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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) P & S Docket No. D-10-0109  
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Empire Kosher Poultry, Inc., )  
)  
Respondent ) **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> 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.

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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.

<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).

## 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.

### **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

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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.

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 acquire a minimum of 54,000 antibiotic-free

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<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).

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 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

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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.

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

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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).

<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).

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

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<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."

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**

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

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

<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  
(continued...)

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).

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<sup>13</sup>(...continued)

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 airsaccualitis; 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.

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 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 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.

### **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 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,

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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 ma[k]e a seasonable objection. The comment notes that incorporating "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.

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 deadline in 7 U.S.C. § 228b-1(a) while seeking concessions from sellers, particularly

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<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.)

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

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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

(continued...)

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 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

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<sup>18</sup>(...continued)

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).

<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

(continued...)

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.

*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

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<sup>19</sup>(...continued)

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).

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).

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>22</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>23</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).

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<sup>22</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>23</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).

**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.

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

July 20, 2011



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William G. Jenson  
Judicial Officer