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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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PACKERS AND STOCKYARDS ACT**COURT DECISION****IBP, INC. v. GLICKMAN.****No. 98-3104.****Decided August 13, 1999.****(Cite as 187 F.3d 974 (8th Cir.))****Packers and stockyards – Substantial evidence – Competition.**

The United States Court of Appeals for the Eighth Circuit reversed the Judicial Officer's decision in which he found that a right of first refusal provision in petitioner's agreement with a group of feedlots violated the Packers and Stockyards Act because the provision had the effect or potential effect of suppressing or reducing competition. The Court found that the record did not contain substantial evidence to support the Judicial Officer's finding that the agreement had the effect or potential effect of reducing or suppressing competition.

**UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT**

Before BEAM and HANSEN, Circuit Judges, and MOODY,¹ District Judge.

BEAM, Circuit Judge.

IBP, a large meat packing company, appeals a Judicial Officer's (JO) decision finding a provision of its agreement with a group of feedlots to be a violation of the Packers and Stockyards Act (the Act). 7 U.S.C. § 192(a)-(b). The suspect provision is a right of first refusal, which the JO found to have the effect or potential effect of suppressing or reducing competition. As a result, the JO ordered IBP to cease and desist entering into or continuing any agreement "containing a right of first refusal which provides [that IBP] may obtain livestock by matching the highest previous bid." We reverse and vacate the order.

¹The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas, sitting by designation.

I. BACKGROUND

In January 1994, a group of Kansas feedlots, collectively known as the "Beef Marketing Group," (BMG) approached IBP with a proposal for the sale of livestock. The two entered into a "Beef Marketing Agreement" (the Agreement) that establishes terms and procedures for the sale of cattle which differ from traditional methods.

Under the Agreement, IBP makes an initial bid on a pen of BMG cattle. The initial bid is based upon the midpoint between the highest purchase price reported by the United States Department of Agriculture (USDA) in a given week in Kansas for at least 2,500 cattle and the highest price IBP paid for the same number of cattle in Kansas during the week (midpoint price hereafter referred to as the Kansas High Price). BMG members can then accept or reject the bid. If IBP's bid is rejected, then other cattle buyers bid. However, as long as IBP's initial bid is no less than "minus fifty," i.e. \$0.50 per hundredweight less than the Kansas High Price, IBP has a right of first refusal on that pen of cattle. Therefore, once others have completed bidding, BMG member feedlots must offer the pen of cattle to IBP at the highest bid price. In the event that IBP elects to exercise the right of first refusal, then BMG members can go back to the high bidder in an attempt to get an increased bid. After all bidding is completed though, IBP may still obtain the pen of cattle by matching the highest bid.

Originally, there were nine BMG-affiliated feedlots that joined the Agreement. Two feedlots later opted-out of the Agreement. IBP also continued to buy cattle from other feedlots that were not affiliated with BMG and with whom IBP had no similar agreement.

In August 1995, the USDA² filed a complaint alleging that the Agreement violates section 192(a)-(b) of the Act.³ A hearing was held before an

²While the Deputy Administrator in the Packers and Stockyards Administration filed the complaint, for purposes of this opinion, we will refer to the complainant as the USDA.

³The Packers and Stockyards Act provides in pertinent part:

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

- (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;
- or
- (b) Make or give any undue or unreasonable preference or advantage to any particular

(continued...)

Administrative Law Judge (ALJ). At the hearing, the USDA first argued that the Agreement contained no benefit for IBP, and therefore granted the BMG members an undue or unreasonable preference or advantage (or subjected non-BMG members to undue or unreasonable prejudice or disadvantage) in violation of the Act. In response, IBP proved that there was, among other benefits, a valuable right of first refusal, whereupon the USDA challenged the right of first refusal as a violation of the Act. The ALJ concluded that there was no violation of the Act. The USDA appealed and a hearing was held before the JO acting as final deciding officer for the USDA.

The JO agreed with most of the ALJ's findings, and found that owners and operators of non-BMG feedlots were not harmed⁴ by the Agreement and that the USDA had not proven that the Agreement caused injury to cattle producers. He conceded that IBP, on average, paid a *higher* price for cattle purchased under the terms of the Agreement. Furthermore, the JO found that the Agreement does not provide an *undue* or *unreasonable* preference or advantage to BMG members. Nevertheless, the JO found that IBP's right of first refusal under the Agreement, has the effect or potential effect of reducing competition because IBP does not have to participate in bidding after its initial bid, and can obtain a pen of cattle by matching, instead of exceeding, the highest bid. Based upon this finding, the JO concluded that the "right of first refusal obviates [IBP's] need to compete" and therefore violates the Act.

II. DISCUSSION

"The findings of the [JO] must be sustained by this court if supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Farrow v. USDA*, 760 F.2d 211, 213 (8th Cir. 1985) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Thus, we review whether there is substantial evidence to support the JO's finding that IBP's right of first refusal has the effect or potential effect of

³(...continued)

person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

⁷ U.S.C. § 192 (a)-(b).

⁴The USDA even admitted that non-BMG feedlots continued to receive competitive prices despite the Agreement.

suppressing or reducing competition. *See id.* We consider first the actual effect and then the potential effect.

It is clear that the Agreement with its right of first refusal, has not had the actual effect of suppressing or reducing competition. IBP, “on average, paid a higher price for cattle purchased under the terms of the Beef Marketing Agreement than it did on other transactions” with other feedlots. Joint Appendix at 36 (opinion of the JO). The JO concluded that the USDA did not prove that the Agreement caused injury to non-BMG feedlots or cattle producers. There is also no claim that other packers were harmed as a result of the Agreement. Thus, there is no substantial evidence to support the notion that the right of first refusal actually suppressed or reduced competition.

The Act, however, “does not require the [USDA to] prove actual injury before a practice may be found unfair,” and in violation of the Act. *Farrow*, 760 F.2d at 215. A potential violation can suffice. “[T]he purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered.” *Id.* (quoting *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir. 1980)). As earlier noted, the JO found that the right of first refusal has the potential effect of suppressing or reducing competition.

We have said that “a practice which is likely to reduce competition and prices paid to farmers for cattle *can be* found an unfair practice under the Act, and be a predicate for a cease and desist order.” *Id.* at 214 (emphasis added); *see also id.* at 215 (finding “[t]he lack of competition between buyers, with the attendant possible depression of producers’ prices, was one of the evils at which the Packers and Stockyards Act was directed”) (quoting *Swift & Co. v. United States*, 393 F.2d 247, 254 (7th Cir. 1986)). However, we are also mindful that the purpose behind the Act “was not to so upset the traditional principles of freedom of contract,” as to require an entirely level playing field for all. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (finding that the Act does not statutorily create an entitlement to have the same type of contract as that offered to other independent growers); *see also Mahon v. Stowers*, 416 U.S. 100, 107-08 (1974) (“[T]here is no indication that, lurking within this intention to control deceptive and monopolistic practices in the packing industry, lies a further intention to guarantee persons who sell cattle to such packers a special favored position . . .”).

The USDA argues that the mere potential suppression or reduction of competition violates the Act. Yet, the “‘chief evil’ at which [the Act] was aimed was ‘the monopoly of the packers, enabling them *unduly* and *arbitrarily* to lower prices to the shipper who sells, and *unduly* and *arbitrarily* to increase the price to the consumer who buys.’” *Mahon*, 416 U.S. at 106 (emphasis added) (quoting *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922)). The statutory language requires

that the practice or device be unfairly or unjustly discriminatory and not merely discriminatory. See 7 U.S.C. § 192(a). Even the JO recognized that while the Agreement discriminates and gives an advantage or preference, the Agreement does not do so unduly, as required for a violation of the Act. We similarly conclude that the right of first refusal does not potentially suppress or reduce competition sufficient to be proscribed by the Act.

The USDA contends that the right of first refusal violates the Act because IBP does not have to participate in the bidding after they have made their initial bid. This is not an accurate characterization. Once a BMG member rejects the initial IBP bid, the bidding is open for all others. After the bidding is open to all, IBP must bid at least the same amount as the highest bidder in order to obtain the cattle. The bidding does not end there; the record shows that once IBP decides to exercise its right of first refusal, the feedlot-seller can then go back to the high bidder in an attempt to get an even higher price. When all is said and done, IBP can choose to match the highest bid, and thereby obtain the pen of cattle. This demonstrates that IBP does participate in the bidding process, even after the initial bid stage, and pays prices that are the result of the bidding process. The record demonstrates that the right of first refusal is an effort by IBP to have a more reliable and efficient method of obtaining a supply of cattle. "The [Act] was designed to promote efficiency, not frustrate it." *Jackson*, 53 F.3d at 1458.

Furthermore, in order to have the right of first refusal, IBP's initial bid must have been no less than \$0.50 per hundred weight below the Kansas High Price. The USDA apparently would like the initial bid to not be considered for purposes of determining whether the right of first refusal provision violates the Act. However, IBP's initial bid is a condition precedent to the right of first refusal and cannot be disregarded. The presence of the initial bid at a fair market price, with the feedlots' attendant right to accept or reject the bid, essentially ensures that the potential for undue or arbitrary lowering of prices is eliminated. Cf. *Mahon*, 416 U.S. at 106, 94 S.Ct. 1626 (stating that the undue or arbitrary lowering of prices was the chief evil for which the Act was designed); *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1337 (8th Cir. 1971) (stating that the purpose of the Act is to assure that farmers and ranchers do not receive less than market value for their livestock). The USDA's complaint itself states that the Agreement "guarantee[s] a high price for livestock purchased from the [BMG]." So, whether the right of first refusal is considered in isolation, or together with the rest of the Agreement, there is no violation of the Act.

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the USDA and vacate the cease and desist order.

PACKERS AND STOCKYARDS ACT**DEPARTMENTAL DECISIONS****In re: GEORGE O. DURFLINGER, JR.****P&S Docket No. D-97-0010.****Decision and Order filed September 8, 1999.****Failing to Pay for Livestock When Due - Issuing Checks With Insufficient Funds on Deposit - Cease and Desist Order.**

Respondent failed to pay when due for livestock purchases and issued checks for livestock purchases which were returned by his bank for insufficient funds. It is no defense that the bank and/or the seller held the checks too long before cashing them.

Kimberly Hart, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), here referred to as the "Act." The Complaint, filed on January 22, 1997, alleges that Respondent George Durflinger failed to pay, when due, for livestock purchases and issued insufficient funds checks in payment for livestock purchases in wilful violation of sections 312(a) and 409 of the Act. In an Answer filed on February 21, 1997, Respondent denied that he violated the Act. A hearing was held before me on June 23, 1999, in Kansas City, Missouri. Complainant was represented by Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent failed to appear at the hearing after being duly notified of the time and place of hearing. Complainant's exhibits are referred to as "CX" and the hearing transcript referred to as "Tr."

Findings of Fact

1. Respondent George O. Durflinger, Jr. is an individual whose mailing address is 1307 Bishop Drive, Kirksville, Missouri 65501.
2. Respondent is and, at all times material, was:
 - (a) Engaged in the business of 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 in commerce for his own account.

3. On December 17, 1994, Respondent purchased \$30,312.64 in livestock from Scotland County Livestock and tendered payment for that transaction with check #1961 which was returned by the bank for insufficient funds (Tr. 15-18; CX-3, 4).

4. On December 31, 1994, Respondent tendered to Scotland County an "IBP" check for \$12,139.53 made payable to him and his personal check #1970 for \$18,173.11 as payment of the \$30,312.64 livestock debt (Tr. 16-18; CX-4). Respondent's check #1970 was returned by the bank for insufficient funds leaving a remaining balance of \$18,173.11 (Tr. 16-18; CX-4).

5. On December 31, 1994, Respondent purchased an additional \$12,130.43 in livestock from Scotland County. This increased the balance that he owed to Scotland County to \$30,303.54. Respondent tendered his personal check #1971 for \$12,140.43 to Scotland County on December 31, 1994, which was returned by the bank for insufficient funds (Tr. 18-19; CX-5).

6. As of November 7, 1995, several payments totaling \$18,520.65 were credited to Respondent's unpaid livestock balance with Scotland County, which reduced his unpaid livestock debt to them to \$11,782.92 (Tr. 22-23; CX-7).

7. On December 18, 1995, Respondent purchased additional livestock from Scotland County in the amount of \$24,105.79 and tendered check #3636 written on the account of Linda McCleary in the amount of \$24,105.79. This too was returned by the bank for insufficient funds (CX-6). Respondent subsequently paid Scotland County for the December 18, 1995, transaction. This reduced his livestock debt with Scotland County to \$11,782.92 which remained his unpaid balance to this firm through the date of the hearing (Tr. 14; CX-3, 5).

8. Respondent also failed to pay when due for 15 livestock transactions from January 7, 1995, to September 1, 1995 (CX 8-22).

Discussion

Section 7 C.F.R. § 1.141(e) states in pertinent part:

A respondent who, after being duly notified, fails to appear at the hearing without good cause shall be deemed . . . to have admitted any facts which may be presented at the hearing. Such failure by the respondent [to appear at hearing] shall also constitute an admission of all the material allegations of fact contained in the complaint. . . .

Respondent, after being notified, failed to appear at the hearing without cause. Complainant presented its case at the hearing. Therefore, pursuant to 7 C.F.R. §

1.141(e), I deem Respondent to have admitted all facts presented at hearing and all material allegations of fact alleged in the Complaint.

The documentary and testimonial evidence overwhelmingly establishes that Respondent failed to pay livestock debt in the amount of \$11,782.86 to Scotland County Livestock Market. This livestock debt has been past due and owing since December 1994. Respondent has made no attempt since November 1995 to reduce or eliminate this debt. Respondent issued four checks in payment for livestock purchases which were returned by his bank for insufficient funds. In addition, Respondent failed to pay, when due, for livestock purchases between January 7, 1995, and September 1, 1995.

Well-established case precedent holds that “the issuance of insufficient funds checks or drafts in payment for livestock whether or not the checks or drafts are later made good constitutes an unfair and deceptive trade practice in violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).” *In re Robert L. Kleinpeter*, 50 Agric. Dec. 1754 (1991).

In addition, the failure to pay promptly and fully for the full purchase price of livestock constitutes an unfair and deceptive practice in wilful violation of sections 312(a) and 409 of the Act. 7 U.S.C. §§ 213(a), 228b.

Respondent’s violations were wilful. “A violation is wilful for administrative law purposes if a respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.” *Butz v. Glover Livestock [Comm’n Co.]*, 411 U.S. 182 (1973); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied* 450 U.S. 997 [(1981)]. Respondent knew or should have known that he did not have sufficient funds in the account upon which the checks were drawn upon at the time that he tendered the checks in payment for his livestock purchases. Respondent, therefore, knew or should have known that he could not make full and prompt payment in accordance with the payment requirements of the Act at the time that he purchased the livestock.

The only defense asserted by Respondent for his failure to pay promptly and in full was that there were sufficient funds in the checking account when the checks were issued in payment for his livestock purchases but the bank and/or the seller held the checks for too long before cashing them (Answer). This defense lacks merit. It is Respondent’s responsibility to ensure that there are sufficient funds in the applicable account as long as there are checks outstanding on that account.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476 (Feb. 8, 1991), *aff’d* 991 F.2d 803 (9th Cir. 1993), provides that the sanction is to be determined “by examining the nature of the violations in relation to the remedial purposes of the statute, along with all

relevant circumstances, giving appropriate weight to administrative recommendations." The Agency recommended that Respondent be ordered to cease and desist from failing to pay, when due, for livestock purchases and issuing insufficient funds checks in payment for livestock purchases; that Respondent's registration be suspended for a period of five years with the proviso that he would be allowed to work for another registrant or packer after the expiration of a 90-day suspension period; and that should Respondent pay the unpaid livestock debt in full, after 90 days, the suspension of his registration would be lifted (Tr. 44). I agree.

Factors to be considered are the gravity of the offense, the length of time the livestock debt has remained unpaid, and sanctions previously imposed in similar violations. Respondent's failures to pay fully and promptly for livestock purchases are serious violations. Prior administrative orders and letters of notice were sent to Respondent. He was named in two prior administrative orders for operating without an adequate bond and for custodial account violations (Tr. 45; CX-1).

Also relevant is that the Respondent's debt of approximately \$11,000 remained unpaid over four years (Tr. 32-34). Respondent's failure to pay Scotland County Livestock caused financial pressure upon the firm (Tr. 37). Therefore, Respondent's failure to pay for these purchases harmed this livestock market.

Order

Respondent George O. Durflinger, Jr., his 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:

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

Respondent is suspended as a registrant under the Act for a period of five years. However, upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating Respondent's suspension at any time after 90 days, upon demonstration by Respondent that the livestock sellers identified by the Complaint in this proceeding have been paid in full. Furthermore, this Order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the 90-day period of suspension and upon demonstration of circumstances warranting modification of the order.

This decision shall become final without further proceedings 35 days after the date of service upon the Respondent, unless 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).

[This Decision and Order became final October 19, 1999.-Editor]

In re: LARRY F. WOOTON AND ROSWELL LIVESTOCK AUCTION SALES, INC.

P&S Docket No. D-97-0021.

Decision and Order filed October 29, 1999.

Failure to properly operate and maintain custodial account - Alter ego - Cease and desist order - Civil penalty.

Respondent Wooton is, and at all material times herein, was the *alter ego* of Respondent Roswell by virtue of his day-to-day management, direction and control of Respondent Roswell and by failure to deposit promptly in the custodial account. Judge Baker assessed a joint and several civil penalty against the Respondents and ordered them to cease and desist from violating the Act.

Kimberly D. Hart, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

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.*), hereinafter referred to as the "Act." The Complaint, filed on May 13, 1997, alleges that Roswell Livestock Auction Sales, Inc. (hereinafter "Respondent Roswell"), under the direction, management and control of its president, manager and forty percent shareholder, Larry F. Wooton (hereinafter "Respondent Wooton"), failed to maintain and properly use its Custodial Account for Shippers Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting and payment of the portions due the owners or consignors of livestock in willful violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42).

The Complaint further alleges that deficiencies in the custodial account were due to the failure of Respondents to deposit in the custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable

from the sale of consigned livestock, and due to the failure of Respondents to timely reimburse the custodial account for purchases made by the owners/officers of Respondent Roswell.

Respondents filed an Answer to the Complaint on July 11, 1997. In their Answer, Respondents admit the jurisdictional allegations of the Complaint but deny the other allegations and in defense state they have never failed to pay a consignor for livestock nor have they ever issued a check to a consignor that was returned for insufficient funds.

An oral hearing was held on April 7, 1999, in Albuquerque, New Mexico, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Kimberly D. Hart, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondents were represented by Larry Wooton in a *pro se* capacity. Throughout these Findings of Fact, Conclusions and Order, Complainant's exhibits will be referred to as "CX" and the hearing transcript will be referred to as "Tr."¹ The last brief herein was filed on August 17, 1999.

Pertinent Statutory and Regulatory Provisions

7 U.S.C. § 208 (Section 307 of the Act)

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer

¹Respondents introduced no exhibits into evidence at the hearing.

from rendering service on other markets or in occasional and incidental off-market transactions. (7 U.S.C. § 208).

7 U.S.C. § 213 (Section 312 of the Act)

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

(b) Whenever a complaint is made to the Secretary of Agriculture by any person, or whenever the Secretary has reason to believe, that any stockyard, owner, market agency, or dealer is violating the provisions of subdivision (a), 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. The Secretary may also assess a civil penalty of not more than \$10,000 for each violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall 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. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States. (7 U.S.C. § 213).

9 C.F.R. § 201.42. Custodial Account for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission basis or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business banking day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimburse in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(d) *Withdrawals from custodial accounts.* The custodial account for shippers' proceeds shall be drawn on only for payment of (1) net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.

(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as part of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

Findings of Fact

Respondents submitted no documentary evidence at the oral hearing. Premised upon the record as a whole and the evidence submitted by Complainant, the following Findings of Fact are appropriate and are supported by the evidence of record:

1. Roswell Livestock Auction Sales, Inc. (hereinafter "Respondent Roswell") is a corporation organized and existing under the laws of the State of New Mexico. Its mailing address is 900 N. Garden, Roswell, New Mexico 88201.

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

(a) Engaged in the business of conducting and operating the Roswell Livestock Auction Sales, Inc., a posted stockyard under the Act, hereinafter referred to as "Respondent Roswell";

(b) Engaged in the business of selling livestock in commerce on a commission basis for its own account and for the account of others; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Larry F. Wooton (herein "Respondent Wooton") is an individual whose mailing address is 900 N. Garden, Roswell, New Mexico 88201.

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

(a) President of Respondent Roswell;

(b) Manager of Respondent Roswell;
(c) Forty percent shareholder of Respondent Roswell;² and
(d) Responsible for the day-to-day management, direction, and control of Respondent Roswell.

5. Respondent Wooton, due to his day-to-day management, direction and control of Respondent Roswell, at all material times herein, is the *alter ego* of Respondent Roswell.

6. Respondents were notified in a certified letter from the Agency on November 26, 1985, of the results of a custodial account audit performed in October and November, 1985, which revealed a custodial account shortage of \$282,739.35, insolvency in the amount of \$206,529.46, and the need for a dealer bond for Respondent Roswell. (CX-6). The Respondents were advised to take immediate action to resolve the violations discovered during the audit. (CX-6; Tr. 20-21).

7. Respondents were notified by the Agency in a certified letter on January 29, 1991, of the results of a custodial audit performed in October, 1990, which revealed that the Respondents were using their custodial account to advance funds to unauthorized individuals in violation of the Act and regulations. (CX-3). The Respondents were informed that this continued practice would be considered as a misuse of the custodial account and could subject them to formal action by the Agency. The requirements of the Act and regulations were set forth in the letter and the Respondents were instructed to take immediate steps to correct the violations discovered. (CX-7; Tr. 22).

8. Respondents were notified in a certified letter from the Agency on April 25, 1995, of the results of a custodial account audit performed during the week of February 27, 1995, which revealed custodial account shortages on four different dates, caused by Respondent Roswell's failure to reimburse the custodial account for those purchases not paid for by the buyers within seven days from the date of the purchases; and due to its failure to reimburse the custodial account, in the manner prescribe by the Act and regulations for market support purchases and for purchases made by owners, officers and employees of Respondent Roswell. The Respondents were instructed to correct the violations discovered and to submit a written response outlining the corrective action to be undertaken. The Respondents were also advised of the requirements of the Act and of the regulations and placed on notice that any future custodial account violations would

²At the time of hearing, Respondent Wooton had increased his stock ownership in Respondent Roswell from forty percent to fifty percent.

be considered as deliberate and willful. (CX-8; Tr. 23-24). Respondent Wooton submitted a written response to the Agency, on behalf of Respondent Roswell, outlining the corrective action to be undertaken and informing the Agency of its disagreement with the provisions of the Act and regulations governing the maintenance and operation of custodial accounts.

9. Mrs. Marlys Sahlin, an auditor with the Regional Office in Colorado, was assigned to conduct an audit of Respondent Roswell's custodial account in early November, 1995. (Tr. 25). Mrs. Sahlin contacted Respondent Wooton prior to initiating the custodial audit to schedule a mutually convenient time. Respondent Wooton and Mrs. Sahlin agreed that the audit would take place in early November, 1995, but was later changed to November 27, 1995, due to a request from Respondent Wooton that the earlier date be rescheduled. (Tr. 25).

10. Upon arrival at Respondents' place of business on November 27, 1995, Mrs. Sahlin initially spoke with Respondent Wooton, who assigned Cindy Wooton, the bookkeeper, the responsibility for providing Mrs. Sahlin with the records necessary for the custodial audit. (Tr. 29). Mrs. Sahlin requested access to Respondent Roswell's financial records, including bank statements, deposit slips, cancelled checks, check register and buyer invoices, in order to determine if the custodial account was being properly maintained pursuant to the requirements of the Act and of the regulations. (Tr. 30). The Respondents made all requested data available to Mrs. Sahlin and cooperated therewith.

11. Mrs. Sahlin chose three dates upon which to reconcile Respondents' custodial account and prepared reconciliation tables representing the analyses of the custodial account on those three dates. Mrs. Sahlin employed the same auditing process for all three reconciliation dates. (Tr. 45, 51). The first reconciliation date, October 31, 1995, was chosen by using the closest day to the date of the custodial audit for which a bank statement had been issued. (Tr. 33). The reconciliation, as of October 31, 1995, revealed that Respondents had a custodial shortage in the amount of \$222,711.78.³ (CX-9; Tr. 34). The custodial

³Mrs. Sahlin explained that the original reconciliation analysis for October 31, 1995, contained an inadvertent calculation error in the total proceeds receivable figures and the custodial account shortage figure that was discovered during the course of preparation for hearing. (Tr. 68). Mrs. Sahlin found that she had inadvertently added the \$90,032.82 in proceeds on hand into the total proceeds receivable figure which produced an incorrect total proceeds receivable figure of \$649,382.21. (Tr. 39). Therefore, it was necessary to deduct the \$90,032.82 from the total proceeds receivable figure and adjust the overall custodial account shortage as a result of the calculation error.

Complainant filed a motion seeking amendment of the Complaint to correct the calculation error
(continued...)

shortage can be attributed to Respondents' failure to reimburse the custodial account for purchases not paid for by buyers within the time period required by the Act and regulations. Mrs. Sahlin described the documents utilized in order to prepare the schedule for the October 31, 1995, reconciliation. (CX-10-16; Tr. 31-44).

12. The second reconciliation date of November 8, 1995, was chosen by taking the next day after a consignment sale had taken place since Respondents should have reimbursed the custodial account for any purchases made by owners, officers or employees of the market. (Tr. 45). The second reconciliation, as of November 8, 1995, revealed a shortage in Respondents' custodial account in the amount of \$236,053.95. (CX-17; Tr. 46). The custodial account shortage can be attributed to Respondents' failure to reimburse the custodial account for purchases not paid for by buyers within the time period required by the Act and regulations. Mrs. Sahlin described the documents utilized in preparing the schedule for the November 8, 1995, reconciliation. (CX-17-21; Tr. 46-50).

13. The third reconciliation date of November 24, 1995, was chosen by using a day closest to the custodial audit but the last day before Respondents' Monday and Tuesday sales. (Tr. 51). The third reconciliation, as of November 24, 1995, revealed a shortage in Respondents' custodial account in the amount of \$51,795.96. The custodial shortage can be attributed to Respondents' failure to reimburse the custodial account for purchases not paid for by buyers within the time period required by the Act and regulations. Mrs. Sahlin described in detail the figures contained on the reconciliation table for November 24, 1995, as well as the documents she utilized to obtain these figures contained therein. (CX-22-27; Tr. 52-56).

14. Mrs. Sahlin spoke with Respondent Wooton concerning the results of the three different reconciliations. At that time, Respondent Wooton requested that a fourth reconciliation of Respondents' custodial account be conducted to prove that the account was in balance as of the later date. (Tr. 56). A fourth reconciliation was conducted, as of November 28, 1995, using the same methods and type of documents utilized in the three prior reconciliations. The initial

³(...continued)

which was granted by Administrative Law Judge Baker on April 5, 1999. The Amended Complaint contains the correct figure reflecting the total proceeds receivable of \$559,351.39 versus the original total proceeds receivable figure of \$649,382.21; and the correct figure reflecting the custodial account shortage of \$222,711.78 versus the original custodial account shortage figure of \$132,680.96. Those corrected figures are also included on the revised reconciliation table for October 31, 1995, which was admitted into evidence as CX-10.

findings were that Respondents' custodial account was short by approximately \$996.00. Based on this, Mrs. Sahlin advised Respondents' bookkeeper to deposit that amount into the custodial account to correct the shortage. (Tr. 75-77). Mrs. Sahlin conducted an exit interview with Respondent Wooton in order to discuss the preliminary results of the custodial audit and the possibility of formal action by the Agency. (Tr. 61). Respondent Wooton responded to Mrs. Sahlin's exit interview by stating that he disagreed with the manner in which the regulations required him to maintain the custodial account. (Tr. 61).

15. Mrs. Sahlin returned to her office after completing the audit of Respondent Roswell's custodial account to organize the records photocopied, review preliminary findings, prepare drafts of the reconciliation tables and to discuss findings with her supervisor, Mr. Milton Hansen. In reviewing the audit documents, Mrs. Sahlin discovered a deposit contained on Respondents' November, 1995, bank statement for which there was no corresponding deposit slip. (Tr. 104). Mrs. Sahlin contacted the bookkeeper to question her about this particular deposit and the bookkeeper faxed a copy of the deposit slip, to Mrs. Sahlin. At that time, it was determined that the deposit was made on November 28, 1995 and therefore should have been taken into consideration in the November 28, 1995, reconciliation. (Tr. 104).

16. Once Mrs. Sahlin received the deposit slip, she determined that the deposit should be considered as a "deposit in transit" since it was deposited on November 28, 1995, but had not been posted to Respondents' account as of that date. (Tr. 104). Mrs. Sahlin testified that, upon taking this "deposit in transit" into account for the November 28, 1995, reconciliation, she further determined that Respondents' custodial account was not deficient but rather contained a positive balance. (Tr. 78). Mrs. Sahlin informed Respondent Wooton of the revised figures for the November 28, 1995, reconciliation which reflected a positive balance in the account versus a deficiency. (Tr. 78). The November 28, 1995, reconciliation was not alleged in the Complaint because it had been determined that there was no custodial account violation. (Tr. 63).

17. The aforesaid deficiencies were due, in part, to the failure of the corporate Respondent Roswell, under the direction, management, and control of Respondent Wooton, to deposit in its custodial account, within the time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock and for failure to reimburse the custodial account within the time prescribed for purchases by its owners, officers, and employees.

Discussion and Conclusions

The Complainant's brief correctly sets forth the position of the Department of Agriculture, and is herein adopted, in substantial part.

Respondent Wooton is, and at all material times herein, was the *alter ego* of Respondent Roswell during the period of October 31, 1995, through November 24, 1995, by virtue of his day-to-day management, direction and control of Respondent Roswell.

The administrative Complaint alleges that Respondent Roswell, under the direction, management and control of Respondent Wooton, willfully violated sections 307 and 312 of the Act and section 201.42 of the regulations by failing to properly maintain and operate its custodial account in accordance with the requirements set forth in the Act and the regulations. It also alleges that Respondent Wooton, as president, forty percent stock owner and manager of Respondent Roswell, is, and at all times material herein, was the *alter ego* of Respondent Roswell due to his day-to-day management, direction and control of Respondent Roswell. (CX-2; Tr. 134). Respondent Wooton filed an Answer on behalf of himself and Respondent Roswell in which they deny the *alter ego* allegation but admit that Respondent Wooton was president, manager and forty percent stock owner in Respondent Roswell during the relevant time period.

The facts of each case must establish the *alter ego* doctrine before the corporate veil can be pierced in order to sanction an individual who exercises such control of the corporation that it is an extension of the individual. Piercing the corporate veil allows the Department to hold not only the corporation liable for violations but also the individual who was in control of the corporation when the violations were committed. The *alter ego* doctrine can be established by showing:

* * * the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud." *In re Syracuse Sales Co., Inc., Ben W. "Bill" Wood and John Knopp*, 52 Agric. Dec. 1511 (1993).

In short, the inquiry focuses on "the control of the corporation and the control must be active and substantial, though it need not be exclusive." *In re Wisner Sales Co., Inc. and James B. Feller*, 53 Agric. Dec. 1577 (1994). If the requirements are satisfied, "it is well settled that the corporate veil will be pierced when the failure

to do so would enable the corporate device to be used to circumvent a statute. *Bruhn's Freezer Meats v. United States Department of Agric.* 438 F.2d 1332, (8th Cir. 1971). See also *In re Sebastopol Meats Company, Inc.*, 28 Agric. Dec. 435 (1969). "It is the Secretary's policy to routinely 'pierce the corporate veil' and find that an *alter ego* situation exists when an individual is a stockholder of a respondent corporation so as to impose a sanction on the individual as well as on the corporation he owns." *In re Britton Bros. Inc. et al.*, 49 Agric. Dec. 423 (1990).

Respondent Wooton testified to the following on cross-examination regarding his role and responsibilities in Respondent Roswell on a day-to-day basis:

Q Mr. Wooton, you're the president of Roswell Livestock; is that correct?

A Yes, ma'am.

Q And how long have you been president of Roswell Livestock?

A Every [sic] since it's inception in 1984.

Q Okay. And basically as president and I understand you're president and you're manager and supervisor?

A The buck stops here.

Q Okay. So, for example, what are your duties as president, officer, well, manager of the market?

A What are my duties?

Q Un-huh.

A **My duties are to make every decision that's made there that amounts to a hill of beans. That's my duty.** (Emphasis added)

Q So there are other stock owners in Roswell Livestock; right.

A I have two sons.

Q Okay. Do they have stock ownership?

A Since, since the time this complaint was filed one of my sons and partners has gone into some other things. I now own 50 percent of the business and I have two other sons still in with me there and they own 50 percent of the business.

Q Okay.

A Each one 25 percent.

* * * * *

Q Okay. What role do they play as stock owners in the corporation --

A Role they play?

Q I understand you say the buck stops with you, what do they do as stock owners?

A **They do what I tell them to do because I'm the biggest and I'm the smartest and I'm the man. And they do what I tell them to do and have been for 40 years.** (Emphasis added)

Q So basically would you say that the corporation is basically your business; would that be correct?

A **The buck stops here. Everything -- I claim full responsibility for everything that happens at Roswell Livestock Auction. If I have employees that make mistakes I take responsibility for it. If I have officer managers who makes mistakes I take responsibility for it. They're doing it the way I tell them to do it.** (Emphasis added).

Q Okay. So you make all the decisions, business, financial, everything, what's to be paid, how it gets paid?

A I'm not, I'm probably not as tough as I'm letting on like I am but I do want you to know and I want the court to know that anything that happens at Roswell Livestock Auction falls right here. (Tr. 112-114).

While Respondent Wooton was a forty percent stockholder during the relevant time period, he exercised the type of active and substantial control that would be more consistent with a 100 per cent stockholder. Respondent Wooton made it perfectly clear during his testimony that he alone is responsible for the business and financial decisions of Respondent Roswell, and its employees and stockholders act on his instructions in carrying out their respective job duties and responsibilities. Respondent Wooton has demonstrated by his testimony that he exercises active and substantial control of Respondent Roswell on a day-to-day basis and has done so since the inception of the corporation in 1984. The evidence establishes that Respondent Wooton completely dominates the corporate entity, Respondent Roswell, so as to negate its separate personality. Therefore, the facts of this case more than amply support the allegation that Respondent Wooton is, and at all times material herein, was the *alter ego* of Respondent Roswell during the violation period.

Since Respondent Wooton was the *alter ego* of Respondent Roswell during the violation period, he was the person responsible for the manner in which the custodial account was maintained and operated. Cindy Wooton, bookkeeper, followed his instructions regarding the maintenance and operation of the custodial account. These instructions would have included whether the custodial account would be reimbursed in a timely manner for the purchases not paid for by buyers within the time frame set forth in section 201.42 of the regulations.

Respondent Wooton, as *alter ego* of Respondent Roswell, was obligated to adhere to the requirements for the custodial account in the day-to-day management, control and direction of Respondent Roswell. In fact, Respondent Wooton admitted that he was aware, at the time of the alleged violations, of the regulations governing custodial accounts and that he received three prior notices that the Agency had concerns about the manner in which Respondent Roswell's custodial account was being maintained prior the initiation of the November, 1995, audit. (CX-6-8; Tr. 114-115). Despite three prior notices, Respondent Wooton made a conscious decision to operate Respondent Roswell's custodial account contrary to the requirements simply because he believed the regulatory requirements to be "unrealistic". (Tr. 120).

Mr. Wooton, in a way, summarized his view of the case when he testified:

"Q Okay. As to the particular date do you dispute that there was a custodial shortage of your account?

A No, ma'am, I do not dispute it.

Q Okay.

A I do not admit that the figure's right. I do not dispute it." (Tr. 119).

* * * * *

A -- do not dispute that there was a shortage or a discrepancy. I do not necessarily think that the figures were right.

Q Okay. Mr. Wooton, you've made it clear that you take issue with the manner in which the act and the regulations state your [sic] must maintain a custodial account?

A Yes, ma'am.

Q And you think it's unrealistic? Okay.

A I think it's, I think it's impossible, Ms. Hart.

Q Okay. But you do understand that the rules, that the statute and the regulations say what they say and that you're required --

A Yes, ma'am.

Q -- to abide by them?

A I've been reading them, I've been reading them since before you were born.

Q Okay. So you do understand that as a registrant you're responsible for abiding by the statutes and the regulations?

A Yes, ma'am I understand that. (Tr. 120).

* * * * *

Q I understand. Now, Mr. Wooton, you do understand or do you understand that just because you may disagree with what the statute and the regulations state that that doesn't exempt you from being responsible or

being held accountable for the statute and the regulations for complying with them?

A Ms. Hart, I have already stated that I do not deny violated [sic] some sections of the P&S Act.

Q Right. And I --

A I do. I know what that act says. I've been reading it for years. I know what it says. I know, I know better than anybody else, including P&SA, how that thing needs to be handled.

Q Okay. But, so but it would be correct that you make, you make a decision as to whether or not you're going to strictly comply, to use just for example, strictly comply with all the provisions of the statute and the regulations?

A Yes, ma'am. Yes, ma'am. That's what you want me to say, I make the decision whether I'm going to comply or whether I'm not going to comply. (Tr. 127, 128).

The evidence sufficiently demonstrates that Respondent Roswell, under the direction, management and control of Respondent Wooton violated sections 307 and 312 of the Act and section 201.42 of the regulations by failing to properly maintain and operate its custodial account and that such violations, as determined by the Department of Agriculture and case precedent, constitute unfair and deceptive trade practices. This is the type of fact situation in which the Secretary has, in the past, pierced the corporate veil in order to reach those individuals who play a significant role in the commission of the violations. The facts of this case fully support a finding that Respondent Wooton is, and at all times material herein, was the *alter ego* of Respondent Roswell. Accordingly, it is appropriate to pierce the corporate veil of Respondent Roswell and hold Respondent Wooton, as *alter ego*, responsible, along with Respondent Roswell, for the violations committed by Respondent Roswell as alleged in the Complaint.

Respondent Roswell, under the direction, management and control of Respondent Wooton, during the period of October 31, 1995, through November 24, 1995, failed to maintain and properly use its custodial account, thereby endangering the faithful and prompt accounting and payment of the portions due the owners or consignors of livestock in that:

As of October 31, 1995, Respondents had \$1,838,520.46 in outstanding checks drawn on their custodial account, and had, to offset those checks, cash in the account totaling \$754,354.85, deposits in transit totaling \$212,071.62, proceeds on hand totaling \$90,032.82 and proceeds receivable totaling \$559,351.39 resulting in a deficiency of \$222,711.78 in funds available to pay shippers their proceeds.

Mrs. Sahlin provided detailed testimony of the custodial audit performed during the week of November 27, 1995, at Respondent Roswell's place of business and in particular the results of the first reconciliation performed as of October 31, 1995.

Mrs. Sahlin testified that she compiled the table for the October 31, 1995, reconciliation from the custodial account documents produced by the Respondents at the time of the audit. (Tr. 31-44). The reconciliation revealed that Respondents' custodial account had total debits in the amount of \$1,615,808.68, which consisted of a bank statement balance of \$754,354.85; deposits in transit in the amount of \$212,071.62; cd's/savings designated as custodial funds in the amount of \$0; proceeds on hand in the amount of \$90,030.39; and proceeds receivable in the amount of \$559,351.39. (CX-10; Tr. 36-42). The line items found on the debit side were defined in detail at the hearing by Mrs. Sahlin. (Tr. 36-44). According to Mrs. Sahlin, Respondents' custodial account had total credits in the amount of \$1,838,520.46, of which there were \$1,838,520.46 in outstanding checks, \$0 for proceeds due shippers and \$0 for expense items remaining in account, all of which were discussed in detail at the hearing. (CX-10; Tr. 36-42). After deducting the total credits from the total debits, there was a resulting deficiency of \$222,711.78 in Respondents' custodial account. (CX-10; Tr. 35).⁴

Mrs. Sahlin described the documentation obtained from Respondents' records, which was the basis upon which the table for the October 31, 1995, reconciliation was compiled. (CX-10; Tr. 36-44). The pertinent documentation includes the custodial account bank statement dated October 31, 1995, a listing of the deposits in transit along with the deposit slips, and the outstanding check list which was prepared by Mrs. Sahlin after reviewing Respondents' check register and invoices. (Tr. 36-44). Mrs. Sahlin stated that, in the course of the audit, she reviewed Respondents' accounts receivable records, which consisted of buyer's invoices, deposit slips and the accounts receivable ledger, up to October 31, 1995, in an attempt to discover the reason for the custodial account shortage. (CX-16;

⁴Accepted accounting principles require that assets appear on the reconciliation table as a debit balance; and that liabilities appear on the reconciliation table as a credit balance.

Tr.-4244). She defined "accounts receivable" as those proceeds from the sale of livestock that were not collected or deposited or reimbursed to the custodial account by the firm within the time period required by the regulation. (Tr. 42). Mrs. Sahlin utilized the information contained in Respondent Roswell's records in compiling the table representing the accounts receivable as of October 31, 1995. Respondent Roswell had accounts receivable totaling \$102,110.36, as of October 31, 1995, which was less than the custodial account shortage, thereby indicating that Respondents were failing to properly use their custodial account. (CX-16; Tr. 43). Mrs. Sahlin testified that the total accounts receivable figure is not contained on a reconciliation table because it represent funds for which the market should have already reimbursed the custodial account which is already included in the bank balance figure. (Tr. 43).

Respondents' deny that their custodial account was deficient, as of October 31, 1995, in the amount of \$222,711.78 and specifically take issue with the Complainant amending the Complaint shortly before hearing to reflect a change in the original custodial shortage figure as of October 31, 1995. The original reconciliation table, as of October 31, 1995, created by Mrs. Sahlin reflected total credits of \$1,705,839.50, total debits of \$1,838,520.46 and a custodial account shortage in the amount of \$132,680.96. These figures were the basis of the allegations contained in the administrative Complaint regarding the October 31, 1995, reconciliation. Mrs. Sahlin, in reviewing the reconciliation table and supporting documents in preparation for hearing, discovered a calculation error in the total proceeds receivable figure (credit item) and the overall custodial account shortage figure. (Tr. 39). She discovered at that time that she had inadvertently included the proceeds on hand figure of \$90,030.82 into the proceeds receivable figure of \$649,382.21 thereby making the total credit figure larger than it should have been and the resulting custodial shortage amount smaller than it should have been. (CX-10; Tr. 39).⁵

Mrs. Sahlin notified Complainant's counsel of the calculation error promptly and there was a Motion filed to Amend the Compliant. Respondents were notified of the calculation error and of Complainant's intent to seek an Amendment of the Complaint in accordance with section 1.137(a) of the Rules of Practice (7 C.F.R. § 1.137(a)). Section 1.137(a) of the Rules of Practice allows Complainant to request permission to Amend the Complaint with the Judge's permission after the filing of an Answer and prior to the decision being rendered by the Administrative

⁵See also the Amended Complaint which explains in detail the amendments to the October 31, 1995, reconciliation table.

Law Judge. Complainant's attorney filed a Motion to Amend the Complaint with the Hearing Clerk's office on March 24, 1999, which was granted by the Administrative Law Judge on April 5, 1999.

The issue of the accuracy of the revised custodial account shortage figure for October 31, 1995, was discussed in detail in Mrs. Sahlin's cross-examination testimony. (Tr. 67-70). Respondents contends that the amendment of the custodial account shortage figure so close to the hearing was unfair to Respondents since they had been operating with the understanding that the shortage was \$132,680.96 instead of the amended figure of \$222,711.78. In particular, Respondents questioned Mrs. Sahlin as to why the calculation error was not discovered at the time of the audit in 1995, but rather prior to hearing in April, 1999. (Tr. 81). Mrs. Sahlin explained that the error occurred when she inadvertently included the proceeds on hand figure in the total proceeds receivable figure. Mrs. Sahlin acknowledged her calculation error but maintained the position that the auditing process was not flawed in any other way and that the remaining numbers contained in the October 31st, November 8th and November 24, 1995 reconciliation table were correct and a true representation of the custodial audit conducted in November, 1995. (Tr. 69).

Although Respondents assert that the revised figures contained in the October 31, 1995, reconciliation table are inaccurate, they presented no testimonial nor documentary evidence to rebut the Complainant's reconciliation figures for October 31, 1995. Even if Respondents were operating with the understanding that the custodial account shortage, as of October 31, 1995, was \$132,680.96 until the week of March 24, 1999, they were notified in sufficient time to allow them to produce evidence from their own records to rebut Complainant's evidence. Respondents made a conscious decision not to avail themselves of the opportunity to review their own records and present rebuttal evidence to Complainant's evidence for the October 31, 1995, reconciliation at the oral hearing. Respondents' bare allegation that the reconciliation is inaccurate, without any accompanying proof, is insufficient to rebut Complainant's evidence that the custodial account shortage, as of October 31, 1995, was \$222,711.78. Complainant's documentary and testimonial evidence fully meets the preponderance of the evidence standard for proving that Respondents' custodial account was deficient in the amount of \$222,711.78 as of October 31, 1995, due to their failure to timely reimburse the custodial account for purchases made in accordance with the requirements of the Act and section 201.42 of the regulations. (CX-10, 15).

As of November 8, 1995, Respondents had outstanding checks drawn on its custodial account in the amount of \$1,268,680.18, and had, to offset those checks, cash in its custodial account in the amount of \$560,116.50, proceeds receivable in

the amount of \$472,509.73, resulting in a deficiency of \$236,053.95 in funds available to pay shippers their proceeds.

Mrs. Sahlin testified that once she discovered a custodial account shortage as of October 31, 1995, she chose a more current date upon which to reconcile Respondents' custodial account. (Tr. 46). The second reconciliation date was chosen by taking the next day after a sale had taken place since Respondent Roswell should have reimbursed the custodial account for any purchases made by owners, officers or employees of the market by that time. (Tr. 45). Mrs. Sahlin was granted access to the same type of records she had reviewed in the October 31, 1995, reconciliation. (Tr. 46).

The schedule of the custodial account reconciliation for November 8, 1995, was compiled from the documents produced by Respondents. Mrs. Sahlin's reconciliation revealed that Respondents' custodial account had total debits in the amount of \$1,032,626.23, which consisted of a bank statement balance of \$560,1160.50; deposits in transit in the amount of \$0; cd's/savings designated as custodial funds in the amount of \$0; proceeds on hand in the amount of \$0; and proceeds receivable in the amount of \$0. (CX-17; Tr. 46-50). The reconciliation also indicated that Respondents' custodial account had total credits in the amount of \$1,268,680.18, which consisted of outstanding checks in the amount of \$1,268,680.18; proceeds due shippers in the amount of \$0; and expense items remaining in account in the amount of \$0. (CX-17; Tr. 46-50). Deducting the total credits from the total debits resulted in the deficiency of \$236,053.95 in Respondents' custodial account. (CX-17; Tr. 46).

The documentation obtained from Respondents' records, which formed the basis of the November 8, 1995, reconciliation schedule, was described by Mrs. Sahlin. (CX-17-20). The review of the accounts receivable indicated that, as of November 8, 1995, there was \$105,538.79 in accounts receivable which had not been collected and/or reimbursed to the custodial account within the time required by the regulations. (CX-21). According to Mrs. Sahlin, the fact that the custodial account shortage was significantly greater than the uncollected accounts receivable was an indication that the shortage was due to an improper handling of the custodial account by the Respondents. (Tr. 49-50).

Respondents allege that the figures reflected on the November 8, 1995, reconciliation schedule are incorrect and challenge the accuracy of Mrs. Sahlin's auditing process. Respondents did not put forth any evidence to prove their allegation of inaccuracy for the November 8, 1995, reconciliation but rather assert that the figures are inaccurate according to their calculations. Respondents further state that if Mrs. Sahlin made a calculation error on the October 31st reconciliation, then she must have made mistakes on the other two reconciliations as well.

Respondent Wooton testified that "he did not dispute that there was a custodial shortage as of November 8th in particular but neither did he admit that Mrs. Sahlin's figures were correct." (Tr. 119). Mrs. Sahlin provided details as to the method utilized in arriving at the figures reflected in the November 8th reconciliation as well as the documentation utilized in obtaining those figures. (Tr. 46-49). Absent some specific evidence of inaccuracy by Respondents', the auditing process employed in reconciling Respondents' custodial account and the resulting figures contained on the November 8th reconciliation must be presumed to be correct.

As of November 24, 1995, Respondent Roswell had outstanding checks drawn on its custodial account in the amount of \$1,277,869.03, and had, to offset those checks, cash in its custodial account in the amount of \$865,439.28, deposits in transit in the amount of \$25,860.07, resulting in a deficiency of \$51,795.96 in funds available to pay shippers their net proceeds.

Mrs. Sahlin testified that she chose a third reconciliation date after discovering a custodial account shortage as of November 8, 1995. (Tr. 51). The third reconciliation date was chosen by taking the closest date to the week of her audit of Respondents' custodial account which was November 24, 1995. (Tr. 51). Mrs. Sahlin was granted access to the same type of records as she had reviewed in the October 31st and November 8th reconciliations. (Tr. 51). The documentation obtained from Respondents' records, which formed the basis of the November 24, 1995, reconciliation schedule, was described by Mrs. Sahlin. (CX-23-27; Tr. 52-56). The table of the custodial account reconciliation for November 24, 1995, was compiled from the documents produced by Respondents. Mrs. Sahlin's reconciliation revealed that Respondents' had total debits in the amount of \$1,226,073.07, which consisted of a bank statement balance of \$865,439.28; deposits in transit in the amount of \$25,860.07, cd's/savings designated as custodial funds in the amount of \$0; proceeds on hand in the amount of \$0; and proceeds receivable in the amount of \$0. (CX-17; Tr. 46-50). The reconciliation also revealed that the Respondents had total credits in the amount of \$1,277,869.03, which consisted of outstanding checks in the amount of \$1,277,869.03; proceeds due shippers in the amount of \$0; and expense items remaining in account in the amount of \$0. (CX-22; Tr. 52-56). Deducting the total credits from the total debits resulted in the deficiency of \$51,795.03 in Respondents' custodial account as of November 24, 1995. (CX-22; Tr. 51-52).

Respondents allege that the figures reflected on the November 24, 1995, reconciliation schedule are incorrect and challenge the accuracy of Mrs. Sahlin's auditing process. Respondents did not put forth any evidence to prove their allegations of inaccuracy for the November 24, 1995, reconciliation but rather asset that the figures are inaccurate according to their calculations. Respondents further

state that if Mrs. Sahlin made a calculation error on the October 31st reconciliation, then she must have made mistakes on the other two reconciliations as well. Mrs. Sahlin provided details as to the method utilized in arriving at the figures reflected in the November 24th reconciliation as well as the documentation utilized in obtaining those figures. (Tr. 51-56). Absent some specific evidence of inaccuracy by Respondents', the auditing process employed in reconciling Respondents' custodial account and the resulting figures contained on the November 24th reconciliation must be presumed to be correct.

During the period of October 31, 1995 through November 24, 1995, Respondents failed to properly maintain and operate their custodial account by failing to reimburse the account for the purchases of owners, officers and employees by the next business day after the purchase of livestock when there were shortages in the custodial account.

Mrs. Sahlin provided testimony as to the manner in which Respondents failed to reimburse the custodial account in a timely manner for the purchases of owners and officers of Respondent Roswell while there were shortages in the custodial account from October 31, 1995, through November 24, 1995. The purchase invoices for the relevant time periods were reviewed to determine if there were any un-reimbursed purchases made by the owners, officers and employees of Respondent Roswell. (Tr. 58). Mrs. Sahlin documented five instances, between October 31, 1995 and November 24, 1995, in which Respondent Roswell failed to timely reimburse its custodial account for the purchases of owners and officers when these purchases were not paid for by the purchasers in accordance with the regulations while there was a shortage in the custodial account. (CX-28). Respondent Roswell failed to reimburse the custodial account for any of these five purchases despite its obligation to do so once the owners and officers failed to timely pay for their own purchases.

Three of the five purchases were made by an owner and officer of Respondent Roswell, Benny Wooton,⁶ on behalf of "Bobcat" on October 10, 17, and 24, 1995, all of which were paid for by Benny Wooton on November 18, 1995, thereby making the buyer payments 25, 31 and 38 days late respectively. (CX-28- 29; Tr. 58). Another purchase was made by Craig Wooton, an owner and officer of Respondent Roswell on November 8, 1995, and paid for by Craig Wooton on November 28, 1995, thereby making the payment 20 days late. (CX-28, 30; Tr. 59). The last of the five purchases was made by Respondent Wooton, on behalf

⁶There is no evidence to indicate that Benny Wooton had any ownership interest in "Bobcat" at the time of the purchases.

of "Top of the World," a partnership in which he holds a thirty-three percent share. (Tr. 60, 110). The livestock was purchased on November 21, 1995, and paid for by Respondent Wooton on November 28, 1995, thereby making payment seven days late. (CX-28, 31; Tr. 60).

Respondents disagree with four of those five transactions being labeled by Complainant as purchases by owners and officers. Respondents assert that the purchases allegedly made by Benny Wooton should not have been attributed to him since Benny Wooton purchased the livestock on behalf of "Bobcat" and then paid for livestock when the purchaser could not pay due to bankruptcy. (Tr. 111). Respondent Wooton argues that those three transactions should not be viewed as purchases being made by Benny Wooton merely because he paid for the livestock with his own personal check. (Tr. 111).

Respondents admit that the purchase made by Craig Wooton was an owner and officer purchase that was not paid for by Craig Wooton on the next business day after purchase. (Tr. 110). In addition, Respondent Roswell failed to reimburse the custodial account immediately when the purchase was not paid for by the end of the next business day. (Tr. 59). Instead, Craig Wooton paid for his livestock purchases twenty days later. (CX-28, 30; Tr. 59). Respondents failed to timely reimburse the custodial account when Craig Wooton failed to pay for his livestock purchases in accordance with the requirements of the Act and regulations.

Mrs. Sahlin, on cross-examination, stated that she did not recall if the purchases were listed in Benny Wooton's name, but his name was listed on a receivables cash slip for the October 10, 1995, purchase. (Tr. 90). This is considered a purchase by Benny Wooton by virtue of the fact that he paid for the livestock with his own personal check rather than a check from the Respondent's custodial account which would have been indication of a reimbursement by Respondent Roswell. (Tr. 91). Mrs. Sahlin was justified, based on the information available, in classifying those purchases as ones being made by and paid for by Benny Wooton. It stands to reason that if the market was reimbursing the custodial account for purchases not paid for in a timely manner, it would have done so in the market's name and with the market's check and not with a personal check from an individual who is an owner and officer of the market.

Those purchases were appropriately attributed as being purchases made by and paid for by Benny Wooton, an individual who was an owner and officer of Respondent Wooton, at the time of the purchase and payment. Section 201.42 of the regulations states as follows:

The market agency shall deposit in its custodial account before the close of the next business banking day (the next day on which banks are customarily

open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency. 9 C.F.R. § 201.42.

Section 201.42 of the regulations requires that any purchases made by owners and officers be paid by the next business day after purchase or the market is obligated to reimburse the custodial account immediately for those purchases regardless of whether it has received payment from the purchaser. This is not what occurred. Instead, the Respondents failed to reimburse the custodial account when they did not receive payment for the livestock by the next business day. It was Benny Wooton who paid for the purchases with his own personal check up to thirty-one days after the purchases had taken place. (CX-30). The documentary and testimonial evidence supports Complainant's allegation that these were purchases made by owners and officers of Respondent Roswell and that Respondents failed to reimburse the custodial account in a timely fashion. Any argument to the contrary is not supported by the record.

Respondents also argue that the purchase made by Respondent Wooton on behalf of "Top of the World" should not be considered as a purchase made by an owner and officer of Respondent Roswell wherein payment by the purchaser or reimbursement by the market would have been required one business day after the purchase. (Tr. 110, 124-125). The basis for Respondents' argument is that Respondent Wooton has only a minor ownership interest in "Top of the World". (Tr. 124). Mrs. Sahlin testified that Respondent Wooton told her, during the investigation, that he purchased livestock under names such as "Top of the World," "Spirlock 7" and "Fred". (Tr. 60). Based on the information provided, Mrs. Sahlin appropriately classified the "Top of the World" purchase as being an owner and officer purchase, thereby requiring payment by the purchaser or reimbursement by the market by the next business day. (CX-28, 31). Respondent Wooton admitted in his testimony that "Top of the World" is a "partnership deal in which I'm a third partner." (Tr. 110). Respondent Wooton, an owner and officer of Respondent Roswell and one-third partner in "Top of the World" also admitted to purchasing

livestock on behalf of "Top of the World." (Tr. 110).

The testimonial and the documentary evidence support Complainant's allegations that this is an owner/officer purchase due to Respondent Wooton's ownership interest in "Top of the World." As such, Respondents were required to reimburse the custodial account not seven days after purchase, but rather one business day after the purchase had taken place if "Top of the World" did not pay for its purchase. 9 C.F.R. § 201.42. Respondents', admittedly, failed to adhere to the custodial account reimbursement requirements set forth in section 201.42 of regulations and failed to do so at a time when there was a significant shortage in the Respondents' custodial account as evidenced by the three reconciliations performed by Mrs. Sahlin.

There is more than sufficient evidence to support the Complainant's allegation that, Respondents, on five occasions, between October 10th, and November 20, 1995, failed to properly maintain their custodial account by failing to reimburse the custodial account for the purchases made by owners/officers of Respondent Roswell. All five purchases, mentioned above, should be viewed as owner/officer purchases and being so, payment was due from the purchaser on the next business day. Upon failure of those owners/officers to pay for their livestock purchases, Respondents were required to timely reimburse the custodial account and failed to do so. The documentary evidence shows that the length of time in which the purchases were unpaid were from seven to thirty-two days and there was no effort at all on Respondents' part to reimburse the custodial account during this time.

Mrs. Sahlin testified that, after conducting three reconciliations of Respondents' custodial account and discussing those preliminary results with Respondent Wooton, Respondent Wooton requested that she conduct yet another reconciliation as of November 28, 1995, because "he was sure that account would be balanced." (Tr. 56). The reconciliation conducted by Mrs. Sahlin, at Respondent Wooton's request, as of November 28, 1995, initially indicated a custodial shortage of approximately \$996.00, that was later revised when Respondents produced a copy of a deposit in transit which, when later applied to the reconciliation, resulted in a positive balance in the custodial account.

There did not appear to be any custodial account violations as of November 28, 1995. (Tr. 104). Mrs. Sahlin testified that it was her understanding that the November 28, 1995, reconciliation was not alleged in the Complaint because it had been previously determined that there was no custodial account violation as of that date. (Tr. 63). The Agency did not allege that there was any kind of a deficiency in Respondents' custodial account as of November 28, 1995. (Tr. 63).

Respondents have willfully committed unfair and deceptive trade practices in violation of sections 307 and 312 of the Act (7 U.S.C. §§ 208, 213(a)) and section

201.42 of the regulations (9 C.F.R. § 201.42) as a result of their failure to properly maintain and operate the custodial account (thereby endangering the faithful and prompt accounting and payment of the portions due the owners or consignors of livestock). Respondents failed to maintain and properly use their custodial account by virtue of the fact that there was a custodial shortage in the amount of \$222,711.78 as of October 31, 1995; a shortage in the amount of \$236,053.95 as of November 4, 1995; and a shortage in the amount of \$51,795.76 as of November 24, 1995. Respondents also failed to properly maintain and use their custodial account by virtue of the fact that Respondents failed to timely reimburse the custodial account for the purchases of owners/officers of Respondent Roswell at a time when there was already a shortage in the custodial account. The defenses raised by Respondents do not mitigate against the violations committed.

The court in *In re George County Stockyard, Inc., et al.*, 45 Agric. Dec. 2349 (1986) stated the following regarding custodial accounts:

... the custodial account is a trust account which is a conduit for funds received for sale of consignor's livestock. When properly designated as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation (FDIC). See also *In re Danny Cobb and Crockett Livestock Sales Co., Inc.*, 48 Agric. Dec. 234 (1989).

"It has been long and consistently held by the Secretary and the courts that the improper handling and use of the shippers' proceeds violates the integrity of the custodial account and the regulations promulgated to preserve it. Improper handling and use of the custodial account is plainly contrary to the Act and regulations." *In re George County Stockyard, Inc., et al., supra*. See also *In re Farmers and Ranchers Livestock Auction, Inc., et al.*, 45 Agric. Dec. 234 (1986); and *In re Arab Stock Yard, Inc. v. U.S. Department of Agriculture*, 582 F.2d 39 (5th Cir. 1978). The courts have also held that the failure of a market agency to handle its custodial account in accordance with section 201.42 of the regulations (9 C.F.R. § 201.42) is an unfair and deceptive trade practice because "shippers do not know that their money is being used to extend credit to buyers [or the market itself] and because the market agency is using trust money for their own purposes to extend credit to themselves and others." *In re Harry C. Hardy and Edith G. Hardy*, 33 Agric. Dec. 1383 (1974). See also *In re Finger Lakes Livestock Exchange, Inc., et al.*, 48 Agric. Dec. 390 (1989).

Respondents contend that the violations, if any, were not committed willfully because they never set out with the purpose of violating the Act and regulations.

(Tr. 115). Respondents would argue that the violations were the result of nothing more than mistakes that are bound to occur when dealing with the volume of business that Respondent Roswell does on a weekly basis. (Tr. 107-108). Well established case law dictates that a violation is willful for administrative law purposes if the Respondent intentionally does an act which is prohibited, irrespective of evil motive of reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182 (1973); *American Fruit Purveyors, Inc. v. United States*, 450 U.S. 997 (1981); *Jeffrey L. Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28 (7th Cir. 1977); *Goodman v. Benson*, 286 F. 2d 896 (7th Cir. 1961). Respondents knew or should have known that they were failing to maintain and properly use their custodial account during the period of October 31, 1995, through November 24, 1995, due to the fact the custodial account was short on three different occasions and Respondents admitted that they made a decision to handle their custodial account in a manner, for which they were on notice from the Agency, was directly contrary to the regulations. (CX-6-8; Tr. 115-116, 120, 122-123). In addition, the testimonial and documentary evidence does not support Respondents' contention that the custodial shortages were the result of mistakes on their part. Rather, it was Respondents' insistence on handling the custodial account in a manner which was known to be contrary to section 201.42 of the regulations that caused the substantial custodial shortages discovered by Mrs. Sahlin's audit in November, 1995. Therefore, Respondents have willfully violated the Act and regulations by their actions.

One of the Respondents' contentions is that the Complaint was issued because of faulty calculations, performed as part of an audit, by one of P&S employees. As a result, it is argued, two of the four weeks which were audited were in error: one week was calculated \$90,032.82 long and the other \$996.00 short. As for the alleged deficiency of \$996.00 for the week of November 28, 1995, such deficiency, resulting from a mistake, was transferred to Respondents' account by a deposit already made and recorded on the bank statement. The Respondents note that they furnished any and all documents requested by the auditor which documents she had in her possession from November, 1995 to May, 1997, and the Complaint herein was issued using miscalculated figures.

Additionally, Respondents points out that shortly before the scheduled hearing on April 7, 1999, Complainant filed, and was granted, a motion to amend the figures contained in the original Complaint, thus taking Complainant four years to discover errors.

Respondents would show that this was the first Complaint filed against them in thirty-two years and they question the appropriateness of the requested

\$35,000.00 penalty.

Respondents admits that "** * ** a mistake was made, admitted and corrected 4 years ago." Respondent Wooton questions the amount of resources used by P&S in this matter and the excessiveness of the proposed \$35,000.00 penalty. It is also specifically stated in Respondents' brief:

Roswell Livestock Auction carries a \$120,000 mandatory P&SA bond and also have a \$600,000 line of credit at my bank, to cover any deficiencies. I have 31 years of experience and expertise in owning and operating livestock markets. I have sold over 3.5 million cattle and countless sheep and horses, and written checks to consignors in excess of 1.1 billion, and have never had a check returned insufficient. P&SA already knows all this, but contend it is all irrelevant. I was told at the hearing by P&SA attorney Kimberly Hart and her expert witness Gunnard Eskilsen, who is also an employee of P&SA, that every statement raised in the defense of Larry Wooton and Roswell Livestock Auction, was completely irrelevant. If all these credentials were unimportant to running a honest, successful business, I ask the court, What is left that is important?

Respondents have a \$600,000.00 line of credit with their bank and monies can be transferred to checking accounts with a phone call. They believe this is more expedient than interest bearing savings accounts or certificates of deposit.

The defenses raised by Respondents are unsupported by evidence and the applicable case law and precedent and therefore do not mitigate against the violations committed by the Respondents. The first defense is a general challenge of the figures from the three reconciliations. Although Respondents generally dispute the figures from the three reconciliations performed by Mrs. Sahlin, they have failed to proffer any specific documentary evidence to rebut Complainant's evidence. Respondents failed to proffer any specific evidence to prove the exact extent of the alleged inaccuracy of the figures contained on the November 8th and November 24th reconciliation schedules but rather merely assert that the figures arrived at by Mrs. Sahlin are not correct according to their calculations and that, if she made a calculation error on the October 31st reconciliations, then she must have made mistakes on the other two reconciliations as well. (Tr. 119).

Respondent Wooton testified that "he did not dispute that there was a custodial shortage as of November 8th in particular but neither did he admit that Mrs. Sahlin's figures were correct." (Tr. 119). Mrs. Sahlin provided details as to how she arrived at the figures reflected in the November 8th and November 24th reconciliations as well as the documentation utilized in obtaining those figures.

(Tr. 45-56). According to Mrs. Sahlin, she felt confident that the auditing process employed in reconciling Respondents' custodial account and the resulting figures contained on the November 8th and November 24th reconciliations were correct and not flawed in any manner. (Tr. 69).

Complainant's evidence supports the accuracy of the methods utilized by Mrs. Sahlin in the auditing process as well as the resulting figures from the three reconciliations revealing significant custodial account shortages on all three dates in violation of the Act and regulations. Respondents' defense of alleged errors in the reconciliation schedules without benefit of specific evidence to prove the alleged inaccuracies is not sufficient to rebut the persuasive evidence submitted by Complainant proving violations of sections 307 and 312 of the Act and section 201.42 of the regulations. Respondents had full access to its own records, from which Mrs. Sahlin derived her reconciliation results, as well as Complainant's proposed exhibits. Respondents was also afforded ample opportunity to review those records in preparation for hearing in order to substantiate its allegations of inaccuracies. Respondents chose not to do so and presented absolutely no evidence at hearing other than its unsupported allegations. Those allegations without accompanying proof are insufficient to rebut the persuasive documentary and testimonial evidence submitted by Complainant at hearing.

The second defense raised by Respondents is that the number of days in which they may have failed to reimburse the custodial account for purchases made by owners/officers of Respondent Roswell is insignificant since the consignors were timely paid for their livestock. Respondents cannot create their own rules in operating and maintaining the custodial account, but rather must adhere to the applicable provisions of the Act and regulations. Respondents allowed owners/officers to purchase livestock from Respondent Roswell without prompt payment and then failed to reimburse the custodial account when that livestock debt was not promptly paid.

Respondents' failure to reimburse the custodial account in conformity with section 201.42 of the regulations is a serious violation. Section 201.42 of the regulations exists for the specific purpose of protecting consignors' proceeds and it is not permissible for a market agency to vary the payment and reimbursement requirements. Section 201.42 of the regulations makes it clear that payment for livestock purchases by owners/officers are due by the next business day and if payment is not received at that time, the market agency is required to reimburse the custodial account immediately, or by the next business day. It is obvious from Respondent Wooton's testimony that he wants to operate and maintain Respondent Roswell's custodial account in the manner that he finds convenient, regardless of the requirements set forth in the Act and regulations governing custodial accounts.

The third defense raised by Respondents is that the Agency is being unrealistic in requiring market agencies of their size to operate within the confines set forth by the provisions of the Act and regulations governing the maintenance of custodial accounts. (Tr. 108-109). Respondent Wooton admits that he, as president and manager of Respondent Roswell, is fully aware of the requirements for the maintenance and operation of the custodial account. (Tr. 115-116, 120, 122-123). Respondent Wooton has stated at the hearing that he does not agree with the requirements governing the maintenance of custodial accounts and therefore chooses to deviate from those requirements with which he finds unreasonable or unrealistic. (Tr. 108-109). Respondent Wooton testified to the following at the hearing.

Respondent Wooton:

With us at Roswell Livestock Auction, with me in particular, I've never told, I've never told -- what you see is what you get. I make no excuses for the way I run my business. **There are some pretty good reasons as to why you can't run that size of a business and stay within the strict guidelines that P&S provides for a business that size to run it.** (Emphasis added)

And, just quickly, if we run a million to two million dollar sale on Monday and we spend Tuesday and Wednesday trying to get the information of the purchase to the person that's going to pay for these cattle, 99 percent of these cattle are sold to an order buyer that doesn't pay for them, he buys them for somebody else that's going to pay for the cattle. We have to get that information to that person:

If we're two days getting that information to him and he's two days making a check and putting it back in the mail and if it takes four days for us to get that letter we're out of compliance. We're out of compliance. We've either got to make a personal check to put in there or we've out of compliance with P&SA.

I've said this all along for years and years that there needs to be a little bit more common sense used in these investigations. **It's virtually impossible to do this within the time frame that P&SA sets up for us to do it under. . .** (Emphasis added) (Tr. 108-109).

Respondent Wooton testified that he believes the responsibilities, as a market

agency, in the maintenance and operation of Respondent's Roswell's custodial account should be different from those set forth in the Act and regulations. (Tr. 121). According to Respondent Wooton, it is unnecessary to reimburse the custodial account with his own personal funds or with borrowed bank funds just to satisfy the requirements of the regulations if payment is expected from the livestock purchaser soon. (Tr. 122). As a result of the strong disagreement with the regulatory requirements, Respondent Wooton has made a conscious decision to maintain and operate Respondent Roswell's custodial account in a manner which he knew was directly contrary to the requirements of the Act and regulations. (Tr. 115-116, 120, 122-123, 128). There is little doubt that Respondent Wooton knew that his actions could constitute violations of the Act and regulations since he had been placed on notice on three prior occasions, as a result of prior audits, that the manner in which Respondent Roswell's custodial account was being maintained was problematic. (CX-6-8; Tr. 115). Yet, Respondents continued to maintain and operate the custodial account in the same manner with seemingly little regard for the consequences.

Respondent Wooton fails to understand that his disagreement with the requirements of the Act and regulations does not serve as sufficient justification for disregarding those requirements in operating Respondent Roswell's custodial account. Section 201.42 of the regulations (9 C.F.R. § 201.42) was enacted for the specific purpose of protecting the consignors of livestock by assuring that their sale proceeds would be adequately maintained by the market agencies and those market agencies are obligated to strictly adhere to those requirements without deviation. Neither the Act nor the regulations grant a market agency the freedom to pick and choose which rules and regulations it will adhere to in maintenance and use of a custodial account. What Respondents have done by their actions is to effectively lessen the protection afforded to the consignors of livestock by section 201.42 of the regulations by instituting their own system for handling their custodial account. In *In re Britton Bros. Inc. et al.*, 49 Agric. Dec. 423 (1990) the Judicial Officer specifically noted:

* * * * *

Interpretations of the Act which characterize failures to maintain [properly] custodial accounts, as being unfair trade practices are expressed in the following cases: *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *Roseth v. Bergland*, 636 F.2d 1224 (8th Cir. 1980); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974); *Hyatt v. United States*, 276 F.2d 308, 309-13 (10th Cir. 1960); *United States v.*

Donahue Bros., Inc., 59 F.2d 1019, 1020-23 (8th Cir. 1923); and *In re Powell*, 41 Agric. Dec. 1354, 1361 (1982).

* * * * *

This precedent reflects the care and concern Congress and the Department have displayed for the protection of the producers in food distribution systems. In this case, the system involves a major source of protein for human consumption and requires numerous complicated financial transactions and transfers of title. And, past failures of this system have required the imposition of market regulation so as to assure that the ranchers and cattle-raisers who bring their efforts to market, will be provided reward for their labors, in full, and in a prompt fashion.

Complainant's sanction witness, Gunnard Eskilsen, reiterated the Agency's position on Respondents' obligation to strictly adhere to the section 201.42 of the regulations without exception:

Q Okay. Now, you also heard Mr. Wooton testify earlier that he found it impossible to comply with the regulations because of the amount of business that he does and the short turnaround period which the regulations provide within which you must be paid or you have to reimburse the custodial, the custodial account. What is the agency's position as to that issue?

A The custodial account regulations are set for all market and we want adherence to all those regulations and there is no, no special thing allowed for this.

Q So is the agency's position that there are no exceptions?

A There are no exceptions. (Tr. 145, 146).

Q Okay. And what is the agency's position on Mr. Wooton's contention that he understands what the requirements are but he doesn't agree with them so he chooses what he wants to do about the statute and regulations?

A We feel that would be unfair because the other market agencies are

under the same rules and a lot of them, most of them follow those rules, although sometimes there are some shortages and those are usually caused by financial failures. But the agency's position that all market agencies are required to follow the regulations. (Tr. 147-148).

The Act and the regulations set forth very specific guidelines on the maintenance and operation of custodial accounts and the Agency is charged with the responsibility of ensuring that market agencies conform to those guidelines. The fact that Respondents may disagree with those guidelines does not give them the right to disregard them. The regulations are reasonable and have been enacted to protect consignors' proceeds. Respondents are required to conform to the regulations that pertain to the maintenance and operation of their custodial account as long as they have the full force and effect of law. Therefore, Respondents' defense that the guidelines are unrealistic and unreasonable as a justification for not adhering to those guidelines is untenable and without merit. Such defense in no way rebuts Complainant's evidence that Respondents have violated the Act and the regulations by failing to operate their custodial account in accord with the applicable provisions.

Another defense raised by Respondents is the "no harm, no foul" defense which argues that the shortages, if any, found in the custodial account should be of no major concern to the Agency because their consignors were always paid in a timely manner and there were never any checks issued to consignors that were returned for insufficient funds by the bank during the relevant time period (Tr. 107) or the many years Respondents have done business. This argument is frequently raised by Respondents in defense of custodial account violations although the courts have consistently disregarded the argument as a valid defense to custodial account violations. The Agency and the courts have consistently held to the following position:

The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury is not required. *See, Harry C. Daniels d/b/a Harry C. Daniels and Co. v. United States*, 242 F.2d 39 (7th Cir. 1957), *cert. denied*, 354 U.S. 939.

The courts have made it clear that the issue is whether Respondents have maintained and operated their custodial account in such a manner which created the potential for injury to consignors, regardless of whether actual injury has actually

occurred. The fact that Respondents caused no harm to consignors by issuing insufficient fund checks does not relieve Respondents from the responsibility for maintaining and operating their custodial account in strict conformity with the Act and regulations. (Tr. 138-139, 145). Respondents' defense does not change the nature of the violations committed which have nothing to do with the issuance of insufficient fund checks. Therefore, this defense lacks merit.

Another contention raised by Respondents is that their statutorily required bonds provide further assurance to the Department that consignors will be paid since the bonds are intended to cover unpaid livestock debt. (Tr. 93-98). While Respondent Wooton disagrees with Mrs. Sahlin as to the exact amount of bond coverage carried by Respondent Roswell, the Agency's records clearly indicate that Respondent Roswell carries a \$110,000.00 clause 1 bond and a \$10,000.00 clause 2 bond. (CX-1; Tr. 93-98). Respondents are of the opinion that the bonds exist to benefit unpaid livestock sellers, therefore, providing extra protection that consignors will be paid for their livestock. As was pointed out by Mrs. Sahlin, the bonds will only cover up to the limit of the bond amounts and should there be claim made against the bonds that exceed the bond limits, livestock sellers would not be paid in full for their livestock. (Tr. 103). More importantly, the fact that Respondents carry bonds, as required by statute, has nothing to do with their obligation to maintain and operate their custodial account in conformity with the Act and regulations.

The purpose of the regulations governing custodial accounts is to stop harm to the consignors in its incipiency instead of determining a course of action after the actual harm has occurred. The regulations governing bond coverage and the regulations governing maintenance and operation of custodial accounts are completely independent and there are varying goals to be achieved by these two regulatory provisions. Therefore, it is irrelevant that Respondents have bonds totaling \$120,000.00 to cover non-payment of livestock debt since it has no bearing on whether Respondents have violated the Act and regulations by allowing a significant shortage in their custodial account to occur on three separate occasions as alleged in the Complaint. Accordingly, Respondents' "bond" defense is without merit and does not address the issue of the violations committed by Respondents by virtue of the custodial account shortages.

Complainant's evidence persuasively establishes that the Respondents violated sections 307 and 312 of the Act and section 201.42 of the regulations by failing to properly maintain and operate their custodial account which resulted in shortages in the custodial account on three separate occasions between October 31, 1995, and November 24, 1995. In addition, the remaining defenses raised by Respondents have absolutely no bearing on the issue of whether the violations occurred as

alleged nor do they serve as mitigating factors as has been demonstrated by applicable case law. The case law makes it clear that Respondents, as market agencies and registrants pursuant to the Act, are expected to strictly conform to the rules and regulations governing the maintenance and operation of custodial accounts without exception.

Departmental policy and testimony at the hearing indicates that the appropriate sanction for the willful violations committed by Respondents is the issuance of an order requiring Respondents to cease and desist from failing to maintain and operate their custodial account in any manner not in accordance with the Act and regulations and the imposition of a civil penalty in the amount of \$35,000.00.

Complainant, through the testimony of Gunnard Eskilsen, has requested a finding that willful violations have occurred and for an order requiring Respondents to cease and desist from:

(1) Failing to deposit in their custodial account, within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

(2) Failing to otherwise maintain their custodial account in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42); and

(3) Failing to reimburse the custodial account for owners' and officers' purchases within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)). (Tr. 135-136). Complainant has also requested that Respondent Wooton be found as the *alter ego* of Respondent Roswell and that both Respondents Roswell and Wooton be assessed a civil penalty jointly and severally in the amount of \$35,000.00 as an appropriate sanction for the willful violations committed by the Respondents. (Tr. 136).

Mr. Eskilsen provided testimony regarding the Agency's position on sanction and the reasons for the recommended sanction. (Tr. 135-168). The purpose of the recommended sanction is to obtain compliance and deter Respondents and other registrants from committing unfair and deceptive trade practices similar to those which occurred in this case. (Tr. 136-137). Mr. Eskilsen explained that custodial account violations are considered as very serious because the Respondents act as a fiduciary for the consignors in handling their funds and must be relied upon to handle the custodial account properly. (Tr. 137). He also explained that it was the goal of the Agency to cease Respondents' violative activities before any consignor suffered a financial loss and there was a real possibility that, should Respondents continue handling the custodial account in the same manner, there would be an eventual loss of consignor's funds. (Tr. 138-140).

Section 312(b) of the Act (7 U.S.C. § 213 (b)) states in pertinent part:

... (a) 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. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall 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.

Since the Agency is seeking the imposition of a civil penalty, it must consider the three factors mandated by section 312 in reaching a decision as to the recommended civil penalty to be sought. Mr. Eskilsen testified that the Agency did consider those three factors in reaching a determination as to the recommended civil penalty that was specific to the Respondents' violations and financial considerations. (Tr. 138). In addition, the Agency also takes into consideration civil penalties assessed in cases with similar violations either by decision of the Secretary or by consent decision. (Tr. 154).

The first factor required by section 312(b) is the gravity of the offense. Mr. Eskilsen testified that the Respondents' custodial account was found to be short on three different dates in significant amounts and that shortages were due to the market's failure to reimburse the account for proceeds receivable over seven days old and for the purchases of market owners and officers. (Tr. 138). The frequency of the custodial shortages is an indication of an ongoing problem with Respondents that endangers consignors' funds regardless of whether any consignor has suffered loss at this point since the potential is there should Respondents continue to operate their custodial account in this manner. (Tr. 138-139). The Agency considers custodial account violations in this case to be serious because of the fiduciary relationship that Respondents hold with consignors' funds and because of the manner in which Respondents have disregarded their regulatory obligations as to the proper maintenance of the custodial account containing consignors' funds. (Tr. 137, 147). Mr. Eskilsen stressed that it is the Agency's responsibility to ensure that consignors' funds are being properly handled. (Tr. 148).

The second factor considered by the Agency is the size of Respondents' business. Mr. Eskilsen testified that Respondent Roswell is one of the largest market agencies in the State of New Mexico with current assets that exceed their current liabilities by \$600,000.00 and a reported net profit income of \$143,000.00. (CX-5; Tr. 139-140). Mr. Eskilsen reviewed Respondents' most recent annual report submitted to the Agency in May, 1998 for the figures referred to in his discussion of the size of Respondent Roswell. The Agency also considered the fact

that Respondent Roswell reported a new profit of \$43,000.00 for the 1997 calendar year (CX-5; Tr. 141) and since Respondent Wooton is a majority stockholder in Respondent Roswell, he would directly benefit from those profits. Mr. Eskilsen stated that it was the Agency's opinion that it would not be hardship on either Respondent to pay the \$35,000.00 civil penalty to appropriately address the severity of the violations. (Tr. 140). The third factor in section 312(b) is the effect of the penalty on the person's ability to continue in business. Mr. Eskilsen testified that the Agency's position is that the imposition of a \$35,000.00 civil penalty should not have an adverse impact on Respondents' ability to continue in business based on its reported working capital and net profits from the most recent annual report on file with the Agency. (CX-5; Tr. 144).

Mr. Eskilsen further testified that there is an aggravating factor present in this case which the Agency took into consideration in fashioning a sanction recommendation. The aggravating factor is the three prior letters issued by the Agency to Respondents on November 26, 1985, January 29, 1991 and April 25, 1995, as a result of custodial audits. (CX-6-8). These letters were issued to put Respondents on notice that the Agency discovered violations during the course of prior custodial audits that needed to be addressed by the Respondents. (CX-6-8; Tr. 144). The letters informed Respondents of the requirements for the maintenance and operation of custodial accounts pursuant to section 201.42 of the regulations and of the possibility of future formal action by the Agency if the violations continued to occur. (Tr. 144-145).

Mr. Eskilsen stressed the point that Respondent Wooton understands what the Act and regulations require him to do in handling Respondent Roswell's custodial account but that he has chosen not to abide by those requirements. (Tr. 147). This is demonstrated by the fact that, despite the three prior letters of notice sent over the past ten years regarding proper maintenance of Respondents' custodial account, Mrs. Sahlin discovered shortages in the custodial account on three different dates during the audit in November, 1995. This is evidence that Respondents have no intention of altering their management activities to conform to the regulatory requirements despite being warned on several occasions to do so. These instances of custodial shortages are not isolated events but rather show a continuing pattern of Respondents' disregard for the Agency rules and regulations for custodial accounts. Respondents would have us to believe that "it does not set out to willfully violate the Act on a daily basis but that mistakes sometimes happen with a business of its size." (Tr. 107-108, 115). This argument is disingenuous especially when viewed in the context of Respondent Wooton's own admission that he understands what the regulations require of him in maintaining and operating Respondent Roswell's custodial account but chooses to handle the account

differently. (Tr. 115-116, 121-124, 128-129). An occasional mistake would not result in custodial shortages ranging from \$51,000.00 to \$236,000.00 between October 31, 1995, and November 24, 1995. These custodial shortages are not the result of inadvertent mistakes but rather the result of Respondents' disregard of the mandatory regulations that apply equally to Respondent Roswell as well as any other registered market agency handling consignors' funds. Mr. Eskilsen stated that the Agency's position is that there are no mitigating factors present in this case. The fact that there were no insufficient fund checks issued or complaints from consignors was irrelevant because it had nothing to do with Respondents' violations of the regulatory provisions governing custodial accounts. (Tr. 145-148).

Mr. Eskilsen's sanction recommendation of a cease and desist order and the imposition of a \$35,000.00 civil penalty is in full accord with the Department's sanction policy. It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the Administrative Agency and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the Respondents but to other potential violators as well. The basis for the Department's sanction policy is set forth at great length in numerous decisions. *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1095 (1986); *In re Samuel Esposito*, 38 Agric. Dec. 613, 624-625 (1979); *In re Braxton M. Worsley*, 33 Agric. Dec. 1547, 1556-1571 (1974); and *In re James J. Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd, per curiam*, 498 F.2d 1088 (5th Cir. 1974). Great weight should be given to the Agency's recommendation as to sanction. *See, In re Worsley, supra*, 1567-1568 (1974).

All of the previously mentioned circumstances presented herein are strong support of Complainant's proposed sanction of a cease and desist order, and the imposition of a joint and several civil penalty in the amount of \$35,000.00 against Respondent Roswell, the corporate entity, and Respondent Wooton as *alter ego* of Respondent Roswell at all times material herein.

I have carefully considered the arguments, contentions, motions and requests of the parties and, to the extent they are inconsistent with this decision, they are denied.

Order

Respondent Roswell Livestock Auction Sales, Inc. and Larry F. Wooton, their Agents and employees, directly or indirectly or through any corporate device shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42); and

3. Failing to reimburse their "Custodial Account for Shippers' Proceeds" for owners' and officers' purchases within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)).

In accordance with section 312(b) (7 U.S.C. § 213(b)), Respondent Roswell Livestock Auction Sales, Inc. and Respondent Larry F. Wooton, as its *alter ego*, are hereby assessed a joint and several civil penalty in the amount of Thirty-Five Thousand Dollars (\$35,000.00).

This Decision and Order shall become final and effective without further proceedings thirty-five days after service thereof unless it is appealed within thirty days to the Judicial Officer by a party to the proceeding as more fully set forth in the Rules of Practice and Procedure. 7 C.F.R. § 1.130 *et seq.*

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 15, 1999.-Editor]

PACKERS AND STOCKYARDS ACT**DEFAULT DECISIONS****In re: NOLAN ULMER, d/b/a NU CATTLE AND NU CATTLE CO.****P&S Docket No. D-98-0035.****Decision and Order filed September 1, 1999.**

Deborah Ben-David, for Complainant.

Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.***Preliminary Statement**

This disciplinary proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter, the P&S Act, by a complaint filed on August 26, 1998 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection Packers and Stockyards Administration (GIPSA). The complaint alleges that Respondent wilfully violated the P&S Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*) by: (1) engaging in business without filing or maintaining an adequate bond, or its equivalent, after termination of a clearor bond; (2) issuing an insufficient funds check in payment for livestock purchases; (3) failing to pay the full purchase price for livestock purchases; and (4) failing to pay, when due, the full purchase price for livestock purchases. The complaint requests a finding that Respondent wilfully violated Sections 312(a) and 409 of the P&S Act (7 U.S.C. §§ 213(a), 228b) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 102.30). The complaint requests an order that Respondent cease and desist from the violations found to exist and that he be suspended as a registrant under the P&S Act.

A copy of the complaint was served on Respondent on September 3, 1998. Respondent filed an answer to the complaint on October 16, 1996 in which he admits: (1) the jurisdictional allegations of Section I of the complaint; (2) that Respondent engaged in business without filing or maintaining an adequate bond, or its equivalent, after termination of a clearor bond; (3) that an insufficient funds check was issued in payment for Respondent's livestock purchases; (5) that Respondent failed to pay, when due, for its livestock purchases; and (6) that

\$17,500.00 of the amounts alleged in the complaint remained unpaid.¹

Respondent's answer constitutes the admission of the material allegations of fact contained in the complaint. The admission of the material allegations of fact contained in a complaint constitute a waiver of hearing, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant moved for the issuance of a Decision and the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Nolan Ulmer, hereinafter referred to as the Respondent, is an individual doing business as NU Cattle and NU Cattle Co., whose business mailing address is 16529 WCR 70, Greeley, Colorado 80631.

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

- a. Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and
- b. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock on a commission basis.

3. On August 5, 1993, Respondent's registration as a clearee operating as a dealer and as a market agency buying on commission was accepted. Respondent was operating under the clearor bond of Albers Cattle Co., Inc., Winser, Nebraska. On January 24, 1996, Respondent was sent, by certified mail, a termination of clearance letter stating that he was required to have a bond and that the bonding instrument maintained in connection with his registration would terminate on February 22, 1996. On March 1, 1996, the Grain Inspection, Packers and Stockyards Administration Denver regional office received a trust agreement from Gary Rasmussen d/b/a R.U. Cattle Company, Ault, Colorado which showed Respondent as a clearee. On December 16, 1996, the principal subsequently requested that the trust agreement be terminated. On December 27, 1996, Respondent was sent, by certified mail, a termination of clearance letter stating that the bonding instrument maintained in connection with his registration was terminating on January 15, 1997. During the period January through November 17, 1997, Respondent continued to operate without an adequate bond as required by the P&S Act and the regulations after the termination of the clearor bond.

¹Respondent, in its answer dated October 16, 1998, stated that the remaining balance of \$17,500.00 "will be taken care of on Nov. 1, 1998, which was the agreement that was made."

4. Respondent, in connection with his operations subject to the P&S Act, on or about the date and in the transaction set forth below, issued a check in payment for livestock purchases which check was returned unpaid by the bank upon which it was drawn because Respondent 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	# of Head	Amount of Check	Check Number	Returned Check Dates
11/07/97	Kathy Miller d/b/a KM Cattle	68	\$34,508.57	#2549	12/04/97 12/09/97

5. Respondent, in connection with his operations subject to the P&S Act, on or about the date and in the transaction set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Seller	Amount Due	Payment Due Date	Amount Paid
11/07/97	Kathy Miller KM Cattle Co.	\$34,508.57	11/10/97	\$17,500.00 ²

6. As of May 26, 1998, \$17,500.00 of the amount due from the transaction set forth in findings of fact 4 and 5 remains unpaid.³

²On or about April 30, 1998, Gordi Ulmer, Respondent's father, paid Kathy M. Miller d/b/a KM Cattle, \$17,500.00 on his son's behalf and signed a promissory note for the balance due payable November 1, 1998. Although the balance due is \$17,008.57, Respondent's father signed a promissory note for \$17,500.00.

³Respondent, in its answer dated October 16, 1998, stated that the remaining balance of \$17,500.00 "will be taken care of on Nov.1, 1998, which was the agreement that was made."

Conclusions

By reason of Finding of fact 3, Respondent wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 (9 C.F.R. §§ 201.29, 201.30) of the Regulations.

By reason of Findings of fact 4 and 5, Respondent willfully violated sections 312(a) & 409 of the P&S Act (7 U.S.C. §§ 213(a) & 228b).

Order

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

- a. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
- b. Failing to pay, when due, the full purchase price of livestock;
- c. Failing to pay for the full purchase price of livestock; and
- d. Operating without an adequate bond.

Respondent Nolan Ulmer is suspended as a registrant under the P&S Act for a period of 5 years. Provided, however, that upon application to the Packers and Stockyards Administration, GIPSA, a supplemental order may be issued terminating the suspension of the Respondent at any time after the expiration of the initial 90 days of the suspension term upon demonstration by the Respondent that the livestock seller identified by the complaint in this proceeding has been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent by another registrant or packer after the expiration of the initial 90 days of this suspension term upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings thirty-five (35) days after the date of 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 hereof shall be served upon the parties.

[This Decision and Order became final October 13, 1999.-Editor]

**In re: E. I. WHITMIRE, d/b/a CALICO LIVESTOCK FARM.
P&S Docket No. D-99-0001.
Decision and Order filed November 3, 1999.**

Kimberly D. Hart, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the Act, by a complaint filed on October 5, 1998, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA). The complaint alleges that Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*) by: (1) issuing insufficient fund checks in payment for livestock purchases; (2) failing to pay, when due, for livestock purchases; and (3) failing to pay the full purchase price of livestock. The complaint requests a finding that Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). The complaint also requests an order that Respondent cease and desist from the violations found to exist and that Respondent be suspended as a registrant under the Act. A copy of the complaint was served on Respondent on October 15, 1998. Respondent filed an answer on November 5, 1998, in which he admits: (1) the jurisdictional allegations of Section I of the complaint; (2) that Respondent issued insufficient fund checks in payment for livestock purchases; (3) that Respondent failed to pay, when due, for livestock purchases; and (4) that Respondent failed to pay \$12,656.56 in livestock purchases and that said amount remains unpaid.

Respondent's answer constitutes the admission of the material allegations of fact contained in the complaint. The admission of the material allegations of fact contained in a complaint constitute a waiver of hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant moves for the issuance of a Decision and the following Decision and Order is issued without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. E. I. Whitmire is an individual doing business as Calico Livestock Farm, hereinafter referred to as Respondent Whitmire, whose mailing address is 2151

Greencrest Road, Gainesville, Georgia 30501.

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

3. The Respondent, at all times material herein, was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock on a commission basis.

4. Respondent Whitmire, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment issued checks which were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

<u>Purchase Date</u>	<u>Seller</u>	<u># of Head</u>	<u>Amount of Check</u>	<u>Check Number</u>
06/10/97	Lanier Farmers Livestock Corp.	22	\$9,008.46	1234 ¹
06/12/97	Calhoun Stockyard	29	7,166.50	1237 ²
06/19/97	Calhoun Stockyard	7	1,300.00	1246 ³

5. Respondent Whitmire, in connection with his operations subject to the Act, on or about the dates and in the transactions listed above in number 4, and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

¹Respondent Whitmire made a partial payment in the amount of \$5,979.00 on 10/15/97 which was applied to this livestock debt thereby leaving a remaining amount due of \$3,029.46.

²Respondent, Whitmire made two partial payments of \$500.00 on 10/2/97 and \$2,133.60 on 10/23/97 which was applied to this livestock debt thereby leaving a remaining amount due of \$4,532.90.

³The check issued in payment for this transaction was \$44.40 short of the total amount due. Respondent Whitmire has made no payments on this particular livestock debt.

<u>Purchase Date</u>	<u>Seller</u>	<u>Amount Due</u>	<u>Payment Due Date</u>	<u>Payment Date</u>
04/24/97	Calhoun Stockyard	\$14,232.81	04/25/97	05/08/97 ⁴
06/03/97	Lanier Farmers Livestock	15,805.20	06/04/97	06/18/97 ⁵
06/11/97	Mid-Georgia Livestock Mkt.	9,296.79	06/12/97	06/26/97 ⁶
06/14/97	Abingdon Stockyard Exchange	7,457.85	06/16/97	07/05/97 ⁷
06/16/97	D & N Livestock Service	6,106.53	06/17/97	07/17/97 ⁸
06/17/97	Lanier Farmers Livestock	3,749.80	06/18/97 ⁹	

6. As of September 1, 1998, there remained unpaid a total of \$12,656.56 for such livestock purchases.

Conclusions

By reason of Finding of Fact numbers 4, 5 and 6, Respondent has willfully violated sections 312(a) & 409 of the Act (7 U.S.C. §§ 213(a) & 228b).

Order

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

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks

⁴The check tendered by Respondent Whitmire cleared on redeposit.

⁵The check tendered by Respondent Whitmire cleared on redeposit.

⁶The respondent paid \$9,006.46 of the livestock amount due with check number 1236 and the remaining balance of \$288.33 was paid by the Respondent by deductions from commission checks.

⁷The Respondent overpaid the livestock amount due by \$1,117.30.

⁸The Respondent's livestock debt was paid by a third party.

⁹Respondent Whitmire has made no payment on this livestock debt.

were drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent E. I. Whitmire is hereby suspended as a registrant under the Act for a period of five (5) years. Provided, however, that upon application to Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of the respondent at any time after 90 days upon demonstration by Respondent that the livestock sellers identified by the complaint in this proceeding have been paid in full and provided further, that this order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the 90 day period of suspension and upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings thirty-five (35) days after the date of 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 shall be served upon the parties.

[This Decision and Order became final December 15, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PACKERS AND STOCKYARDS ACT

Ogden Livestock Auction, Inc., Dean Barrow, Duane Bitton, Kent Spencer and Kirk Hansen. P&S Docket No. D-98-0014. 7/1/99.

Allen Clark, Inc., and Howard Foulkrod. P&S Docket No. D-98-0019. 7/22/99.

Ernest A. Douglas. P&S Docket No. D-98-0011. 8/3/99.

Melvin Kolb, Inc., Alma Kolb, and Dennis Kolb. P&S Docket No. D-99-0006. 11/9/99.
