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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	[PS-D]
Thomas H. Hodge, Jr., d/b/a People's Livestock Auction, Hodge Cattle Co., and Hodge 21 Ranch,	)	Docket No. **16-0063**
	)	**Decision and Order on The Written Record**
Respondent	)	

Appearances:

Thomas N. Bolick, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant (Packers and Stockyards); [1] and

Sidra P. Winter, Esq., Pontotoc, Mississippi, for the Respondent Thomas H. Hodge, Jr.

Decision Summary

1. For Respondent Thomas H. Hodge, Jr.'s failures to comply with the Packers and Stockyards Act, I impose: (a) **cease and desist orders**; *see* paragraph 13; and (b) civil penalties totaling **$20,500.00** (twenty thousand five hundred dollars); *see* paragraph 14.

Parties and Allegations

2. The Complainant is the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States

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1. The Complainant is the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture ("Packers and Stockyards" or "Complainant").

Department of Agriculture (frequently herein "Packers and Stockyards" or "Complainant").

3. The Respondent is Thomas H. Hodge, Jr., an individual (also "Thomas Hodge" or "Respondent Hodge" or "Respondent Thomas Hodge" or "Respondent").

4. The Complaint, filed on February 25, 2016, alleged there is reason to believe that the Respondent Thomas H. Hodge, Jr. willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*) (frequently herein the "Packers and Stockyards Act" or the "Act"), and the regulations promulgated thereunder, 9 C.F.R. § 201.1 *et seq.*

5. The Respondent Thomas H. Hodge, Jr. filed his Answer (a general denial) on March 29, 2016.

Procedural History

6. Packers and Stockyards filed a Motion for Summary Judgment on June 17, 2016. The Respondent, Thomas H. Hodge, Jr., failed to respond.

Findings of Fact

7. The Respondent Thomas H. Hodge, Jr. is an individual doing business as People's Livestock Auction, Hodge Cattle Co., and Hodge 21 Ranch, with a mailing address of P.O. Box 268, Houston, Mississippi 38851.

8. The Respondent Thomas H. Hodge, Jr. at all times material herein,

(a) was engaged in the business of a market agency buying and selling livestock on a commission basis;

(b) was engaged in the business of a dealer buying and selling livestock in commerce; and

(c) was registered with the Secretary of Agriculture as a market agency to sell livestock in commerce.

9. During March 3, 2011 through April 30, 2011, in 18 transactions involving 6 different livestock auctions, the Respondent Thomas H. Hodge, Jr. purchased a total of 484 head of livestock for a total purchase price of $301,212.50, but failed to pay, when due, the full purchase price of the livestock.

Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties and the subject matter.

11. Respondent Thomas H. Hodge, Jr. purchased livestock for which full payment was not timely made, thereby engaging in an "unfair practice" in violation of section 312(a) of the Act (7 U.S.C. §213(a)), and a violation of section 409(a) of the Act (7 U.S.C. §228b(a)); and section 201.43 of the regulations (9 C.F.R. § 201.43). *See* paragraph 9.

12. My Conclusions include its entirety The Declaration of Jeana Harbison (CX-24 filed June 17, 2016), incorporated herein by this reference and attached as Exhibit B.

Order

13. Respondent Thomas H. Hodge, Jr. and his agents and employees, directly or indirectly through any corporate or other device, in connection with activities subject to the Packers and Stockyards Act, **shall cease and desist** from purchasing livestock and failing to **pay the full purchase price** of livestock **when due** (normally before the close of the next business day following each purchase of livestock); as required by section 409 of the Act (7 U.S.C. §228b) and section 201.43 of the regulations (9 C.F.R. § 201.43).

14. Respondent Thomas H. Hodge, Jr. shall pay civil penalties totaling **$20,500.00** (twenty thousand five hundred dollars) in accordance with section 312(b) of the Act (7 U.S.C. § 213(b)). The civil penalty payment instrument(s) shall be made payable to the order of the **U. S. Department of Agriculture**, marked with **PS-D** No. **16-0063** and sent to:

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

Payment(s) shall be **completed within 60 days** from the date this Order is final and effective.

Finality

15. 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).

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

Done at Washington, D.C.
this 6th day of September 2016

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
Stop 9203 South Building Room 1031
1400 Independence Ave SW
Washington, DC 20250-9203
202-720-4443
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APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 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. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(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) *Scope of argument*. Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement*. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument*. The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs*. By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal*. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

APPENDIX B

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P & S Docket No. D-16-0063
Thomas H. Hodge, Jr. d/b/a People's Livestock Auction, Hodge Cattle Co., and Hodge 21 Ranch	)	
Respondent.	)	

DECLARATION OF JEANA HARBISON

I, Jeana M. Harbison, hereby declare under penalty of perjury as follows:

1. My name is Jeana M. Harbison. I am an Investigative/Enforcement Attorney for the Packers & Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA) in Washington, DC. I have held this position since 2011. Prior to that, I was a legal specialist with GIPSA from 2008 to 2011, when my title changed.

As an Investigative/Enforcement Attorney in GIPSA's Litigation and Economic Analysis Division (LEAD), one of my primary responsibilities is to review investigative files involving potential violations of the Packers & Stockyards Act (the Act) and regulations, to assess, in each case, whether the evidence warrants an enforcement action,

Appendix B

and, as appropriate, to make a proposed sanction recommendation. I typically review 15 to 40 investigation files per year.

I obtained the information provided in this declaration during the course of my official duties as an Investigative/Enforcement Attorney of GIPSA.

2. S. Brett Offutt, Director of LEAD, designated me to make the sanction recommendation in this case.

3. I have reviewed the investigative file regarding alleged violations of the Act and regulations by Thomas H. Hodge, Jr. d/b/a People's Livestock Auction, Hodge Cattle Co., and Hodge 21 Ranch (Respondent), which was prepared by Michael Mosimann, Resident Auditor, from the Eastern Regional Office. Specifically, I reviewed the overview of the investigation prepared and the documents marked as Complainant's Exhibit (CX) 2 through 23. These documents show that Respondent failed to timely pay for livestock. Thereby, the Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

4. Based on the facts and circumstances of the violations at issue, I recommend ordering the Respondent to cease and desist from failing to pay livestock dealers or their duly authorized representatives the full amount of the purchase price for livestock before the close of the next business day following each purchase of livestock, as required by sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

5. I also recommend that the Respondent be assessed a civil penalty of $20,500 pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)).

6. In my opinion, the facts and circumstances of this case warrant the recommended sanctions.

7. The documents in CX-5 through CX-19 consist of true and correct copies of documentation showing the details of Respondent's March and April 2011 livestock purchases from posted auction markets in Mississippi, Missouri, Arkansas and Texas, for which Respondent willfully failed to timely pay for livestock.

8. Exhibit CX-3 is a December 23, 2010, Notice of Violation (NOV) letter sent to Respondent, with a certified receipt. The NOV informed respondent that the Packers and Stockyards Program had found that he had failed to pay promptly for certain livestock purchases in September and October, 2010, in violation of section 409(a) of the Act, and told him to take immediate action to correct these violations and bring his payment practices into statutory compliance. The NOV warned respondent that failure to do so could result in, among other things, a cease and desist order from his unlawful conduct and civil penalties of up to $11,000 per violation. The certified receipt shows that Sally Hamilton, Respondent's office manager at the time, signed for the notice on December 28, 2010.

9. Section 312(a) (7 U.S.C. § 213(a)) provides, in part, that it is unlawful for any dealer or market agency to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with marketing, buying, or selling livestock. Section 409(a) (7 U.S.C. § 228b(a)) provides, in part, that dealers and market agencies must deliver full payment to the seller for livestock purchases before the close of the next business day following the purchase and transfer of possession. The only exception is when the parties to the sale and purchase of livestock, prior to making any such sales or purchases, enter into a written credit agreement expressly waiving the prompt payment provisions of section 409(a), as provided in section 409(b) of the Act (7 U.S.C. §

228b(b)). Section 409(c) of the Act (7 U.S.C. § 228b(c)) further provides that any delay in payment or attempt to delay is deemed an unfair practice in violation of Section 312(a) of the Act. It is longstanding departmental policy that making late payment for livestock purchases is considered to be an unfair and deceptive practice in violation of Section 312(a) of the Act.

10. The administrative sanction options that Congress authorized the Secretary of Agriculture to apply for violations under Section 312(b) of the Act (7 U.S.C. § 213(b)) include making a cease and desist order and assessing a civil penalty. Section 312(b) provides, in part, for the assessment of a civil penalty of not more than $11,000 for each violation of section (a) by a dealer. In determining the assessed amount of civil penalty under this section, the Secretary must 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.

11. Respondent's alleged offenses are very grave. USDA has consistently held that pursuant to the Act, the seller has the right to expect full payment for livestock no later than the close of the next business day. A dealer's or market agency's failure to timely pay for livestock has a detrimental ripple effect across the livestock industry. For instance, when a livestock market does not receive timely payment, then the market must replace the funds in its custodial account with its own funds or borrowed funds, if the market does not have its own funds. A dealer's failure to timely pay for livestock has caused markets who did not receive payment or full payment to fail financially. Further, failure to timely pay the auction market affects whether or not the market is able to make payment to the consignors of the livestock. The documents in CX-5 through CX-19

demonstrate that, during the period from March, 3, 2011, through April 30, 2011, in eighteen (18) transactions involving his purchase of a total of 484 head of livestock at six different auction markets in Mississippi, Missouri, Arkansas and Texas for a total purchase price of $301,212.50, the respondent engaged in the business of a dealer buying and selling livestock in commerce and failed to pay the full purchase price for these livestock purchases within the time period required by the Act. Mr. Mossiman's declaration in CX-1 states that Respondent told him in June, 2011, that he did not have the written credit agreement required by section 409(b) at the time that he made these eighteen (18) livestock purchases. Therefore, the Respondent engaged in unfair and deceptive practices with respect to each of the documented transactions, in contravention of one of the primary purposes of the Act.

12. In 2015, the Respondent reported a gross value of livestock sold on commission of $21,739,562 and a total cost of livestock purchased on a dealer basis in the amount of $3,831,320. *See Exhibit CX-23.* The Respondent's 2015 Annual Report balance sheet reported that the Respondent had cash on hand in the amount of $208,902, a custodial account overage of $1,006, working capital of $199,823 and a total net worth of $2,154,023. *Id.* Respondent maintains a clause 1 bond of $80,000 and a clause 2 bond of $35,000. This amount of volume constitutes the Respondent as a large dealer and market agency and demonstrates to the agency that the Respondent has the ability to pay a minimal civil penalty. Per Section 312(b) of the Act, the agency is entitled to assess a maximum civil penalty of $11,000 per violation. Here we have eighteen (18) violations, which thus could result in a maximum civil penalty of $198,000. Therefore, the $20,500 civil penalty is significantly lower than the maximum penalty allowable based on the

agency's best estimate of the size of respondent's business and his ability or likelihood of staying in business.

13. The agency considers the Respondent's actions to be willful unfair practices under section 312(a) of the Act. A violation is willful if it is done "intentionally or with careless disregard of statutory requirements" or is "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." In re: Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson, 59 Agric. Dec. 299, 309 (2000). In Marysville Enterprises, the Judicial Officer held that "the respondents knew, or should have known, that they had the duties under the Act to pay, when due, the full purchase price for livestock, to refrain from issuing checks in purported payment of the purchase price of livestock without sufficient funds on deposit and available in the account to pay such checks when presented, and to operate with adequate finances to ensure that livestock sellers are paid." Id. In the present case, the respondent engaged in the business of a dealer buying and selling livestock in commerce subject to the Act. As noted in paragraph 8 above, respondent received an NOV in December 2010, informing him that failing to make timely payment for livestock was a violation of the Act and that failure to bring his payment practices in compliance with the Act could subject him to civil penalties, yet he continued to make late payments in contravention of a primary purpose of the Act. Therefore, the respondent likewise knew, or should have known, that he had the duty under the act to timely pay the full purchase price for livestock.

15. The recommended civil penalty and cease and desist order, are intended to accomplish the remedial purposes of the Act by deterring Respondent and others from

failing to pay livestock dealers or their duly authorized representatives the full amount of the purchase price for livestock before the close of the next business day following each purchase of livestock, as required by sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.

Executed this 17th day of June 2016

[redacted]

JEANA M. HARBISON