payment support the policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for the packers' own purposes); *Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

¹⁴ 7 C.F.R. § 1.145(d).

PACKERS AND STOCKYARDS ACT**ORDER**

1. Golden West and Mr. Kastner, their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

- a. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented; and
- b. Failing to pay, when due, the full purchase price of livestock.

2. Golden West and Mr. Kastner are assessed, jointly and severally, a \$10,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA—GIPSA
P.O. Box 790335
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Golden West and Mr. Kastner. Golden West and Mr. Kastner shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0206.

RIGHT TO JUDICIAL REVIEW

Golden West and Mr. Kastner have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Golden West and Mr. Kastner must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁵ The date of entry of the Order in this Decision and Order is December 18, 2012.

¹⁵ 28 U.S.C. § 2344.

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In re: VERNON BLACK.
Docket No. D-11-0139.
Decision and Order.
Filed December 31, 2012.

PS-D.

Charles Spicknall, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on February 18, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period May 26, 2009, through August 11, 2009, Vernon Black engaged in the business of a market agency buying cattle on a commission basis without maintaining an adequate bond or bond equivalent, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29.¹ On March 21, 2011, Mr. Black filed a letter in which he denied the material allegations of the Complaint.

¹ Compl. ¶¶ II-IV.

PACKERS AND STOCKYARDS ACT

On June 25, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing in Riverton, Wyoming. Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. Mr. Black appeared pro se. The Deputy Administrator called two witnesses and Mr. Black testified on his own behalf.² The Deputy Administrator introduced 24 exhibits identified as CX 1-CX 24.

On August 23, 2012, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding Mr. Black engaged in operations subject to the Packers and Stockyards Act without obtaining and maintaining an adequate bond or bond equivalent, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29; (2) ordering Mr. Black to cease and desist from violations of the Packers and Stockyards Act and the Regulations; and (3) assessing Mr. Black a \$4,000 civil penalty.³

On October 3, 2012, Mr. Black filed Respondent's Appeal Petition to the Judicial Officer Against Decision and Order [hereinafter Appeal Petition]. On October 22, 2012, the Deputy Administrator filed Appeal Response. On October 26, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Decision and Order as the final Decision and Order.

DECISION**Discussion**

The term "market agency" is defined in the Packers and Stockyards Act, as follows:

² References to the transcript of the June 25, 2012, hearing are indicated as "Tr." with the page reference.

³ Chief ALJ's Decision and Order at 5-6.

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**§ 201. “Stockyard owner”; “stockyard services”;
“market agency”; “dealer”; defined**

When used in this chapter—

.....

(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[.]

7 U.S.C. § 201(c). The Packers and Stockyards Act authorizes the Secretary of Agriculture to require market agencies to obtain bonds to secure their obligations under the Packers and Stockyards Act:

§ 204. Bonds and suspension of registrants

On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency (as defined in this subchapter) . . . under such rules and regulations as he may prescribe, to secure the performance of their obligations[.]

7 U.S.C. § 204. Pursuant to this statutory authority, the Secretary of Agriculture has issued bonding regulations (9 C.F.R. §§ 201.10, .27-.34), which require market agencies to file and maintain bonds:

**§ 201.29 Market agencies, packers and dealers
required to file and maintain bonds.**

(a) Every market agency . . . shall execute and maintain a reasonable bond on forms approved by the Administrator containing the appropriate condition clauses, as set forth in § 201.31 of the regulations, applicable to the activity or activities in which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency No market agency . . . required to maintain a bond shall conduct his operations unless there is on file

PACKERS AND STOCKYARDS ACT

and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis . . . shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

9 C.F.R. § 201.29(a)-(b).

The failure to obtain and maintain the required bond or bond equivalent is an unfair and deceptive practice that constitutes a violation of 7 U.S.C. § 213(a).⁴ The evidence establishes that, at least during the period May 26, 2009, through August 11, 2009, Mr. Black bought cattle for a Nebraska-based feedlot operator, Meyers & Sons, and other individuals on a commission basis without obtaining and maintaining the required bond or bond equivalent (CX 2-CX 24). In addition, Mr. Black acknowledged during the hearing that he continues to buy cattle for Meyers & Sons (Tr. 38).

Findings of Fact

1. Mr. Black is an individual residing in the State of Wyoming.
2. Mr. Black was, at all times material to this proceeding:
 - (a) Engaged in the business of buying cattle in commerce on a commission basis; and

⁴ *United States v. Hulings*, 484 F. Supp. 562, 566-67 (D. Kan. 1980); *In re Mark V. Porter*, 47 Agric. Dec. 656, 667 (1988); *In re Robert F. Johnson*, 47 Agric. Dec. 436, 441-44 (1988); *In re Mart (Bill) White*, 23 Agric. Dec. 1104, 1106 (1964); *In re Floyd Bryan Moore*, 23 Agric. Dec. 312, 314 (1964); *In re Caesar Bros., Inc.*, 22 Agric. Dec. 1248, 1250 (1963); *In re Arden Vietmeier*, 22 Agric. Dec. 529, 531 (1963); *In re C.D. Goff*, 21 Agric. Dec. 1323, 1325 (1962); *In re Ray York*, 20 Agric. Dec. 1112, 1113-14 (1961); *In re Olion Ray Brown*, 20 Agric. Dec. 842, 843-44 (1961); *In re W.O. Steen*, 16 Agric. Dec. 125, 127 (1957); *In re Isom Martin*, 8 Agric. Dec. 1247, 1249 (1949).

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(b) Not registered with the Secretary of Agriculture.

3. On July 10, 2006, Mr. Black was notified by certified mail that the Packers and Stockyards Program had information indicating he was operating as a market agency without being registered with the Secretary of Agriculture and operating as a market agency without having a bond or bond equivalent. The notice also informed Mr. Black that he was required to register with the Secretary of Agriculture and to secure a bond or bond equivalent. (CX 1.)

4. Notwithstanding the notice described in Finding of Fact number 3, Mr. Black continued to engage in the business of buying cattle in commerce on a commission basis without registering with the Secretary of Agriculture and without obtaining and maintaining an adequate bond. During the period May 26, 2009, through August 11, 2009, Mr. Black bought approximately 358 head of cattle from Riverton Livestock Auction in Riverton, Wyoming, for Meyers & Sons and other individuals and was paid commissions totaling \$1,221.11 (CX 2-CX 22; Tr. 16-18).

5. After the Hearing Clerk served Mr. Black with the Complaint, Mr. Black continued to buy cattle in commerce on a commission basis without registering with the Secretary of Agriculture and without obtaining and maintaining an adequate bond (CX 23-CX 24; Tr. 19-24, 38).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Mr. Black, at all times material to this proceeding, bought cattle in commerce on a commission basis and was a "market agency" as that term is defined in the Packers and Stockyards Act.
3. Mr. Black willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29 by engaging in operations subject to the Packers and Stockyards Act without obtaining and maintaining an adequate bond or bond equivalent.

PACKERS AND STOCKYARDS ACT**Mr. Black's Appeal Petition**

Mr. Black raises six issues on appeal. First, Mr. Black asserts the Deputy Administrator violated the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [hereinafter the Privacy Act], when he disclosed records introduced as exhibits in this proceeding without a prior written request by, or the prior written consent of, Mr. Black (Appeal Pet. ¶¶ 1, 9(2)⁵).

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Black has violated the Packers and Stockyards Act and the Regulations; it is not a proceeding to determine whether the Deputy Administrator violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Black's Privacy Act claims.⁶ Therefore, I decline to address Mr. Black's assertion that the Deputy Administrator violated the Privacy Act.

Second, Mr. Black contends the Chief ALJ's finding that the Packers and Stockyards Program notified Mr. Black of his obligations to register with the Secretary of Agriculture and to secure a bond or bond equivalent, is error (Appeal Pet. ¶ 2).

The Chief ALJ found that, on July 10, 2006, Mr. Black was notified by certified mail that he must register with the Secretary of Agriculture and secure a bond or bond equivalent (Chief ALJ's Decision and Order at 4). The record establishes that the Packers and Stockyards Program sent the letter in question to Mr. Black's proper address and Mr. Black's brother, Jim Black, received the letter on July 10, 2006 (CX 1; Tr. 13-14, 31-32). I infer Mr. Black was notified of the registration and bonding requirements based upon the Packers and Stockyards Program's having directed the letter to the proper address and the receipt of the letter at Mr. Black's address by Mr. Black's brother. Therefore, I reject Mr. Black's contention that the Chief ALJ's finding that Mr. Black was notified of the requirement that he register with the Secretary of

⁵ Two paragraphs in Mr. Black's Appeal Petition are identified as "9." I identify the first paragraph "9" as "9(1)" and the second paragraph "9" as "9(2)."

⁶ See 7 U.S.C. §§ 450c-450g which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer and 7 C.F.R. § 2.35 which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer.

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Agriculture and the requirement that he secure a bond or bond equivalent, is error.

Moreover, even if I were to find that Mr. Black was not provided actual notice of the Packers and Stockyards Act bonding requirements, that finding would not change the disposition of this proceeding. Neither the Packers and Stockyards Act nor the Regulations require the Packers and Stockyards Program to provide a market agency with actual notice of the bonding requirements prior to the institution of a disciplinary administrative proceeding against that market agency for a violation of the bonding requirements in 9 C.F.R. pt. 201.

Third, Mr. Black contends the Chief ALJ's finding that Mr. Black operated as a market agency in the transactions at issue, is error (Appeal Pet. ¶¶ 3-5, 9(2)).

A market agency acts as an agent for another person, the principal, for the purpose of buying or selling livestock.⁷ Mr. Black testified he received orders to buy cattle for Meyers & Sons and other individuals, by telephone. When he found cattle of the type and at the price requested by his principals, Mr. Black bought the cattle for his principals. After these transactions, Riverton Livestock Auction issued checks to Mr. Black. (Tr. 35-38; CX 2-CX 22.) Mr. Black referred to the checks issued to him by Riverton Livestock Auction as "gratuity check[s]" (Tr. 37); however, the record establishes that the checks payable to Mr. Black were issued in payment for Mr. Black's services in connection with the purchase of cattle for Mr. Black's principals. Thus, I conclude Mr. Black was paid commissions and Mr. Black bought the cattle in question on a commission basis.⁸ As Mr. Black was acting as a

⁷ *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating a person who buys cattle for others is the agent of the purchasers), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

⁸ *Keszenheimer v. Reliance Standard Life Ins. Co.*, 402 F.3d 504, 509 (5th Cir. 2005) (stating the word "commission" means a fee paid to an agent or employee for transacting a piece of business or performing a service); *Estes v. Meridian One Corporation*, 77 F. Supp.2d 722, 726 n.7 (E.D. Va. 1999) (stating the common definition of the word "commission" is a fee or percentage allowed to a salesman or agent for his services), *aff'd*, 6 F. App'x 142 (4th Cir. 2001); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating the word "commission" means a fee paid to an agent or

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commission buyer, he was a “market agency” as that term is defined in 7 U.S.C. § 201(c).⁹ Therefore, I reject Mr. Black’s contention that the Chief ALJ’s finding that Mr. Black operated as a market agency in the transactions at issue, is error.

Fourth, Mr. Black contends he has no obligation to obtain and maintain a bond because the auction market at which he bought cattle, Riverton Livestock Auction, is bonded and Mr. Black’s principal, Myers & Sons, pays Riverton Livestock Auction directly (Appeal Pet. ¶ 6).

The Regulations require every market agency to execute and maintain a reasonable bond and prohibit market agencies from conducting operations subject to the Packers and Stockyards Act unless there is on file and in effect a bond complying with 9 C.F.R. pt. 201.¹⁰ I find no exception from the bonding requirements for a market agency that buys cattle at a livestock auction company that is bonded and no exception for a market agency whose principal pays the livestock auction company directly. Therefore, I reject Mr. Black’s contention that he has no obligation to obtain and maintain a bond because Riverton Livestock Auction is bonded and Myers & Sons pays Riverton Livestock Auction directly.

Fifth, Mr. Black contends he has no obligation to obtain and maintain a bond because he does not take title to or possession of the cattle he buys for Meyers & Sons and others at Riverton Livestock Auction (Appeal Pet. ¶¶ 7-9(1)).

Mr. Black’s failure to take title to or possession of the cattle which he buys for others at Riverton Livestock Auction is not relevant to Mr. Black’s obligation to obtain and maintain a bond. Mr. Black is required to obtain and maintain a bond because he operates as a “market agency” which term is defined as any person engaged in the business of

employee for transacting a piece of business or performing a service), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980).

⁹ *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating, under the Packers and Stockyards Act, a person who is engaged in buying or selling livestock for others is either a market agency or a dealer - a market agency if he charges a commission; a dealer if he does not), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

¹⁰ 9 C.F.R. § 201.29(a).

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(1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.¹¹ Nothing in the definition of the term “market agency” indicates that a person must take title to or possession of the livestock bought or sold on a commission basis in order to meet the definition of market agency.¹² Therefore, I reject Mr. Black’s contention that he has no obligation to obtain and maintain a bond because he does not take title to or possession of the cattle he buys for Meyers & Sons and others at Riverton Livestock Auction.

Sixth, Mr. Black contends the Chief ALJ’s order that Mr. Black cease and desist from violations of the Packers and Stockyards Act and the Regulations was premature (Appeal Pet. ¶ 10).

The Secretary of Agriculture is authorized to order any market agency to cease and desist from violations of 7 U.S.C. § 213(a), as follows:

§ 213. Prevention of unfair, discriminatory, or deceptive practices

....
(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

7 U.S.C. § 213(b). The Hearing Clerk served Mr. Black with notice of his alleged violations of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29 on

¹¹ 7 U.S.C. § 201(c).

¹² I note that, generally, a market agency does not take title to livestock, but merely facilitates transactions between buyer and seller. *See Syverson v. U.S. Dep’t of Agric.*, 601 F.3d 793, 801-02 (8th Cir. 2010) (discussing the issue of title in the context of market agency transactions).

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March 2, 2011,¹³ and the Chief ALJ conducted a hearing on June 25, 2012.¹⁴ After the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order on August 23, 2012, which included the cease and desist order which Mr. Black contends was premature.¹⁵ As the Chief ALJ issued the cease and desist order subsequent to notice and hearing in this proceeding, I reject Mr. Black's contention that the Chief ALJ prematurely issued the cease and desist order.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Black, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required without obtaining, filing, and maintaining an adequate bond as required by the Packers and Stockyards Act and the Regulations.

Paragraph 1 of this Order shall become effective on the day after service of this Decision and Order on Mr. Black.

2. Mr. Black is prohibited from and shall cease and desist from engaging in any capacity for which bonding is required under the Packers and Stockyards Act without first becoming properly registered with the Secretary of Agriculture.

Paragraph 2 of this Order shall become effective on the day after service of this Decision and Order on Mr. Black.

3. Mr. Black is assessed a \$4,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

¹³ United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9851 5888.

¹⁴ Tr. 1-68.

¹⁵ Chief ALJ's Decision and Order at 5-6.

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USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Mr. Black. Mr. Black shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-11-0139.

RIGHT TO JUDICIAL REVIEW

Mr. Black has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Black must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁶ The date of entry of the Order in this Decision and Order is December 31, 2012.

In re: GEOFFREY S. MARTIN.
Docket No. 12-0146.
Decision and Order.
Filed August 7, 2012.

PS-D.

Charles E. Spicknall, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”;

¹⁶ 28 U.S.C. § 2344.

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“Complainant”) against Geoffrey S. Martin (“Respondent”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”).

II. Issues

1. Whether Respondent failed to obtain a bond in willful violation of the Act; and
2. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. Findings of Fact and Conclusions of Law**A. Procedural History**

On December 22, 2011, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On January 17, 2012, Respondent filed an Answer with the Hearing Clerk, acting pro se. References to the Answer in this Decision and Order shall be denoted as “RX-1”. Attempts to arrange a pre-hearing telephone conference with Complainant’s counsel and Respondent were unsuccessful and by Order issued March 8, 2012, I directed Respondent to provide a valid telephone number and other valid means of contact to my staff. When Respondent had not complied with my Order, on April 2, 2012, I issued an Order setting deadlines for the parties’ submissions in advance of setting a hearing date.

On April 26, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondent did not file any pre-hearing submissions, and on July 5, 2012, I issued an Order to Respondent to show cause why a Decision and Order on the Record should not be entered. Respondent did not respond.

In response to my Order, on July 24, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief (“Proposed Findings”), as well as evidence hereby identified as CX-1 through CX-23. On that date Complainant also filed Declarations by

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Susan S. McBryde and Timothy Hansen, which are hereby identified respectively as CX-24 and CX-25. All of Complainant's evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

1. Statutory and Regulatory Authority

7 C.F.R. § 1.1.39 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.1.39.

Livestock dealers, market agencies and packers operating subject to the Act are required to obtain reasonable bonds to secure their obligations to livestock sellers. 7 U.S.C. § 704. The Secretary has issued regulations requiring parties subject to the bond requirements to file bonds or bond equivalents with the Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration ("GIPSA"), in an amount set forth by 9 C.F.R. § 201.30. See, 9 C.F.R. § 201.29. The Act allows for the assessment of civil money penalties in an amount of up to \$11,000 per violation for violations of the Act. 7 U.S.C. § 213(b).

B. Summary of the Facts

In his Answer filed on January 17, 2012, Respondent admitted that he has co-owned and operated a licensed and bonded livestock auction company in Louisiana since the year 2000. He asserted that he has conducted business in various states and has paid his bills and accounts

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in full at all times. Respondent asserted that of the nineteen (19) violations charged in Complainant's complaint, eleven (11) represent purchases made for his family farm. He noted that he periodically purchases cattle for his uncle Stacey Martin and his close friend Tom Lindsey. Respondent denied purchasing cattle for R&W Farms, LLC at Miller Livestock Inc., located in Dequincy, Louisiana. Respondent attributed that allegation to a mistake that should have noted his work hauling for R& W, LLC. Respondent purchased cattle for San Angelo Packing Co. under two invoices. He stopped purchasing cattle for that entity when he learned that his bond did not cover such purchases. RX-1.

Respondent did not register with GIPSA regarding his business buying livestock on commission, and did not obtain a bond or bond equivalent related to that business. CX-24. By notice of default dated October 4, 2010, delivered on November 5, 2010, GIPSA advised Respondent that he could not continue to buy or sell cattle subject to the Act without registering with GIPSA and obtaining an appropriate bond. CX-1.

Resident Agent for GIPSA Susan McBryde completed an investigation into Respondent's business practices involving the Act in May, 2011. CX-24. Her investigation included a December 10, 2010 interview with Peggy Perkins, co-owner and office manager at the Kinder Livestock Auction in Kinder, Louisiana. CX-24. According to Ms. Perkins, Respondent continued to purchase livestock on a commission basis at the Kinder Livestock Auction after November 4, 2010, the date he received GIPSA's notice of default. CX-2. Agent McBryde also interviewed Jim Miller, an owner of Miller Livestock Markets, Inc. in DeQuincy, Louisiana, who confirmed that Respondent continued to purchase livestock on a commission basis at his auction after November 5, 2010. CX-3. Records reflecting livestock purchases made by Respondent during the period from November 10, 2010 through December 18, 2010, are in evidence at CX-5 through CX-23, summarized at CX-4.

As of the date of Ms. McBryde's declaration made on July 10, 2012, Respondent had not notified GIPSA the he had obtained an appropriate bond or bond equivalent. CX-24.

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Timothy Hansen is a program analyst for GIPSA who is familiar with investigations conducted by the agency into violations of the Act. CX-25. As part of his duties, Mr. Hansen makes recommendations regarding sanctions in circumstances where violations are disclosed. CX-25, ¶ 1. He explained that civil penalties are intended to further the remedial purposes of the Act by deterring Respondent and others from acting in violation of the Act, against the interests of livestock sellers. CX-25, ¶ 6.

Mr. Hansen reviewed the investigation into Respondent's alleged violations and concluded that Mr. Martin willfully violated the Act and regulations by operating as an unregistered and unbonded market agent who bought livestock on commission in Louisiana. CX-25, ¶¶ 2, 3. Mr. Hansen recommended that Respondent be ordered to cease and desist from operating without a bond or bond equivalent and be assessed a civil penalty of \$4,000.00. CX-25, ¶ 3. Civil penalty is warranted because Respondent did not cooperate with GIPSA's investigation and did not obtain a bond or bond equivalent despite being notified of the Act's requirements. CX-25, ¶ 4.

C. Discussion

Respondent failed to respond to any attempt to ascertain his availability for a hearing. Agent McBryde also noted that Mr. Martin did not cooperate with her during her investigation, as he failed to return her many attempts to contact him. See, CX-24, ¶ 9. Respondent's answer did not specifically deny all of the allegations of the complaint, and indeed, Mr. Martin admitted to purchasing livestock without requisite bonds. See, RX-1. Respondent failed to cooperate with the investigation. Other than filing a letter in response to Complainant's complaint, Mr. Martin also failed to file any defensive evidence or argument. Accordingly, I find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

Respondent did not specifically address all of the allegations in the Complaint, but rather asserted that he bought cattle for his uncle and a friend. Such purchases do not exempt Respondent from complying with the requirements of the Act and regulations to purchase appropriate

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bonds or bond equivalents. The requirement to obtain a bond or equivalent surety is to protect livestock sellers, not buyers. *In re: Edward Tiemann*, 47 Agric. Dec. 1573, 1585 (U.S.D.A. 1988). As of the date of the notice of default issued by GIPSA in October, 2010, and received by Mr. Martin on November 5, 2010, Respondent had actual notice that he needed to register with the agency and obtain required surety to continue operating in the livestock business. Respondent's failure to come into compliance has been corroborated by owners of auction markets where Respondent bought livestock on commission without a bond after receiving the notice of non-compliance.

Although Respondent alleged that certain accounting entries documented work he did as a hauler, he has provided no independent records to corroborate that charge, such as invoices or payments. I accord substantial weight to the findings of Agent McBryde, who regularly conducts investigations involving compliance with the Act. I conclude that the information she reviewed showed nothing to distinguish the challenged transactions from livestock purchases. Her opinion is corroborated by Analyst Hansen, who reviewed the file and similarly found nothing to suggest that the transactions involving R& W represented anything other than livestock sales.

Respondent's failure to obtain a bond or other financial instrument to act as surety while continuing to buy livestock on commission constitutes an unfair and deceptive practice that violates 7 U.S.C. § 312(a). *See In re: Robert F. John*, 47 Agric. Dec. 436, 441 (U.S.D.A. 1998). Further, Respondent has failed to register with the agency. GIPSA's recommended sanctions are appropriate for Respondent's willful violations of the Act. *See In re: Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1025 (U.S.D.A. 1989). There is little indication that Respondent has sought to achieve compliance with the Act and regulations, despite a letter from GIPSA advising him of his transgressions.

D. Findings of Fact

1. Respondent Geoffrey Martin is an individual whose business address is his home address in the State of Louisiana.

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2. At all times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis, and was not registered with GIPSA.
3. On November 4, 2010, Respondent received written notification from GIPSA advising him that the agency had concluded that he was operating under the Act without being registered and without having a bond.
4. In the notice letter received on November 4, 2010, GIPSA advised Respondent of his obligation to register with the agency and to secure a bond or bond equivalent.
5. Respondent continued to engage in the business of buying livestock in commerce on a commission basis without registering with GIPSA and without obtaining an adequate bond or equivalent, during the period from November 13, 2010 through December 8, 2012, as enumerated in Appendix 1, attached hereto.

E. Conclusions of Law

1. Respondent Geoffrey Martin willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.
2. Respondent Geoffrey Martin operated in violation of the Act and its implementing regulations by failing to register with the Secretary of Agriculture, pursuant to 9 C.F.R. § 201.10.
3. Sanctions are appropriate to deter Respondent and others from willfully failing to register.

ORDER

Respondent Geoffrey S. Martin, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required

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without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations.

Further Respondent is prohibited from registering to engage in business subject to the Act for a period of thirty (30) days from the date of this Order. Pursuant to 7 U.S.C. § 203, Respondent is prohibited from engaging in business subject to the Act without being registered with GIPSA.

After expiration of this thirty (30) day period, Respondent may submit an application for registration to GIPSA along with the required bond or bond equivalent.

Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of four thousand dollars (\$4,000.00). Respondent's payment shall be made out to the "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondent shall include on the payment instrument a reference to this case, Docket No. 12-0146.

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 for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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**In re: CLAUSEN MEAT PACKING, INC., MICHELLE TSAO,
AND KENNETH KHOO.**

Docket No. 12-0213.¹

Decision and Order.

Filed August 9, 2012.

PS-D.

Ciarra Toomey, Esq. for Complainant.

Respondents, pro se.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”; “Complainant”) against Clausen Meat Packing Inc., Michelle Tsao, and Kenneth Khoo (“Respondents”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”). The Complaint alleges that Respondents failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

II. Issues

1. Whether a hearing is necessary in this matter;
2. Whether Respondents failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and
3. If Respondents willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

¹ Associated cases assigned docket numbers for accounting purposes, 12-0214 and 12-0215, are included in this disposition.

PACKERS AND STOCKYARDS ACT**III. Findings of Fact and Conclusions of Law****A. Procedural History**

On January 27, 2012 Complainant filed a complaint against Respondents with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On February 23, 2012, Respondents filed an Answer with the Hearing Clerk, acting *pro se*. References to the Answer in this Decision and Order shall be denoted as “RX-1”. By Order issued March 22, 2012, I set deadlines for the parties’ submissions in advance of setting a hearing date.

On May 9, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondents did not file pre-hearing submissions, and on July 5, 2012, I issued an Order to Respondents to show cause why a Decision and Order on the Record should not be entered. On July 23, 2012, Respondents filed a response to my Order, hereby identified as RX-2. On July 24, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief (“Proposed Findings”), as well as evidence hereby identified as CX-1 through CX-16. On that date Complainant also filed Declarations by Amy Blechinger and James Morcaldi, which are hereby identified respectively as CX-17 and CX-18. All of Complainant’s and Respondents’ evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

1. *Statutory and Regulatory Authority*

7 C.F.R. § 1.1.39 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections

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thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.1.39.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.* Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991).

B. Summary of the Facts

On or about July 29, 2010, GIPSA sent written notice to Respondents that it had come to GIPSA's attention that Respondents had failed to timely mail checks that were meant as payment for livestock purchases in violation of the Act. CX-5. The letter was acknowledged as received by Respondents on August 5, 2010. Thereafter, GIPSA's Resident Agent in California, James Morcaldi, conducted a follow up investigation and determined that Respondents had failed to timely pay for transactions made during the period from September 15, 2010 through October 19, 2010. CX-17, ¶ 2.

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Agent Morcaldi documented his findings with copies of invoices, checks, and mailing envelopes involving nine separate transactions during this period. CX-18, ¶ 7; CX-7 through CX-16. Agent Morcaldi concluded that Respondents had dated checks for purchases on the dates of the transactions, affixed postage through a postal meter machine that marked the envelopes with the dates that payments were due, and deposited the envelopes in the mail for delivery as many as eighteen days late. CX-18, ¶8. This information formed the underpinnings for USDA's complaint against Respondents.

In the Answer that they filed, Respondents admitted that they had made late payments in violation of the Act. CX-1. This admission was reiterated in their response to my Order to show cause. CX-2. In justification for their actions, Respondents asserted that their suppliers did not complain, and they were not the only company making late payments. Further, Respondents noted that their customers have never been faced with non-payment due to non-sufficient funds. They observed that economic circumstances have produced an unfavorable situation, in which they receive untimely payments from creditors, or have accounts that result in uncollectible judgments because of business bankruptcies or dissolutions. Respondents further assert that they have agreements with suppliers to deduct from the amount due specific amounts for animals that have died or were damaged. CX-1. Respondents repeated these assertions in their response to my Order to show cause. CX-2.

Amy Blechinger is a Program Analyst for GIPSA whose duties include reviewing investigations and making recommendations regarding the propriety of sanctions. CX-17, ¶¶ 1. Ms. Blechinger reviewed Respondents' file and concluded that they had willfully violated the Act by purchasing livestock and failing to pay the full amount within the time period required by the Act. CX-17, ¶ 3. In her opinion, Respondents acted willfully by failing to make payments after being given notice by GIPSA that such failure represented violation of the Act. CX-17, ¶ 4.

Analyst Blechinger concluded that a civil penalty of \$4,000.00 should be assessed against the Respondents, jointly and severally. CX-17, ¶¶ 3, 4. Ms. Blechinger noted that the Act allowed a greater amount of penalty, but she considered Respondents' reports that their liabilities

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exceeded assets for the period from July 1, 2010 through June 30, 2011, and recommended a reduction in the penalty. CX-17, ¶ 5.

C. Discussion

The record is undisputed that Respondents failed to make timely payments within the mandates of the Act. Respondents have essentially admitted that they failed to make timely payments. Respondents allude to agreements with suppliers to make other kind of payment arrangements. However, despite at least three opportunities to produce such evidence, none is of record. Respondents did not provide any specific information about that defense in their Answer to the Complaint; Respondents failed to file a list of evidence or witnesses in their defense; and Respondents failed to provide specific information or evidence in response to the Order to show cause that I issued.

Further, Respondents did not comply with the payment provisions of the Act despite being given notice of their violations by GIPSA. The Secretary has found that "...once a licensee has been adequately warned, if he subsequently violated 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. 1762, 1782 (U.S.D.A. 1991). Accordingly, I find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

I find that Respondents have willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re: Great American Veal, Inc.*, 48 Agric. Dec. 183, 202-03 (U.S.D.A. 1989). Respondents withheld payments in nine transactions conducted after receiving a notice from GIPSA advising them that their payment practices violated the Act. I conclude that their continued practice of making late payments despite notice constitutes substantial evidence of willfulness.

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I credit Respondents' explanation that their cash flow has suffered during the current economy, and I even sympathize with their position. Nevertheless, Respondents' financial problems are not a meritorious defense to their failure to make payments. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *Id.* at 211. Moreover, the Secretary has concluded that Respondents who admit to the allegations in a complaint are in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994). I note that Complainant considered Respondents' liabilities and assets when Ms. Blechinger recommended a reduced monetary sanction. Complainant has not proposed suspending or otherwise hampering Respondents' ability to engage in the business of buying and selling livestock, despite its authority to do so. *See In re: Jeff Palmer*, 50 Agric. Dec. at 1582.

Respondents' actions also support the imposition of an Order directing them to cease and desist their practice of late payment. GIPSA's notice to Respondents failed to act as a suitable deterrence from their practice of making late payments. I agree with GIPSA's assessment of penalties, and find that both a cease and desist Order and monetary penalties should persuade Respondents to comply with the prompt payment requirements of the Act in the future.

D. Findings of Fact

1. Respondent Clausen Meat Packing, Inc. ("Clausen") is a corporation organized and existing under the laws of the State of California, and its registered agent for service of process is Michelle Tsao.
2. At all times material herein, Clausen was engaged in the business of buying livestock in commerce for the purpose of slaughter, and was a packer within the meaning of the Act.
3. Michelle Tsao and Kenneth Khoo are individuals whose current mailing address is in the State of California. At all times material herein, Michelle Tsao was the president, treasurer, registered agent, and owner of 50% of the stock of Clausen Meat Packing Inc., and was, together

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with Kenneth Khoo, responsible for the direction, management and control of Clausen.

4. At all times material herein, Kenneth Khoo was the vice-president, secretary, and owner of 50% of the stock of Clausen Meat Packing Inc., and was, together with Michelle Tsao, responsible for the direction, management and control of Clausen.

5. On July 29, 2010, GIPSA sent Respondents written notification advising them that the agency had concluded that they were not mailing checks for livestock purchases in a timely manner, which correspondence was received by Respondents on August 5, 2010.

6. Respondents purchased livestock and failed to pay the full amount of the purchase price within the time period required by the Act on nine occasions between September 15, 2010 and October 19, 2010, as documented at Attachment "A" hereto.

7. Respondents failed to make timely payments in nine transactions after being notified by GIPSA that this practice constituted a violation of the Act.

E. Conclusions of Law

Respondents willfully violated 7 U.S.C. § 192(a) and § 228b of the Act by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Sanctions are appropriate to deter Respondents and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. §193(b).

ORDER

Respondents Clausen Meat Packing, Inc., Michelle Tsao and Kenneth Khoo, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

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Pursuant to 7 U.S.C. § 193(b), Respondents are assessed, jointly and severally, a civil penalty in the amount of four thousand dollars (\$4,000.00). Respondents' payment shall be made out to the "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondents shall include on the payment instrument a reference to this case, Docket No. 12-0213.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

In re: VERNON LEROY BLACK.
Docket No. 11-0139.
Decision and Order.
Filed August 23, 2012.

PS-D.

Charles E. Spicknall, Esq. for Complainant.
Respondent, pro se.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER**Preliminary Statement**

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*) (Act), instituted by a Complaint filed on February 18, 2011 by Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture. The Complaint alleges that

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Vernon Leroy Black (Respondent) willfully violated section 312(a) of the Act, 7 U.S.C. § 213(a) and sections 201.29 of the Regulations, 9 C.F.R. § 201.29 by engaging in operations subject to the Act without maintaining a bond or bond equivalent for the protection of livestock sellers.

Copies of the Complaint were served upon the Respondents by certified mail on March 2, 2011. On March 21, 2011, a copy of a letter from Respondent to Charles E. Spicknall was filed as the Respondent's Answer. In the letter, Respondent denied violating the Act, denied receiving prior correspondence from GIPSA, and denied that he was operating as a market agency subject to the Act.

An Exchange Order was entered on May 23, 2011 and following a teleconference with the parties on February 29, 2012, the matter was initially set for hearing in Riverton, Wyoming on May 14, 2011. Due to a conflict in my schedule and the availability of court space in Riverton, Wyoming, the matter was postponed and rescheduled for June 25, 2012.

At the hearing on June 25, 2012, the Government called two witnesses and introduced twenty-four exhibits (CX-1 through 24).¹ The Respondent, appearing without counsel, also testified. Both parties were invited to and have submitted post hearing briefs and the matter is now ready for disposition.²

Discussion

Nearly 90 years ago, Congress inserted a provision into Act through the 1924 annual appropriation bill for USDA which authorized the Secretary to require livestock dealers, market agencies, and packers to obtain reasonable bonds to secure their obligations under the Act. The bonding provision was made permanent in 1943 and codified at 7 U.S.C. §204 and the implementing regulations are contained in Part 201 of 9 C.F.R.

¹ References to the transcript of the proceedings will be indicated as Tr. and the page number.

² Respondent filed a pleading titled Respondent's Reply as to Complainant's Proposed Findings of Fact, Conclusions of Law and Order and Brief.

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9 C.F.R. § 201.29 provides in pertinent part:

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

(a) Every market agency, packer, and dealer....shall execute and maintain a reasonable bond on forms approved by the Administrator....applicable to the activity or activities in which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency, packer, or dealer. No market agency, packer, or dealer required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis and every dealer buying for his own account or for the accounts of others shall file and maintain a bond. If a registrant operates both as a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed.....

The term “market agency” is defined at 7 U.S.C. §201(c) as:

(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.....

While the appearance of the word “commission” on an invoice does not conclusively establish that a cattle dealer was selling on a commission basis so as to render him a market agency, *Ferguson v. U.S. Dep’t of Agric.*, 911 F. 2d 1273 (8th Cir. 1990), the provision defining “marketing agency includes individuals who buy and sell livestock for customers for which service they charge commission. *Kelley v. United States*, 202 F. 2d 838 (10th Cir. 1953).

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Failing to obtain a bond or other acceptable financial instrument is an unfair and deceptive practice that violates section 312(a) of the Act, 7 U.S.C. § 312(a). See *In re Robert F. Johnson*, 47 Agric. Dec. 436, 441 (U.S.D.A. 1988); *In re Mark V. Porter*, 47 Agric. Dec. 656, 667 (1988); *In re Klemme Cattle Co., Inc.*, 45 Agric. Dec. 1108, 1110 (U.S.D.A. 1986).

In addition to the evidence introduced at the hearing reflecting that at least since May 26, 2009 Respondent has been purchasing cattle on commission for a Nebraska based feedlot operator, Myers & Sons, and other individuals without being registered with the Secretary or having the required bond or bond equivalent (CX-2 through 24), Respondent acknowledged that he continues to buy cattle for Myers & Sons. Tr. 38.

In Respondent's Reply as to Complainant's Proposed Findings of Fact, Conclusions of Law and Order and Brief, despite his admissions at the hearing (Tr. 38), he denies being a market agency as the term is defined in the Act, repeats his earlier belief that he has not violated the Act and asserts that the exhibits introduced at the hearing should not be allowed as evidence as he was not provided a copy of the transcript. His objection to the exhibits while novel, is untimely and without merit as the transcript could have been obtained by him by paying for the copy.

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Vernon Leroy Black is an individual residing in the State of Wyoming.
2. Respondent is, and at all times material herein, was:
 - a. Engaged in the business of buying livestock in commerce on a commission basis; and
 - b. Not registered with the Secretary of Agriculture.

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3. On July 10, 2006, Respondent was notified by certified mail that GIPSA had information indicating that he was operating as a market agency without being registered with the Secretary or having a bond or bond equivalent and notified him of his obligation to register and to secure a bond or bond equivalent. CX-1.

4. Notwithstanding the above notice, Respondent continued to engage in the business of buying livestock in commerce on a commission basis without registering or maintaining an adequate bond as required by the Act. Between May 26, 2009 and August 11, 2009, Respondent purchased some 358 head of cattle from Riverton Livestock in Riverton, Wyoming and was paid commissions totaling \$1,221.11. CX-2 through CX-22. Tr. 16-18.

5. After being served with the Complaint, Respondent continued to purchase cattle on commission. CX-23-24; Tr. 19-22, 38.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent at all times material herein has bought livestock in commerce on a commission basis and is a market agency within the definition of the Act.
3. Respondent Vernon Leroy willfully violated section 312(a) of the Act, 7 U.S.C. § 213(a) and sections 201.29 of the Regulations, 9 C.F.R. § 201.29 by engaging in operations subject to the Act without obtaining and maintaining an adequate bond or bond equivalent.

ORDER

1. Respondent Vernon Leroy Black, 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 engaging in business in any capacity for which bonding is required without obtaining, filing or maintaining an adequate bond as required by the Act and its Regulations.

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2. Respondent is prohibited from and shall cease and desist from engaging in any capacity for which bonding is required under the Act without first becoming properly registered with the Secretary.
3. Respondent is assessed a civil penalty in the amount of Four Thousand Dollars (\$4,000.00).

Payment shall be made to: US Department of Agriculture
USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335

Respondent is further directed to note the Docket Number of this action on the payment instrument.

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

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

In re: MICHAEL T. GODBERSON.
Docket No. 12-0034.
Decision and Order.
Filed August 30, 2012.

PS-D—Operation as dealer—Sanctions.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

I. Introduction

PACKERS AND STOCKYARDS ACT

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”; “Complainant”) against Michael T. Godberson (“Respondent”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”). The Complaint alleges that Respondent failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

II. Issues

1. Whether a hearing is necessary in this matter;
2. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the Act;
3. Whether Respondent failed to register with GIPSA;
4. Whether Respondent operated as a “dealer” subject to the Act without a bond; and
5. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. Findings of Fact and Conclusions of Law**D. Procedural History**

On October 19, 2011, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On November 8, 2011, Respondent filed an Answer with the Hearing Clerk, acting *pro se*. References to the Answer in this Decision and Order shall be denoted as “RX-1”. On April 2, 2012, I issued an Order setting deadlines for the parties’ submissions in advance of setting a hearing date.

On May 7, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondent did not file any pre-hearing

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submissions, and on July 5, 2012, I issued an Order to Respondent to show cause why a Decision and Order on the Record should not be entered. Respondent did not respond in writing as directed. On July 25, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief (“Proposed Findings”), as well as evidence hereby identified as CX-1 through CX-7. On that date Complainant also filed Declarations by Justin K. Ham and Peter Jackson, which are hereby identified respectively as CX-8 and CX-9.

On August 21, 2012, Respondent filed correspondence, hereby identified as RX-2. Respondent asked for “additional time”, asserting that he did not know that he was expected “to respond unless [he] had a dispute to [Complainant’s] evidence” and expressing concern about Complainant’s request for a cease and desist Order and the imposition of penalties. Respondent also asked for help in understanding this matter.

I find that no good cause has been established to allow additional time to Respondent to file any evidence. Respondent did not deny any aspect of the allegations charged against him in the complaint. Respondent’s initial answer stated in the entirety, verbatim:

I Mike Godberson am writing this response in regards to docket #12-0034. I have been inactive in my position as a livestock dealer since Dec. 2010. Cattle purchased in 2010 for grazing purposes. I am auctioneer at two auction barns currently and I graze cattle and pre-condition cattle with a partner. Thank you, Mike Godberson (signature).

RX-1. Respondent failed to file submissions in response to two Orders that I issued. Although it is regrettable that Respondent does not completely understand the instant proceeding, he has had since the date he was served notice of the Complaint, in October 2011, to consult counsel or another knowledgeable individual to help him. Respondent took no action to get help and he did not comply with two Orders that I issued that directed him to take actions. According, his motion for an extension is hereby DENIED.

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All of the evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

E. Statutory and Regulatory Authority

7 C.F.R. § 1.1.39 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.1.39.

Livestock dealers, market agencies and packers operating subject to the Act are required to obtain reasonable bonds to secure their obligations to livestock sellers. 7 U.S.C. § 704. The Secretary has issued regulations requiring parties subject to the bond requirements to file bonds or bond equivalents with GIPSA, in an amount set forth by 9 C.F.R. § 201.30. *See* 9 C.F.R. § 201.29.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written

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agreement between the buyer and the seller. *Id.* Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). Cease and desist orders are routinely issued in cases under the Act even where the violator is no longer engaged in business regulated by the Act and regulations. *In re: Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1025 (U.S.D.A. 1989).

F. Summary of the Facts

On August 23, 2007, GIPSA notified Respondent by certified mail that the agency had placed his registration in inactive status, effective August 22, 2007, based upon information provided by Respondent in the annual report he had filed with GIPSA on December 21, 2006. CX-1. Respondent was advised that he was no longer required to maintain Trust Agreement No. OK-183 in the amount of \$10,000.00; however, if he decided to operate under the Act in the future, he would need to apply for a registration and a bond or its equivalent. CX-1.

An investigation conducted by GIPSA Resident Agent Justin Ham (“Agent Ham”) in September, 2010 revealed that Respondent had been dealing in livestock without a bond and had outstanding debts to livestock sellers. CX-8. Agent Ham’s investigation concluded that Respondent consistently failed to pay for livestock purchases when payment was due. CX 6 through CX-8. The owner of Ouachita Livestock Market, Mark Wedel, confirmed that Respondent regularly bought livestock on commission at that market. CX-2. Sales invoices and other documents from the period from February 2010 through September 2010 reflect that Respondent had purchased livestock on commission at Ouachita Livestock Market and sold livestock at other auction markets. CX-4 through CX-7. The chart at CX-6 shows seventeen (17) instances of Respondent’s failure to timely pay for purchases during this period. See, Attachment “A”, hereto.

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In a statement given to Agent Ham on September 10, 2010, Respondent Godberson admitted that he had been operating without a dealers' license or a bonding instrument when he purchased cattle at Ouachita Livestock in Louisiana and Covington Sale Barn in Oklahoma. CX-3. Respondent admitted that he owed Darrel Clark of Welch Stockyard approximately \$7,000.00. *Id.* In his Answer, Respondent advised that he has not actively engaged in livestock dealing since December, 2010, but has purchased cattle for his own use. RX-1. Respondent's answer did not address the issues of registration with GIPSA or failing to secure a bond or equivalent.

Peter Jackson is an auditor for GIPSA, who gave a declaration dated July 25, 2012, in which he described his duties reviewing investigative files. CX-9, ¶1. Mr. Jackson reviews between 40 and 60 investigative files annually and makes recommendations regarding the type and amount, if any, of sanctions that GIPSA should impose in those cases. *Id.* Mr. Jackson reviewed the circumstances involved in the instant cause of action and concluded that Respondent willfully violated the Act by failing to pay within the time period required for livestock purchases. In addition, it was found that Respondent operated under the Act without a bond or equivalent financial security. Mr. Jackson recommended that a civil penalty of \$42,250.00 be assessed against Respondent and that Respondent be Ordered to cease and desist violations of the Act. He further recommended the imposition of a thirty (30) day period of prohibition from registering to engage in business subject to the Act.

D. Discussion

Respondent has failed to file affirmative defenses denying the allegations raised by the Complaint served against him. Respondent did not respond to my Order to show cause why a Decision on the record should not be entered. He filed a letter in response to Complainant's Proposed Findings, in which he stated that he was uncertain what to do about the case, but was concerned about the recommended sanction. In a statement given to APHIS' investigator, Respondent admitted that he did not timely pay people or have proper bonds. I find that Respondent Michael Godberson has admitted the allegations underlying this cause of action, and therefore good cause lies to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

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The record is undisputed that Respondent engaged in activities regulated under the Act without the requisite bond or equivalent required by 9 C.F.R. § 201.29. The requirement to obtain a bond or equivalent surety is to protect livestock sellers, not buyers. *In re: Edward Tiemann*, 47 Agric. Dec. 1573, 1585 (U.S.D.A. 1988). Respondent had specific notice from GIPSA by certified mail on August 23, 2007 that he would need to file an application for registration with GIPSA and secure a bond or equivalent if he once again engaged in transactions covered by the Act. Respondent admitted to GIPSA Investigator Ham that he had operated under the Act without a dealers' license or a bonding instrument when he purchased cattle at Ouachita Livestock. His activities were corroborated by owners of auction markets where Respondent bought livestock on commission without a bond after receiving the notice explaining terms of compliance with the Act.

Respondent's failure to obtain a bond or other financial instrument to act as surety while continuing to buy livestock on commission constitutes an unfair and deceptive practice that violates 7 U.S.C. § 312(a). *See In re: Robert F. John*, 47 Agric. Dec. 436, 441 (U.S.D.A. 1998). Further, Respondent has failed to register with the agency. These actions constitute willful violations of the Act. GIPSA's recommended sanctions are appropriate for Respondent's willful violations of the Act. *See In re: Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1025 (U.S.D.A. 1989).

In addition, the record establishes that Respondent failed to make timely payments for livestock purchases as required by the Act and prevailing regulations. Mr. Godberson admitted to Agent Ham that he owed people money, and records of transactions at various livestock auctions corroborate that admission. I accord substantial weight to the findings of Agent Ham, who regularly conducts investigations involving compliance with the Act. I conclude that the information he reviewed established that Respondent acted in violations of the Act.

The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re:*

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Great American Veal, Inc., 48 Agric. Dec. 183, 202-03 (U.S.D.A. 1989). The Secretary further has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994). Although Respondent did not make any overt admission in his filings regarding the instant adjudication, he admitted to an official representing GIPSA that he had failed to fully pay for purchases that were subject to the Act.

I find that Respondent willfully violated the Act by failing to make payments when due. Respondent withheld payments in a number of actions, and I find that his practice of making partial and late payments constitutes substantial evidence of willfulness. I note that in his filed correspondence, Respondent has made statements that are not entirely supported by the evidence. Respondent maintained that he has not operated as a dealer subject to the Act since 2010, and moreover asserted that livestock purchases he made in 2010 were for his use. However, the evidence disclosed by Agent Ham's investigation demonstrates that Respondent acted as a dealer from February 2010 through September 2010.

I credit Mr. Jackson's recommendations for sanctions, but note that Mr. Jackson's statements supporting his proposal for a civil money penalty in the amount of \$42,450.00 are conclusory. Although similar penalties have been assessed in other cases, the imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See In re: S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. *In re: Marilyn Shepherd*, 57 Agric. Dec. 242 (U.S.D.A. 1998).

Mr. Jackson's rationale for recommending such a severe penalty is that it will serve as a deterrent. I find that it is not necessary to impose such a burdensome penalty to effectuate that goal. Although Respondent has made seemingly contradictory statements about his business activities in 2010, I accord Respondent the benefit of the doubt and

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conclude that he stopped operated as a dealer after September 2010, and purchases made thereafter were for his own use. Therefore, I find it appropriate to suspend imposition of the recommended penalty of \$42,250.00 until such time as Respondent may once again engage in conduct that violates the Act.

Since Respondent engaged in activities that violated the Act despite having notice of requirements for compliance, it is appropriate to Order him to cease and desist violating the Act and regulations. His conduct also supports the imposition of a specific period prohibiting him from engaging in covered activity. Respondent shall be suspended from registering as a dealer under the Act for a period of thirty (30) days from the date this Decision and Order becomes final.

Further, should Respondent wish to engage in conduct covered by the Act at any time in the future, he must complete the terms of registration with GIPSA. He shall also need to substantiate that he has secured a bond or equivalent financial instrument at that time. In addition, he must establish that he has made full payment to the sellers of livestock who received only partial payments from Respondent in the transactions documented herein.

E. Findings of Fact

1. Respondent Michael Godberson is an individual whose business address is his home address in the State of Oklahoma.
2. At times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis, and was not registered with GIPSA.
3. On or about August 23, 2007, Respondent was notified by certified mail that GIPSA had placed his registration in inactive status as of August 22, 2007, pursuant to information gleaned from Respondent's annual report filed with GIPSA on December 21, 2006.

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4. Respondent was also advised that since he was no longer active, he did not need to maintain Trust Agreement No. OK-183 in the amount of \$10,000.00.
5. Respondent was further advised that if he decided to engage in activities subject to the Act in the future, he would be required to file an application for registration and a bond or its equivalent with GIPSA.
6. An investigation conducted by GIPSA disclosed that Respondent had engaged in the business of a dealer without a bond or equivalent during the period from February 2010 through September 2010. See, Attachment "A".
7. In addition, with respect to the transactions that he undertook in that period, Respondent failed to pay when due the full purchase price of livestock. See, Attachment "A".

F. Conclusions of Law

1. Respondent Michael Godberson willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.
2. Respondent Michael Godberson operated in willful violation of the Act and its implementing regulations by failing to register with the Secretary of Agriculture, pursuant to 9 C.F.R. § 201.10.
3. Respondent Michael Godberson operated in willful violation of the Act and its implementing regulations by failing to register with the Secretary of Agriculture.
4. Respondents willfully violated 7 U.S.C. § 213(a) and 228b(a) by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.
5. Sanctions are appropriate to deter Respondent and others from willfully failing to register; from willfully failing to secure a bond or equivalent; and from willfully failing to make prompt payments as required by the Act and regulations.

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ORDER

Respondent Michael Godberson, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations.

Further, Respondent is prohibited from registering to engage in business subject to the Act for a period of thirty (30) days from the date this Order becomes final. Pursuant to 7 U.S.C. § 203, Respondent is prohibited from engaging in business subject to the Act without being registered with GIPSA and acquiring proper bond or equivalent.

After expiration of this thirty (30) day period, Respondent may engage in business subject to the Act after submitting an application for registration to GIPSA along with the required bond or bond equivalent; EXCEPT that Respondent shall not be registered unless he provides proof of payment in full to any seller of livestock who did not receive full payment in the transactions that are the subject of this adjudication. Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of \$42,250.00, EXCEPT that payment of that penalty is suspended for so long as Respondent remains in compliance with the Act and prevailing regulations. Should Respondent engage in activities covered by the Act without fulfilling the obligations set forth by this Order, the penalty shall become immediately due.

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 for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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In re: DOUGLAS BUTLER.
Docket No. 12-0033.
Decision and Order.
Filed August 31, 2012.

PS-D.

Jonathan Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER**Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint filed on October 19, 2011 by Alan R. Christian, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that Douglas Butler, herein referred to as Respondent, willfully violated the Act.

The Complaint alleges that between May 16, 2009 and the end of the summer of 2009, on six occasions Respondent, a dealer registered with the Secretary, purchased a total of 116 head of cattle from M.R. Pollock & Sons (Pollock) and failed to pay the purchase price of \$105,800.00 for the livestock when due.¹ The Complaint also alleges that Respondent failed to maintain records of the transactions that took place between Pollock and himself in that there are no invoices or records or inventory of the cattle purchased.

The Respondent filed his Answer on November 18, 2011, admitting the jurisdictional allegations, but denying the remaining allegations, asserting that he had not purchased the cattle, but rather had instead entered into a joint venture with Pollock, agreeing to care for the

¹ Complainant since conceded that 9 head of cattle were returned to Pollock and that the total amount due for the remaining cattle was \$92,750.00. n.1, page 2, Complainant's Post-Hearing Brief, Docket Entry No. 24; RX-2.

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livestock for the milk that they produced and splitting half of the profits from their intended sale to third parties.

The matter was heard in Burlington, Vermont on June 5 and 6, 2012. Four witnesses testified for the Complainant and the Respondent and his son testified for the Respondent.² Fifteen exhibits were admitted into evidence, twelve from the Complainant (CX-1-12) and three from the Respondent (RX-1-3).

Discussion

The Packers and Stockyards Act, enacted on August 15, 1921,³ is a product of the same era that produced § 3 of the Interstate Commerce Act of 1887⁴ (prohibiting undue preferences), the Sherman Anti-Trust Act in 1890,⁵ § 2 of the Clayton Act in 1914⁶ (prohibiting specified discriminatory pricing), and § 5 of the Federal Trade Act in 1914⁷ (prohibiting unfair methods of competition in commerce). In 1917, President Wilson had directed the Federal Trade Commission (FTC) to investigate the food industry to determine the truth or falsity of allegations made earlier that year in Congressional hearings ‘that the course of trade in important food products is not free, but is restricted and controlled by artificial and illegal means.’⁸ The strongly worded FTC Report concluded there was “conclusive evidence” that “monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest” existed.⁹ When enacted, the House Report described it as “a most comprehensive measure and extends further than any previous law in the regulation of

² References to the transcript of the proceeds will be indicated as Tr. and the page number.

³ Aug. 15, 1921, c.64, Title I, § 1, 42 Stat. 159.

⁴ Interstate Commerce Act, ch. 104, 24 Stat. 380 (1887), 49 U.S.C. § 10701(c)(1), 10741, 10742.

⁵ 15 U.S.C. §§ 1-7.

⁶ 15 U.S.C. §13

⁷ 15 U.S.C. §45

⁸ FED. TRADE COMM’N, REP. OF FED. TRADE COMM’N ON MEAT PACKING INDUSTRY, 392 (1919).

⁹ *Id.*

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private business, in time of peace, except possibly the interstate commerce act.¹⁰

The purpose of the Act was expressed in connection with a 1958 amendment as being:

[T]o assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.¹¹

Included in the Act's major provisions are prohibitions against unfair, unjustly discriminatory, or deceptive practices,¹² record keeping requirements,¹³ and stringent requirements for the payment of livestock purchased by a packer, market agency or dealing purchasing livestock.¹⁴

The evidence of record establishes that in late August of 2010, Ronald Pollock contacted the Packers and Stockyard Program officials and complained that Respondent had not paid him for cattle purchases that had been negotiated on Pollock's behalf by Mike Lane, an individual who worked with Pollock. Tr. 20-21. Jamie Ziem, a Packers and Stockyards Program Resident Agent proceeded to investigate the matter, collecting copies of the sales invoices from Pollock; taking statements from Mike Lane (CX-3), Ronald Pollock (CX-4), Milton Pollock (CX-5) and Respondent (CX-6); and reviewing Respondent's records. Tr. 21-37. At the hearing, Ziem identified the records produced during the course of the investigation, as well as the statements that had been given to her. Tr. 13-50.

¹⁰ H.R. REP. NO. 77, 67th Cong, 1st Sess. 2 (1921).

¹¹ H.R. REP. NO. 1048, 85th Cong, 1st Sess. 1(1957).

¹² 7 U.S.C. § 201.

¹³ 7 U.S.C. § 213.

¹⁴ 7 U.S.C. § 228b.

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The characterization of the transactions by the parties as reflected in the testimony adduced at trial is in sharp conflict, with Complainant's witnesses testifying that the transactions were all sales and the Respondent testifying that in each case a form of joint venture was established whereby he would take care of the cattle, retain any milk that was produced, and that when the cattle were sold to third parties that he would get half of the proceeds.

Mike Lane, the individual who negotiated dairy cattle transactions on Pollock's behalf,¹⁵ testified that on May 6, 2009, he, Ronald Pollock, Milton Pollock (Ron's brother), and Respondent took 39 Holstein cows, also described in the testimony as the Cooper herd from Maine to Butler's farm in Vermont.¹⁶ Tr. 55-56, 126. The herd was considered to be in excellent shape and Respondent was on hand at the time of the transfer to inspect the animals before they were delivered to his farm.¹⁷ Tr. 56-57, 125. Lane testified that the negotiated sale price was \$1,450.00 per head and an invoice reflecting the sale was prepared and given to Respondent. Tr. 56-57, 126, 127, 139, CX-3, 7. At the time of the sale, Respondent told both Lane and Pollock that he had a buyer for the cattle and that he would pay for them when they were sold. Tr. 56, 135. On May 17, 2009, Lane delivered another 33 head of cattle from the Lovewell farm to Butler. Tr. 58-60. Butler again told Lane that he had a buyer for the cattle and that payment would be forthcoming once they were resold. *Id.* An invoice was again prepared reflecting a purchase amount of \$22,300.00 and given to Respondent. Tr. 59-60, 113, CX-8.

The third transaction occurred on or about May 28, 2009 when Lane delivered six cattle (5 bred Holsteins and a bull) to Respondent's farm. Tr. 60-61. The invoice prepared and delivered to Respondent reflected the six animals and a purchase price of \$6,950.00. CX-9. On July 12,

¹⁵ Lane indicated that he "trucks" cattle for a living and that he also works with Ron Pollock in buying cows to sell to other people. Tr. 52. Pollock confirmed that he and Lane started "dealing" in [dairy] cows together. Tr. 123.

¹⁶ Respondent subsequently returned nine of the cattle to Lane. Tr. 66-67. At \$1,450 per head, the cost of the remaining cattle would be \$43,500.00.

¹⁷ Butler took only a portion of the cattle in the herd as there were a number that he did not take. Those animals were sold to another farmer in Maine. Tr. 56.

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2009, Lane met Butler at Santa Claus Village in New Hampshire where eight cattle were unloaded from Lane's trailer onto Respondent's. Tr. 62-63. Respondent had told Lane that he needed some cheaper animals for a neighbor who was going to buy them. Tr. 62-63. An invoice reflecting a sales price of \$5,600.00 was prepared and given to Respondent. CX-10. On or about July 22, 2009, Lane delivered a breeding age bull to Respondent. Tr. 64. An invoice reflecting a purchase price of \$750.00 was given to Respondent. CX-11.

The final transaction negotiated by Lane occurred in July or August of 2009. Tr. 66. Those cattle were delivered to Respondent by Milton Pollock. Tr. 132. An invoice reflecting the purchase price of \$13,650 was prepared. CX-12.

Although the evidence very clearly reflected that Respondent had disposed of a number of the cattle that had been sold to him without remitting any portion of their purchase price to Pollock (Tr. 69, 133, 146, 155), Respondent maintained in his testimony that he and Pollock had made a deal as partners.¹⁸ Tr. 210. As part of the deal, Respondent indicated that Pollock provided the cattle and Respondent furnished the feed and labor. Tr. 210. He also testified that rather than just the nine animals being taken back from the Cooper herd that Lane had indicated, all but two or three had been retrieved and resold by Pollock. Tr. 203.

Respondent's testimony was strongly disputed by Pollock. Throughout his testimony, he indicated that all of the transactions were sales and that he still expected to be paid. Tr. 121-168.

Having heard the testimony from both parties, I find Respondent's testimony that the transactions were part of a partnership arrangement or joint venture incredible and unworthy of belief. Not only is there no evidence of a written agreement between the parties, the evidence is clear that many of the animals purchased were subsequently either resold or otherwise disposed of without there being any remittance to Pollock. Tr. 69, 133, 146, 155. Even had there been such an agreement as Respondent has suggested, Respondent has in essence admitted flagitious conduct on his part in that he has not settled up with Pollock. Tr. 210.

¹⁸ Respondent admitted that he had not been able to settle up with them (Pollock and Lane). Tr. 210.

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In this action Complainant has sought a cease and desist order, a five year suspension and a civil penalty of \$66,000.00. The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (U.S.D.A. 1991).

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.¹⁹ In the action before me here, the Agency has recommended that a civil penalty of \$66,000.00 be imposed. While I will impose a civil penalty in that amount, given the purpose of the Act that sellers of livestock be paid for the animals that were sold, rather than diminish the potential for payment to made to the seller, I will suspend a significant portion of the penalty provided the Respondent can provide evidence that his debt to Pollock has been satisfied within six months of the date of this Decision and Order.

¹⁹ *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 89 (U.S.D.A. 2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); *In re Mary Jean Williams*, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (U.S.D.A. 2005); *In re George A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), enforced as modified, 397 F. 3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (U.S.D.A. 2002).

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On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Douglas Butler is an individual who resides in the Middlebury, Vermont who operates a dairy and cattle farm and is also a cattle dealer. Tr. 196.
2. Respondent, at all times material herein, was:
 - (a) Engaged in business as a dealer, buying and selling livestock in commerce for his own account; and
 - (b) Registered with the Secretary of Agriculture, as a dealer to buy and sell livestock for his own account and as a market agency buying livestock on commission.
3. Between May 16, 2009 and the end of July of 2009, on six occasions Respondent purchased 107 head of cattle from M.R. Pollock & Sons and failed to pay the purchase price of \$92,750.00 for the livestock, when due. CX-7 through 12, RX-2.
4. Respondent also failed to maintain adequate records of the transactions that took place between M.R. Pollock & Sons and himself in that there are no invoices or records or inventory of the cattle purchased.
5. As of the date of the issuance of this Decision, Respondent still continues to owe Pollock for the cattle purchased from him.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated Sections 312(a), 401 and 409 of the Act, 7 U.S.C. §213(a), 221, and 228(b).

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ORDER

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

- a. Failing to pay the full purchase of livestock as required by section 409 of the Act, 7 U.S.C. § 228b;
- b. Failing to maintain records that fully and correctly disclose all transactions in his business, as required by section 401 of the Act, 7 U.S.C. § 221.

2. Respondent is suspended as a registrant under the Act for a period of five years, and thereafter for such time until he:

- a. Provides evidence that the debt for the livestock purchases in this action has been satisfied.
- b. Acquires, files and maintains an adequate bond as required by the Act and the Regulations thereunder.

3. Respondent is assessed a civil penalty of \$66,000.00; however, \$36,000.00 of that amount will be suspended on condition that Respondent provides satisfactory evidence that his debt to Pollock has been satisfied within six months of the date of this Decision and Order. Failing production of such evidence within the allotted time, the full amount of the penalty shall then be due and owing.

Payment shall be made to: US Department of Agriculture
USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335

Respondent is further directed to note the Docket Number of this action on the payment instrument.

4. This Decision shall become final and effective without further

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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.

**In re: RONNIE LEWIS, D/B/A LAZY L ORDER BUYERS.
Docket No. 12-0011.
Decision and Order.
Filed October 11, 2012.**

PS-D—Surety—Sanctions.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before me pursuant to a complaint filed by the United States Department of Agriculture, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administrations (“GIPSA”; “Complainant”) against Ronnie Lewis, d/b/a Lazy L Order Buyers (“Respondent”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”).

I. Issues

1. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the section 312(a) of Act (7 U.S.C. § 213(a));
2. Whether Respondent operated under the Act without adequate surety; and
3. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

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II. Findings of Fact and Conclusions of Law

A. Procedural History

On October 5, 2011 Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On November 1, 2011, Respondent filed an Answer with the Hearing Clerk, acting *pro se*. References to the Answer in this Decision and Order shall be denoted as “RX-1”. By Order issued February 2, 2012, I set deadlines for the parties’ submissions in advance of setting a hearing date.

Complainant timely filed pre-hearing submissions in accordance with my Order, but Respondent did not file any pre-hearing submissions. On February 15, 2012, Complainant filed a motion for Decision by reason of Default. I deferred ruling on that motion and instead held a hearing on June 21, 2012. At the hearing, I admitted to the record Complainant’s documentary evidence identified as CX-1 through CX-21 and heard testimony from Complainant’s witnesses and from Respondent Ronnie Lewis, who represented himself. The transcript of the hearing was filed. Complainant filed written closing argument post-hearing, and Respondent filed documents pursuant to my oral Order at the hearing. Those documents are identified as “RX-2” and hereby admitted to the record.

The record is closed and this matter is ripe for adjudication.

B. Summary of the Facts

In his Answer and at the hearing Respondent Ronnie Lewis admitted that he had made late payments in violation of the Act. RX-1; Tr. At 85-86. Mr. Lewis has been in the livestock business all of his life. Tr. At 87. He began working with his father when Mr. Lewis was in high school. Id. The family business has been in operation since 1969. Tr. At 87-88.

Respondent explained that on September 13, 2010, he learned that funds from his checking account had been stolen when his bank cashed

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two forged checks written against the account. Tr. At 84; 94; CX-8. When checks Mr. Lewis had written to pay for livestock (identified at CX-11) were presented to his bank, his account had been diminished by the forged checks in the aggregate total of \$87,500.00. Tr. At 85. Mr. Lewis learned about the problem from his bank, and not from sellers who were unable to cash Mr. Lewis' checks. Tr. At 96-97.

The bank returned the amount of one of the forged checks, \$41,000.00, because the bank was familiar with the name used by the forger on that check. Tr. At 100. A similar theft by forgery under the same name had been perpetrated at a livestock auction in the state of Georgia. Tr. At 100-101. However, the bank refused to return to Mr. Lewis the amount of the other forged check in the amount of \$46,500.00 and he engaged counsel to try to resolve the matter. See, RX-2, letter of November 29, 2010.

During the period between August 23 and October 12, 2010 checks were presented for payment to Mr. Lewis' bank, and were denied. Tr. At 95; CX-11. Some of the checks were rejected because Mr. Lewis' bank advised him to close the compromised account and open a new account for his business needs. Tr. At 85. Mr. Lewis did as he was advised on September 14, 2010, and he was assured by his bank that checks presented on the closed account would be cashed. Tr. At 99. He called people who were holding his checks to warn them of his problem; at the time of the transfer of accounts, sufficient funds were available to cover the checks he had written. Tr. At 99-100. However, an \$80,000.00 check written to Cattleman's drained the account, and could only be partially paid.

Mr. Lewis testified that the matter was further complicated because his original bank, Wachovia, had been taken over by Wells Fargo. Tr. At 85. Another obstacle for Mr. Lewis has been his inability to secure a bond. As a result of non-payment due to the theft, a seller filed a claim against his bond, which was not renewed and has not been replaced, despite Mr. Lewis' efforts. Tr. At 86. Mr. Lewis would like to pay back the outstanding balance of \$38,205.19 owed to livestock sellers, but he cannot operate his business without a bond, and without resolving the matter of the stolen money. Tr. At 86. He believes that the thief has been identified by investigators looking into the Georgia theft. Tr. At 102-104.

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Mr. Lewis was attempting to take over his family business from his mother, and GIPSA notified him that he needed to secure an adequate bond to operate as a dealer. CX-4; Tr. At 109-111. Mr. Lewis was unable to secure the bond and by letter dated December 15, 2010, GIPSA advised the business that it must discontinue all livestock operations for which bonding are required under the Act. CX-9; Tr. At 109.

Nilsa Ramos Taylor works for GIPSA as a resident agent whose duties include conducting regulatory and investigative activities in the livestock and poultry industry in Florida, South Georgia and Alabama. Tr. At 14. In mid-September 2010, she received a telephone call from Tony Yeomans, the president of the Ocala Livestock Market who asked for bonding documents and claim forms relating to Respondent's business. TR. At 15-16. Ms. Taylor conducted an investigation into Mr. Yeoman's allegations that some checks written by Respondent were not cashed because the account had been closed. Tr. At 17; 27. She spoke with Respondent shortly after the phone call from Mr. Yeomans and interviewed Respondent on November 29, 2010. Tr. At 19. Respondent explained that forged checks had been cashed against his account by his bank and that the bank was looking into the problem. Tr. At 20.

Ms. Taylor explained that the failure to make good on the payments by the close of the next business day resulted in Respondent's violation of the Act and regulations. Tr. At 29. Six sellers were not paid timely for transactions that took place from August 23, 2010 to October 12, 2010, although \$80,649.25 of a check written to Cattleman's Auction in the amount of \$85,949.96 cleared the bank. Tr. At 30-36; CX-11; CX-13. In addition, Ocala Livestock Market Inc. filed a claim on Respondent's bond and received \$30,000.00 of the \$39,741.95 owed by Mr. Lewis. Tr. At 29. Ms. Taylor testified that Mr. Lewis provided her with documentation supporting that funds from his bank account had been stolen, but she considered him to be in violation of the Act because he had not paid sellers.

Mr. David Tomkow operates a livestock market and has sold cattle to Mr. Lewis' business, Lazy L Order Buyers, for years. Tr. At 50-51. Mr. Tomkow corroborated the testimony that Mr. Lewis bought livestock in

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August and September 2010 and did not fully pay for the orders. Tr. At 50-56. Mr. Tomkow testified that Mr. Lewis has not bought cattle at his market after September, 2010. Tr. At 55.

Ms. Taylor testified that records showed that Respondent continued to buy livestock on order for an individual, Terry Bomhak, and received a commission for the purchases. Tr. At 124. Ms. Taylor explained that individuals who buy on order for other registered dealers are required to be bonded and registered. Tr. At 126. Mr. Lewis is not currently registered as a livestock dealer. Tr. At 91. His registration was terminated in December, 2010 because he did not have a bond. Tr. At 109; CX-9.

Respondent made efforts to secure a bond after his bank account was compromised, but was unsuccessful. Tr. At 110. Mr. Lewis testified that he was not aware that he needed to be registered for commission sales of cattle he made on behalf of Mr. Bomhak, who paid for the cattle. Tr. At 111-112; 128. Mr. Lewis contended that he was advised by a GIPSA employee, Ms. Ramos-Taylor, that so long as he was included in Mr. Bomhak's bond, he was covered. Tr. At 112; 131-132. He believed that Mr. Bomhak included him on the bond. Tr. At 132. A copy of a revocable letter of credit and Trust Agreement issued to Terry Bomhak on May 18, 2011 includes Mr. Lewis and extends to May 18, 2013. See, RX-2.

Mr. Lewis believed that he has worked for Mr. Bomhak since August or September, 2011. Tr. At 113. During the period from November, 2010 until he began working with Mr. Bomhak, Mr. Lewis had done very little work and earned no income. Tr. At 113-114. Income tax returns reflect that Mr. Lewis' income plunged between 2010 and 2011. RX-2.¹

C. Statutory and Regulatory Authority

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of

¹ These tax returns have been redacted to protect private information.

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possession of livestock by paying by check to the seller of authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.*

Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a). The Act allows for the assessment of civil money penalties in an amount of up to \$11,000 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991).

D. Discussion

1. *Motion for judgment by default*

Pursuant to 7 C.F.R. § 1.136(c), the failure to file an answer within the time frame set forth by to 7 C.F.R. § 1.136(a) constitutes an admission of the allegations in the Complaint, and the failure to deny or otherwise respond to an allegation of the Complaint shall be deemed an admission of the allegation. In such instances, the entry of default against a Respondent is appropriate. In addition, pursuant to 7 C.F.R. § 1.139, the failure to file an answer constitutes a waiver of a hearing on the Complaint. If no objection to a motion for entry of proposed decision is filed by Respondent, “the Judge shall issue a decision without further procedure or hearing.” 7 C.F.R. § 1.139.

Having considered all the evidence, I find grounds to deny Complainant’s motion for judgment by default. Respondent filed an answer that Complainant apparently deemed to be timely because Complainant moved for a hearing in the matter on November 9, 2011. Since the motion placed Respondent on notice that a hearing was anticipated in the matter, the grant of a subsequent motion for a default judgment filed months later would impinge upon Respondent’s due process rights. In addition, the Hearing Clerk sent a corrected notice of the Complaint, which was delivered to Respondent on October 11, 2011.

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Respondent's answer was docketed by the Hearing Clerk on November 1, 2011. I deem the Answer timely filed as it was received on the 20th day after receipt of the Complaint.

2. *Non-payment to livestock sellers*

Respondent admits that livestock sellers were not paid, but maintains that his failure to pay was not willful. I find that GIPSA has established that Respondent failed to make timely payments to six sellers during the period from August 23, 2010 to October 12, 2010, as described at CX-11.

3. *Operating as a dealer without registration or bonding*

I credit Mr. Lewis' testimony that he did not do any business on his own behalf after October 2010. Mr. Lewis' income tax returns show a wide disparity of income between 2010 and 2011, which supports his contention. See, RX-1.

The evidence reflects that Mr. Lewis bought livestock on commission through Mr. Bomhak's business and made purchases in May and June, 2012. CX-21. In compliance with my instructions at the hearing, Respondent submitted post-hearing a copy of a letter of credit from the Bank of Union El Reno, OK, in the names of Terry Bomhak/Ronnie Lewis, which is dated May 18, 2011 and which was renewed for one year on May 18, 2012. See, RX-1. The letter of credit has a notation that Mr. Lewis was added on May 18, 2012. I cannot deduce from this document alone whether Mr. Bomhak covered Mr. Lewis for transactions that took place before May 18, 2012 or May 18, 2011, as the information is somewhat contradictory. However, it is apparent that Mr. Lewis was included in Mr. Bomhak's surety as of May 18, 2012 at the latest, and accordingly, transactions conducted by Respondent after that date do not represent violations of the Act. I infer from Complainant's closing argument and recommended findings of fact that it has accepted that Mr. Lewis did not violate the Act in 2012.

The evidence reflects that Mr. Lewis bought livestock on commission for Bomhak on March 8, 2011, April 6, 2011, and April 12, 2011. CX-18-CX-20. The only evidence regarding whether he had surety at this

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time is Mr. Lewis' credible testimony that he believed that Mr. Bomhak included him on Bomhak's letter of credit from the time he began to work with Bomhak. No other documentary evidence regarding Mr. Bomhak's surety is of record. A copy of Mr. Bomhak's letter of credit or other surety for the period before May, 2011 would have resolved any doubt regarding whether Mr. Lewis was covered in March and April, 2011. It is disappointing that Complainant did not submit such evidence, particularly since GIPSA requires the documentation and presumably has it on file, and since I suggested at the hearing that the documentation would be helpful and held the record open for its receipt.

Mr. Lewis' loss of income, as demonstrated by tax returns that he freely provided, shows that Respondent did not act as a dealer on his behalf without securing a bond. I decline to infer from Mr. Lewis' filings that he was not covered under Mr. Bomhak's letter of credit when he made purchases on commission in March and April, 2011, absent some affirmative evidence supporting that conclusion. I impose no affirmative duty on Mr. Lewis to provide all documentation from Mr. Bomhak, given the uncertainty of Respondent's access to Bomhak's records and the government's certain access to them. I further decline to shift the burden of proof to Respondent.

However, Mr. Lewis testified that he believed he began to work for Mr. Bomhak in August or September, 2011. Despite finding Mr. Lewis' testimony very credible and according it weight due to his many years as a dealer, his understanding from a GIPSA agent that he needed to be covered by Mr. Bomhak, and his business practice of being similarly covered on his mother's bond in his family business, I must discount his testimony regarding when he began to work for Bomhak. The record clearly establishes that Respondent bought livestock on commission in March and April, 2011, and I conclude from the preponderance of the evidence that Respondent engaged in those transactions without being covered by a financial instrument as surety in violation of 7 U.S.C. § 312(a).

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Elkin Parker is a Regional Director at GIPSA, whose office is located in Atlanta, Georgia. Tr. at 61-62. Mr. Parker's duties include enforcing the Act in the eastern region of the United States and in Puerto Rico. Tr. at 62. He has worked for GIPSA for over thirty-five years. Tr. at 63. Mr. Parker is familiar with livestock dealers' compliance with the Act, and with the results of GIPSA's enforcement efforts in the territory for which he is responsible. TR. at 65.

Mr. Parker was aware of the circumstances underlying GIPSA's investigation of Respondent's failure to make prompt payment and failure to be bonded. Tr. at 67. He considered these violations serious non-compliance with the Act and believed sanctions were appropriate to promote a deterrent effect by facilitating compliance with the Act. Tr. at 69. Mr. Parker was aware that Mr. Lewis had alleged that forged checks wiped out his bank account, but he nevertheless believed that Mr. Lewis was responsible for failing to pay in accordance with the law and regulations. Tr. at 80.

Peter Jackson is an auditor with GIPSA's Policy and Litigation Division. Tr. at 136. He reviews investigation files and recommends discipline. Tr. at 138. Mr. Jackson reviewed Respondent's case and concluded that his failure to pay sellers as required was willful. Tr. at 138-139. He recommended that Mr. Lewis be ordered to cease and desist from violating the Act, as well as be ordered to obtain a bond and to be assessed a civil penalty of \$58,000.00. Tr. at 139.

Mr. Jackson explained that the recommended penalty was substantially reduced from the \$11,000.00 per violation that is authorized at law. Tr. at 142. The penalty would not reimburse the outstanding balance Mr. Lewis still owes to sellers, but Mr. Jackson would reconsider his recommendation of the penalty amount if Mr. Lewis could prove that he paid the balances, since the starting point for the penalty was the unpaid amount. Tr. at 142-144.

Mr. Jackson was aware of the forgeries which depleted Mr. Lewis' account, and he considered that when making a penalty assessment. Tr.

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at 147. However, he continued to assert that the failure to pay when due was a willful violation of the Act. *Id.*

Willfulness is defined by the Administrative Procedures Act (5 U.S.C. §558(c)) as an act where “the actor intentionally does a prohibited act irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.” A violation is considered willful “if a prohibited act is done intentionally, regardless of the violator’s intent in committing those acts.” *In re: Hines & Thurn Feedlot*, 57 Agric. Dec. at 1414.

It is undisputed that Respondent failed to pay for livestock purchases in violation of the Act. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *In re: Great American Veal Inc.*, 48 Agric. Dec. 183, 211 (U.S.D.A. 1989). Moreover, the Secretary has concluded that Respondents who admit to the allegations in a complaint are in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994).

I have found no precedent involving the theft of funds being the reason for non-payment of amounts due to sellers of livestock. Despite the language in the seminal cases cited herein, *supra*, I find it difficult apply those conclusions in circumstances where unknown agents interfered with a dealer’s ability to pay sellers by stealing the dealer’s funds. I fully credit the evidence and find that Respondent’s bank account held the funds to pay for his purchases until a third party or parties forged checks that his bank, rather foolishly, paid over.

There is no evidence that Respondent was aware of the theft of his funds when he wrote checks to pay for livestock purchases. He closed his account on the advice of his bank, and his remaining funds were disbursed when valid checks were presented for payment. Mr. Lewis informed the sellers of the problem. He used the funds that the bank agreed to return to him to pay the sellers what he could. It is likely that all sellers would have been paid had the bank not refused to reimburse

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him for one of the forgeries, an issue that he continues to pursue to this date². A claim was made on his bond, and he could not secure a replacement bond, thereby disqualifying him from working in the business that he had worked in all of his life. Respondent did not continue to purchase livestock after the thefts caused him to shortchange sellers. He believed that he met all requirements to buy livestock on commission for a dealer.

Respondent suffered severe loss of income and has been unable to pay all of the sellers, though he has made some reimbursements. Respondent could have avoided falling into violation of the Act in these circumstances if he could have foreseen the future and taken measures to stop payment on the forgeries. He also could have kept a reserve of cash large enough to pay creditors, although that should have been covered by the bond that Respondent acquired in the amount set by regulation. Respondent's bond was not large enough to pay all claims, although it met GIPSA requirements. Respondent's livelihood was extinguished when he was unable to find an agency willing to give him a bond after a claim was made. I find that these circumstances do not represent a willful violation of the Act.

In addition, this situation can hardly set standards for deterring other dealers from failing to comply with the Act and regulations. What cautionary tale would sanctions in this case tell: Do not allow thieves to forge checks that your bank is careless enough to cash? The sanctions recommended against Respondent are harsh where the failure to pay was caused by a crime perpetrated against Respondent; where Respondent could not secure a bond to continue to operate his business and generate cash to make sellers whole; and where Respondent did his best to recover the money. In addition, a civil penalty will do nothing to make the sellers whole, and Respondent's debt to the sellers remains unsatisfied.

² I note the government's argument that Mr. Lewis did not produce proof that he is suing his bank for restitution, and find it has no relevance to burdens of proof or my credibility assessments. Mr. Lewis has suffered severe economic loss as the result of the theft, the ensuing failure to pay, and ultimate inability to conduct his business. His efforts were complicated by a change in bank ownership as well. Mr. Lewis' evidence on this issue, while not complete, is sufficient to verify his testimony that he consulted legal counsel about this issue—the only material reason for its admission.

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I note, however, that Mr. Lewis was not the only victim of the theft of his bank account. The sellers who still have not been paid for the sales made to Mr. Lewis were also victims of the crime. Although I accord full credit to Mr. Lewis' efforts to make restitution, there is no evidence that the livestock sales were canceled or that attempts to return the livestock were made. I acknowledge that Mr. Lewis has experienced a financial crisis in the loss of his business, and encourage his efforts to find employment. However, more than \$38,000.00 remains unpaid to sellers. Since the purpose of the Act and regulations is to protect sellers from the failure of buyers to pay, and since Respondent has not yet made full payment to sellers for transactions that took place two years ago, I find it appropriate to impose a conditional civil penalty. A penalty is also warranted because Mr. Lewis bought livestock in transactions covered by the Act without apparent adequate surety.

Accordingly, I hereby impose a civil penalty of \$38,000.00, which shall be suspended on condition that Respondent provides proof that he has paid in full, within one year of the date this Decision becomes final, all outstanding balances due to sellers who were not fully and promptly paid for the transactions underlying the instant cause of action³. I also adopt the agency's recommendation of issuing a cease and desist Order, as well as ordering Respondent to obtain an adequate bond or bond equivalent in order to operate subject to the Act.

E. Findings of Fact

1. At all times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis.
2. Respondent bought livestock at auction on six occasions between the period from August 23, 2010 and October 12, 2010 and failed to make full payment to the buyers by the end of the next business day.
3. On November 16, 2010, GIPSA notified Respondent that Lazy L Order Buyers could not engage in transactions covered by the Act because its bond had been terminated.

³ I am optimistic that Respondent's employment as a livestock buyer on commission shall improve his financial condition and allow him to make restitution.

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4. Respondent was unaware that his bank had paid out two forged checks in the total amount of \$87,500.00 on September 13, 2010.
5. On the advice of his bank, Respondent closed his account, and subsequent sellers' demands for payment were refused.
6. One seller made a claim against Respondent's bond and was partially paid the amount due from the sale.
7. Respondent's bank restored the sum of one of the forged checks, \$41,000.00, from which Respondent made payments and partial payments to the sellers.
8. Respondent continues to pursue restitution from his bank for the other check, which has been complicated by a law enforcement investigation and the sale of the bank to another entity.
9. Sellers remain unpaid for the transactions in the aggregate of slightly more than \$38,000.00.
10. Respondent ceased operating as a dealer under his own business name when he could not get a bond or other financial surety.
11. Sometime in 2011, Respondent began to buy livestock on commission on behalf of dealer Terry Bomhak.
12. Respondent was included in Bomhak's letter of credit as of not later than May 18, 2012.
13. Respondent bought livestock for Bomhak on three occasions in March and April 2012 without apparent surety.
14. Respondent bought livestock for Bomhak later in 2012, after he had been added to the letter of credit covering Bomhak's actions covered by the Act.

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F. Conclusions of Law

1. Respondent Ronnie Lewis willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.
2. Respondent Ronnie Lewis, doing business as Lazy L Order Buyers operated in violation of the Act and its implementing regulations by failing to pay the full amount of the purchase price for livestock within the time period required by the Act during the period from August 23, 2010 to October 12, 2010 in violation of 7 U.S.C. § 213(a).
3. Respondent's failure to pay was caused by the theft of his funds through forged checks cashed against his bank account, and his failure to pay was not willful.
4. Although Respondent did not willfully fail to pay sellers, balances remain on the account of some of the sellers, and therefore sanctions are appropriate to encourage others to make restitution and to operate with proper surety.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from: (1) engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations; and (2) failing to pay the full amount of the purchase price for livestock within the time period required by the Act and regulations.

Further, Respondent is ordered to obtain an adequate bond or bond equivalent if Respondent wishes to operate subject to the provisions of the Act.

Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of thirty-eight thousand dollars (\$38,000.00), except that

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the penalty shall be suspended on condition that Respondent has satisfied the outstanding debts owed to sellers by not later than one year from the date this Decision becomes final.

Respondent's payment, if due, shall be made out to the "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondent shall include on the payment instrument a reference to this case, Docket No. 12-0033.

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 for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

**In re: CHARLES HELMICK.
Docket No. 12-0563.
Decision and Order.
Filed December 19, 2012.**

PS-D.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD**I. Introduction**

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture ("USDA"; "Complainant") against Charles Helmick ("Respondent") alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. ("the Act"). The Complaint alleges that Respondent

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failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

II. Issues

1. Whether a hearing is necessary in this matter;
2. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and
3. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. Findings of Fact and Conclusions of Law

A. Procedural History

On August 1, 2012 Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On August 29, 2012, Respondent filed correspondence, acting *pro se*, which I construe to be a timely filed Answer. References to the Answer in this Decision and Order shall be denoted as “RX-1”. By Order issued March 22, 2012, I set deadlines for the parties’ submissions in advance of setting a hearing date.

On October 10, 2012, Complainant filed a motion for a Decision and Order on the Record. On November 14, 2012, Respondent filed correspondence in which he did not deny the complaint allegations, and asserted that he was attempting to make restitution for unpaid sales of livestock. This document is hereby designated “RX-2”. On November 20, 2012, I deferred ruling on Complainant’s motion, and allowed additional time for Respondent and Complainant to file evidence. On December 13, 2012, Complainant filed documentary evidence identified as CX-1 through CX-8, and also filed sworn declarations by two individuals, hereby identified as CX-9 and CX-10. Complainant’s evidence is hereby admitted to the record. Respondent has not filed any

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evidence other than his two letters, which are hereby admitted to the record.

The matter is ripe for adjudication and the record is closed.

1. *Statutory and Regulatory Authority*

7 C.F.R. § 1.1.39 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.1.39.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.* Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

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The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. *See, S.S. Farms Linn County*, 50 Agric. Dec. 476 (U.S.D.A. 1991). One of the primary purposes of the Act is to assure fair trade practices and safeguard farmers and ranchers from being paid less than the fair market value of their livestock. *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F. 2d 1332, 1337 (8th Circ. 1971).

B. Summary of the Facts

Respondent is registered with USDA as a livestock dealer. On September 19, 2009, Complainant GIPSA sent to Respondent a Notice of Violation regarding Respondent's insolvency as of December 31, 2008. During the period from June 23, 2009 through May 26, 2011, Respondent failed to make timely payment for 100 head of livestock purchased from Virginia Cattle Company, South Branch Valley Livestock Exchange and Harry "Buck" Hamborsky for the aggregate amount of \$52,147.88. CX-5 through CX-8. To the knowledge of GIPSA Resident Agent James Cannon, an amount of \$29,504.20 remains due to those livestock sellers. CX-10. Agent Cannon documented the failure to pay the full amounts due to sellers. CX-5 through CX-8; CX-10.

In his written correspondence, Respondent admitted that he had failed to fully pay sellers for livestock that he purchased. Respondent explained that his accountant had passed away, and review of the accountant's books revealed that Respondent had not made proper tax payments. The additional financial burden of resolving his tax deficits led to problems with making prompt payment. Respondent freely admitted that he had violated the Act, but he believed that he had made payments to one seller for which he has not received credit.

Jeanna Harbison is an Investigative/Enforcement Attorney for GIPSA whose duties include reviewing investigations and making recommendations regarding the propriety of sanctions. CX-9. Ms. Harbison reviewed Respondent's file and concluded that he had willfully

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violated the Act by purchasing livestock and failing to pay the full amount within the time period required by the Act. She concluded that a civil penalty of \$29,504.26 should be assessed against the Respondent, with set-offs for proof of payment to sellers. In addition, Ms. Harbison believed that a five year suspension of Respondent's registration to act as a dealer under the Act should be imposed, with the proviso that the suspension could be reduced to one year upon proof of full payment to the sellers, particularly in consideration of Respondent's assertion that he had paid one seller an additional \$10,000.00. In the alternative, Ms. Harbison believed that Respondent could be employed by another dealer, after one year suspension of his own registration.

C. Discussion

The record is undisputed that Respondent failed to make timely payments within the mandates of the Act. Respondent has admitted that he failed to make timely payments. Although Respondent asserted that he made more payments than GIPSA credits him, he did not provide any specific information about the payments. Further, Respondent did not comply with the payment provisions of the Act despite being given notice by GIPSA that he was in violation of the Act. The Secretary has found that "...once a licensee has been adequately warned, if he subsequently violated 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. 1762, 1782 (U.S.D.A. 1991). Accordingly, I find that a hearing in this matter is not necessary, and further find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. § 1.139.

I find that Respondent has willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re: Great American Veal, Inc.*, 48 Agric. Dec. 183, 202-03 (U.S.D.A. 1989). Respondent failed to make timely payments despite receiving a notice from GIPSA advising him of the need to comply with the Act. I conclude that Mr. Helmick's continued practice of making late or incomplete payments despite notice constitutes substantial evidence of willfulness.

Charles Helmick
71 Agric. Dec. 1150

I credit Respondent's explanation that his cash flow suffered due to tax deficiencies that needed to be addressed, and I sympathize with his position. Nevertheless, Respondent's financial problems are not a meritorious defense to his failure to make payments. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *In re: Great American Veal Inc.*, 48 Agric. Dec. at 211. Moreover, the Secretary has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondent. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994).

I accord substantial weight to Ms. Harbison's recommendations, considering the number of years and transactions that disclose Respondent's failure to comply with the Act. GIPSA's notice to Respondent failed to serve as a suitable deterrent to his practice of making late payments. I agree with GIPSA's assessment of penalties, and find that a cease and desist Order, a suspension, and monetary penalties should persuade Respondent to comply with the prompt payment requirements of the Act in the future. However, I decline to adopt wholesale the recommendations proposed by Complainant regarding the timeframe for making full payment, considering that the proposed date has passed. I also find that the period of suspension should be reduced to correlate with the number of years that Respondent failed to comply with the Act.

D. Findings of Fact

1. Respondent is an individual whose current address is in the State of West Virginia.
2. At all times material herein, Respondent was engaged in the business of buying livestock in commerce and acted as a dealer within the meaning of the Act.

PACKERS AND STOCKYARDS ACT

3. On September 19, 2009, GIPSA sent Respondent written notification advising him that he had violated the Act.
4. During the period from June 23, 2009 through May 26, 2011, Respondent was involved in five transactions to purchase a total of 100 head of livestock from Virginia Cattle Company, South Branch Valley Livestock Exchange, and Harry "Buck" Hamborsky for a total price of \$52,147.88 and failed to pay the full amount of the purchase prices within the time period required by the Act.
5. During the period from April 1, 2011 through May 27, 2011, Respondent was involved in fourteen transactions to purchase a total of 144 head of livestock from five different livestock sellers for a total purchase price of \$91,583.29, which Respondent failed to fully pay when due.
6. Respondent failed to make timely payments after being notified by GIPSA that he had violated the Act.

E. Conclusions of Law

Respondent willfully violated 7 U.S.C. § 192(a) and § 228b of the Act by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Sanctions are appropriate to deter Respondent and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. § 193(b).

ORDER

Respondent Charles R. Helmick, shall cease and desist from failing to pay when due the full purchase price of livestock in transactions subject to the Act and regulations monitored by GIPSA.

Pursuant to 7 U.S.C. § 193(b), Respondent is assessed a civil penalty of not more than \$29,504.26, with full credit for all payments that Respondent can establish by written proof provided to counsel for Complainant not later than December 31, 2012. In addition, the penalty

Charles Helmick
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shall be suspended if Complainant makes all payments due on the outstanding balances owed to sellers as the result of transactions involved in this adjudication so long as those payments are made by not later than December 31, 2012. If Respondent fails to fully satisfy the outstanding balances, the amount of the final penalty shall be made by check to "U.S. Department of Agriculture" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis Missouri, 63179-0335. Respondent shall include on the payment instrument a reference to this matter, Docket No. 12-0563.

Respondent is hereby suspended from registering under the Act for a period of not to exceed **three years**, which is the time period equivalent to the period during which violations arose. If Respondent can demonstrate through written proof that he has satisfied the outstanding balance by December 31, 2012, the suspension shall be reduced to six months. If Respondent fails to meet the deadline imposed herein, but makes restitution in full within six months, he may be employed by another dealer within the meaning of the Act.

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 for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

MISCELLANEOUS ORDERS**MISCELLANEOUS ORDERS**

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/].

PACKERS AND STOCKYARDS ACT

In re: TYSON FARMS, INC.

Docket No. D-12-0123.

Miscellaneous Order.

Filed July 5, 2012.

PS-D.

Jonathan D. Gordy, Esq., Krishna G. Ramaraju, Esq., Brian P. Sylvester, Esq., and Ciarra A. Toomey, Esq. for Complainant.

L. Bryan Burns, Esq., Robert W. George, Esq., Jay T. Jorgenson, Esq., and Brian P. Morrissey, Esq. for Respondent.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

Ruling by William G. Jenson, Judicial Officer.

RULING DENYING REQUEST FOR ORAL ARGUMENT

On June 19, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] requested that I determine whether the Secretary of Agriculture lacks statutory authority to proceed with this action on the grounds raised by Tyson Farms, Inc. [hereinafter Tyson] (Chief ALJ's Certification of Motion to the Judicial Officer at 2).¹ On June 25, 2012, Tyson requested oral argument before the Judicial

¹ The Chief ALJ certified his request in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] which authorize administrative law judges to certify requests to the Judicial Officer, as follows:

§ 1.143 Motions and requests.

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Officer regarding the Chief ALJ's certified request. On July 3, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, filed a response opposing Tyson's request for oral argument (Complainant's Response to Respondent's Request for Oral Argument). On July 3, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Tyson's request for oral argument.

Tyson requests oral argument before the Judicial Officer pursuant to 7 C.F.R. § 1.145(d), which provides, as follows:

§ 1.145 Appeal to Judicial Officer.

.....
(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

.....
(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R. § 1.143(e).

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A review of the record reveals that Tyson is not a party bringing an appeal or an appellee in the instant proceeding. Therefore, I deny Tyson's request for oral argument pursuant to 7 C.F.R. § 1.145(d).

In re: TYSON FARMS, INC.
Docket No. D-12-0123.
Miscellaneous Order.
Filed July 6, 2012.

PS-D.

Jonathan D. Gordy, Esq., Krishna G. Ramaraju, Esq., Brian P. Sylvester, Esq., and Ciarra A. Toomey, Esq. for Complainant.
L. Bryan Burns, Esq., Robert W. George, Esq., Jay T. Jorgenson, Esq., and Brian P. Morrissey, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING ON CERTIFIED QUESTION**The Chief Administrative Law Judge's Certified Question**

On June 19, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] certified the following question to me: Does the Secretary of Agriculture have statutory jurisdiction to proceed with this action against Tyson Farms, Inc. [hereinafter Tyson]? (Chief ALJ's Certification of Motion to the Judicial Officer [hereinafter the Chief ALJ's Certified Question] at 2.)¹

¹ The Chief ALJ certified the question in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] which authorize administrative law judges to certify any question to the Judicial Officer, as follows:

§ 1.143 Motions and requests.

.....
(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may

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Discussion

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], and the Rules of Practice by filing a Complaint on December 20, 2011. The Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1 and has committed an unfair practice and deceptive practice under 7 U.S.C. § 192.²

The Chief ALJ requests that I address three independent reasons advanced by Tyson as the basis for Tyson's contention that the Secretary of Agriculture lacks statutory authority to proceed with this action.

1. Tyson contends that the Complaint seeks to sanction Tyson for engaging in conduct—the ranking of flocks of birds with different breeds in the same “tournament”—that the Secretary proposed to regulate in a recent proposed rule (amending 9 C.F.R. Part 201) which Congress has prohibited any funds from being used to “implement.” Consolidated and Further Continuing Appropriations Act of 2012 (the “Agriculture Appropriations Bill”), Publ. L. 112-55, 125 Stat. 552 (Nov. 18, 2011). If Congress's prohibition does extend to the instant administrative proceeding, Tyson argues that the Secretary's action would violate Article I, Sections 8 and 9 of the U.S. Constitution, the Purpose Statute, 31 U.S.C. § 1301, the Antideficiency

either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

⁷ C.F.R. § 1.143(e).

² Compl. ¶¶ II-III.

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Act, 31 U.S.C. § 1341, and the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.*

Chief ALJ's Certified Question at 1-2.

The Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552 (2011), provides:

SEC. 721. None of the funds made available by this or any other Act may be used to write, prepare, or publish a final rule or an interim final rule in furtherance of, or otherwise to implement, "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (75 Fed. Reg. 35338 (June 22, 2010)) unless the combined annual cost to the economy of such rules do not exceed \$100,000,000: *Provided*, That no funds be made available by this or any other Act to publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), 201.3(c), 201.210, 201.211, 201.213, or 201.214 of "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (75 Fed. Reg. 35338 (June 22, 2010)): *Provided further*, That such rules must be published in the Federal Register no later than December 9, 2011: *Provided further*, That none of the funds made available by this or any other Act may be used to implement such rules until 60 days from the publication date of such rules, and only unless such rules are otherwise in compliance with this section.

The Complaint does not refer to any proposed rule and the Deputy Administrator does not allege a violation of any proposed rule. Instead, the Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1 and has committed an unfair practice and deceptive practice under 7 U.S.C. § 192.³ Therefore, I conclude

³ Compl. ¶¶ II-III.

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Congress's prohibition in the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552 (2011), does not extend to the Complaint filed by the Deputy Administrator.

2. Tyson next contends that Congress has not authorized the Secretary of Agriculture to initiate administrative proceedings to adjudicate allegations of unfair and deceptive practices committed by **live poultry dealers** such as Tyson, citing *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456 (8th Cir. 1995) and *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005).

Chief ALJ's Certified Question at 2 (emphasis in original).

The Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1. An underpayment of a poultry grower in violation of 7 U.S.C. § 228b-1(a) is considered an "unfair practice" in violation of the Packers and Stockyards Act, as follows:

§ 228b-1. Final date for making payment to cash seller or poultry grower

.....

(b) Delay or attempt to delay collection of funds as "unfair practice"

Any delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry obtained by poultry growing arrangement or purchased in a cash sale, shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

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7 U.S.C. § 228b-1(b). Thus, a violation of the payment requirements in 7 U.S.C. § 228b-1(a) is also a prohibited “unfair practice” under 7 U.S.C. § 192. Pursuant to 7 U.S.C. § 228b-2, the Secretary of Agriculture may institute an administrative adjudicatory proceeding against a live poultry dealer for an alleged violation of the payment requirements in 7 U.S.C. § 228b-1, which violation is also an unfair practice prohibited by 7 U.S.C. § 192.⁴ Therefore, I conclude the Packers and Stockyards Act authorizes the Secretary of Agriculture to institute this administrative adjudicatory proceeding against Tyson for alleged underpayment of poultry growers in violation of 7 U.S.C. § 228b-1 and an alleged unfair practice under 7 U.S.C. § 192.⁵

3. Last, Tyson argues that even were the Secretary vested with jurisdiction to bring an action pursuant to § 202 of the Packers and Stockyards Act (Act), 7 U.S.C. § 192, the Complaint in this action is fatally deficient in that it fails to plead an essential allegation that Tyson’s conduct resulted in injury or a likelihood of injury to competition.

Chief ALJ’s Certified Question at 2.

⁴ The cases cited by Tyson in support of the position that the Secretary of Agriculture has no authority to initiate administrative proceedings to adjudicate allegations of an unfair practice committed by live poultry dealers are inapposite as they do not relate to proceedings instituted under 7 U.S.C. § 228b-2. (See *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005) (stating the Secretary of Agriculture has no authority under 7 U.S.C. § 193(a) to adjudicate alleged violations of 7 U.S.C. § 192 by live poultry dealers), *cert. denied*, 546 U.S. 1034 (2005); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1457 (8th Cir. 1995) (stating, under the plain language of the Packers and Stockyards Act, the administrative complaint procedure under 7 U.S.C. § 210 is not available for claims against a live poultry dealer; however, the Secretary of Agriculture is authorized to enforce administratively the prompt payment provision of the Packers and Stockyards Act (7 U.S.C. § 228b-1), which provision is not at issue in this case).

⁵ The Deputy Administrator also alleges Tyson has committed a “deceptive practice” under 7 U.S.C. § 192 (Compl. ¶ III). I find the Deputy Administrator’s allegation that Tyson committed a “deceptive practice” under 7 U.S.C. § 192 puzzling because 7 U.S.C. § 228b-1(b) does not provide that a violation of 7 U.S.C. § 228b-1(a) shall be considered a “deceptive practice” under the Packers and Stockyards Act; instead, 7 U.S.C. § 228b-1(b) provides only that a violation of 7 U.S.C. § 228b-1(a) shall be considered an “unfair practice” under the Packers and Stockyards Act.

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The Deputy Administrator alleges Tyson violated 7 U.S.C. § 228b-1(a). The Packers and Stockyards Act contains no requirement that injury to competition or likelihood of injury to competition must be shown in order to prove a violation of 7 U.S.C. § 228b-1(a); however, 7 U.S.C. § 228b-1(b) specifically provides that a violation of 7 U.S.C. § 228b-1(a) shall be considered an “unfair practice” under the Packers and Stockyards Act. Thus, a violation of 7 U.S.C. § 228b-1(a) is a prohibited “unfair practice” under 7 U.S.C. § 192 without regard to whether injury to competition or likelihood of injury to competition is shown.

**Response to the Chief Administrative Law Judge’s
Certified Question**

The Secretary of Agriculture has statutory jurisdiction to proceed with this action against Tyson.⁶

⁶ The Rules of Practice are applicable to administrative adjudicatory proceedings under the Packers and Stockyards Act (9 C.F.R. § 202.200). However, except for Packers and Stockyards Act adjudicatory proceedings conducted under 7 U.S.C. §§ 193, 204, 213, and 221 (7 C.F.R. § 1.131(a)), the complaint instituting the proceeding must provide that the Rules of Practice are applicable to the proceeding and the Assistant Secretary for Administration must concur with the complaint (7 C.F.R. § 1.131(b)(6)). The Complaint filed in this proceeding specifically provides that the Rules of Practice are applicable to this proceeding instituted under 7 U.S.C. § 228b-2 (Compl. at fourth unnumbered page); however, I am unable to locate the Assistant Secretary for Administration’s concurrence with the Complaint. Therefore, while the Secretary of Agriculture has statutory jurisdiction to proceed with this action against Tyson under 7 U.S.C. § 228b-2, the Chief ALJ may want to ensure that the Rules of Practice have been properly made applicable to the instant proceeding.

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In re: CLAYPOOLE LIVESTOCK, INC. AND TIMOTHY J. CLAYPOOLE.

Docket No. D-12-0135.

Miscellaneous Order.

Filed August 15, 2012.

PS-D.

Charles E. Spicknall, Esq. for Complainant.

Respondent, pro se.

Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.

Ruling by William G. Jenson, Judicial Officer.

**ORDER GRANTING COMPLAINANT'S
MOTION TO MODIFY ORDER**

In *In re Claypoole Livestock, Inc.*, ___ Agric. Dec. ___ (June 20, 2012), I concluded that Claypoole Livestock, Inc., and Timothy J. Claypoole violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], and the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]. I issued a cease and desist order and assessed Claypoole Livestock, Inc., and Mr. Claypoole a civil penalty to be paid within 60 days after the Hearing Clerk served them with the June 20, 2012, Decision and Order.

On August 13, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a Motion to Modify Order to Extend Respondents' Time to Pay Civil Penalty in which the Deputy Administrator states Mr. Claypoole had requested an extension of time within which to pay the assessed civil penalty. The Deputy Administrator states the parties now agree that Claypoole Livestock, Inc., and Mr. Claypoole's time to pay the civil penalty should be extended to November 1, 2012.

Accordingly, I vacate the Order issued in *In re Claypoole Livestock, Inc.*, ___ Agric. Dec. ___ (June 20, 2012), and substitute the following Order in its place:

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ORDER

1. Claypoole Livestock, Inc., and Timothy J. Claypoole, their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:
 - a. Engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or bond equivalent as required by the Packers and Stockyards Act and the Regulations;
 - b. Purchasing livestock and failing to pay for the livestock purchases within the time period required by the Packers and Stockyards Act; and
 - c. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the accounts upon which the checks are drawn to pay the checks when presented.
2. Claypoole Livestock, Inc., and Timothy J. Claypoole are prohibited from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act without first becoming properly registered.
3. In accordance with 7 U.S.C. § 213(b), Claypoole Livestock, Inc., and Timothy J. Claypoole are jointly and severally assessed an \$11,000 civil penalty. However, the civil penalty in excess of \$2,500 is suspended: *Provided, That* Claypoole Livestock, Inc., and Timothy J. Claypoole fully comply with terms of the cease and desist provisions contained in this Order for a period of 1 year. Payment of the unsuspended amount of \$2,500 shall be made by certified check or money order, made payable to the "Treasurer of the United States," and sent to:

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USDA-GIPSA
PO Box 790335
St. Louis, Missouri 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA on or before November 1, 2012. Timothy J. Claypoole shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0135.

**In re: SAMMY SIMMONS AND WENDY SIMMONS, D/B/A
PEOPLE'S LIVESTOCK OF CARTERSVILLE.
Docket No. D-12-0131.
Miscellaneous Order.
Filed August 29, 2012.**

PS-D.

Jonathan D. Gordy, Esq. for Complainant.
Respondents, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

**ORDER EXTENDING TIME FOR FILING A RESPONSE
TO RESPONDENT'S APPEAL**

On August 28, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], requested that I grant a 10-day extension of time within which to respond to Sammy Simmons and Wendy Simmons' appeal petition. For good reason stated, the Deputy Administrator's motion to extend the time for responding to the Simmons' appeal petition is granted. The time for filing the Deputy Administrator's response to the Simmons' appeal petition is extended to, and includes, September 7, 2012.¹

¹ The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to the

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In re: ROBERT M. SELF.
Docket No. D-12-0167.
Miscellaneous Order.
Filed September 24, 2012.

PS-D.

Ciarra A. Toomey, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 10, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges Robert M. Self: (1) operated as a dealer or market agency without obtaining the necessary registration and bond, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29-.30; (2) issued checks in payment for livestock purchases, which checks

Simmons' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, September 7, 2012.

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were returned unpaid by the bank upon which the checks were drawn because Mr. Self 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, in willful violation of 7 U.S.C. §§ 213(a) and 228b; and (3) failed to pay, when due, the full purchase price of the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b.¹

The Hearing Clerk served Mr. Self with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on February 7, 2012.² Mr. Self failed to file an answer to the Complaint within 20 days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated February 28, 2012, to Mr. Self informing him that an answer to the Complaint had not been filed within the time prescribed in the Rules of Practice. Mr. Self failed to respond to the Hearing Clerk's February 28, 2012, letter.

On March 6, 2012, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing By Reason of Default attached to which was a proposed Decision Without Hearing By Reason of Default. On May 17, 2012, the Hearing Clerk served Mr. Self with the Deputy Administrator's Motion for Decision Without Hearing By Reason of Default and the Hearing Clerk's service letter.³ Mr. Self failed to file objections to the Deputy Administrator's Motion for Decision Without Hearing By Reason of Default within 20 days after service, as required by 7 C.F.R. § 1.139.

On June 29, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ], in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Mr. Self violated the Packers and Stockyards Act and the Regulations, as alleged in the Complaint; (2) ordering Mr. Self to cease and desist from violating the Packers and Stockyards Act and the Regulations; (3) prohibiting Mr. Self from engaging in business for which registration and bonding is required under the Packers and Stockyards Act without first becoming registered under the Packers and Stockyards Act; and (4) assessing

¹ Compl. ¶¶ II-IV.

² Hearing Clerk's Memorandum To The File, dated February 7, 2012.

³ Hearing Clerk's Memorandum To The File, dated May 17, 2012.

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Mr. Self a \$19,600 civil penalty.⁴ The Hearing Clerk served Mr. Self with the Chief ALJ's Default Decision and Order on July 6, 2012.⁵

On August 24, 2012, the Mr. Self filed an appeal petition. On September 17, 2012, the Deputy Administrator filed Complainant's Opposition to Respondent's Appeal Petition. On September 20, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.⁶ The Hearing Clerk served Mr. Self with the Chief ALJ's Default Decision and Order on July 6, 2012;⁷ therefore, Mr. Self was required to file his appeal petition with the Hearing Clerk no later than August 6, 2012. Instead, Mr. Self filed his appeal petition with the Hearing Clerk on August 24, 2012. Therefore, I find Mr. Self's appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.⁸ The Chief ALJ's Default Decision and Order became

⁴ Chief ALJ's Default Decision and Order at 3-4.

⁵ United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 1537.

⁶ 7 C.F.R. § 1.145(a).

⁷ See note 5.

⁸ See, e.g., *In re Timothy Mays* (Order Denying Late Appeal), 69 Agric. Dec. 631 (2010) (dismissing respondent's appeal petition filed 1 week after the administrative law judge's decision became final); *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Michael Claude Edwards* (Order Denying Late Appeal), 66 Agric. Dec. 1362 (2007) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); *In re Tung Wan Co.* (Order Denying Late Appeal), 66 Agric. Dec. 939 (2007) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief

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final 35 days after the Hearing Clerk served Mr. Self with the Default Decision and Order, namely, August 10, 2012.⁹ Mr. Self filed his appeal petition on August 24, 2012, 14 days after the Chief ALJ's Default Decision and Order became final. Therefore, I have no jurisdiction to hear Mr. Self's appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Mr. Self's filing an appeal petition after the Chief ALJ's Default Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources*

administrative law judge's decision became final); *In re Jozset Mokos* (Order Denying Late Appeal), 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re Ross Blackstock* (Order Denying Late Appeal), 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David Gilbert* (Order Denying Late Appeal), 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez* (Order Denying Late Appeal), 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

⁹ See 7 C.F.R. § 1.142(c)(4).

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Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.^[10]

Accordingly, Mr. Self's appeal petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Robert M. Self's appeal petition, filed August 24, 2012, is denied.
2. The Chief ALJ's Default Decision and Order, filed June 29, 2012, is the final decision in this proceeding.

¹⁰ *Accord City of Arlington v. FCC*, 668 F.3d 229, 237 (5th Cir. 2012) (stating the 60-day period to file a petition for review of an agency order in 28 U.S.C. § 2344 is jurisdictional and cannot be judicially altered or expanded); *Brazoria County v. EEOC*, 391 F.3d 685, 688 (5th Cir. 2004) (same); *Jem Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

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**In re: DOUGLAS BUTLER.
Docket No. D-12-0033.
Miscellaneous Order.
Filed October 19, 2012.**

PS-D.

Jonathan D. Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

**ORDER EXTENDING TIME TO FILE A RESPONSE TO
RESPONDENT'S APPEAL PETITION**

On October 16, 2012, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], requested that I extend the time for filing a response to Douglas Butler's appeal petition to October 26, 2012. The Deputy Administrator's motion to extend the time to respond to Mr. Butler's appeal petition is granted. The time for filing the Deputy Administrator's response to Mr. Butler's appeal petition is extended to, and includes, October 26, 2012.¹

¹ The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Mr. Butler's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 26, 2012.

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**In re: H.D. EDWARDS.
Docket No. D-10-0296.
Miscellaneous Order.
Filed November 5, 2012.**

PS-D.

Brian Sylvester, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER

Procedural History

On March 23, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed Complainant's Petition for Reconsideration of Order Denying Late Appeal [hereinafter Petition to Reconsider] requesting that I reconsider *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ___ (Mar. 15, 2012). On April 17, 2012, H.D. Edwards filed a response to the Deputy Administrator's Petition to Reconsider, and on April 23, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Deputy Administrator's Petition to Reconsider.

Discussion

In *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. ___ (Mar. 15, 2012), I found Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an oral decision at the close of the December 5, 2011, hearing. This finding resulted in my concluding that, under the rules of practice applicable to this proceeding,¹ the ALJ's oral decision

¹ The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

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was issued on December 5, 2011, any appeal of the ALJ's oral decision was required to be filed no later than January 4, 2012, and the ALJ's oral decision became effective on January 9, 2012.² As the Deputy Administrator filed an appeal petition with the Hearing Clerk on January 31, 2012, I denied the Deputy Administrator's appeal petition because it was late-filed.

The Deputy Administrator contends the ALJ's December 5, 2011, oral decision was a tentative oral decision; thus, time for filing an appeal petition with the Hearing Clerk did not begin to run on December 5, 2011. Instead, the Deputy Administrator asserts the ALJ's final decision was the ALJ's written Decision and Order filed with the Hearing Clerk and served on the Deputy Administrator on January 6, 2012; thus, the Deputy Administrator's appeal petition was timely filed.³ (Pet. to Reconsider at 1-5.)

The record establishes that, at the close of the December 5, 2011, hearing, the ALJ asked the parties if they had any objection to her issuing an oral decision from the bench and both parties agreed to the issuance of an oral decision (Tr. 299). The ALJ then issued an oral decision (Tr. 299-310). As Mr. Edwards correctly points out in his response to the Deputy Administrator's Petition to Reconsider, the ALJ did not state that the oral decision was a "tentative" oral decision. While the ALJ stated the oral decision was not binding on Mr. Edwards until he received the written confirmation of the oral decision (Tr. 300), the ALJ did not state the oral decision was not binding on the Deputy Administrator (Tr. 299-310). Moreover, I find nothing in the record indicating that the ALJ vacated the December 5, 2011, oral decision. Instead, the ALJ states she "ruled from the bench (oral decision)," and the ALJ characterizes the January 6, 2012, Decision and Order as a "written confirmation" of the December 5, 2011, oral decision (ALJ's January 6, 2012, Decision and Order at 2 ¶ 6). Therefore, I reject the

² The Rules of Practice provide that the issuance date of an oral decision is the date the oral decision is announced, any appeal of an oral decision to the Judicial Officer must be filed with the Hearing Clerk within 30 days after the date the oral decision is issued, and the effective date of an oral decision is 35 days after the date the oral decision is issued. (See 7 C.F.R. §§ 1.142(c)(2), (c)(4), .145(a).)

³ The Rules of Practice provide a party must file an appeal of a written decision with the Hearing Clerk within 30 days after receiving service of the administrative law judge's written decision. (See 7 C.F.R. § 1.145(a).)

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Deputy Administrator's contention that the ALJ's statement at the close of the December 5, 2011, hearing (Tr. 299-310) was not an oral decision.

However, the record is not without ambiguity. The ALJ states that each party has 30 days from the date of service of the written Decision and Order within which to appeal to the Judicial Officer, as follows:

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

ALJ's January 6, 2012, Decision and Order at 7 ¶ 24.

In *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons.), 59 Agric. Dec. 351 (2000), I held that a statement by an administrative law judge indicating that an appeal petition may be filed within 30 days after service of a written excerpt of an oral decision does not modify the time in the Rules of Practice for filing an appeal of an oral decision. In *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000), the Court concluded that neither the Rules of Practice nor any other action by the Secretary of Agriculture provided fair notice of the time within which an appeal of an oral decision must be filed with the Hearing Clerk, and the Court set aside *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons.), 59 Agric. Dec. 351 (2000), and *In re PMD Produce Brokerage Corp.* (Order Denying Late Appeal), 59 Agric. Dec. 344 (2000). At the time, 7 C.F.R. § 1.145(a) did not specifically state that an appeal of an administrative law judge's oral decision must be filed within 30 days after the administrative law judge issues the oral decision:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by

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the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a) (2000).

In response to *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000), the Secretary of Agriculture, in an effort to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit, issued a final rule amending 7 C.F.R. § 1.145(a) to read, as follows:

§ 1.145 Appeal to Judicial Officer

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

68 Fed. Reg. 6339, 6341 (Feb. 7, 2003). The Secretary of Agriculture explained the need for the amendment to 7 C.F.R. § 1.145(a), as follows:

Appeal to the Judicial Officer

The rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes (7 CFR 1.130 through 1.151) (referred to as the "uniform rules" below) provide that an administrative law judge may issue an oral or written decision. Current 7 CFR 1.142(c)(2) provides that if an administrative law judge orally announces a decision, a copy of the decision shall be furnished to the parties by the Hearing Clerk. Irrespective of the date a copy of the decision is mailed, the issuance date of the oral decision is the date the

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decision is orally announced. Current 7 CFR 1.145(a) provides that a party who disagrees with an administrative law judge's decision may appeal to the Judicial Officer within 30 days after receiving service of the administrative law judge's decision.

The Judicial Officer has held that an appeal from an oral decision must be filed within 30 days after the date the administrative law judge orally announces the decision. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (order denying late appeal); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (order denying petition for reconsideration). On appeal, the United States Court of Appeals for the District of Columbia Circuit held that current 7 CFR 1.142(c)(2) and 7 CFR 1.145(a) are ambiguous because the Secretary of Agriculture did not give fair notice that the uniform rules require an appeal to be filed within 30 days after the administrative law judge orally announces a decision. *PMD Produce Brokerage Corp. v. U.S. Department of Agriculture*, 234 F.3d 48 (D.C. Cir. 2000).

The Office of the Secretary is amending 7 CFR 1.145(a) to eliminate the ambiguity found by the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Office of the Secretary is amending 7 CFR 1.145(a) to provide that any appeal to the Judicial Officer from an oral decision issued by an administrative law judge must be filed within 30 days after the administrative law judge issues the oral decision.

68 Fed. Reg. 6339 (Feb. 7, 2003). Thus, I conclude the ALJ's January 6, 2012, written Decision and Order providing the parties 30 days from the date of service of the written decision to file an appeal petition with the Hearing Clerk does not modify the requirement in 7 C.F.R. § 1.145(a) that an appeal from an oral decision must be filed with the Hearing Clerk within 30 days after the administrative law judge issues the oral decision.

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Finally, the Deputy Administrator expresses concern that *In re H.D. Edwards* (Order Denying Late Appeal), __ Agric. Dec. __ (Mar. 15, 2012), will have the effect of forcing parties to appeal oral decisions without benefit of the administrative law judges' subsequent written decision (Pet. to Reconsider at 4). While I share the Deputy Administrator's concern, I am bound by the Rules of Practice which require filing of any appeal from an administrative law judge's oral decision within 30 days after the issuance of the oral decision.⁴ I note, however, that under the Rules of Practice any party may request that the time for filing an appeal of an oral decision be extended to a point in time after service of the subsequent written decision.⁵

For the foregoing reasons, the following Order is issued.

ORDER

The Deputy Administrator's Petition to Reconsider, filed March 23, 2012, is denied.

⁴ Generally, the Rules of Practice are binding on administrative law judges and the Judicial Officer. See *In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); *In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay), 59 Agric. Dec. 265, 269 n.2 (2000); *In re Far West Meats* (Ruling on Certified Question), 55 Agric. Dec. 1033, 1036 n.4 (1996); *In re Hermiston Livestock Co.* (Ruling on Certified Question), 48 Agric. Dec. 434 (1989).

⁵ Compare *In re Jennifer Caudill* (Order Extending Time for Filing Appeal Pet.), AWA Docket No. 10-0416 (extending the time for filing an appeal petition with respect to the initial Decision and Order as to Mitchell Kalmanson to 30 days after service of an initial decision as to Jennifer Caudill) (Appendix 1); *In re Kathy Jo Bauck* (Order Extending Time for Filing Appeal Pet.), AWA Docket No. 11-0088 (extending the time for filing an appeal petition to 30 days after the administrative law judge files a ruling on the complainant's motion for reconsideration) (Appendix 2).

Default Decisions
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DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/.

PACKERS AND STOCKYARDS ACT

GOLDEN WEST CATTLE CO., LLC AND MICHAEL KASTNER.
Docket No. 12-0206, 12-0207.
Default Decision.
Filed September 25, 2012.

FREIGHTOUT.COM, LLC AND LLOYD H. MINIFIE.
Docket No. 12-0462, 12-0463.
Default Decision.
Filed September 27, 2012.

RONALD RYAN SHEPARD, JR., A/K/A RONALD RYAN SHEPPARD, JR., A/KA/ RON SHEPHARD; JEREMY E. PIERCE; BROOKFIELD CATTLE COMPANY, LLC.
Docket No. 12-0357.
Default Decision and Order as to Ronald Ryan Shephard, Jr.
Filed October 25, 2012.

JOHN E. LUNDGREN.
Docket No. 12-0441.
Default Decision.
Filed October 25, 2012.

JEREMY EMERSON.
Docket No. 12-0551.
Default Decision.
Filed October 25, 2012.

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THAN FOOTE.

Docket No. 12-0549.

Default Decision.

Filed December 5, 2012.

**TERRY DUSTIN MATTHEWS, D/B/A MOO MOO'S CATTLE
CO.**

Docket No. 12-0452.

Default Decision.

Filed December 6, 2012.

BRIAN ADAMS.

Docket No. 12-0321.

Default Decision.

Filed December 17, 2012.

Consent Decisions
71 Agric. Dec. 1183-1184

CONSENT DECISIONS

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Norberto Gonzales, a/k/a Tito Gonzales, d/b/a TG Cattle, PS-12-0403, 07/06/12.
Boswell Livestock Commission Co., Inc., Ronald R. Bullard, Jr., & Kevin R. Bullard, PS-D-12-0419, 07/06/12.
Sugarcreek Livestock Auction, Inc., PS-D-12-0079, 07/23/12.
Leroy H. Baker, Jr., PS-D-12-0080, 07/23/12.
J. Cuiksa, Inc. & Jason Cuiksa, PS-D-12-0361, 07/26/12.
Commanche Livestock, Inc., W. Raymond Brown, & Jo Ann Brown, PS-12-0425, 07/30/12.
Richard Hunter, d/b/a H&H Farms, PS-D-12-0203, 08/01/12.
Steven Demarest, Brenda Demarest, & Deborah Baldwin, d/b/a Wyalusing Livestock Market, PS-D-12-0245, 08/01/12.
New Lee's Live Poultry Market, Inc. & Shen Chen, PS-D-12-0494, 08/02/12.
Jeremy E. Pierce & Brookfield Cattle Company, LLC, PS-D-12-0357, 08/07/12.
Doyle Harms, d/b/a Harms Livestock, PS-12-0187, 08/09/12.
Lloyd Nash, PS-D-12-0170, 08/17/12.
Chad Duncan, d/b/a T&C Cattle, PS-D-12-0442, 08/28/12.
Headwaters Livestock Auction, LLC, PS-D-12-0239, 08/30/12.
Jeffrey D. Smith, a/k/a Jeff Smith & Dale T. Smith and Sons Packing Company, PS-12-0578, 09/04/12.
California All Natural, LLC & Nathan Lewis, PS-12-0518, 09/05/12.
Wayne Bradshaw, PS-12-0578, 09/06/12.
Mark Holder, d/b/a Mark Holder Livestock, PS-D-12-0171, 09/13/12.
Ronald Wayne Kitchen, PS-D-0407, 09/13/12.
Upchurch Livestock, Inc., PS-D-11-0362, 09/18/12.
Weikert's Livestock, Inc. & Todd D. Weikert, PS-12-0544, 09/20/12.
Don Boyer & Carol Boyer, d/b/a Boyer Cattle Co., PS-12-0562, 09/20/12.
Magic Valley Buying Station, Inc., Eric Drees, & Mindy Drees, PS-D-12-0453, 09/21/12.

CONSENT DECISIONS

Stephen Smeal, d/b/a Fatted Calf Cattle Farms # 6, PS-D-12-0376, 09/24/12.
Double H Cattle Co., LLC, Todd Holstein, & Tyler Holstein, PS-D-12-0631, 09/27/12.
Jeffrey D. Smith, a/k/a Jeff Smith & Dale T. Smith and Sons Packing Company, Inc., PS-12-0578, 09/28/12.
Lacy Bowman Livestock Co., Inc. & Lacy Bowman, PS-12-0502, 10/11/12.
Stephen Conley, PS-11-0441, 10/17/12.
Larry Conley, PS-11-0442, 10/17/12.
Intermountain Livestock, Inc. & Dennis Arnzen, PS-12-0514, 10/17/12.
Plainville Livestock Commission, Inc. & Tyler Gillum, PS-12-0546, 10/22/12.
Tallgrass Beef Company, LLC, PS-D-10-0206, 10/23/12.
Jeremy E. Pierce & Brookfield Cattle Company, LLC, PS-D-12-0357, 10/25/12.
ZD Quality Meats, Inc. & Jamal Saramah, PS-D-12-0595, 10/31/12.
Mason Georges, PS-12-0561, 11/01/12.
Florence Meat Packing Co., Inc., d/b/a White House Packing Company, Gypson J. Fernandez, & Sonia G. Fernandez, PS-12-0575, 11/01/12.
United Producers, Inc., PS-12-0635, 11/08/12.
New Holland Stables, Inc. & Frank A. Fillippo, Inc., PS-12-0598, 11/27/12.
Curtis Malone, PS-D-13-0009, 11/28/12.
G&G Cattle Co., Inc., Kenneth Garrett, & Tim Garrett, PS-13-0061, 12/03/12.
Southern California Livestock Auction, Inc. & John R. Malouff, Jr., PS-12-0492, 12/14/12.
Johnny Dobson, PS-13-0059, 12/20/12.
Luke Kottke, d/b/a Kottke Cattle Company, PS-12-0543, 12/31/12.