

# **AGRICULTURE DECISIONS**

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE  
SECRETARY OF AGRICULTURE AND THE COURTS  
PERTAINING TO STATUTES ADMINISTERED BY THE  
UNITED STATES DEPARTMENT OF AGRICULTURE

## AGRICULTURE DECISIONS

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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 number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

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## PACKERS AND STOCKYARDS ACT

## DEPARTMENTAL DECISIONS

**EMPIRE KOSHER POULTRY, INC.****PS Docket No. D-10-0109.****Decision and Order.****Filed July 20, 2011.**

PS.

Jonathan Rudd, Esq for Respondent.

Charles Spicknall, Esq. for GIPSA.

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

*Decision and Order by William Jenson, Judicial Officer.***Decision and Order****PROCEDURAL HISTORY**

On February 4, 2010, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a Complaint alleging Empire Kosher Poultry, Inc. [hereinafter Empire], willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], by failing to pay, when due, for turkeys Empire had purchased, received, and accepted from Koch's Turkey Farm. Empire filed an Answer to Complaint on April 15, 2010, denying the material allegations of the Complaint.

Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing on January 4, 2011, in Harrisburg, Pennsylvania. Jonathan H. Rudd of McNess Wallace & Nurick, LLC, Harrisburg, Pennsylvania, represented Empire. Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. Empire called three witnesses and the Deputy Administrator called four witnesses.<sup>1</sup>

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<sup>1</sup>All of the witnesses testified under oath and all of the testimony was transcribed. References to the transcript of the hearing are indicated as "Tr." with the page reference.

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The parties stipulated that, with the exception of exhibit CX 4, all of the exhibits were admissible as evidence.<sup>2</sup>

On March 8, 2011, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) concluded Empire failed to pay for turkey purchases within the time period required for payment in a cash sale, in willful violation of 7 U.S.C. § 228b-1; (2) ordered Empire to cease and desist from failing to pay for poultry purchases within the time period required by 7 U.S.C. § 228b-1; and (3) assessed Empire an \$18,000 civil penalty.

On April 8, 2011, Empire appealed to the Judicial Officer. On April 27, 2011, the Deputy Administrator filed Complainant's Response to Appeal Petition. On May 3, 2011, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the Chief ALJ's Decision and Order and, except for minor changes, I adopt the Chief ALJ's Decision and Order as the final agency Decision and Order.

## **DECISION**

### **The Deputy Administrator's Position**

The Deputy Administrator contends Empire obtained live poultry from Koch's Turkey Farm by purchases in cash sales and failed to pay for the purchases before the close of the next business day following the purchases, in willful violation of 7 U.S.C. § 228b-1.

### **Empire's Position**

Empire contends the Packers and Stockyards Act does not apply to its purchases of live poultry from Koch's Turkey Farm, but even if it does, the Packers and Stockyards Act does not prevent Empire from withholding payment under circumstances in which Koch's Turkey Farm breached the contract it had with Empire. Empire also asserts, even if it violated the Packers and Stockyards Act, no civil penalty is justified in fact or warranted in law, as Empire and Koch's Turkey Farm have resolved their dispute and have an on-going business relationship.

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<sup>2</sup>The Deputy Administrator submitted 14 exhibits (CX 1-CX 14). Empire submitted 17 exhibits (RX 1-RX 17). CX 4 was admitted during the hearing (Tr. 337-38).

## PACKERS AND STOCKYARDS ACT

**The 1987 Packers and Stockyards Act Amendments**

The Secretary of Agriculture has exercised jurisdiction over shipments of live poultry since 1935. Congress enacted the "Poultry Producers Financial Protection Act of 1987" thereby amending the Packers and Stockyards Act to address the length of time some poultry producers were forced to wait for payment for live poultry.<sup>3</sup> The 1987 amendments to the Packers and Stockyards Act provide that all live poultry sales are deemed to be "cash sales" in which payment is due "before the close of the next business day following the purchase" unless there is an express extension of credit by the poultry seller to the poultry buyer or there is a growing arrangement contract in place (7 U.S.C. § 228b-1).

**Evaluation of the Evidence**

Empire and Koch's Turkey Farm engaged in the transactions in question as a result of Empire's securing a contract to deliver 43,200 kosher turkeys to Trader Joe's (RX 1; Tr. 201-02, 208). The Trader Joe's contract had special significance to Empire as it had supplied turkeys to Trader Joe's in prior years, but had been dropped as a Trader Joe's supplier in 2002 thereby losing an important segment of Empire's business (Tr. 198).<sup>4</sup> The opportunity to re-establish the relationship with Trader Joe's was a "huge, huge deal" of critical importance to Empire (Tr. 201, 210).<sup>5</sup>

The execution of the contract with Trader Joe's, however, represented a significant risk for Empire as, in order to fulfill its contractual obligation to supply 43,200 kosher turkeys to Trader Joe's, Empire had to

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<sup>3</sup> See H.R. Rep. No. 100-397, *reprinted in* 1987 U.S.C.C.A.N. 855, 857.

<sup>4</sup> Jeffrey Brown, Empire's chief operating officer, testified that the relationship between Empire and Trader Joe's began in the 1990's and continued until 2002. By 2002, Trader Joe's represented approximately 6 percent of Empire's sales (Tr. 198-99). Currently, Trader Joe's is Empire's largest account, representing approximately 20 percent of Empire's sales (Tr. 197-98).

<sup>5</sup> Jeffrey Brown testified that failing to fulfill the contract with Trader Joe's had the potential of shutting down Empire (Tr. 241).



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acquire a minimum of 54,000 antibiotic-free turkeys. Given the 18-week period required for turkeys to attain the proper size and degree of maturity, Empire did not possess the capacity to supply Trader Joe's with the contractually required number of turkeys (Tr. 207-09). Because only antibiotic-free turkeys would meet contract specifications and because of the limited number of producers of antibiotic-free turkeys, Empire had to compete in the marketplace for the already commenced production of antibiotic-free turkeys which would mature and reach the target weight during the performance period (Tr. 205-09). Having a long-standing relationship with Koch's Turkey Farm, Empire contacted Duane Koch, an owner and the vice president and general manager of Koch's Turkey Farm, as a potential supplier of the needed turkeys (Tr. 209). Although the record contains conflicting testimony as to the number of turkeys which Koch's Turkey Farm would supply, Duane Koch agreed to sell some antibiotic-free turkeys to Empire (Tr. 141, 151-52, 175-76, 209-10). Empire claims its transactions with Koch's Turkey Farm were credit sales; however, although Empire and Koch's Turkey Farm exchanged e-mails concerning requested terms, the evidence establishes that Empire and Koch's Turkey Farm reached no meeting of the minds and never agreed upon credit terms (Tr. 79, 87, 134-35, 212-13, 254-55, 360, 363).

Koch's Turkey Farm delivered 8,910 turkeys to Empire on August 6, 2008, and sent Empire an invoice for the shipment on August 8, 2008, in the amount of \$114,380 with payment due within 14 days (CX 9 at 1). Prior to the expiration of this 14-day period, on August 13 and 14, 2008, Koch's Turkey Farm delivered 7,168 turkeys to Empire in four trucks. On this occasion, for reasons which are not entirely clear, a large number of what appeared on the inspection reports as "Plant Rejects" were on the first two trucks (Tr. 144-47, 180-82, 220-21, 228, 256-57, 288, 317).<sup>6</sup> The second two trucks were sent back to Koch's Turkey Farm where Koch's Turkey Farm processed the turkeys in its own plant without any

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<sup>6</sup>Empire claimed the 1,200 plant rejects were rejected by United States Department of Agriculture inspectors for airsaccualitis; however, the condemnation form contains no entry for airsaccualitis and none of the witnesses testifying personally observed the condition of the turkeys in question (Tr. 288, 317). Neither the plant representative nor the United States Department of Agriculture inspector who signed the condemnation form appeared as a witness.

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condemnations (Tr. 143-44). Koch's Turkey Farm delivered 8,902 turkeys to Empire on August 20, 2008, which were invoiced to Empire along with the August 13 and 14, 2008, shipments, on August 25, 2008 (CX 10). By this time, Empire had not made payment within the 14-day period requested on the August 8, 2008, invoice. When Duane Koch inquired about Empire's failure to pay, Jeffrey Brown informed Duane Koch that, if he wanted to get paid, Koch's Turkey Farm must deliver more turkeys to Empire (Tr. 151-52). Under the threat of non-payment unless additional turkeys were delivered to Empire, Koch's Turkey Farm delivered additional turkeys on September 3, 4, and 8, 2008, invoicing those turkeys on September 10 and 18, 2008 (CX 12-CX 14). On September 19, 2008, 42 days after the date of the first invoice and 44 days after the actual delivery, Koch's Turkey Farm received a partial payment of \$50,000 from Empire (RX 11 at 1).<sup>7</sup>

On September 24, 2008, faced with Empire's failure to pay the approximately \$400,000 in outstanding invoices for the tens of thousands of turkeys which Empire had purchased, received, and accepted and being under mounting financial pressure from its own suppliers after deferring payments for feed (Tr. 131-34), Koch's Turkey Farm contacted the Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter GIPSA], and requested assistance (Tr. 23-24, 38-39). When GIPSA contacted Empire, Empire initially stated it had been experiencing cash flow problems and payment to Koch's Turkey Farm would be forthcoming (Tr. 24).<sup>8</sup> Thereafter, Empire sent Koch's Turkey Farm an extended payment plan and commenced installment payments to Koch's Turkey Farm (CX 6). Koch's Turkey Farm agreed to the deferred payments, but Empire's

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<sup>7</sup> Empire's \$50,000 payment was less than half of the amount due for the initial shipment and Koch's Turkey Farm, at that point, had a receivable of over \$420,000 which was unpaid (CX 8; Tr. 157-58, 160).

<sup>8</sup> The cash flow problems testified to by John Rollins (Tr. 24-25) were minimized by Jeffrey Brown in his testimony; however, Mr. Brown did testify concerning the need to pay other suppliers of turkeys being processed for the Trader Joe's contract during the same time Empire was withholding payment to Koch's Turkey Farm (Tr. 240-41).

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payment of all the amounts owed to Koch's Turkey Farm was not completed until November 3, 2008.<sup>9</sup>

Given the vague arrangement for the supply of turkeys, in absence of a written agreement, it is difficult to see how Empire could have legally compelled Koch's Turkey Farm to deliver any specific number of turkeys, particularly after Empire failed to remit in a timely manner for Koch's Turkey Farm's August 6, 2008, delivery of turkeys to Empire (Tr. 196, 201, 210, 240-44). The testimony is clear that no express credit agreement existed prior to Empire's purchase of turkeys in the transactions at issue in the instant proceeding (Tr. 134-35, 211-13). While Jeffrey Brown's testimony establishes that Empire eschewed cash sales and, in its usual arrangements, avoided complying with the cash sale requirements in 7 U.S.C. § 228b-1 (Tr. 213), Empire's failure to agree on credit terms in advance of Empire's purchase of turkeys in the transactions at issue eliminated the possibility of the transactions being credit sales and left as the only option cash sales under the Packers and Stockyards Act.<sup>10</sup> I conclude Empire's failure to pay Koch's Turkey Farm in accordance with 7 U.S.C. § 228b-1 was an "unfair practice" contrary to the purpose of the Packers and Stockyards Act.<sup>11</sup>

As I find the transactions in question to be a live poultry dealer's purchases of live poultry in a cash sale, I reject Empire's position that the Packers and Stockyards Act does not apply to the transactions between Empire and Koch's Turkey Farm. I also reject Empire's contention that, because Empire and Koch's Turkey Farm are still doing business together, no sanction is justified.

### Findings of Fact

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<sup>9</sup> Empire's check was dated October 30, 2008; Koch's Turkey Farm did not receive the check until November 3, 2008 (CX 8; Tr. 138-39, 155).

<sup>10</sup> A cash sale means a sale in which the seller does not expressly extend credit to the buyer (7 U.S.C. § 228b-1(c)).

<sup>11</sup> 7 U.S.C. § 228b-1(b) provides: "Any delay or attempt to delay . . . the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry . . . purchased in a cash sale, shall be considered an 'unfair practice' in violation of this chapter."

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1. Empire is a Delaware corporation with its principal place of business in Mifflintown, Pennsylvania (CX 1).

2. Empire is a kosher poultry processor, which sells cold cuts of meat, whole birds, and cooked and fried products to supermarkets and delicatessens around the country (Tr. 189-90).

3. Empire is a live poultry dealer operating in interstate commerce subject to the Packers and Stockyards Act.

4. In approximately May or June of 2008, Empire executed a contract to provide 43,200 antibiotic-free turkeys to Trader Joe's for the 2008 end of year holiday season (RX 1; Tr. 201-02). At the time Empire executed the contract with Trader Joe's, Empire lacked capacity to supply Trader Joe's with the contractually required number of turkeys with Empire's existing growing arrangements and had to compete in the marketplace for the already commenced production of turkeys which would mature and reach the target weight during the performance period (Tr. 205-09). Empire contacted Duane Koch, an owner and the vice president and general manager of Koch's Turkey Farm, as a potential supplier of the needed turkeys (Tr. 209). Although the record contains conflicting testimony as to the number of turkeys which Koch's Turkey Farm would supply, Duane Koch agreed to sell some turkeys to Empire (Tr. 141, 151-52, 175-76, 209-10).<sup>12</sup>

5. The arrangement between Empire and Koch's Turkey Farm was vague and was never reduced to writing. Koch's Turkey Farm and Empire did not have an express agreement concerning credit terms prior to Empire's purchase of turkeys in any of the transactions at issue in the instant proceeding. (Tr. 79, 87, 134-35, 196, 212-13, 254-55, 360, 363.)

6. On August 6, 2008, Koch's Turkey Farm delivered 8,910 turkeys weighing 163,400 pounds with a value of \$114,380 to Empire (CX 9).

7. Empire failed to pay for the turkeys it received from Koch's Turkey Farm on August 6, 2008, within the time period required for payment in a cash sale as set forth in 7 U.S.C. § 228b-1. On August 8, 2008, Koch's Turkey Farm invoiced Empire for the August 6, 2008, delivery requesting payment within 14 days (CX 9 at 1). Empire also failed to pay Koch's Turkey Farm within the requested 14-day period. Prior to the date GIPSA contacted Empire, Empire made only a single

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<sup>12</sup> Koch's Turkey Farm ultimately provided approximately 43,000 turkeys to Empire (CX 9-CX 14).

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partial payment of \$50,000 which Koch's Turkey Farm deposited on September 19, 2008 (CX 8).<sup>13</sup>

8. On August 13 and 14, 2008, Koch's Turkey Farm delivered 7,168 turkeys to Empire in four trucks (CX 11). One truck containing 1,736 turkeys weighing 30,300 pounds was unloaded and processed (CX 11 at 3). A second truck containing 1,848 turkeys weighing 32,840 pounds was also unloaded; however, only 84 turkeys were processed (CX 11 at 4). Of the turkeys in the first two trucks, 1,200 were plant rejects (CX 11 at 2).<sup>14</sup> The other two trucks containing 3,584 turkeys were not processed, but were sent back to Koch's Turkey Farm (CX 11 at 5-6). Koch's Turkey Farm processed the turkeys returned to it by Empire at its own processing plant without any turkeys being condemned (Tr. 143-44).

9. Empire failed to pay for the turkeys it received from Koch's Turkey Farm on August 13 and 14, 2008, within the time period required for payment in a cash sale as set forth in 7 U.S.C. § 228b-1.

10. On August 20, 2008, Koch's Turkey Farm delivered 8,902 turkeys weighing 140,120 pounds with a value of \$98,084 to Empire (CX 10; RX 3).

11. Empire failed to pay for the turkeys it received from Koch's Turkey Farm on August 20, 2008, within the time period required for payment in a cash sale as set forth in 7 U.S.C. § 228b-1.

12. On August 25, 2008, Koch's Turkey Farm invoiced Empire for the August 13 and 14, 2008, shipments in the amount of \$21,588 and for the August 20, 2008, shipment in the amount of \$98,084. Koch's Turkey Farm requested payment of both invoices within 14 days. (CX 10-CX 11.)

13. Empire failed to make payment of the August 25, 2008, invoices within the 14-day period requested by Koch's Turkey Farm. When Duane Koch contacted Empire regarding Empire's failure to pay, Jeffrey

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<sup>13</sup>This single payment represented less than half of the total amount due for the August 6, 2008, shipment and was the only payment made by Empire to Koch's Turkey Farm until after GIPSA contacted Empire.

<sup>14</sup>The reason for the plant rejects is unclear from the evidence. Empire claimed United States Department of Agriculture inspectors rejected the turkeys for airsacculitis; however, the space on the form for that specific entry was blank (Tr. 257). Neither the authorized plant official nor the United States Department of Agriculture inspector testified.

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Brown, Empire's chief operating officer, informed Duane Koch that, if he wanted to get paid, Koch's Turkey Farm must deliver more turkeys to Empire (Tr. 151-52).

14. On September 3 and 4, 2008, Koch's Turkey Farm delivered 8,708 turkeys weighing 140,900 pounds with a value of \$98,630 to Empire in five trucks (CX 12).

15. On September 4, 2008, Koch's Turkey Farm delivered 5,586 turkeys weighing 97,200 pounds with a value of \$68,040 to Empire in four trucks (CX 13).

16. Empire failed to pay for the turkeys it received from Koch's Turkey Farm on September 3 and 4, 2008, within the time period required for payment in a cash sale as set forth in 7 U.S.C. § 228b-1.

17. On September 8, 2008, Koch's Turkey Farm delivered 5,502 turkeys weighing 101,660 pounds with a value of \$71,162 to Empire (CX 14).

18. Empire failed to pay for the turkeys it received from Koch's Turkey Farm on September 8, 2008, within the time period required for payment in a cash sale as set forth in 7 U.S.C. § 228b-1.

19. On September 10, 2008, Koch's Turkey Farm sent invoices for the September 3 and 4, 2008, shipments to Empire (CX 12 at 1, CX 13 at 1). On September 18, 2008, Koch's Turkey Farm sent an invoice for the September 8, 2008, shipment to Empire (CX 14 at 1). Again, Empire failed to make payment within the requested 14-day remittance period.

20. Despite Empire's continued failure to timely remit payment for the turkeys purchased, received, and accepted by Empire, Koch's Turkey Farm continued to pay its growers in a timely fashion, but was forced to delay payments to its feed suppliers and was faced with the prospect of not being able to make payroll disbursements (Tr. 131-34).

21. On September 24, 2008, faced with Empire's continued failure to pay the approximately \$400,000 in outstanding invoices for the tens of thousands of turkeys which Empire had purchased, received, and accepted and being under mounting financial pressure by its own suppliers after deferring payments for feed, Koch's Turkey Farm contacted GIPSA for assistance (Tr. 23-24, 38-39).

22. When GIPSA contacted Empire, Empire initially stated it had been experiencing cash flow problems and payment to Koch's Turkey Farm would be forthcoming (Tr. 24). On September 26, 2008, Empire sent Koch's Turkey Farm a proposed extended payment plan which Koch's Turkey Farm accepted and Empire commenced installment

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payments to Koch's Turkey Farm (CX 6; Tr. 138-39). Koch's Turkey Farm received the final and complete payment of the amounts owed by Empire on November 3, 2008 (Tr. 138-40, 155, 166).

23. After receiving final payment from Empire, Koch's Turkey Farm was satisfied with the resolution of its dispute with Empire. Koch's Turkey Farm's business relationship with Empire has continued, and Duane Koch has expressed his desire that no sanction be imposed on Empire. (Tr. 155-56, 165-68.)

24. On May 15, 2008, prior to the transactions in question, GIPSA had issued Empire a Notice of Violation. The Notice of Violation specifies the payment requirements of 7 U.S.C. § 228b-1 (CX 4).

25. Empire is a large operating concern, earning in excess of \$5,000,000 in 2009, and the \$18,000 civil penalty recommended by the Deputy Administrator is unlikely to have any effect upon Empire's ability to continue in business (CX 3; Tr. 332-35, 351, 359).

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Koch's Turkey Farm is without standing to withdraw its report of Empire's failures to pay for live poultry in accordance with 7 U.S.C. § 228b-1.
3. Koch's Turkey Farm did not expressly extend credit to Empire prior to the transactions in question in which Empire obtained live poultry from Koch's Turkey Farm. Accordingly, the transactions in question between Koch's Turkey Farm and Empire constituted purchases of live poultry in cash sales under the Packers and Stockyards Act requiring Empire to pay within the time required by 7 U.S.C. § 228b-1(a).
4. Koch's Turkey Farm's ultimate acceptance of deferred credit payment terms after complaint to, and intervention by, GIPSA does not alter the nature of the cash sale transactions in question when they were negotiated by Koch's Turkey Farm and Empire and when Empire purchased, received, and accepted the live poultry from Koch's Turkey Farm.
5. Empire's failure to pay for live poultry purchased, received, and accepted within the time period required for payment in a cash sale, as set forth in 7 U.S.C. § 228b-1(a), constitutes an unfair practice, in willful violation of the Packers and Stockyards Act.

## PACKERS AND STOCKYARDS ACT

**Empire's Appeal Petition**

Empire raises three issues in its Appeal Petition. First, Empire contends the Chief ALJ's conclusion that the Packers and Stockyards Act applies to the transactions in question between Koch's Turkey Farm and Empire, is error. Empire argues its purchases of live poultry from Koch's Turkey Farm were not cash sales but rather credit transactions; thus, the time period for payment in 7 U.S.C. § 228b-1(a) does not apply to the transactions in question. (Appeal Pet. at 1-2.)

The Chief ALJ correctly found that the transactions at issue in the instant proceeding were cash sales subject to the payment requirement in 7 U.S.C. § 228b-1. The seller, Koch's Turkey Farm, did not expressly extend credit to the buyer, Empire, in any of the poultry transactions at issue prior to Empire's purchase of turkeys. In the absence of an express extension of credit by the seller, payment was due "before the close of the next business day following the purchase" (7 U.S.C. § 228b-1(a)). Empire violated this requirement by delaying payments to Koch's Turkey Farm while attempting to obtain more antibiotic-free turkeys from Koch's Turkey Farm.

Empire argues its purchases from Koch's Turkey Farm were credit transactions because the parties contemplated that the transactions would be credit sales and, although Empire and Koch's Turkey Farm could not agree on credit terms, the Uniform Commercial Code would have eventually resolved the dispute over terms. While I agree that Empire and Koch's Turkey Farm contemplated that the transactions would be on credit and that Pennsylvania law would have eventually resolved the parties' dispute over terms, the transactions were not credit sales because the Packers and Stockyards Act intervened to set the time for payment (7 U.S.C. § 228b-1(a)).<sup>15</sup> The Packers and Stockyards Act trumps state

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<sup>15</sup>As the Deputy Administrator correctly explained:

If the Packers and Stockyards Act did not set the time for payment in the transactions at issue in this case, then the fourteen-day credit period set forth on Koch's invoices to Empire would have become part of the parties' contracts pursuant to Pennsylvania contract law unless there was seasonable objection to the proposed credit terms by Empire. *See* 13 Pa.C.S.A. § 2207 (West 2009) (additional terms in acceptance or confirmation). Comment 5 to section 2-207 of the Uniform Commercial Code gives examples of invoice clauses that are incorporated into oral contracts where a receiving merchant fails to make a seasonable objection. The comment notes that incorporating



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law to ensure that payments for poultry are not delayed (H.R. Rep. No. 100-397, *reprinted in* 1987 U.S.C.C.A.N. 855, 857).

Pursuant to the Packers and Stockyards Act, all live poultry sales transactions are deemed to be “cash sales” in which payment is due before the close of the next business day following the purchase unless the seller “expressly” extends credit to the buyer or a growing arrangement contract is in place (7 U.S.C. § 228b-1). An “express” extension of credit is one that is “[c]learly and unmistakably communicated; directly stated.” (BLACK’S LAW DICTIONARY 661 (9th ed. 2009)). I have carefully examined the record, and I find no evidence that Koch’s Turkey Farm expressly extended credit to Empire prior to Empire’s purchase of turkeys in any of the transactions at issue in the instant proceeding.<sup>16</sup>

Empire’s argument that the parties could accomplish a credit sale in which the terms of payment were left open and filled in later by operation of the Uniform Commercial Code or by agreement is wrong as matter of law. In the absence of an “express” extension of credit by the seller, payment was due “before the close of the next business day following the purchase” (7 U.S.C. § 228b-1(a)). Empire’s failure to agree on credit terms in advance of its purchase of turkeys from Koch’s Turkey Farm eliminated the possibility of the transaction being a credit sale and left as the only option a cash sale under the Packers and Stockyards Act. The purpose of the Packers and Stockyards Act is to limit the time that poultry sellers can be forced to wait for payment in a cash sale. To permit live poultry dealers, like Empire, to ignore the cash sale payment

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“a clause providing for interest on overdue invoices” and “fixing the seller’s standard credit terms where they are within the range of trade practice” would involve no element of unreasonable surprise.

Complainant’s Proposed Findings of Fact, Conclusions of Law, Order, and Brief at 15 n.10.

<sup>16</sup>Duane Koch testified that credit terms were not discussed (Tr. 134-35). Even when credit terms were finally discussed, the parties could not reach agreement. Koch’s Turkey Farm declined to agree to 30-day terms that were proposed by Empire (Tr. 212-13, 254-55). Similarly, Empire rejected and did not make payment in accordance with the 14-day terms that were belatedly proposed by Koch’s Turkey Farm (Tr. 79, 254-55). Koch’s Turkey Farm only offered the 14-day payment terms to Empire after the cash sale deadline in 7 U.S.C. § 228b-1(a) had passed. The 14-day terms were on Koch’s Turkey Farm’s invoices to Empire. (CX 9-CX 14.)

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deadline in 7 U.S.C. § 228b-1(a) while seeking concessions from sellers, particularly extended payment plans, would be inconsistent with the purpose of the Packers and Stockyards Act.<sup>17</sup>

Second, Empire contends the Chief ALJ's conclusion that Empire had no justification for its failure to pay Koch's Turkey Farm in accordance with 7 U.S.C. § 228b-1, is error. Empire argues its concern that Koch's Turkey Farm would not deliver the 55,000 turkeys that Empire needed to fill the contract with Trader Joe's justified Empire's withholding payment. (Appeal Pet. at 2-4.)

The Chief ALJ correctly found that Koch's Turkey Farm was under no obligation to deliver the 55,000 turkeys necessary for Empire to meet its contractual obligation to Trader Joe's (Chief ALJ's Decision and Order at 7). Koch's Turkey Farm was not a party to the contract executed by Empire and Trader Joe's (RX 1). Duane Koch testified that the 55,000 turkey requirement asserted by Empire was "totally incorrect." (Tr. 141.) Chuck Nye, a former Empire employee, negotiated the turkey transactions with Koch's Turkey Farm on behalf of Empire (RX 2). Empire did not produce Mr. Nye at the hearing to refute Duane Koch's testimony.<sup>18</sup> Moreover, even if Koch's Turkey Farm were obligated to deliver the 55,000 turkeys that Empire needed to fill its contract with Trader Joe's, Empire was still required to pay for the turkeys it purchased, received, and accepted from Koch's Turkey Farm "before the close of the next business day following the purchase" (7 U.S.C. § 228b-1(a)). Koch's Turkey Farm did not expressly extend credit to Empire and there was no agreement on credit terms until well after Empire's purchase of the turkeys from Koch's Turkey Farm. Even if the problem shipments on August 13 and 14, 2008, are excluded from

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<sup>17</sup>The Packers and Stockyards Act is remedial in nature and intended to be construed liberally with its purpose to prevent economic harm to producers and consumers. *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 569 (M.D. Pa. 1980); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 225 (N.D. Cal. 1969).

<sup>18</sup>An internal e-mail authored by Mr. Nye indicates that Koch's Turkey Farm would deliver "around" 55,000 turkeys (RX 2). Although Empire's chief operating officer interpreted the e-mail to mean that Koch's Turkey Farm had committed to deliver 54,000 to 56,000 turkeys, he did not participate in the initial negotiations (Tr. 260). Koch's Turkey Farm delivered approximately 43,000 turkeys to Empire (CX 9-CX 14).

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consideration, Empire still violated the Packer and Stockyards Act by failing to make timely payments for the tens of thousands of other turkeys that it purchased, received, accepted, and processed from the four other shipments listed in the Complaint (Compl. ¶ III(a)). The condemnation rates for the turkeys in these shipments were well within acceptable limits (Tr. 218, 235, 255).

Third, Empire contends the Chief ALJ's assessment of an \$18,000 civil penalty is unwarranted in law and not justified in fact (Appeal Pet. at 4-5).

Empire's violations involved a small number of transactions with one seller; however, the violations are serious. When poultry dealers delay payments for poultry, the sellers are in effect forced to finance the transaction.<sup>19</sup> The accumulation of unsecured debt for poultry purchases in the hands of poultry dealers can result in catastrophic losses to poultry producers. The Packers and Stockyards Act is intended "to ensure that those engaged in poultry production are protected from circumstances that could inflict heavy losses on an extremely important segment of our nation's agricultural community." (H.R. Rep. No. 100-397, *reprinted in* 1987 U.S.C.C.A.N. 855, 856.) Empire began withholding payments to Koch's Turkey Farm shortly after receiving a Notice of Violation from GIPSA that specified the payment requirements in 7 U.S.C. § 228b-1. I find the civil penalty assessed by the Chief ALJ will effectuate the congressional purpose of the Packers and Stockyards Act by deterring Empire and other poultry dealers from delaying payments for poultry in order to alleviate cash flow problems and to extract concessions from sellers.

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

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

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<sup>19</sup>See *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payments in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (1998) (stating the requirement that a purchaser make timely payment effectively prevents the seller from being forced to finance the transaction).

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*In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993). Pursuant to 7 U.S.C. § 228b-2(b), the Secretary of Agriculture must also consider “the gravity of the offense, the size of the business involved, and the effect of the penalty on the person’s ability to continue in business.” The maximum civil penalty that can be assessed for each of Empire’s violations of 7 U.S.C. § 228b-1 is \$27,000.<sup>20</sup>

With regard to the nature and gravity of the violations in relation to the remedial purposes of the Packers and Stockyards Act, Empire’s violations are serious.<sup>21</sup> When poultry dealers ignore the cash sale payment deadline and defer payments for poultry in order to alleviate cash flow problems or to obtain concessions from sellers, the accumulation of debts to poultry sellers creates the very risk that Congress sought to prevent. The cease and desist order and civil penalty that the Chief ALJ imposed serve the remedial purposes of the Packers and Stockyards Act by deterring Empire and other live poultry dealers from delaying payments to poultry sellers beyond the time period required by 7 U.S.C. § 228b-1(a) (Tr. 331).

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<sup>20</sup>The Packers and Stockyards Act provides that the maximum civil penalty that may be imposed for each violation of 7 U.S.C. § 228b-1 is \$20,000 (7 U.S.C. § 228b-2(b)). However, the maximum civil penalty that may be assessed for each violation of 7 U.S.C. § 228b-1 has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. In 2008, when Empire violated 7 U.S.C. § 228b-1, the maximum civil penalty for each violation of 7 U.S.C. § 228b-1 was \$27,000 (7 C.F.R. § 3.91(b)(6)(vii) (2010)).

<sup>21</sup>See *In re Syracuse Sales Co.*(Decision as to John Knopp), 52 Agric. Dec. 1511, 1524 (1993) (stating failure to pay, when due, for livestock is a serious violation of the Packers and Stockyards Act and constitutes an unfair and deceptive practice), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1773 (1991) (same); *In re Mark V. Porter*, 47 Agric. Dec. 656, 671 (1988) (same); *In re George County Stockyards, Inc.*, 45 Agric. Dec. 2342, 2350 (1986) (same).

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Although Empire's violations are serious, the maximum civil penalty that could be assessed for the five instances of delayed payment in the instant proceeding, which would be \$135,000, is plainly too severe (Tr. 331). The goal of the Packers and Stockyards Act is compliance, not retribution.<sup>1</sup> Empire's violations involved a small number of transactions with one seller and Empire and Koch's Turkey Farm had a dispute over a large number of turkeys that were rejected in one of the shipments (Tr. 332, 337). I find that these factors mitigate against a severe sanction in the instant proceeding.<sup>2</sup> On the other hand, Empire began intentionally delaying payments to Koch's Turkey Farm shortly after receiving a Notice of Violation that specified the payment requirements in 7 U.S.C. § 228b-1 (CX 4). The \$18,000 civil penalty assessed by the Chief ALJ balances these considerations (Tr. 332-33, 335, 351). As the Chief ALJ noted, the \$18,000 civil penalty is unlikely to have any effect on Empire's ability to continue in business because "Empire is a large operating concern, earning in excess of \$5,000,000.00 in 2009" (Chief ALJ's Decision and Order at 12).

### ORDER

1. Empire, its agents and employees, directly or indirectly through any corporate or other device, in connection with Empire's activities subject to the Packers and Stockyards Act, shall cease and desist from failing to pay for poultry purchases within the time period required by 7 U.S.C. § 228b-1(a).

Paragraph 1 of this Order shall become effective on the day after service of this Order on Empire.

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<sup>1</sup>*Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 804 (8th Cir. 2010). See also *In re Braxton M. Worsley*, 33 Agric. Dec. 1547, 1557 (1974) ("[t]he function of an administrative sanction is 'deterrence rather than retribution'").

<sup>2</sup>See *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 804-05 (noting the mitigating effect of violations that were limited to one customer and a relatively small number of livestock).

## PACKERS AND STOCKYARDS ACT

2. Empire is assessed an \$18,000 civil penalty pursuant to 7 U.S.C. § 228b-2(b). The civil penalty shall be paid by certified check or money order, payable to the "U.S. Department of Agriculture," and sent to:

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

Payment of the civil penalty shall be received by GIPSA within 60 days after service of this Order on Empire. Empire shall state on the certified check or money order that payment is in reference to P & S Docket No. D-10-0109.

Done at Washington, DC

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**BRAD BRADLEY d/b/a FARM DIRECT PORK COMPANY.**  
**PS-Docket No. D-11-0001.**  
**Decision and Order.**  
**Filed August 2, 2011.**

PS –

Respondent Pro se.  
Christopher Young Morales, Esq. for GIPSA.  
*Decision and Order by Chief Administrative Law Judge Peter M. Davenport.*

### Decision and Order

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*) (Act). On October 10, 2010, a Complaint was issued against Brad Bradley d/b/a Farm Direct Pork Company (Respondent) alleging that Respondent engaged in the business of a dealer purchasing and selling livestock in commerce without obtaining the necessary registration and bond as required by the Act and the Regulations, and that Respondent purchased livestock and failed to pay for those livestock purchases as required by the Act and the Regulations.

On November 23, 2010, Respondent's Answer to the Complaint was filed. Respondent stated in his Answer, *inter alia*, that:

I agree with all allegations within said Complaint.

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I have remained in contact with the National Farmers Organization<sup>1</sup> on a continual basis, related to this issue. At this point in time I do not have the monetary resources to satisfy same, however my future intent is to pay same.

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

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

#### **Findings of Fact**

1. Respondent is an individual whose business mailing address was in Del Rio, Texas.
2. At all times material to the Complaint, Respondent engaged in the business of a dealer buying and selling livestock in commerce under the Act.
3. At all times material to the Complaint, Respondent operated as a dealer within the meaning of and subject to the Act.
4. On March 18, 2010, Respondent admitted in a signed affidavit that he operated subject to the Act without registering with the Packers and Stockyards Program and maintaining a bond as required by the Act, and stated that he would "cease and desist from buying swine until registered and bonded with the Packers and Stockyards administration and its regulations... ."
5. Respondent, between November 2009 and January 2010, operated as a dealer purchasing livestock (swine) subject to the Act and engaged in the business of a dealer purchasing and selling livestock in commerce without obtaining the necessary registration and bond as required by the Act and the Regulations.

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<sup>1</sup> National Farmers Organization is the livestock seller listed in the Complaint filed on October 10, 2010.

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6. Between December 16, 2009 and January 5, 2010, Respondent purchased 1,229 head of livestock in the amount of \$180,551.63.

7. Between December 3, 2009 and January 7, 2010, Respondent sold 1,838 head of livestock (swine) in the amount of \$ 274,042.54.

8. Respondent, on August 15, 2009, entered into a contract wherein he agreed to pay a purchase price for livestock (swine). Between November 2009 and December 2009, Respondent purchased 2,174 head of livestock pursuant to the contract and paid \$6,648.12 less than the agreed upon price under the contract.

9. Respondent, between December 16, 2009 and January 5, 2010, purchased 1,229 head of livestock in the amount of \$180,551.63 from one (1) seller in twelve (12) separate transactions and failed to pay for such livestock purchases.

10. As of the date of filing of the Complaint, neither the \$6,648.12 amount nor the \$180,551.63 amount had been paid.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent admitted in his Answer the jurisdictional allegations of the Complaint.
3. Respondent also admitted all material allegations of the Complaint, including that he operated without registration and bond and failed to pay for livestock purchases as required by the Packers and Stockyards Act.
4. It is unnecessary to hold a hearing when there is no material fact in dispute, and no valid defense is presented.
5. Operation without proper bond and registration in accordance with section 312(a) of the Act ( 7 U.S.C. § 213(a)) and section 201.29 of the regulations (9 C.F.R. § 201.29) is a violation of those sections of the Act and regulations.
6. Failure to pay for livestock is an unfair and deceptive practice in violation of section 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the regulations (9 C.F.R. § 201.43).

**Order**



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

a. engaging in the business of a dealer purchasing and selling livestock in commerce without obtaining the necessary registration and bond as required by the Act and the Regulations, and

b. purchasing livestock and failing to pay for those livestock purchases as required by the Act and the Regulations.

2. Respondent is assessed a civil penalty of one hundred and nine thousand dollars (\$109,000.00), to be abated up to the full amount of \$109,000.00, provided that Respondent makes payments to National Farmers Organization, the livestock seller listed in the Complaint (or shows that payments have been made between the date of the Answer and this Motion) for the livestock that Respondent purchased between December 2009 and January 2010, as stated above.

3. Complainant shall be the final arbiter of whether payment has been made. Proof of payment to livestock producers shall be received by December 31, 2011, and on that date, the \$109,000.00 civil penalty will be abated in the amount that National Farmers Organization has been paid.

4. Any remainder<sup>2</sup> will be paid as a civil penalty without further proceeding, payable to the United States Treasury by January 15, 2012. Proof of payment to the livestock seller listed in the Complaint be mailed to:

USDA  
GIPSA  
1400 Independence Ave., S.W.  
Room 2420-S, Stop 3646  
Washington, D.C. 20250

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<sup>2</sup> \$109,000.00 civil penalty minus the amount proven as paid to the seller listed in the Complaint, National Farmers Organization.

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Payment of the civil penalty or of the remainder of the penalty shall be by mail or wire transfer to :

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

5. This order shall be effective upon service on Respondent.  
Copies of this Decision and Order shall be served on the parties by the Hearing Clerk.

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**BARNESVILLE LIVESTOCK, LLC AND DARRYL WATSON.**  
**PS-Docket No. 10-0058.**  
**Decision and Order.**  
**Filed October 13, 2011.**

PS –

Miles D. Furies, Esq. and Susan J. McDonald, Esq. for Respondent.  
Charles Spicknall, Esq. for GIPSA.  
*Decision and Order by Chief Administrative Law Judge Peter M. Davenport.*

**Decision and Order**

**Preliminary Statement**

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181, *et seq.*) (Act), instituted by a Complaint filed on December 10, 2009 by Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture. The Complaint alleges that Barnesville Livestock, LLC and Darryl Watson (Respondents) willfully violated section 312(a) of the Act, 7 U.S.C. §213(a) and sections 201.42 and 201.43 of the Regulations, 9 C.F.R. §201.42 and §201.43 by failing to correct shortages in their custodial

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account for shipper's proceeds and by failing to timely pay consignors of livestock sold on a commission basis at the auction market that they operate in Barnesville, Ohio.

Copies of the Complaint were served upon the Respondents by certified mail. On December 29, 2009, a corrected Complaint<sup>1</sup> was filed which was also served upon the Respondents by certified mail. On January 11, 2010, Respondents filed their Answer, admitting the general allegations as to the identity of the Respondents, their operation of the auction market and its location, but denying violations of the Act. The Answer additionally raised the defense that any acts complained of were isolated and thus not an unfair practice, the affirmative defense of failure to afford due process, and lack of personal jurisdiction. A substantially identical Answer was filed to the Corrected Complaint on January 26, 2010.

On July 27, 2010, Complainant filed a Motion to set a hearing date. On March 22, 2011, a scheduling teleconference was conducted, exchange deadlines for exhibits and witness lists were established and the matter was set for oral hearing to commence on August 2, 2011 in Columbus, Ohio. On July 28, 2011, the parties filed a Joint Stipulation wherein the Respondents admitted violating the Act and Regulations as alleged in the Complaint, leaving only the imposition of an appropriate sanction unresolved. As a result of the simplification of the proceedings, following a teleconference, the hearing was changed to a telephonic hearing, with the Complainant in Washington, DC and the Respondents participating from their attorneys' offices in Ohio. The parties were invited to file post hearing briefs; however, only the Complainant did so.

In assessing the appropriate sanction in this action, I considered the impact that a suspension of the length sought by the Complainant would have upon the Respondents' ability to remain in business and the resulting impact upon their employees and the consignors in the area that the auction market serves. In this regard, I have taken note of the obvious and continued loyalty of those consignors to the auction market despite an unacceptably high volume issuance of NSF checks and delays in payment that individual consignors experienced, all of whom apparently now have been paid. I also considered the fact that the cause of the problems experienced by the Respondents was attributable to the

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<sup>1</sup> The corrected Complaint merely added an appendix that had been omitted at the time of the initial filing.

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defalcation by a single individual against whom no action has been taken to date by the Department. Other mitigating factors considered include the full and open cooperation that the Respondents provided to GIPSA in its investigation and in admitting their wrongdoing. I also considered the seriousness of the violations and the lengthy and protracted duration of the period of misuse of the custodial fund as well as the number of NSF checks issued to cosignors.

On the basis of the testimony of the parties at the telephonic hearing and the entire record,<sup>2</sup> the following Findings of fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

1. Barnesville Livestock, LLC is an Ohio limited liability company with a business mailing address in New Concord, Ohio. The registered agent for service of process is Darryl L. Watson of Norwich, Ohio.

2. Respondent Barnesville Livestock operates a livestock auction market in Barnesville, Ohio, and at all times material to the allegations in this action, was:

a. Engaged in the business of conducting and operating a posted stockyard subject to the provisions of the Act.

b. Engaged in the business of a market agency selling consigned livestock in commerce on a commission basis at the stockyard; and

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

3. Respondent Darryl Watson is an individual residing in the State of Ohio. Watson was:

a. The sole member and owner of Barnesville Livestock, LLC;

b. The individual responsible for day to day direction, management and control of Barnesville Livestock's business operations.

4. On October 28, 2008, the Packers and Stockyards Program notified the Respondents via certified mail that its operation with a

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<sup>2</sup> GIPSA's exhibits (CX-1 through CX 449) were stipulated as being pre-marked and exchanged, admissible as evidence and made a part of the record of proceedings. Joint Stipulation, Docket Entry 18.

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custodial account shortage is an unfair practice and a violation of the Act.

5. Notwithstanding the above notice, Respondents Barnesville Livestock and Watson, during the period of October 31, 2008 and May 31, 2011, failed to properly use and maintain its custodial account, thereby endangering the faithful and prompt accounting of shipper's proceeds and the payment due the owners or consignors of livestock.

6. As of October 31, 2008, Respondents had outstanding checks drawn on its custodial account in the amount of \$285,548.03. On that same date, the custodial account had a negative balance of \$58,381.28, with proceeds receivable of \$109,957.85, leaving a custodial account shortage of \$233,971.46.

7. As of December 31, 2008, Respondents had outstanding checks drawn on its custodial account in the amount of \$281,043.28. On that same date, the custodial account had a negative balance of \$3,454.86, with proceeds receivable of \$17,749.53, leaving a custodial account shortage of \$266,748.61.

8. As of June 30, 2009, Respondents had outstanding checks drawn on its custodial account in the amount of \$165,417.78. On that same date, the custodial account had a negative balance of \$25,268.52, with proceeds receivable of \$19,723.21, leaving a custodial account shortage of \$170,963.09.

9. As of April 29, 2011, Respondents had outstanding checks drawn on its custodial account in the amount of \$181,176.11. On that same date, the custodial account had a balance of \$29,672.96, with proceeds receivable of \$15,634.98, leaving a custodial account shortage of \$135,868.17.

10. As of May 31, 2011, Respondents had outstanding checks drawn on its custodial account in the amount of \$258,409.34. On that same date, the custodial account had a balance of \$107,890.60, with proceeds receivable of \$19,325.00, leaving a custodial account shortage of \$131,193.74.

11. The shortages in the Respondents' custodial account were due, in part, to Respondents' failure to deposit into the account amounts equal to the proceeds receivable from the sale of consigned livestock within the time prescribed by section 201.42 of the Regulations, 9 C.F.R. §201.42.

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12. The shortages in the Respondents' custodial account, during the period of October 31, 2008 through May 31, 2011, were also due, in part, to the misuse of custodial account funds.

13. Respondents, during the period of October 6, 2008 through December 26, 2008, permitted \$137.00 in bank fees to be charged to the custodial account.

14. Respondents, during the period of October 3, 2008 through December 30, 2008, transferred \$78,785.71 in custodial funds to Respondents' general account.

15. Respondents, on October 31, 2008, deposited proceeds in the amount of \$5,723.52 from the sale of livestock sold on a commission basis into an account other than Respondents' custodial account.

16. Respondents, during the period of September 13, 2008 through August 15, 2009, sold livestock on a commission basis and in purported payment of the net proceeds thereof issued at least 350 NSF checks to consignors that were returned by the bank upon which they were drawn because Respondents failed to maintain a sufficient balance in the custodial account for the checks to be honored when presented for payment and in so doing failed to remit, when due, the net proceeds due from the sale price of such livestock on a commission basis.

17. Respondents have fully cooperated with GIPSA's investigation of issues concerning the custodial account for shipper's proceeds at the auction market.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Barnesville Livestock, LLC was at all times pertinent to the violations a market agency selling consigned livestock within the meaning of and subject to the provisions of the Act.
3. Respondent Darryl Watson is the alter ego of Respondent Barnesville Livestock, LLC.
4. Respondents willfully violated section 312(a) of the Act, 7 U.S.C. §213(a) and sections 201.42 of the Regulations, 9 C.F.R. §201.42 by failing to maintain and properly use the custodial account for shippers' proceeds at the auction market.
5. Respondents willfully violated section 312(a) of the Act, 7 U.S.C. §213(a) and sections 201.43 of the Regulations, 9 C.F.R. §201.43

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by issuing NSF checks and by failing to timely remit the net proceeds due from the sale of livestock to the consignors.

### **Order**

1. Respondents Barnesville Livestock, LLC and Darryl Watson, their agents and employees, directly or through any corporate or other device, in connection with the corporation's activities subject to the Act, shall cease and desist from further violations of section 312(a) of the Act, 7 U.S.C. §213(a) and sections 201.42 and 201.43 of the Regulations, 9 C.F.R. §201.42 and §201.43.

2. Respondent Barnesville Livestock, LLC is suspended as a registrant under the Act for a period of twenty-one days.

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

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

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**RICHARD L. REECE.**  
**PS-Docket No. 11-0213.**  
**Decision and Order.**  
**Filed October 17, 2011.**

**PS.**

Brian Sylvester, Esq. for GIPSA.  
Respondent Pro se.  
Initial Decision by Administrative Law Judge Janice K. Bullard.  
*Decision and Order by William Jenson, Judicial Officer.*

### **PROCEDURAL HISTORY**

Alan R. Christian, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy

## PACKERS AND STOCKYARDS ACT

Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges that, during the period May 16, 2009, through December 7, 2009, Richard L. Reece failed to pay, within the time period required by the Packers and Stockyards Act, for livestock, in violation of 7 U.S.C. §§ 213(a) and 228b.<sup>1</sup>

The Hearing Clerk served Mr. Reece with the Complaint on June 1, 2011.<sup>2</sup> Mr. Reece failed to file an answer to the Complaint within 20 days after service, as required by 7 C.F.R. § 1.136(a). On June 22, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued an Order To Show Cause Why Default Should Not Be Entered [hereinafter Order to Show Cause] and provided Mr. Reece and the Deputy Administrator 20 days after the date of the Order to Show Cause within which to respond to the Order to Show Cause.

On June 23, 2011, Mr. Reece filed a letter, dated June 21, 2011, in response to the Complaint [hereinafter Answer]. Mr. Reece's Answer did not deny the allegations of the Complaint, but, instead, stated he "got behind" in his payments for livestock because three people owed him \$421,302.33, plus interest on the amount owed.

On July 11, 2011, the Deputy Administrator filed a response to the ALJ's Order to Show Cause. Mr. Reece did not file a response to the ALJ's Order to Show Cause. On July 19, 2011, the ALJ, in accordance with 7 C.F.R. § 1.139, issued a Decision Without Hearing By Entry Of Default Against Respondent [hereinafter Default Decision] in which the ALJ: (1) concluded that Mr. Reece willfully violated 7 U.S.C. §§ 213(a) and 228b(a), as alleged in the Complaint; (2) ordered Mr. Reece to cease and desist from failing to pay, when due, the full purchase price of livestock; (3) ordered Mr. Reece to cease and desist from failing to pay

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<sup>1</sup> Compl. ¶¶ II-III.

<sup>2</sup> Memorandum to the File, dated June 1, 2011, and signed by L. Eugene Whitfield, Hearing Clerk.



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the full purchase price of livestock; and (4) assessed Mr. Reece a \$40,625 civil penalty.

On September 14, 2011, Mr. Reece appealed the ALJ's Default Decision to, and requested an opportunity to present oral argument before, the Judicial Officer. On September 22, 2011, the Deputy Administrator filed Complainant's Opposition to Respondent's Appeal Petition. On September 27, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I adopt, with minor changes, the ALJ's Default Decision as the final agency decision.

## **DECISION**

### **Statement of the Case**

Mr. Reece failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). Pursuant to 7 C.F.R. § 1.136(c), the failure to file an answer within the time provided in 7 C.F.R. § 1.136(a) is deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

### **Discussion**

On June 23, 2011, Mr. Reece filed an Answer with the Hearing Clerk 2 days after the date within which an answer was due pursuant to 7 C.F.R. § 1.136(a). Although Mr. Reece's Answer is dated June 21, 2011, Mr. Reece used facsimile to file his Answer, and the date of the facsimile is June 23, 2011. The time for filing an answer to a complaint may be extended when there is good reason for the extension.<sup>3</sup> Mr. Reece stated in his Answer that he received the Complaint on June 6, 2011. Mr. Reece provided no reason for failing to meet the deadline of June 21, 2011. As Mr. Reece failed to file a timely answer, default is appropriate.

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<sup>3</sup> 7 C.F.R. § 1.147(f).

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Even if I were to find Mr. Reece's Answer to have been filed timely, the content of Mr. Reece's Answer admits the allegations in the Complaint. The Complaint alleged that Mr. Reece failed to pay the full purchase price timely to Colfax Livestock Sales for livestock purchases that transpired during the period May 16, 2009, through November 28, 2009.<sup>4</sup> In addition, the Complaint alleged that Mr. Reece failed to pay the full purchase price timely to Waverly Sales Co. for a livestock purchase that transpired on December 7, 2009.<sup>5</sup> Mr. Reece stated in his Answer that he made arrangements with Shawn Cogley at Colfax Livestock Sales and with Ron Dean at Waverly Sales Co. to make payments. Mr. Reece asserts as a defense that he fell behind in his payments to Colfax Livestock Sales and Waverly Sales Co. because he in turn was owed \$421,302.33, plus interest on the amount owed, by three people;<sup>6</sup> however, Mr. Reece is not absolved of his obligation to pay for livestock in accordance with the Packers and Stockyards Act merely because he is owed money by others.

In addition, I find Mr. Reece's Answer lacks the specificity required of an answer by 7 C.F.R. § 1.136(b) and further find that Mr. Reece admitted to the violations of the Packers and Stockyards Act alleged in the Complaint by failing to specifically deny the allegations. Accordingly, pursuant to 7 C.F.R. § 1.136(c), default is appropriate. Mr. Reece's admissions and failure to specifically deny the allegations in the Complaint constitute a waiver of a hearing under 7 C.F.R. § 1.139.

**Findings of Fact**

1. Richard L. Reece is an individual whose mailing address is in Adel, Iowa.
2. At all times material to the instant proceeding, Mr. Reece was:
  - a. Engaged in the business of buying and selling livestock in commerce for his own account as a dealer and as a market agency buying on commission; and

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<sup>4</sup> Compl. ¶ II.

<sup>5</sup> Compl. ¶ II.

<sup>6</sup> Attached to Mr. Reece's Answer is a copy of a letter from Mr. Reece's attorney to Brothers Quality, LLC, that indicates that Brothers Quality, LLC, allegedly failed to pay Mr. Reece for sales during the period from 2008 through 2010.

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b. Registered with the Secretary of Agriculture as a dealer within the meaning of, and subject to, the Packers and Stockyards Act.

3. On or about the dates and in the transactions set forth in Appendix A attached to this Decision and Order, Mr. Reece purchased livestock and failed to pay, within the time period required by the Packers and Stockyards Act, the full purchase price of the livestock.

4. As of March 31, 2011, Mr. Reece owed Colfax Livestock Sales approximately \$46,000 of the amount involved in the May 30, 2009, and November 28, 2009, livestock transactions referenced in Appendix A attached to this Decision and Order.

5. As of March 31, 2011, Mr. Reece owed Waverly Sales Co. approximately \$1,900 for the December 7, 2009, livestock transaction referenced in Appendix A attached to this Decision and Order.

6. Mr. Reece admits in his Answer outstanding payments due to the Colfax Livestock Sales and Waverly Sales Co. for livestock purchases.

### Conclusions of Law

By reason of the Findings of Fact in this Decision and Order, Mr. Reece has willfully violated 7 U.S.C. §§ 213(a) and 228b(a).

#### Mr. Reece's Request for Oral Argument

Mr. Reece's request for oral argument (Appeal Pet. at 2 ¶ 5), which the Judicial Officer may grant, refuse, or limit,<sup>7</sup> is refused because the issues are not complex and oral argument would serve no useful purpose.

#### Mr. Reece's Appeal Petition

Mr. Reece raises six issues in his Appeal Petition. First, Mr. Reece asserts his violations of 7 U.S.C. §§ 213(a) and 228b(a) were not willful (Appeal Pet. at 1 ¶ 1).

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.<sup>8</sup>

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<sup>7</sup> 7 C.F.R. § 1.145(d).

<sup>8</sup> See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 502 U.S. 860 (1991); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1414 (1998); *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590, 607 (1995), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Hardin County Stockyards, Inc.* (Decision as to Hardin County Stockyards, Inc., and Rex Lineberry), 53 Agric. Dec. 654, 658 (1994); *In re Syracuse*

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The Packers and Stockyards Act explicitly requires each dealer and market agency purchasing livestock, before the close of the next business day following the purchase of the livestock and the transfer of possession of the livestock, to pay the full amount of the purchase price.<sup>9</sup> Mr. Reece knew, or should have known, that he had the duty under the Packers and Stockyards Act to pay, when due, the full purchase price for livestock. Mr. Reece's willfulness is reflected by his violations of express provisions of the Packers and Stockyards Act and the length of time during which Mr. Reece committed the violations and the dollar amount and number of Mr. Reece's violative transactions. Therefore, I reject Mr. Reece's contention that the ALJ's conclusion that Mr. Reece willfully violated the Packers and Stockyards Act, is error.

Second, Mr. Reece asserts he did not timely receive the Complaint (Appeal Pet. at 1 ¶ 2).

The Hearing Clerk served Mr. Reece with the Complaint on June 1, 2011.<sup>10</sup> Mr. Reece asserts he received the Complaint on June 6, 2011.<sup>11</sup> The Rules of Practice require that a response to a complaint must be filed with the Hearing Clerk within 20 days after service.<sup>12</sup> Thus, Mr. Reece's response to the Complaint was required to be filed with the Hearing Clerk no later than June 21, 2011, 14 days after Mr. Reece asserts he received the Complaint. Mr. Reece dated each page of his Answer and the attachment to his Answer "6-21 2011;" thereby indicating he completed preparing his Answer on June 21, 2011. Nonetheless, Mr. Reece sent the Answer to the Hearing Clerk by facsimile on June 23, 2011, 2 days after his Answer was required to be filed with the Hearing Clerk. Therefore, I reject Mr. Reece's contention that he had insufficient time within which to respond to the Complaint.

Third, Mr. Reece asserts he did not timely receive the ALJ's Order to Show Cause (Appeal Pet. at 1 ¶ 2).

The ALJ's Order to Show Cause is dated June 22, 2011. The ALJ directed Mr. Reece and the Deputy Administrator to respond to the Order

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*Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1529 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994).

<sup>9</sup> 7 U.S.C. § 228b(a).

<sup>10</sup> See note 2.

<sup>11</sup> Answer at 1.

<sup>12</sup> 7 C.F.R. § 1.136(a).

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to Show Cause not more than 20 days after the date of the Order to Show Cause; namely, no later than July 12, 2011. The Hearing Clerk sent the Order to Show Cause to Mr. Reece by regular mail on June 23, 2011.<sup>13</sup> The record does not indicate when Mr. Reece received the ALJ's Order to Show Cause. If Mr. Reece required additional time to file his response to the Order to Show Cause, he could have filed a motion for an extension of time.<sup>14</sup> Mr. Reece did not file such a request for an extension of time and it is far too late for Mr. Reece to raise the issue of the amount of time he had to file a response to the ALJ's Order to Show Cause.

Fourth, Mr. Reece asserts the Hearing Clerk did not send him the ALJ's Default Decision until August 16, 2011 (Appeal Pet. at 1 ¶ 2). In support of this assertion, Mr. Reece attached to his Appeal Petition a copy of an envelope addressed to Mr. Reece, which purportedly contained the ALJ's Default Decision. This envelope is postmarked August 16, 2011.

The record reveals that the Hearing Clerk mailed the ALJ's Default Decision to Mr. Reece by certified mail on July 19, 2011.<sup>15</sup> The United States Postal Service returned the ALJ's Default Decision marked "Unclaimed Unable to Forward" to the Hearing Clerk,<sup>16</sup> and on August 16, 2011, the Hearing Clerk remailed the ALJ's Default Decision to Mr. Reece by ordinary mail.<sup>17</sup> Pursuant to 7 C.F.R. § 1.147(c)(1), the Hearing Clerk served Mr. Reece with the ALJ's Default Decision on August 16, 2011, and Mr. Reece's appeal of the ALJ's Default Decision was required to be filed with the Hearing Clerk no later than

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<sup>13</sup>Office of Administrative Law Judges, Hearing Clerk's Office Document Distribution Form showing the Hearing Clerk sent the ALJ's Order to Show Cause to Mr. Reece by regular mail on June 23, 2011.

<sup>14</sup>7 C.F.R. § 1.147(f).

<sup>15</sup>Hearing Clerk's service letter to Mr. Reece dated July 19, 2011, and the companion Office of Administrative Law Judges, Hearing Clerk's Office Document Distribution Form.

<sup>16</sup>Envelope marked United States Postal Service Domestic Return Receipt article number 7009 1680 0001 9852 2985.

<sup>17</sup>Memorandum to the File dated August 16, 2011, and signed by Fe C. Angeles, Legal Technician.

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September 15, 2011.<sup>18</sup> Therefore, I conclude Mr. Reece's Appeal Petition, filed September 14, 2011, was timely filed.

Fifth, Mr. Reece denies the allegations in the Complaint and requests an opportunity to be heard on the merits in accordance with the due process clause of the Constitution of the United States (Appeal Pet. at 1 ¶ 3).

Mr. Reece's denial of the allegations in the Complaint comes too late to be considered. The Hearing Clerk served Mr. Reece with the Complaint on June 1, 2011. In accordance with 7 C.F.R. § 1.136(a), Mr. Reece's Answer was due 20 days after service of the Complaint; namely, June 21, 2011. Mr. Reece filed his Answer with the Hearing Clerk on June 23, 2011, 2 days after Mr. Reece's Answer was due. Mr. Reece is deemed, by his failure to file a timely answer, to have admitted the allegations in the Complaint. Moreover, I agree with the ALJ that Mr. Reece's Answer admits the allegations of the Complaint by failing to specifically deny the allegations. Therefore, Mr. Reece has waived the opportunity for a hearing and the ALJ's issuance of the Default Decision was proper. The application of the default provisions of the Rules of Practice does not deprive Mr. Reece of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.<sup>19</sup>

Sixth, Mr. Reece asserts he has paid or has entered into payment plans with the two livestock sellers named in the Complaint, Colfax Livestock Sales and Waverly Sales Co. (Appeal Pet. at 1 ¶ 4).

The Packers and Stockyards Act explicitly requires market agencies and dealers purchasing livestock to pay the full amount of the purchase

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<sup>18</sup> 7 C.F.R. § 1.145(a).

<sup>19</sup> See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations in the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

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price before the close of the next business day following the purchase of the livestock and the transfer of possession of the livestock.<sup>20</sup> Mr. Reece's payments to Colfax Livestock Sales and Waverly Sales Co. after the time when payment was due and Mr. Reece's entry into payment plans with Colfax Livestock Sales and Waverly Sales Co. do not comply with 7 U.S.C. § 228b(a). Moreover, Mr. Reece's failures to pay for livestock and failures to pay for livestock when due constitute unfair and deceptive practices, in violation of 7 U.S.C. § 213(a). Therefore, I reject Mr. Reece's suggestion that the ALJ's Default Decision should be set aside based upon Mr. Reece's payment plans which he purportedly entered into with Colfax Livestock Sales and Waverly Sales Co. and Mr. Reece's late payments made to Colfax Livestock Sales and Waverly Sales Co.

For the foregoing reasons, the following Order is issued.

#### **ORDER**

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

- a. Failing to pay, when due, the full purchase price of livestock; and
- b. Failing to pay the full purchase price of livestock.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Mr. Reece.

2. Mr. Reece is assessed a civil penalty of \$40,625. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

USDA-GIPSA  
P.O. Box 790335  
St. Louis, MO 63197-0335

Payment of the civil penalty shall be sent to, and received by, the USDA-GIPSA within 60 days after service of this Order on Mr. Reece. Mr. Reece shall state on the certified check or money order that payment is in reference to Docket No. 11-0213.

Done at Washington, DC

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<sup>20</sup>7 U.S.C. § 228b(a).

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## Appendix A

Purchase Date	Live-Stock Seller	No. of Head	Purchase Price	Date Payment	Deposit Date	Payment Amount	Number of Head
5/16/09	Colfax I	233	\$23,090	5/18/09	6/4/09	\$23,090.57	17
5/30/09	Colfax I	405	\$38,134	6/1/09	8/1/10 -	\$13,942.15	427 - 669
6/27/09	Colfax I	393	\$38,445	6/29/09	7/11/09	\$27,834.75	12
					7/18/09	\$6,735.81	19
					8/1/10 -	\$3,874.57*	398 - 640
					Total	\$38,445.13	
7/25/09	Colfax I	513	\$52,392	7/27/09	7/30/09	\$20,000.00	3



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					8/1/09	\$12,392.72	5
					8/6/09	\$15,000.00	10
					8/1/10 -	\$5,000**	371 - 613
					TOTAL	\$52,392.72	
9/19/09	Colfax I	515	\$54,433	9/21/09	9/28/09	\$6,433.17	7
					9/29/09	\$32,000.00	8
					9/30/09	\$16,000.00	9
					TOTAL	\$54,433.17	

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9/26/09	Colfax I	506	\$56,510	9/28/09	10/3/09	\$16,510.00	5
					10/7/09	\$20,000.00	9
					10/10/09	\$20,000.00	12
					TOTAL	\$56,510.00	
10/3/09	Colfax I	413	\$41,450	10/5/09	10/10/09	\$1,450.21	5
					10/14/09	\$25,000.00	9
					10/17/09	\$5,000.00	12
					10/30/09	\$10,000.00	25

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					TOTAL	\$41,450.21	
10/10/09	Colfax I	503	\$53,139	10/13/09	10/15/09	\$35,139.08	2
					10/20/09	\$6,000.00	7
					10/30/09	\$11,000.00	17
					10/31/09	\$1,000.00	18
					TOTAL	\$53,139.08	
10/17/09	Colfax I	312	\$31,347	10/19/09	10/30/09	\$6,347.35	11
					10/31/09	\$25,000.00	12

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					TOTAL	\$31,347.35	
10/24/09	Colfax I	306	\$29,014	10/26/09	10/30/09	\$10,000.00	4
					11/7/09	\$17,014.87	12
					11/9/09	\$1,000.00	14
					11/19/09	\$1,000.00	24
					TOTAL	\$29,014.87	
10/31/09	Colfax I	234	\$22,869	11/2/09	11/19/09	\$22,869.49	17
11/7/09	Colfax I	170	\$17,150	11/9/09	11/19/09	\$17,150.28	10

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11/14/09	Colfax I	260	\$24,448	11/16/09	11/27/09	\$24,448.20	11
11/21/09	Colfax I	245	\$24,010	11/23/09	12/4/09	\$24,010.58	11
11/28/09	Colfax I	337	\$35,749	11/30/09	8/1/10 -	\$13,942.15	245 - 487
12/7/09	Waverly	309	\$32,178	12/8/09	12/21/09	\$5,178.82	13
					12/23/09	\$11,000.00	15
					1/15/10	\$1,000.00	38
					1/21/10	\$1,000.00	44
					1/29/10	\$500.00	52

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					8/1/10 -	\$16,778.82	237 - 479
					TOTAL	\$30,278.82	

\* Mr. Reece has made and continues to make weekly installment payments on these transactions.

\*\* Mr. Reece made weekly installment payments on these transactions during the period of August 1, 2010, through March 31, 2011.

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**MISCELLANEOUS ORDERS**

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

**RICHARD L. REECE.**  
**PS Docket No. 11-0213.**  
**Miscellaneous Order.**  
**Filed October 28, 2011.**

**PS.**

Brian Sylvester, Esq. for GIPSA.  
Respondent Pro se.  
Initial Decision by Administrative Law Judge Janice K. Bullard.  
*Decision and Order by William Jenson, Judicial Officer.*

**Order Denying Petition to Reconsider**

**PROCEDURAL HISTORY**

On October 28, 2011, Richard L. Reece filed a petition for reconsideration of *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ (Oct. 17, 2011) [hereinafter Petition to Reconsider]. On November 1, 2011, Alan R. Christian, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a response to Mr. Reece's Petition to Reconsider. On November 2, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Reece's Petition to Reconsider.

**CONCLUSIONS ON RECONSIDERATION**

Mr. Reece raises five issues in his Petition to Reconsider. First, Mr. Reece asserts his violations of the Packers and Stockyards Act, 1921, as

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amended and supplemented (7 U.S.C. § § 181-229b) [hereinafter the Packers and Stockyards Act], were not willful violations (Pet. to Reconsider at 1 ¶ 1-2).

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.<sup>1</sup> The Packers and Stockyards Act explicitly requires each dealer and market agency purchasing livestock, before the close of the next business day following the purchase of the livestock and the transfer of possession of the livestock, to pay the full amount of the purchase price.<sup>2</sup> Mr. Reece knew, or should have known, that he had the duty under the Packers and Stockyards Act to pay, when due, the full purchase price for livestock. Mr. Reece's willfulness is reflected by his violations of express provisions of the Packers and Stockyards Act and the length of time during which Mr. Reece committed the violations and the dollar amount and number of Mr. Reece's violative transactions.<sup>3</sup> Therefore, I reject Mr. Reece's contention that I erroneously concluded his violations of the Packers and Stockyards Act were willful.

Second, Mr. Reece asserts Brothers Quality, LLC, owed him over \$300,000, which severely affected his cash flow (Pet. to Reconsider at 1 ¶ 2).

I infer that Mr. Reece raises the issue of the amount owed to him by Brothers Quality, LLC, as a defense to his failure to pay for livestock, within the time period required by the Packers and Stockyards Act, in

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<sup>1</sup> See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 502 U.S. 860 (1991); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1414 (1998); *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590, 607 (1995), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Hardin County Stockyards, Inc.* (Decision as to Hardin County Stockyards, Inc., and Rex Lineberry), 53 Agric. Dec. 654, 658 (1994); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1529 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994).

<sup>2</sup> 7 U.S.C. § 228b(a).

<sup>3</sup> See *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ Attach. A (Oct. 17, 2011) (setting forth the length of time during which Mr. Reece committed the violations of the Packers and Stockyards Act and the dollar amount and number of Mr. Reece's violative transactions).



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violation of 7 U.S.C. § § 213(a) and 228b(a). However, Mr. Reece is not absolved of his obligation to pay for livestock in accordance with the Packers and Stockyards Act merely because he is owed money by others.

Third, Mr. Reece requests that “he be afforded due process as dictated by the Constitution of the United States of America and its Amendments” (Pet. to Reconsider at 1 ¶ 3).

Mr. Reece filed his Answer with the Hearing Clerk 2 days after Mr. Reece’s Answer was due. Mr. Reece is deemed, by his failure to file a timely answer, to have admitted the allegations in the Complaint.<sup>4</sup> Moreover, Mr. Reece’s late-filed Answer admits the allegations of the Complaint. Therefore, Mr. Reece has waived the opportunity for a hearing. The application of the default provisions of the rules of practice applicable to the instant proceeding<sup>5</sup> does not deprive Mr. Reece of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.<sup>6</sup>

Fourth, Mr. Reece asserts he has paid, or has entered into a payment plan with, the livestock sellers named in the Complaint, Colfax Livestock Sales and Waverly Sales Co. Moreover, Mr. Reece asserts both Colfax Livestock Sales and Waverly Sales Co. allow him to purchase livestock at their facilities, which he does on a regular basis. (Pet. to Reconsider at 1 ¶ 4.)

The Packers and Stockyards Act explicitly requires market agencies and dealers purchasing livestock to pay the full amount of the purchase

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<sup>4</sup> See 7 C.F.R. § 1.136(c).

<sup>5</sup> The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § § 1.130-.151) [hereinafter the Rules of Practice].

<sup>6</sup> See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations in the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party’s failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party’s failure to file a timely answer).

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price before the close of the next business day following the purchase of the livestock and the transfer of possession of the livestock.<sup>7</sup> Mr. Reece's payments to Colfax Livestock Sales and Waverly Sales Co. after the time when payment was due and Mr. Reece's entry into payment plans with Colfax Livestock Sales and Waverly Sales Co. do not comply with 7 U.S.C. § 228b(a).<sup>8</sup> Moreover, Mr. Reece's failures to pay for livestock and failures to pay for livestock when due constitute unfair and deceptive practices, in violation of 7 U.S.C. § 213(a). Therefore, I reject Mr. Reece's suggestion that *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ (Oct. 17, 2011), should be set aside based upon Mr. Reece's entry into payment plans with Colfax Livestock Sales and Waverly Sales Co. and Mr. Reece's late payments to Colfax Livestock Sales and Waverly Sales Co. Moreover, Mr. Reece's continued business relationships with Colfax Livestock Sales and Waverly Sales Co. provide no basis for setting aside *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ (Oct. 17, 2011).

Fifth, Mr. Reece requests an opportunity to be heard on the amount of the civil penalty which I assessed against Mr. Reece in *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ (Oct. 17, 2011) (Pet. to Reconsider at 2 ¶ 5).

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

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

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

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<sup>7</sup> 7 U.S.C. § 228b(a).

<sup>8</sup> See *In re Edward Tiemann*, 47 Agric. Dec. 1573, 1587 (1988) (stating if a seller agrees to accept less than full and prompt payment, where there was no such agreement prior to the payment violation, that does not constitute prompt payment and does not negate a violation of the Packers and Stockyards Act).

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ability to continue in business.” The maximum civil penalty that the Secretary of Agriculture may assess for each of Mr. Reece’s violations of 7 U.S.C. § 213(a) is \$11,000.<sup>9</sup>

Mr. Reece’s willful violations of 7 U.S.C. §§ 213(a) and 228b(a) involved 15 transactions with Colfax Livestock Sales, which occurred during the period May 16, 2009, through November 28, 2009, and involved 5,345 head of cattle; and one transaction with Waverly Sales Co., on December 7, 2009, which involved 309 head of cattle.

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is “to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock.” *Bruhn’s Freezer Meats v. U.S. Dep’t of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971), *cited in Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978). The requirement that a livestock purchaser make timely payment effectively prevents livestock sellers from being forced to finance transactions.<sup>10</sup> Mr. Reece contravened the timely-payment requirement, and Mr. Reece’s violations directly thwart one of the primary purposes of the Packers and Stockyards Act.<sup>11</sup>

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<sup>9</sup>The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) is \$10,000 (7 U.S.C. § 213(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. In 2009, when Mr. Reece violated 7 U.S.C. §§ 213(a) and 228b(a), the maximum civil penalty for each violation of 7 U.S.C. § 213(a) was \$11,000 (7 C.F.R. § 3.91(b)(6)(iv) (2010)).

<sup>10</sup>*See Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (1998) (stating the requirement that a purchaser make timely payment effectively prevents the seller from being forced to finance the transaction).

<sup>11</sup>*See Mahon v. Stowers*, 416 U.S. 100, 111, (1974) (per curiam) (dictum) (stating that regulation requiring prompt payment supports policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for their own purposes);

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Given the number of Mr. Reece's violative transactions, the dollar amounts involved, the number of cattle involved, and the length of time during which Mr. Reece committed the violations, a severe sanction is warranted. Further, I give weight to the sanction recommendations of administrative officials, and the Deputy Administrator recommended the \$40,625 civil penalty which I assessed against Mr. Reece.<sup>12</sup>

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). Mr. Reece's Petition to Reconsider was timely-filed and automatically stayed *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ (Oct. 17, 2011). Therefore, since Mr. Reece's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Richard L. Reece*, \_\_ Agric. Dec. \_\_ (Oct. 17, 2011), is reinstated.

For the foregoing reasons, the following Order is issued.

**ORDER**

Mr. Reece's Petition to Reconsider, filed October 28, 2011, is denied. This Order shall become effective upon service on Mr. Reece.

Done at Washington, DC.

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*Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

<sup>12</sup>See Deputy Administrator's proposed Decision Without Hearing By Reason of Default at 3, filed July 11, 2011.

Default Decisions  
70 Agric. Dec. 1083  
**DEFAULT DECISIONS**

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

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**WELCH STOCKYARDS, LLC, ET AL.**  
**PS Docket No. 11-0384.**  
**Default Decision.**  
**Filed November 9, 2011.**

**DARREL R. CLARK.**  
**PS Docket No. 11-0385.**  
**Default Decision.**  
**Filed November 9, 2011.**

**ROBERT MORALES CATTLE COMPANY, d/b/a K-M CATTLE,  
AND ROBERT MORALES.**  
**PS Docket No. 11-0406.**  
**Default Decision.**  
**Filed December 27, 2011.**

**ROBERT MORALES.**  
**PS Docket No. 11-0128.**  
**Default Decision.**  
**Filed December 27, 2011.**

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CONSENT DECISIONS

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George Gonzalez, PS-D-10-0218, 07/26/11.  
Clay Billingsley, PS-11-0193, 07/28/11.  
Kenneth Moe, PS-11-0359, 08/09/11.  
Randy Myers, PS-11-0290, 09/14/11.  
Gregory Mellott, PS-10-0006, 09/14/11.  
Mike McEnroe, PS-D-11-0133, 10/13/11.  
American Beef Packers, Inc., PS-D-10-0239, 10/24/11.  
Dennis Chiappetti, PS-D-11-0040, 10/31/11.  
Park Poultry Inc., d/b/a Park Farms, PS-D-11-0181, 11/04/11.  
Daniel Murray, PS-D-10-0294, 11/07/11.  
Francine Rainey, PS-D-11-0399, 11/07/11.  
David Ballou, PS-D-11-0413, 11/18/11.  
Shirley Dance, Mike Whitfield, N.B. Hutchinson, Jr., Pete Pingrey,  
d.b.a. Gowan Stockyards, PS-D-12-0029, 11/22/11.  
Steve (Bubba) Kemp, d/b/a Kemp Cattle, PS-D-11-0132, 11/25/11.  
Victor Peak, Peak Livestock Co., LLC, PS-D-11-0130, 12/07/11.  
Devon Perkins, PS-D-11-0447, 12/09/11.