UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

REC'D - USDA/OALJ/HCO
2024 MAR 13 1:46 PM

In re: Thomas D. Unger, Respondent.	P&S Docket No. 23-J-0075

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearances:

Rupa Chilukuri, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service ("AMS")

Respondent Thomas D. Unger, pro se

This is a proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181 *et seq.*) ("Act"); the regulations promulgated thereunder (9 C.F.R. §§ 201.1 *et seq.*); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice").

The Deputy Administrator of the Agricultural Marketing Service, Fair Trade Practices Program, Packers and Stockyards Division ("PSD"), United States Department of Agriculture ("Complainant"), initiated this proceeding by filing a complaint against Thomas D. Unger ("Respondent") on July 12, 2023. The Complaint alleged that Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b)) and section 201.43 of the Regulations (7 C.F.R. § 201.43) by failing to pay the full purchase price of livestock; failing to pay, when due, the full purchase price of livestock; and issuing "insufficient funds checks"

without sufficient money in his bank account to pay for such checks.[1] Further, the Complaint requested:

> 1. That *unless Respondent fails to file an answer in the time allowed*, or files an answer admitting all the material allegations of this complaint, this proceeding be set for oral hearing in accordance with the Rules of Practice; and
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> 2. That an order be issued requiring Respondent to cease and desist from the violations of the Act and the pertinent regulations; suspending Respondent's registration under the Act for a specified period; prohibiting Respondent, for a specified period, from engaged in business in any capacity for which registration and bonding are required under the Act; and assessing such civil penalties against Respondent as are authorized by the Act and warranted by the facts and circumstances of this case.

Complaint at 3 (emphasis added).

Respondent was duly served with a copy of the Complaint and did not file an answer within the twenty-day period as prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).[2]

On December 26, 2023, Complainant filed a motion for decision without hearing ("Motion for Default") and proposed decision and order ("Proposed Decision") pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant now requests that Respondent be assessed a civil penalty of $3,400; be suspended as a registrant under the Act for a period of five years; and be ordered to cease and desist from violations of the Act.[3]

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[1] *See* Complaint at 2; Motion for Default at 1-2.

[2] United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on October 14, 2023. Respondent had twenty days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's answer was due on or before November 3, 2023. Respondent has not filed an answer.

delivered on October 31, 2023.

[3] Motion for Default at 4.

Respondent did not file any objections to Complainant's Motion for Default or Proposed Decision.[4]

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision.[5] Other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely answer where, as in the present case, no meritorious objections have been filed.[6]

Sanctions

As previously noted, Complainant requests an order assessing a $3,400 civil penalty against Respondent, suspending Respondent as a registrant under the Act for a period of five years, and ordering Respondent to cease and desist from violations of the Act.[7]

The Act authorizes the Secretary to assess a civil penalty of up to $10,000 per violation,[8] or $29,270 per violation when adjusted for inflation.[9] When determining civil penalties, the Secretary is required to "consider the gravity of the offense, the size of the business involved,

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[4] United States Postal Service records reflect that Complainant's Motion for Default and Proposed Decision were sent to Respondent via certified mail and delivered on January 6, 2024. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's objections were due on or before January 26, 2024. Respondent has not filed any objections.

[5] 7 C.F.R. § 1.136(c).

[6] *See supra* note 4 and accompanying text.

[7] Motion for Default at 4.

[8] 7 U.S.C. § 213(b).

[9] In this case, the violations occurred on August 31, 2020 and September 4, 2020. *See* Complaint at 2. From June 17, 2020 to May 9, 2021, the maximum civil penalty was $29,270 per violation. 7 C.F.R. § 3.91(b)(1)(lvi) (June 17, 2020).

and the effect of the penalty on the person's ability to continue in business."[10] Complainant states that it "considered these factors in its formulation of the recommended civil penalty in this case."[11] Complainant submits that the requested $3,400 civil penalty represents the two transactions for which Respondent failed to pay and the two transactions for which Respondent submitted a check with insufficient funds to pay the check.[12] Complainant explains how it calculated the civil-penalty amount and notes that "[t]he requested penalty is roughly only 3 percent of the maximum amount permitted by the Act."[13]

With regard to gravity, Complainant that Respondent's violations were serious and "significant in nature."[14] I agree. Respondent failed to pay, when due, the purchase price of livestock to New Holland in two transactions in 2020 and now, more than three years later, still owes $38,944 to New Holland.[15] Further, Complainant states that it considered the size and volume of Respondent's business—$801,090 in purchases from its 2019-2020 annual report—when evaluating whether the requested penalty would impact Respondent's ability to continue in business.[16] Complainant "does not believe that the civil penalty—which is far less than the penalty the Secretary is permitted to assess for such violations as those alleged in the Complaint—should prevent Respondent from continuing operations."[17] I agree and find that a $3,400 civil penalty, which is "nominal in light of the maximum amount permitted by the Act,"

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[10] 7 U.S.C. § 193(b).

[11] Motion for Default at 5.

[12] Motion for Default at 4.

[13] Motion for Default at 5.

[14] Motion for Default at 5-6.

[15] *See* Complaint at 2; Findings of Fact ¶ ¶ 3-5, *infra*.

[16] Motion for Default at 6.

[17] Motion for Default at 6.

is reasonable under the circumstances.[18]

In addition to assessing civil penalties, the Secretary is authorized to suspend a registrant "for a reasonable specified period" for violations of the Act.[19] Here Complainant requests an order suspending Respondent's registration for a period of five years, provided that such suspension shall end if Respondent submits proof to the Packers and Stockyards Division establishing that the livestock sellers listed in the Complaint have been paid in full.[20] Given Respondent's "severe violations of the Act" and "continued failure to fully pay what is owed to New Holland," I find that the proposed suspension is reasonable and consistent with the remedial purposes of the Act.[21]

Finally, the Act authorizes the Secretary to issue an order requiring a registrant to "case and deist from continuing such violation[s]." For the same reasons outlined above, I find a cease-and-desist order to be appropriate and necessary to deter future and/or repeated violations of the Act.[22]

Having considered the required statutory factors, and in accordance with the

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[18] Motion for Default at 6.

[19] 7 U.S.C. § 204; *see Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973) ("The Secretary may suspend 'for a reasonable specified period' any registrant who has violated any provision of the Act.").

[20] Motion for Default at 3.

[21] Motion for Default at 6. *See Syverson*, 69 Agric. Dec. 1500, 1503 (U.S.D.A. 2010) (Decision on Remand) ("The Packers and Stockyards Act is remedial legislation designed to protect farmers and ranchers in the livestock industry. 'The primary purpose of [the Packers and Stockyards] Act is to assure fair competition and fair trade practices in livestock marketing.'") (quoting H.R. Rep. No. 85-1048, at 1 (1957)).

[22] *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973); *Syverson*, 69 Agric. Dec. 1500, 1509 (U.S.D.A. 2010) (Decision on Remand) ("The purpose of an administrative sanction is to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future violations of the Packers and Stockyards Act by the violator and others.").

Department's sanction policy,[23] I find Complainant's sanction recommendations to be reasonable and appropriate under the facts and circumstances of this case.

As Respondent failed to file an answer to the Complaint, and upon Complainant's motion for the issuance of a decision without hearing, this Decision and Order is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Thomas D. Unger is an individual whose current address is in the State of New York.
2. Respondent is, and at all times material herein, 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 and as a market agency to buy livestock on a commission basis.
3. On August 31, 2020, Respondent purchased 50 head of cattle at New Holland Sales Stables, Inc., New Holland, Pennsylvania ("New Holland") for $40,682.10. Respondent issued a check in payment for the livestock 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 such check was drawn to pay such check when presented.

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[23] *See S.S. Farms Linn Cnty., Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision as to James Joseph Hickey & Shannon Hansen), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3)) ("[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose.").

4. On September 4, 2020, Respondent purchased 46 head of cattle at New Holland for $50,240.35. Respondent issued a check in payment for the livestock purchase which check was returned unpaid by the bank upon which it is drawn because Respondent did not have and maintain sufficient funds on deposit and available in the account upon which such check was drawn to pay such check when presented.
5. By issuing insufficient funds checks for two (2) transactions referenced above, Respondent both issued "insufficient funds checks" and failed to pay, when due, the full purchase price of the livestock. As of the filing date of the Complaint and to the Packers and Stockyards Division's knowledge, Respondent still has failed to pay $38,944 owed for these livestock purchases.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent Thomas D. Unger willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b) by failing to pay, when due, the full purchase price of livestock and by issuing insufficient funds checks in payment for livestock.

ORDER

1. Complainant's Motion for Default is GRANTED.
2. Respondent Thomas D. Unger and Respondent's agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, in connection with Respondent's activities subject to the Act, shall cease and desist from:
    a. Issuing checks in payment for the livestock purchases which checks are returned unpaid by the bank upon which they are drawn because Respondent does not have

and maintain 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; and

c. Failing to pay the full purchase price of livestock.

3. Respondent's registration under the Act is suspended for a period of five (5) years from the date of this Decision and Order, provided that such suspension shall end if Respondent submits proof to the Packers and Stockyards Division that the livestock sellers listed in the Complaint have been paid in full.

4. Respondent shall pay a civil penalty of $3,400.00. Respondent shall send a certified check or money order with the docket number (P&S Docket No. 23-J-0075) to US BANK, ATTN: GOVERNMENT LOCKBOX (790312), 3180 RIDER TRAILS, EARTH CITY, MO 63045-0312.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

Done at Washington, D.C.
this 13th day of March 2024

CHANNING STROTHER

Digitally signed by CHANNING STROTHER
Date: 2024.03.13 13:34:42 -04'00'

Channing D. Strother
Chief Administrative Law Judge

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