

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:) P&S Docket No. D-02-0022
)
Fred Holmes, d/b/a Holmes)
Livestock,)
)
Respondent)

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DECISION AND ORDER BY REASON OF ADMISSIONS

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, (7 U.S.C. § 181 *et seq.*), hereinafter the “Act,” instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture alleging that the Respondent has willfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon the Respondent, Fred Holmes, doing business as Fred Holmes Livestock, by certified mail. The complaint alleged that, as of January 28, 2002, the Respondent had failed to pay eleven livestock sellers for \$505,648.16 in livestock purchases and that payments on those purchases were more than 325 days overdue in violation of the Act. See Complaint ¶ II. The complaint also alleged that the Respondent had violated the Act by issuing checks for a majority of these purchases, which checks were returned unpaid by the bank upon which they were drawn because the Respondent did not maintain sufficient funds on deposit and available in the accounts to pay such checks when presented. See *id.*

On October 24, 2002, Respondent filed its “Answer to Complaint Filed by United States Department of Agriculture” generally denying the allegations in the complaint but admitting that

Respondent had filed for bankruptcy under Chapter 11, Title 11 of the United States Bankruptcy Code, in the United States District Court, Eastern District of Missouri, Case No. 02-20293. See Answer ¶ III. Respondent's answer attached a copy of its filing in the bankruptcy proceeding, including a document entitled "Schedule F – Creditors Holding Unsecured Priority Claims," and deemed all further actions against him stayed pursuant to 11 U.S.C. § 362. See Answer at ¶ III and "Exhibit A." Respondent's Schedule F admits that ten of the eleven livestock sellers in the complaint were unpaid at the time of Respondent's bankruptcy filing, but claims that the debts were contingent, unliquidated and disputed. See id. Respondent's answer also alleges that any failure to pay livestock creditors was actually attributable to the misappropriation and misapplication of Respondent's funds by the First National Bank of Missouri. See Answer ¶ II.

On April 1, 2003, Complainant filed a "Motion for Decision Without Hearing." Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's motion is hereby granted and the following decision is issued without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Fred Holmes, doing business as Holmes Livestock, referred to herein as the "Respondent" is an individual whose business mailing address is P.O. Box 391, Brookfield, Missouri 64658.
2. The Respondent is and, at all times material herein, was:
 - a. Engaged in the business of a dealer buying and selling livestock in commerce for his own account and a market agency buying livestock on a commission basis; and
 - b. Registered as an individual with the Secretary of Agriculture as a dealer to

buy and sell livestock in commerce and as a market agency to buy livestock on a commission basis.

3. Respondent filed for bankruptcy under Chapter 11, Title 11 of the United States Bankruptcy Code, in the United States District Court, Eastern District of Missouri, Case No. 02-20293. See Answer ¶ III.

4. Respondent has admitted in bankruptcy pleadings, of which the Secretary may take official notice, that ten of the eleven sellers alleged to be unpaid in the complaint remained unpaid for more than \$500,000 worth of livestock as of the date of Respondent's amended bankruptcy filing on June 5, 2002. Schedule F of the bankruptcy filing contains a table with columns for the name and address of the creditor, along with the amounts of their claims.

5. The amounts alleged unpaid by the Complainant and admitted unpaid by the Respondent are as follows:

<u>SELLER</u>	<u>SCHEDULE F</u>	<u>COMPLAINT</u>
James Brunscher	\$305.00	\$305.00
David Conrad	\$6,224.16	\$6,224.16
Farmers Livestock Sales	\$63,927.25	\$63,927.25 ¹
Jim Gerdes	\$32,609.40	\$32,609.40
George Kimbrough ²	\$746.50	\$746.50
Harold Logsdon	\$37,411.50	\$37,411.50

¹ The unpaid total for Farmer's Livestock combines the amounts listed in paragraphs II(a) and (b) of the complaint.

² George Kimbrough is listed as "GEO KINBROUGH" at page 3 of 7 in Respondent's Schedule F.

St. Joseph Stockyards	\$124,436.83	\$86,671.55 ³
Marvin Springer	\$424.25	\$424.25
Tecumseh Livestock	\$89,107.16	\$89,107.16
A&W Cattle/Tim Reese	\$186,780.39	\$186,780.39
	_____	_____
TOTALS:	\$541,972.44	\$504,207.16

Conclusions

In his answer to the complaint, Respondent Holmes “deems all further actions against Respondent/Debtor as stayed, pursuant to 11 U.S.C. § 362.” (Answer ¶ III.) However, disciplinary proceedings under the Packers and Stockyards Act are exempted from the automatic stay provisions of 362(a) of the Bankruptcy Code pursuant to 11 U.S.C. § 362(b)(4) and the express exception provided for enforcement proceedings under the Packers and Stockyards Act in 11 U.S.C. § 525(a). See, e.g., *In re: Sechler Foods, Inc.*, 59 Agric. Dec. 336, 336 (2000); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 455 (1996); *In re Bluegrass Packing Co.*, 42 Agric. Dec. 1464, 1470 (1983); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 397 (1980). The express language of section 525 was intended to remove any doubt that the Secretary of Agriculture could proceed against registrants under the Packers and Stockyards Act, even where the proceeding involved debts dischargeable in bankruptcy. See generally, *B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985) (discussing the legislative history of the express exemption in Section 525). Accordingly, this action is not stayed.

Section 409 of the Packers and Stockyards Act generally requires livestock dealers and

³ The complaint reduces the amount of livestock debt owed by St. Joseph Stockyards alleging that eleven head of cattle valued at \$5,687.01 were reclaimed by the seller and that \$32,078.27 in sale proceeds were also recovered by the seller. See Complaint at ¶ II, n. 1.

market agencies, like the Respondent, to pay for all livestock purchases by the close of the next business day following the sale. See 7 U.S.C. § 228b.⁴ Here, the Respondent is bankrupt and admits in his bankruptcy pleadings appended to his answer that he has been unable to pay for more than half a million dollars in livestock purchases for a period of time far in excess of anything permitted by the Act.⁵ Even under the most liberal interpretation of the prompt payment requirements of the Packers and Stockyards Act, Respondent is in violation of sections 409 and 312(a) of the Act.

Respondent's denials in his answer do not establish the existence of a *bona fide* dispute as to the material facts such that a hearing would be necessary. In particular, Respondent alleges "that any failure to pay was due to the actions by First National Bank of Missouri." See Answer at ¶ II(b)). However, even if Respondent's failure to pay for his livestock purchases can be attributed to a misappropriation and misapplication of the Respondent's funds by the First National Bank of Missouri, (see Answer ¶ II(c)), it does not excuse the violation under the Packers and Stockyards Act which was designed to protect farmers and ranchers from receiving less than fair market value for their livestock by removing financially unstable and unbonded persons from the chain of distribution. See, e.g., In re Robert F. Johnson, 47 Agric. Dec. 436, 443 (1988). As the Department's Judicial Officer ("JO") has explained – the damage done to livestock producers is the same regardless of the reasons underlying Respondent's payment

⁴ Section 409 requires payment by the next business day, unless different payment terms are expressly agreed to in writing prior to the sale. See 7 U.S.C. § 228b(b). If payment for livestock purchases is mailed, it must be placed in the mail by the next business day. Id. at § 228b(a). Respondent does not appear to contend that there were prior written agreements extending the time for payment indefinitely or that payments were lost in the mail.

⁵ Official notice is taken of Respondent's bankruptcy schedules appended to his answer. See In re Peter DeVito Company, Inc., 57 Agric. Dec. 830, 834, n. 1 (1997).

violations. See In re Great American Veal, 48 Agric. Dec. 183, 211 (1989). The 1976 amendments to the Packers and Stockyards Act make any delay in payment to livestock sellers an “unfair practice” and a violation of the Act. See 7 U.S.C. § 228b(c)).

Nor does the fact that Respondent checked the “unliquidated,” “contingent” and “disputed” boxes for all of the livestock debt listed in his Schedule F filing affect the quality of the bankruptcy admissions for purposes of this proceeding under the Packers and Stockyards Act. See Answer at “Exhibit A.”⁶ The livestock sellers’ claims are not “contingent” because the events giving rise to liability occurred prior to the filing of the bankruptcy petition. See, e.g., Barcal v. Laughlin, 213 B.R. 1008, 1012 - 1014 (8th Cir. BAP 1997). Similarly, the claims are not “unliquidated” because they are simple contract claims ascertainable by reference to the sales invoice or simple computation. See id. Perhaps Respondent could argue that his livestock debts are “disputed” in the bankruptcy proceeding because Respondent’s bond, required under the Packers and Stockyards Act, will serve to reduce the admitted amounts. However, under the Packers and Stockyards Act even if Respondent had now fully repaid its livestock-related debts, “it is well-settled that present compliance is irrelevant in determining the sanction for past violations.” See, e.g., In re A.W. Schmidt & Son, Inc., 46 Agric. Dec. 586, 593 (1987) (citations omitted).⁷

It is the policy of the Department to impose sanctions for violations of any of the

⁶ Checking the “unliquidated,” “contingent” and “disputed” boxes on Schedule F of the bankruptcy form forces the livestock creditors to file timely proof of their claims with the bankruptcy court. See Bankr. R. 3003(c). The livestock creditors may lose their creditor status if they fail to file proof of their claim by the bar date. Id.

⁷ In addition to the likely bond payout, the Complainant alleges that at least one livestock seller was able to reclaim some of its livestock, along with some of the proceeds from the sale of other livestock, which will further reduce the debts owed by Respondent.

regulatory programs administered by the Department that are serious and repeated in order to serve as an effective deterrent not only to the Respondent, but to other potential violators as well. See, e.g., In re Larry Wooten, 58 Agric. Dec. 944, 980 (1999). Here, the Respondent's failure-to-pay violations are serious and repeated. When livestock purchasers, such as the Respondent, do not make prompt payment it forces the sellers to finance the transaction. See Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978). Considering Respondent's bankruptcy, there is a very real risk that the sellers may never receive full payment for their livestock. One of the primary purposes of the Packers and Stockyards Act is "to assure fair trade practices . . . in order to safeguard farmers and ranchers against receiving less than the fair market value of their livestock." Bruhn's Freezer Meats v. United States Dep't of Agric., 438 F.2d 1332, 1337 (8th Cir. 1971). A producer's "livestock may represent his entire year's output. And, if he is not paid, he faces ruin." In re Great American Veal, 48 Agric. Dec. 183, 203 (1989) (quoting H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p.5).

The agency's recommendation that the Respondent be ordered to cease and desist from violating the Act and suspended as a registrant under the Act for five years is consistent with the sanctions regularly imposed in other cases involving failure to pay for livestock. See, e.g., In re Hines and Thurn Feedlot, Inc., 57 Agric. Dec. 1408, 1429 (1998).⁸ Respondent's alleged victimization by the First National Bank of Missouri is not relevant in determining sanctions for Respondent's violation. See id. at 1430 (citing Van Wyk, 570 F.2d at 704). The sanctions are

⁸ See also In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (1991) ("appropriate weight" is to be given to the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose); In re Marysville Enterprises, Inc., 59 Agric. Dec. 299, 318 (2000) (same). See also 7 U.S.C. § 204 (permitting the Secretary to suspend a registrant "for a reasonable specified period").

necessary to deter future violations and to prevent the Respondent from continuing to deal in livestock while he is bankrupt and unable to pay for his purchases. See In re Larry Wooten, 58 Agric. Dec. at 977 (the sanction is intended to obtain compliance and deter the Respondent and other registrants from committing unfair and deceptive trade practices similar to those which occurred in this case).

Order

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

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

The Respondent is hereby suspended as a registrant under the Act for a period of five (5) years. Provided, however, that upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of the Respondent at any time after one (1) year upon demonstration by the Respondent that he is in full compliance with the Act; and provided further, that this order may be modified upon application to Packers and Stockyards Programs to permit the Respondent's salaried employment by another registrant or a packer after the expiration of one (1) year of suspension upon demonstration of circumstances warranting modification of the order, such as a reasonable schedule of restitution.

The provisions of this order shall become effective on the sixth (6th) day after service of

this order on the Respondent.

Copies of this decision shall be served upon the parties.

Issued in Washington D.C.

this 5th day of MAY, 2003

A handwritten signature in cursive script, appearing to read "James Hunt", is written over a horizontal line.

Administrative Law Judge