

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

P & S Docket No. D-09-0185

In re: McLAUGHLIN LIVESTOCK, INC.,

Respondent

DECISION AND ORDER AS TO McLAUGHLIN LIVESTOCK, INC.

Preliminary Statement

This disciplinary proceeding was initiated by the filing of a complaint on August 27, 2009 by the Deputy Administrator, Grain Inspection, Packers and Stockyards Program pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.; hereinafter “Act”) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 - 1.151; hereinafter “Rules of Practice”) against Respondents McLaughlin Livestock, Inc., Mitchell Livestock Auction, Inc. and Watertown Sales Barn, Inc. On August 28, 2009, prior to the Respondents filing an Answer, the Complainant moved to amend the Complaint. Pursuant to 7 C.F.R. §1.137, that amendment was effective upon filing.

After being granted two extensions of time in which to file an answer, Respondents filed an Answer to the Amended Complaint on October 16, 2009. Since the filing of the Amended Complaint, upon the motion of Complainant, Mitchell Livestock Auction, Inc., and Watertown Sales Barn, Inc., have been dismissed due to the markets having sold their assets and ceased business operations. In response to Respondent McLaughlin’s Answer, Complainant moved for a Decision Without Hearing By Reason of Admissions pursuant to section 1.139 of the Rules of

Practice (7 C.F.R. § 1.139) as a result of admissions of fact that Respondent McLaughlin made in its Answer to the Amended Complaint.

Discussion

Respondent McLaughlin filed an Answer admitting that during the time periods alleged in the Amended Complaint, Respondent McLaughlin was operating pursuant to the Act while its current liabilities exceeded its current assets. In its defense, Respondent McLaughlin claimed the equitable doctrines of waiver, estoppel, and laches.

The Judicial Officer has consistently held that the USDA is not subject to estoppel when it is acting in its sovereign capacity. *E.g.*, *In re Contorti*, 54 Agric. Dec. 649, 671 (1995); *In re DiCarlo Distribs., Inc.*, 53 Agric. Dec. 1680, 1713 (1994); *In re Finger Lakes Livestock Ex., Inc.*, 48 Agric. Dec. 385, 400 (1989). Filing disciplinary complaints against registered entities for violation of a federal statute is within Complainant's sovereign capacity. The Judicial Officer has also repeatedly held that the doctrine of laches does not apply to the USDA when it is acting in its sovereign capacity. *E.g.*, *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1316 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1605, 1613 (1993); *In re Catanzaro*, 35 Agric. Dec. 26, 34 (1976), aff'd, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977).

Regarding waiver, at no time did Complainant inform Respondent McLaughlin, either by express or implied word or deed, that it would not file a disciplinary complaint against Respondent McLaughlin for insolvency. Absent any specific act on the part of Complainant demonstrating its intent to forgo pursuing administrative action against Respondent McLaughlin for its insolvency, this argument fails. Accordingly, because Respondent McLaughlin cannot claim these equitable doctrines against the USDA, the asserted defenses are without merit.

As a second defense, Respondent McLaughlin denies that it committed any willful violations of the Act. This defense is also without merit. 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 a careless disregard of statutory requirements.” *In re Marysville Enters., Inc.*, 59 Agric. Dec. 299, 309 & n.5 (2000). In other words, “a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.” *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1414 (1998). Here, willfulness is established because Respondent McLaughlin intentionally continued to operate subject to the Act for a period of approximately two years while insolvent.

Even applying the more stringent standard of willfulness used by the Fourth and Tenth Circuits, namely that willfulness requires “such gross neglect of a known duty as to be the equivalent” of an intentional misdeed, the conduct of Respondent McLaughlin was still willful. *Capital Produce Co. v. USDA*, 930 F.2d 1077, 1079-80 (4th Cir. 1991); *Capitol Packing Co. v. USDA*, 350 F.2d 67, 78-79 (10th Cir. 1965). Respondent McLaughlin clearly knew or should have known that it was insolvent during the period December 31, 2006, through December 31, 2008, because of the fact that Complainant informed Respondent McLaughlin in two letters dated May 31, 2007, and September 25, 2007, that it was operating while its current liabilities exceeded its current assets and because Complainant repeatedly required Respondent McLaughlin to submit Supplemental Balance Sheet Special Reports, which special reports showed Respondent McLaughlin to be operating while its current liabilities exceeded its current assets. Because Respondent McLaughlin was insolvent on December 31, 2006, June 30, 2007, September 30, 2007, December 31, 2007, and December 31, 2008, and operated while insolvent through these dates, in neglect of a known duty and despite being notified of its insolvency, its

actions can only be described as willful, both as intentional acts or as acts performed with careless disregard of statutory requirements.

As the Respondent's Answer presents no bona fide dispute as to the material facts, no hearing is warranted in this matter and the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent McLaughlin is a corporation organized and existing under the laws of the State of South Dakota, with a mailing address in McLaughlin, South Dakota.

2. At all times material to the Amended Complaint, Respondent McLaughlin was:

(a) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

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

3. As of December 31, 2006, Respondent McLaughlin had current assets of \$311,669.96 and current liabilities of \$356,159.05, resulting in an excess of current liabilities over current assets in the amount of \$44,489.09.

4. As of June 30, 2007, Respondent McLaughlin had current assets of \$890.24 and current liabilities of \$23,092.69, resulting in an excess of current liabilities over current assets in the amount of \$22,202.45.

5. As of September 30, 2007, Respondent McLaughlin had current assets of \$6,167.17 and current liabilities of \$41,596.91, resulting in an excess of current liabilities over current assets in the amount of \$35,429.74.

6. As of December 31, 2007, Respondent McLaughlin had current assets of

\$428,132.07 and current liabilities of \$451,673.42, resulting in an excess of current liabilities over current assets in the amount of \$23,541.35.

7. As of December 31, 2008, Respondent McLaughlin had current assets of \$7,591.00 and current liabilities of \$123,473.00, resulting in an excess of current liabilities over current assets in the amount of \$115,882.00.

8. During the period December 31, 2006, through December 31, 2008, and to the present, Respondent McLaughlin engaged in the business of a market agency selling livestock in commerce on a commission basis, notwithstanding that its current liabilities exceeded its current assets.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts found in Findings of Fact 3 through 8 above, Respondent McLaughlin's financial condition does not meet the requirements of the Act pursuant to 7 U.S.C. § 204 and Respondent McLaughlin has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

Order

Respondent McLaughlin, its agents and employees, directly or through any corporate or other device, in connection with its activities subject to the Act, shall cease and desist from operating while its current liabilities exceed its current assets, a financial condition which does not comply with the requirements of the Act.

Pursuant to 7 U.S.C. § 204, Respondent McLaughlin is hereby suspended as a registrant under the Act for a period of 30 days and thereafter until Respondent McLaughlin has demonstrated solvency. When Respondent McLaughlin demonstrates that its current liabilities

no longer exceed its current assets, a supplemental order will be issued terminating the suspension after the expiration of the 30 day period of suspension.

The provisions of this Order shall become effective on the sixth day after service of this Decision and Order on Respondent McLaughlin.

This Decision and Order shall become final without further proceedings thirty-five (35) days after service on Respondent McLaughlin, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, D.C.
May 5, 2010

PETER M. DAVENPORT
Acting Chief Administrative Law Judge