

1981

Neil Jorgensen v. John Clay and Company, a Corporation, and Aetna Casualty and Surety Company, a Corporation : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NEIL JORGENSEN,)
Plaintiff-Respondent,)
v.) Case No. 17621
JOHN CLAY AND COMPANY, a)
corporation, and AETNA)
CASUALTY AND SURETY COMPANY,)
a corporation,)
Defendants-Appellants.)
_____)

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Judgment of the
Sixth Judicial District Court, Sanpete County
Honorable Don V. Tibbs

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a corporation,)	
Defendants-Appellants.)	

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiff Neil Jorgensen for damages against the Defendant John Clay and Company for the willful, malicious and outrageous breach of contract by said Defendant. Defendant Aetna Casualty and Surety Company is the surety for Defendant John Clay and Company pursuant to a bond required by the Packers and Stockyards Act administered by the Department of Agriculture, and is thereby liable to the extent of its bond (\$75,000).

DISPOSITION IN THE LOWER COURT

On June 30, 1980, following a lengthy jury trial before the Honorable Don V. Tibbs, District Judge, the jury returned a verdict in favor of the Plaintiff and against the Defendant for general damages of \$191,463.40 and one dollar punitive

damages. (Verdict, R. 130) The jury also found in the Plaintiff's favor and against Defendant John Clay on its Counterclaim. (R. 131) The Judgment on the Verdict was entered by the trial court on July 8, 1980, for \$191,464.40, "together with interest on all of said Judgment as shall hereafter be determined by the Court." The Judgment further provided that "Pursuant to the Pretrial Order, the amount of interest, if any, and whether Plaintiff is entitled to attorneys' fees and, if so, the amount thereof are reserved for future determination by the Court." (Judgment, R. 136-37, Appendix A, attached hereto)

On November 7, 1980, Defendants' appeal to this Court was dismissed, sua sponte, because it was not an appeal from a final judgment. The matter was remitted to the trial court for the determination of the questions of interest and attorneys' fees. (Remittitur, R. 154)

Following consideration of lengthy memoranda, oral arguments of counsel and the Defendants' objections, the trial court awarded Plaintiff a reasonable attorneys' fee and interest. The Court entered Amended Findings of Fact and Conclusions of Law, finding that "the conduct of the Defendant John Clay and Company and its officers and employees was willful, malicious and oppressive as found by the jury." (Amended Findings, R. 216-18, Appendix B, attached hereto)

Pursuant to its Findings, an Amended Supplemental Judgment was entered on February 24, 1981, awarding Plaintiff, in

addition to the jury's verdict, the sum of \$21,400.00 as a reasonable attorneys' fee. The Plaintiff was also awarded prejudgment interest at six percent per annum, totaling \$14,822.37; and interest after the Judgment on the Verdict at eight percent, totaling \$9,087.21. (Amended Supplemental Judgment, R. 214-15, attached as Appendix C) Defendants then appealed to this Court.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmance in their entirety of the jury's verdict, the Judgment entered thereon and the Amended Supplemental Judgment.

STATEMENT OF FACTS

Respondent refers to the trial record as follows:

Trial transcript as "Tr.--;"

Court file as "R.--;"

Trial exhibits as "Exh.--."

While Appellants' Statement of Facts is generally accurate, it is incomplete and omits substantial evidence, presumably in order to avoid the overwhelming preponderance of the evidence supporting the judgment against Appellants. Appellants also state as "fact" testimony favorable only to their contentions on appeal. Therefore, Respondent provides the following comprehensive Statement of Facts:

The Parties

Plaintiff-Respondent Neil Jorgensen is a sheep rancher-farmer residing in Mount Pleasant, Sanpete County,

Utah. He has been in the sheep business under the name of the Skyline Sheep Company for 25 years, having raised and sold lambs for over ten years. In the fall of 1978, Mr. Jorgensen had purchased and/or raised 18,000 lambs to be marketed. (Tr. 49-51, 54)

Defendant-Appellant John Clay and Company (hereinafter sometimes referred to as "John Clay" or "Defendant") is a closely-held Utah corporation doing business as a livestock dealer. While it has an office in Ogden, Weber County, Utah, it conducts its business of buying and selling sheep and other livestock throughout the western states. (Tr. 697) As particularly described herein, virtually all of the transactions in the instant dispute occurred in Arizona, California, Colorado or Sanpete County, Utah. (Tr. 70, 100-106, 293, 297, 311, 323, 328, 694-95)

John Clay purchases and markets approximately one-half million lambs each year to the major meat packing houses. (Tr. 342, 697-98, 726) It estimates an average profit of sixty cents for each lamb it markets. (Tr. 342-43) In 1979, it sold 250,000 lambs (valued at over \$16,000,000.00) to Monfort Company of Colorado, a processor with plants in Colorado and Texas. (Tr. 696) Officers and stockholders of John Clay are Raymond (Rink) Williams and Frank Rynders. (Tr. 694-95) Leon Sparrow is a sheep "salesman and buyer" for the company under Williams' direction. During the marketing season, Sparrow lives in and works out of Yuma, Arizona. (Tr. 78, 285, 323, 704; Exh. 12A) Williams resides in Phoenix, Arizona. (Tr. 694)

In the sheep industry, lambs born in the preceding winter or spring are fed on summer range. Mr. Jorgensen's lambs which are not ready for market in the fall are sent to pastures or feedlots near Blythe, California, or Arizona. These lambs are called "feeder lambs." Later, when they become "fat" and are ready for market, they are generally termed "old crop lambs." (Tr. 52-55) The fat lambs are sold by Mr. Jorgensen either to a middleman livestock dealer such as John Clay and Company or directly to the packing house. (Tr. 51-55) The price of the lambs is determined by their weight and time of delivery. The price of the lambs may be discounted by a "weight stop" when a buyer does not want to pay for weight above a certain minimum (e.g., 120 pounds). Such practice is disapproved by the Packers and Stockyards Administration as an unfair trade practice. (Tr. 557-58, 686-68; App. E, pp. 4-5)

The Contract

In December, 1978, Leon Sparrow, Defendant's lamb buyer, contacted the Plaintiff in Mount Pleasant to see if the latter would sell another 10,000 lambs to John Clay and Company. (Tr. 63-64) Sparrow had already come to Jorgensen in Mount Pleasant the previous month and entered into a written contract with Plaintiff to purchase 5,000 of Plaintiff's lambs at 65¢ per pound with a "120-pound weight stop." (Tr. 60, 298, 345-47, 685-88; Exh. 16) Sparrow had already arranged to sell these lambs to Monfort for 65.50¢ per pound. (Tr. 348) At this time most of Plaintiff's 18,000 lambs were on feed in Blythe,

California, with some loads in Cedar City and Mount Pleasant, Utah. (Tr. 65, 292)

On December 13, 1978, in Mount Pleasant, Plaintiff received from Sparrow and signed a contract to sell to John Clay 10,000 "old crop lambs" at 70¢ per pound with no weight stop. (Exh. 1; R. 24) The contract, prepared by Sparrow, states in part:

The lambs are on pasture in Blythe, California Area. They are to be sorted at Daylight the morning of Del., loaded on trucks & weighed on the trucks at nearest scale. delivery to be F.O.B. truck. . . .
Balance of Purchase Price shall be paid when livestock are loaded on cars.
(Exh. 1, Appendix D, attached hereto)

As an "amendment" to the 5,000 head (65¢) contract, a further clause was inserted that "4 loads to go after X-mas from Cedar City." (Appendix D; Tr. 65, 69, 348-49)

Thereafter, Sparrow contacted Ray Wadlington, lamb buyer for Monfort of Colorado. Sparrow arranged to sell the lambs to Monfort at a price one-half cent per pound greater than the price in John Clay's contract with Jorgensen. (Exhs. 17, 18)

After Christmas, 1978, shipments from Blythe (and Cedar City) began on the 65¢ contract directly to Monfort's processing plant in Greeley, Colorado. (Tr. 69) Deliveries from Blythe continued into January, 1979, until the 65¢ contract was completed. (Tr. 139; Exh. 14) Plaintiff also orally agreed to sell other lambs to John Clay at 73¢ per pound with no weight stop. (Tr. 136, 140, 163) On the occasion of each shipment, shipping dates were discussed and agreed upon in advance of each shipment so that Plaintiff could either be

present or have a representative present to supervise the sorting, loading and inspection of the lambs. (Tr. 69, 137)

John Clay worked very closely with Monfort because it is a major buyer of livestock from John Clay. (Tr. 696) Lambs sold by the Defendant to Monfort were shipped both to Greeley, Colorado, and San Angelo, Texas. (R. 634-35) Leon Sparrow and Rink Williams (John Clay's representatives) knew Wadlington and Robert Quam (Monfort's head lamb buyers) and dealt with them on a daily basis. Sparrow was always in close daily contact with Wadlington and other Monfort personnel, arranging shipping dates and settling payment on other lambs, as well as Neil Jorgnesen's. (Tr. 393, 342-44, 600, 615, 622, 655-56, 704)

About December 30, 1978, the Plaintiff informed Leon Sparrow that because of weather conditions in Blythe, California, the lambs to be shipped under the 10,000 head 70¢ contract needed to be moved to get better feed. The parties discussed the weather condition in Blythe. (Tr. 70-71) Sparrow called Plaintiff and suggested that he move the 10,000 head to the Marvin Weber feedlot in Ault, Colorado, eleven miles from Monfort's plant at Greeley. (Tr. 71) Sparrow agreed that John Clay would reimburse Plaintiff for the freight to Colorado since Clay was already obligated to pay for shipment of the fat lambs from Blythe under the terms of the written contract. (Tr. 72-74, 352) Sparrow also made the arrangements with the feedlot, through Wadlington at Monfort, where the lambs would be cared for and fed at Plaintiff's

expense until such time as proper delivery was to be made under the contract. (Tr. 74, 352, 585-86) No change was made in the delivery dates. John Clay still had the option to take delivery of the lambs between January and March 15, 1979. (Tr. 352)

Shipment of all Plaintiff's lambs from Blythe proceeded through January, 1979. While Plaintiff's fat lambs were shipped to the Monfort packing house to fill the 65¢ contract, the parties were also shipping the "feeder lambs" (which were not yet fat) to the Weber feedlot under the 10,000 lamb contract. (Tr. 76-77, 354-60) The last shipment of "feeder lambs" to Ault left Blythe on January 24, 1979. Proper shipping arrangements were observed and either Plaintiff or his representative was present for every shipment. (Tr. 74) A total of 9,887 lambs were received by Weber in Ault. (Exh. 19)

During this period, Sparrow and Plaintiff were in daily telephone communication between Mount Pleasant, Blythe, California, and Yuma, Arizona. (Tr. 74, 77-78, 369-71) Sparrow was also in daily contact with Wadlington at Monfort. (Tr. 344)

John Clay's Breach

While in Mount Pleasant on February 10, 1979, Mr. Jorgensen received a phone call from Sparrow in Yuma. (Tr. 323) Sparrow informed Plaintiff that on February 5, 6 and 7 Rink Williams and Monfort had taken 2421 of Plaintiff's lambs from the Weber feedlot and shipped them to the Monfort plant. (Tr. 78-81)

sparrow apologized for John Clay's failure to notify Plaintiff of the intended delivery and promised that he would make sure it never happened again and that Plaintiff would be notified before any further shipments. (Tr. 79, 143, 171, 325)

Although in daily contact with Wadlington, Sparrow claimed that he had not been notified of any scheduled shipment. (Tr. 344, 371, 618) Rink Williams admitted that he had known that the lambs would be taken the first week of February but claimed it was up to Sparrow to follow through with respect to notifying Plaintiff of the delivery dates. (Tr. 728-31)

Jorgensen was upset that his lambs had been taken from the feedlot without any notice to him. He was not acquainted with any of the people in Colorado and wanted to see that his lambs were handled properly. (Tr. 81, 171) Sparrow said that he didn't blame Jorgensen for being upset and repeated his promise that it would never happen again. (Tr. 81) Plaintiff called Sparrow back three or four times that day to get an understanding of the situation and to make sure it would not happen again. On each occasion Sparrow repeated his promise. (Tr. 80-81, 143-44) Plaintiff also requested the weight tickets from Sparrow for the lambs taken. (Tr. 81) Sparrow assured him everything had been taken care of "properly in the usual manner." (Tr. 83)

The Plaintiff then called Rink Williams in Phoenix, Arizona, and expressed dissatisfaction with John Clay's business of shipping Plaintiff's lambs without notifying him.

Williams replied that he would do so whenever he (Williams) so desired. (Tr. 81-82, 144) Plaintiff then called Sparrow again, who again repeated his prior promise that they would not ship Plaintiff's lambs without prior notice. (Tr. 82) Plaintiff also called Wadlington at his home in Arizona, who also assured Plaintiff that no more lambs would be taken until Plaintiff was notified. (Tr. 84, 619, 654-55)

After these conversations, there was no doubt in the Plaintiff's mind that John Clay and Monfort had promised to notify Plaintiff and would so notify him before they took any more of his lambs. (Tr. 171) Not only was this the practice in all prior transactions between the parties, but advance notice to the seller prior to shipping is clearly the accepted custom and practice in the livestock industry. (Tr. 68-69, 172-73, 190-96, 202-5, 500-1, 682) See, also, 42 FR 49929, September 28, 1977.

Later, Plaintiff received through the mail from Sparrow a John Clay receipt and check for the 2421 lambs taken, showing the number and weight of the lambs as the basis for the payment. However, no official weight tickets were ever sent to Plaintiff to verify the weight, nor was there any payment or accounting for the freight from Blythe to Ault. (Exhs. 3, 3A; Tr. 84-86, 182)

The following week on February 13 and 14, Neil Jorgensen went to Colorado with his wife and her parents to check on the lambs. They met Wadlington at the Monfort plant. Wadlington

again apologized for not having notified Plaintiff in advance of delivery and assured Plaintiff he would make sure he was so notified in the future. Nothing was said about when the next shipment would be. The Monfort buyer was in a hurry to catch a plane so he quickly excused himself. (Tr. 87-88, 230, 233, 594)

Following his return to Sanpete County on February 14, Plaintiff was in contact with Sparrow in Arizona or California practically every day. (Tr. 88-89) In fact, Plaintiff continued to sell lambs to Sparrow under various oral contracts as late as February 27. (Tr. 160-62) But contrary to the promises made to him by John Clay and Monfort, Jorgensen never received any notice in advance that John Clay or Monfort (or anyone else) wanted to take delivery of more lambs at Ault. (Tr. 88, 121)

In the evening of February 22 or 23, Sparrow again called from Yuma to Jorgensen, informing him that John Clay and Monfort had again taken lambs from the Weber feedlot in Ault. (Tr. 89, 328) Sparrow again apologized, stating he was informed by Wadlington that 695 lambs had been shipped. But Sparrow didn't know the weights. Plaintiff then called Marvin Weber at the feedlot, who informed him that 1096 lambs had been taken, not just 695. (Tr. 89)

Because of confusion and uncertainty as to the number and weight of the sheep taken, Plaintiff had to make several calls to obtain the information. (Tr. 276-80, 458-66) Plaintiff called Sparrow back, telling him what Weber had said and

expressing dissatisfaction at the way Defendant's business was run. At Sparrow's suggestion, Plaintiff called Wadlington who was in California. Wadlington claimed that only 695 of Jorgensen's lambs were taken. He advised Plaintiff that if he didn't "trust anybody" to go over to Colorado himself to check it out. (Tr. 89-90, 630)

Plaintiff then called the Monfort plant. The Monfort employee at the "lamb desk" confirmed that 1096 Jorgensen lambs were slaughtered; but when Plaintiff asked her for the weights on the lambs, she told him she had been ordered not to give Plaintiff that information. Plaintiff stated to the employee he would call the Packers and Stockyards Administration, if necessary, to get the information. (Tr. 95-96, 176-80, 261)

Plaintiff also called Marvin Weber again, who informed him another shipment was scheduled for the next morning. Plaintiff told Weber to wait until (he) Plaintiff arrived on the first plane in the morning before releasing any more lambs. When it appeared that Plaintiff could not fly to Ault because of bad weather, he called Weber and told him to go ahead and ship the load if necessary. Weber replied that they had already substituted another's lambs and there would be no problem. (Tr. 91, 134, 428-29, 466, 472) Although approximately 6300 of Plaintiff's lambs remained in Weber's feedlot, neither Plaintiff nor the feedlot ever received any further order or request from John Clay or Monfort to ship more Jorgensen lambs. (Tr. 121, 134, 473, 566)

Plaintiff again received a check from Sparrow for the second taking, but no official weight slips were given as required by law. (Exhs. 4, 4A; Tr. 92-94, 558) Plaintiff later learned that on each occasion John Clay and Monfort had obtained the weight of the sheep by loading and weighing each shipment contrary to the contract and the accepted custom and practice in the industry. (Tr. 131, 133-34, 175-176, 191-92, 354, 609, 752-55) Furthermore, without any excuse and in violation of the contract and government regulation, the lambs had not been weighed on the "nearest public scale," even through a public scale was located only a block from the truck route to the Monfort plant. (Tr. 175, 385, 553-56, 577, 579)

On February 27, 1979, in Blythe, California, Plaintiff and Leon Sparrow agreed that Plaintiff's last 274 fat lambs in Blythe would be delivered as part of the 70¢ per pound contract. (Tr. 97-98, 214) But Defendant failed to make any timely payment for them. (Tr. 369-70) Sparrow also told Plaintiff that they wanted to resume deliveries from Ault under the 10,000 lamb contract the following Monday, March 5, 1979. Plaintiff stated he would be there. (Tr. 99, 217)

However, on Saturday, March 3, 1979, Sparrow called Jorgensen and told him that John Clay would not accept any more of Plaintiff's lambs because Monfort would not take them. (Tr. 100, 391, 566) Sparrow admitted that he felt John Clay still had a contract with Jorgensen and was obligated to take the lambs. But, Sparrow said, there was nothing he could do.

Sparrow did not give any reason other than that Rink Williams had refused to take Jorgensen's lambs. (Tr. 100, 391-92) By this time, the market price for lambs had dropped to 60¢ per pound. (Tr. 580)

Plaintiff and Sparrow went to Greeley, Colorado, to "see what might be done." (Tr. 391) In a meeting with Bob Quam, Monfort's head buyer, on Tuesday, March 6, 1981, Quam simply stated he would not take the lambs; that his deal was not with Jorgensen but with John Clay. (Tr. 103, 249-51) Later, Sparrow admitted to Plaintiff, "It looks to me like, in my opinion, that John Clay will have to pay you for the lambs. . ." (Tr. 104, 258)

Rink Williams and Frank Rynders arrived in Ault on Thursday, March 8, at Sparrow's request, and met with Sparrow and Plaintiff. (Tr. 103) Williams claimed the situation was out of Defendant's hands and wasn't its responsibility. No reason was given for not accepting the lambs. (R. 255) He "offered" to help Plaintiff resell the lambs for considerably less money. (Tr. 106) When requested by Plaintiff to honor the contract, Williams threateningly retorted, " . . . if you plan on being in the feeding business, my advice is for you to take your loss now and forget it." (Tr. 254-55, 105-6)

The following day, Williams and Rynders met privately with Monfort and thereafter "suggested" to Plaintiff that he accept their "offer" to take the lambs at 60¢ a pound with a 120-pound weight stop, provided Plaintiff released them from all

obligations under the contract. Although Monfort could have slaughtered all of Jorgensen's lambs within three days, neither it nor John Clay would even promise to take them promptly but would "clean them up by April 1, or attempt to." (Tr. 106, 178, 546, 580) Plaintiff refused such a drastic change in the contract and left to return to Sanpete County, Utah. (Tr. 107)

Before leaving Greeley, Plaintiff contacted R. H. Rock Company and offered to sell it the remaining lambs. He informed the Defendant that if it wanted to honor the contract, to contact him by 9:00 a.m. Saturday, March 10, in Mount Pleasant, Utah, otherwise, the lambs would be resold to Rock. (Tr. 107-109) When the Defendant only raised its offer to 63¢ per pound, Plaintiff signed the contract to sell to R. H. Rock for the equivalent of \$70.20 per head. (Tr. 107-109; Exhs. 8, 9)

Plaintiff shipped 6283 lambs to R. H. Rock, resulting in a loss to him of \$166,566.40, plus the unpaid freight of \$22,000.00 for their transportation from Blythe, California, to Ault, Colorado. (Tr. 130-31; Exh. 10)

On their return from Colorado, Williams and Sparrow discussed how much they would pay Jorgensen for the 274 lambs delivered on February 27, payment for which was long overdue. They determined they would pay him 65¢ per pound instead of the previously agreed 70¢. (Tr. 737-39; Exhs. 12, 12A, 14A) After Sparrow arrived in Yuma, he mailed to Jorgensen in Sanpete County a check for the 274 lambs at only 65¢ per pound. (Tr. 113, 177, 369-70; Exhs. 12, 12A)

After filing a proper claim with the Defendant Aetna Casualty and Surety Company and with the Packers and Stockyards Administration of the United States Department of Agriculture, Plaintiff brought this action for damages as a result of Defendant's breach of contract which breach Plaintiff claims was willfully malicious, in bad faith and with a reckless indifference and disregard of Plaintiff's rights under the contract and the custom and law regarding livestock transactions.

Summary of Argument

1. Venue is proper in Sanpete County, Utah.

The trial court correctly determined that venue was properly laid in Sanpete County, the county of Plaintiff's residence. Under Section 78-13-6, U.C.A. (1953), where a "transitory" cause of action has arisen outside of the state, the plaintiff resident may bring the action in his own county. Defendant breached the contract by taking the lambs without notice and later refusing delivery of the lambs in Ault, Colorado. Even if the provisions of Section 78-13-6 are applied, the rules, custom and trade in the livestock industry, as well as prior dealings between the parties, regarding payment of the purchase price necessarily implies that Sanpete County is the place of performance in Utah.

2. Punitive Damages and Attorneys' Fees Against Defendant John Clay For Its Malicious and Willful Breach of Contract Were Proper.

Punitive damages and attorneys' fees may properly be recovered for the malicious, willful and oppressive breach of contract by the Defendant. The jury necessarily found that John Clay's breach was willful and malicious. The trial court also so found. There is substantial evidence in support of these findings. Justice and equity require that the Defendant

bear the consequence of its conduct outrageously contrary to accepted custom, practice and regulation and demonstrating a callous indifference to its obligations and Plaintiff's rights under the contract.

3. Plaintiff was properly awarded prejudgment interest.

Prejudgment interest is proper when a plaintiff's damages are "liquidated" or, in other words, fixed and capable of calculation as of a certain date. Plaintiff was properly awarded such interest from March 24, 1979, to the date of judgment. On March 24, Plaintiff's damages were fixed and capable of calculation by subtracting from the amount received upon resale the amount he would have received at 70¢ per pound.

The verdict and judgments of the lower court should be affirmed.

ARGUMENT

POINT I

VENUE IS PROPER IN SANPETE COUNTY AND THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR CHANGE OF VENUE.

Appellants argue that the trial court erred in failing to grant Defendants' Motion for change of venue to transfer this case to Weber County. Appellants claim this case is necessarily controlled by Sections 78-13-4 and 78-13-7, U.C.A. (1953), and cite various cases where these sections have been applied by this Court. But in asserting that these cases should have controlled the lower court, Appellants ignore both the facts of this case and other statutes regarding proper venue.

The trial court did not err in determining venue is proper in Sanpete County. Notwithstanding Defendants' claim to a general right to have an action tried in the county of their "residence," "actions may be tried elsewhere when so provided by statute." Walker Bank and Trust Co. v. Walker, 631 P.2d 860 (Utah, 1981).

Initially, it should be noted that while Defendant Clay claims its "principal and only place of business" is in Ogden, Weber County (R. 12), none of the contacts or transactions between the parties ever occurred in Weber County. Defendant Aetna Casualty and Surety Company, John Clay's bonding Company, is also a foreign corporation, transacting business in this state. (R.1)

John Clay's business with Plaintiff took place either outside of the State of Utah or in Sanpete County. (Tr. 293, 297, 313, 320, 323, 328, 330-33, 337, 100-106, 178, 694; Aff., R. 24-25; Exh. 12A) During the sheep season, Mr. Sparrow lived in and worked out of Yuma, Arizona. (Tr. 313, 323; Exh. 12A) Mr. Rink Williams also resides in and works out of Arizona. (Tr. 694)

Mr. Sparrow contacted the Plaintiff in Mount Pleasant, Sanpete County, offering to purchase Plaintiff's lambs on feed in Blythe, California. Sparrow's written contracts were entered into in Mount Pleasant, Sanpete County. (Tr. 60, 287; Aff., R. 24, 25) Other lambs owned by Plaintiff were purchased by and delivered to Defendant in Blythe, California, and in Sanpete County. (Tr. 292, 296-97)

The 10,000 lamb contract (App. D) specifically provides that the sheep are on pasture at Blythe, California, to be sorted and loaded there--"delivery to be f.o.b. truck" at which time they were to be paid for. (App. D; R. 25) These lambs were later transported from Blythe, California, to Ault, Colorado, pursuant to the parties' oral agreement. (Tr. 352)

While in Ault, Colorado, John Clay and Monfort repeatedly removed the lambs from the feedlot without any notice to Mr. Jorgensen and improperly weighed the lambs loaded on the trucks. (Tr. 556, 682) Leon Sparrow called Jorgensen from Yuma, Arizona, on each occasion to "apologize" for the failure to notify him. (Tr. 374-75, 380) When the Plaintiff objected

to this procedure, Clay repudiated its contract by refusing delivery of the lambs f.o.b. truck at the Ault feedlot. (Tr. 391-92) Plaintiff's conversations and meetings with Sparrow and Williams of John Clay and with Monfort took place either personally in California and Colorado or by telephone between Mount Pleasant, Arizona, Colorado and California. (Tr. 101-108) All payments by John Clay to Jorgensen in this and other contracts were made by Sparrow either in California at the time and place of delivery or by mail from Arizona to the Plaintiff's home in Sanpete County. (Exh. 12A; R. 25) Nothing relative to this contract ever transpired in Ogden, Utah. (Tr. 70, 313, 318, 694-95)

Under Section 78-13-6, U.C.A. (1953), this action was properly brought by Plaintiff in the county of his residence. Section 78-13-6 provides:

All transitory causes of action arising without this state in favor of residents of this state shall, if action is brought thereon in this state, be brought and tried in the county where the plaintiff resides, or in the county where the principal defendant resides, or if the principal defendant is a corporation, then in the county where the plaintiff resides or in the county where such corporation has an office or place of business, subject, however, to a change of venue as provided by law.

If the cause of action is transitory, has arisen outside of the state and Plaintiff is a resident, then venue is proper in Sanpete County, the county of Plaintiff's residence.

It is clear that the instant case is a "transitory action." Allen v. Allen, 47 Utah 145, 151 Pac. 982 (1915). Calder v. Third Judicial District Court, 2 Utah 2d 309, 273

P.2d 168, 171 (1954). In Steed v. Harvey, 18 Utah 367, 54 Pac. 1011 (1898), the Utah court held that an action to recover damages for breach of contract for the failure to deliver cattle in Wyoming was a transitory action.

It cannot be disputed that Plaintiff's action arose in Colorado first when Defendant John Clay (with Monfort Company) took 3517 lambs without any notice to Plaintiff; and later when requested in Colorado by Plaintiff to honor the contract, Defendant Clay refused to take or accept further deliveries, repudiating its obligations under the contract. (Tr. 121, 105-6, 391-92, 251, 254-55, 717) Even Defendant's counterclaim that Plaintiff "delayed" delivery in Ault, Colorado, not in Utah. (Appt. Brief, p. 23) This action certainly cannot be claimed to have "arisen" in Utah, and venue is controlled by Section 78-13-6 U.C.A. (1953, as amended). Dee v. San Pedro, L.A. & S.L.R. Co., 50 Utah 167, 167 Pac. 246 (1917); Seedling Inc. v. King, 378 So.2d (Fla. App., 1979); Briggs Transportation Co. v. Ranzenberger, 299 Minn. 127, 217 NW2d 198 (1974); State v. Circuit Court, 221 Or. 309, 351 P.2d 39 (1960); 77 Am. Jur. 2d, Venue, Section 37, p. 882.

Plaintiff was entitled to bring this action in the county of his residence. The trial court should liberally construe the Complaint and supporting material in favor of the pleader. In fact, the allegations of Plaintiff's Complaint and supporting Affidavit were not disputed by the Defendants for purposes of Defendants' Motion to change venue. (Compl. R. 2,

3; Aff., R. 24-26) Even so, the determination of disputed matters for the purpose of ruling on proper venue is within the sound discretion of the trial court. Deimler v. Ostler, 600 P.2d 814, 815 (Mont., 1979); Tribolet v. Fowler, 77 Ariz. 59, 266 P.2d 1088 (1954); 77 Am. Jur. 2d, supra at 930.

In Dee v. San Pedro, L.A. & S.L.R. Co., 50 Utah 167, 167 Pac. 246 (1917), this Court interpreted the identical predecessor section to Section 78-13-6, U.C.A. (1953), and held that the action was properly brought in the county of the plaintiff's residence, even though the plaintiff was only an assignee of the claim. That claim arose from damage to livestock being transported by the defendant railroad from Salt Lake City to Los Angeles. Plaintiff Dee, an assignee of the livestock owner, Sheffor, brought the action in Weber County for the injuries to horses while in transit in Nevada and California. The railroad claimed that the proper counties for venue were either the residence of the livestock owner (Cache County) or the "principal place" of defendant's business (Salt Lake County). Not only did the court indicate that these places of venue were proper under then Section 2931X1, Comp. Laws Utah (1907), the court also held that venue was proper in Weber County, the county of the plaintiff-assignee's residence, pursuant to the provisions of the statute.

In discussing the effect of an assignment to the plaintiff on the issue of proper venue, the court, in Dee, stated that if a motion for change of venue is "based upon the ground that the

action is brought in the wrong county, it should negative the facts under which such county would be the proper one." (157 Pac. at 249) In the instant case, as in Dee, the Defendants did not "negative" or deny any specific facts alleged in Plaintiff's Complaint or his Affidavit supporting venue--e.g., Plaintiff is a resident of Sanpete County (R. 1); the parties entered into their contracts in Sanpete County; the lambs were to be delivered f.o.b. truck in Ault, Colorado; in Ault, John Clay repudiated the contract and refused to take delivery of the lambs (R. 2, 25); and payment was to be made to Plaintiff in Sanpete County (R. 25). Defendants' response by Affidavit was only that John Clay is a Utah corporation with its "principal and only place of business in Ogden, Weber County, Utah," attaching a copy of the 10,000 lamb contract. (R. 13, 14) The Defendants' Affidavit was not sufficient to entitle them to have venue transferred to Weber County as a matter of right. It added nothing different than already stated in Plaintiff's Complaint. 77 Am. Jur. 2d, Venue, Section 82, p. 930.

Affirming the statutory right of Plaintiff to bring this action in the county of his residence does not violate any policy to avoid undue expense, inconvenience or disadvantage to Defendants. Although some pretrial discovery was conducted in Salt Lake City for the convenience of both parties, the bulk of discovery took place in Colorado. At trial, Defendants did not incur any significant additional expense by bringing its

various trial witnesses from Colorado to Sanpete County than had the trial been held in Weber County. Moreover, Defendant's officer, Rink Williams, presumably traveled to the trial from his Phoenix residence--a shorter distance to Manti than to Ogden.

Respondent submits that the evidence of Defendant's breach, malicious and with flagrant, reckless disregard for Plaintiff's rights, is so clear and unequivocal in the trial record that the jury's verdict cannot be considered "manifestly unjust." There is absolutely no reason to suppose that the Sanpete County jury was unfairly impassioned or prejudiced for or against either party. Respondent further believes that the legislature was fully aware that the inconvenience and disadvantage in litigating disputes arising in foreign states is just as great for a resident plaintiff as for a resident defendant. The policy to protect a party litigant from undue inconvenience and disadvantage is the same whether plaintiff or defendant.

In this case, virtually all of the transactions between the parties, including Defendant's repeated breach, occurred outside of the State of Utah. Plaintiff's cause of action arose outside of Utah. Venue, under Section 78-14-6, is therefore proper in Sanpete County. None of the cases cited by Appellants involves such facts similar to this case. Certain of these cases even involved oral and not written contracts--i.e., Buckle v. Ogden Furniture & Carpet Co., 61

Utah 559, 216 Pac. 684 (1923); Olympia Sales Co. v. Long, 604 P.2d 919 (Utah, 1979).

Even assuming, arguendo, that the provisions of Section 78-13-4, U.C.A. (1953), should be applied to the agreement between the parties, venue is still proper in Sanpete County. This section applies to written contracts where the place of obligation is stated or appears by "necessary implication." Palfreyman v. Trueman, 105 Utah 463, 142 P.2d 677 (1943). As noted, the contract expressly provides that Defendant is to perform by taking delivery of the livestock at the time they are loaded on the trucks, f.o.b. at Blythe, California (and later, Ault, Colorado).

Further, payment for the delivered animals must be made at that time, either at the place of delivery or Plaintiff's residence in Sanpete County. "Balance of purchase price shall be paid when livestock are loaded on cars." (App. D) All payments made were made in that manner. (R. 25; Exh. 12A) Plaintiff's Affidavit states that "it was the intent of the parties . . . that the livestock purchased by John Clay and Company would be paid for by mailing or delivering the purchase price to Affiant in Sanpete County, Utah." (R. 25) There is no evidence to the contrary. Plaintiff's undisputed Affidavit was properly considered by the trial court to support the "necessary implication" that Plaintiff's residence in Sanpete County was the place of payment in Utah. Deimler v. Ostler, supra, at 815. Any question of interpretation arising from the

language of the written contract (prepared by Sparrow) is properly resolved in favor of Respondent and against Appellants.

Under the Federal Packers and Stockyards Act, 1921, as amended (7 U.S.C., Section 181, et seq.), a "market agency" or "dealer" (e.g., John Clay and Company) shall, upon delivery of the livestock, deliver to the livestock seller the net proceeds of the purchase price, with a full accounting, before the end of the next business day. (Tr. 370, 645) It requires that if the seller is not present to receive the check at the time of delivery of the sheep, the payment must be timely mailed first class, postage prepaid, and properly addressed to the seller. 7 U.S.C., Section 228b; Regs. of Sec. of Agriculture, Packers & Stockyards Act, 9 CFR, Section 201.43. (Pertinent parts of the regulations are attached as Appendix E.)

As provided in Atlas Acceptance Corporation v. Pratt, 85 Utah 352, 39 P.2d 710, 714 (1935), a "necessary implication" does not require the court to "shut out every other possible or imaginary conclusion," but rather to take what would be a "reasonable view," the contrary of which would be improbable. 39 P.2d at 714. This is not a case where the court has to guess where or how the parties intended that Clay should perform its contract. There can be "no room to doubt" that the law and the contract required and the parties intended that if payment for the sheep was not made to Plaintiff at the time and place of delivery in California or Colorado, payment would be made by mailing to Plaintiff's residence in Sanpete County.

Even under the provisions of Section 78-13-4 U.C.A. (1953, as amended), venue was proper in Sanpete County. Itel-Pas Inc. v. Jones, 389 So.2d 1085 (Fla. App., 1980); State v. Circuit Court, 221 Or. 309, 351 P.2d 39 (1960). Such a determination by the trial court was proper and reasonable.

If initially an action is brought in the proper county, it does not lie within the prerogative of the defendant or trial court to transfer it to another county merely because venue might also have been proper there. Walker Bank & Trust Co. v. Walker, supra, at 861; Tribolet v. Fowler, 77 Ariz. 59, 266 P.2d 1088 (1954); Deimler v. Ostler, 600 P.2d 814, 815 (Mont., 1979)

Although this action might have been properly brought in Weber County, Plaintiff chose a county equally, if not more, proper. Defendants did not have an "absolute right" to have the action transferred to Weber County when Sanpete County was proper.

The laws regarding venue are not intended to permit a defendant to conduct business dealings and incur extensive obligations in other states and counties only to run back to its office to claim the exclusive venue of Weber County when it has repudiated those obligations. Appellants' complaint that they must have been prejudiced because a jury in Weber County might have found differently is self-serving and arises only because of the outcome of the jury's deliberation. It is not supported by the facts or record herein.

Moreover, Appellants waived whatever right they claimed when they requested (and received) an extension of time "to answer" Plaintiff's Complaint. (R. 23) Nello L. Teer Co. v. Hitchcock Corporation, 235 N.C. 741, 71 S.E.2d 54 (1952).

Defendants' Motion for change of venue was properly denied by the trial court.

POINT II

THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF A REASONABLE ATTORNEYS' FEE BASED UPON DEFENDANT'S WILLFUL AND MALICIOUS CONDUCT.

Appellants maintain that the trial court erred in submitting to the jury the question of punitive damages for John Clay's offensive conduct. Specifically, Defendants complain that there is no basis for the trial court's award of a reasonable attorneys' fee. (Aplt. Brief, pp. 31-32) Appellants ignore the substantial evidence which fully supports both the jury's verdict and the court's finding that the Defendant's conduct was "willful and malicious."

Instruction No. 25, (not No. 4 as cited by Appellants) permitted the jury to consider an award to Plaintiff of punitive damages if it found that "Defendant's conduct in injuring Plaintiff was willful and malicious." (Instruction 25; JIFU, Section 90.76) The jury so found and awarded, punitive damage, albeit one dollar. By stipulation, the consideration of attorneys' fees was left to the trial court (and not the jury) for determination. (Pretrial Order, R. 84) The trial court found as the jury did and entered its finding that the "conduct of the Defendant John Clay and Company and its officers and employees was willful, malicious and oppressive as found by the jury." (App. C, Finding #1) Based upon this finding and the undisputed affidavit of reasonable attorneys' fees, Plaintiff was awarded \$21,400.00 attorneys' fees.

Since attorneys' fees and costs of litigation may be appropriately considered by a trial court as an element or part of punitive damages, Appellants' real dispute appears to be the propriety of punitive damages and the sufficiency of the findings of willful and malicious conduct. DeBry and Hilton Travel v. Capital International Airways, 538 P.2d 1181, 1185 (Utah, 1978); Linscott v. Ranier National Life Insurance Co., 100 Ida. 854, 606 P.2d 958, 966 (1980); Kramer and Schnebeck, "Punitive Damages in Idaho," 17 Idaho L.R. 87, 90 (1980); Mallor and Roberts, "Punitive Damages: Toward a Principled Approach," The 31 Hastings L.J. 639, 649-50, 668 (1980). Even the case of Lyman Grazing Association v. Smith, 24 Utah 2d 443, 473 P.2d 905 (1970), cited by Appellants, states that attorneys' fees are appropriate upon a showing of fraud, malice or wantoness such as would sustain an award of punitive damages. 473 P.2d at 908.

The propriety of punitive damages in contract actions has been the subject of substantial recent discussion by courts and scholars which is ignored in Appellants' Brief. "Developments in Utah Law," 1979 Utah Law Rev., 347, 367-70; Sullivan, "Punitive Damages in the Law of Contract," 61 Minn. L.Rev. 207 (1976-77); "The Expanding Availability of Punitive Damages in Contract Actions," 8 Indiana L.Rev. 668, 681 (1974); 31 The Hastings L.J. 639, supra; "Punitive Damages in Contract Actions, etc.," 20 Washburn L.J. 86 (1980), Lee, "Punitive Damages on Ordinary Contracts," 42 Mont L.Rev. 93 (1981) and numerous cases cited therein.

Appellants' attempt to constrict the law is not even supported by their own cases. Contrary to their assertion in the affirmative, it is not necessary to show "an underlying tort" as the basis for a punitive damage award. (Aplt. Brief at 27) For example, Curtiss v. Aetna Life Insurance Co., 90 N.M. 105, 560 P.2d 169, 172-73 (N.M. App., 1976), states that "willful and wanton" means an "actual or deliberate intention to harm" or "an utter indifference to or conscious disregard for the rights of others." The award of punitive damages was affirmed. In Lull v. Wick Construction Co., 614 P.2d 321 (Alaska, 1980), that court observed that punitive damages are allowed in some states for "malicious or grossly reckless" breach of contract but that in Alaska no punitive damages were recoverable on any basis. (614 P.2d at 325) But, see Clary Insurance Agency v. Doyle, 620 P.2d 194, 202-204 (Alaska 1980) where an Alaskan award of punitive damages was affirmed by that court.

While some courts may categorize such conduct as the equivalent of an "independent tort," other courts merely refer to it as "willful," "malicious" or "reckless disregard for plaintiff's rights". Regardless of the label, the focus is not upon a convenient catch word but on the nature and type of Defendant's wrongful conduct and the manner in which the contract is breached. Nash v. Craigco, 585 P.2d 775, 778 (Utah, 1978); Powers v. Taylor, 14 Utah 2d 152, 379 P.2d 380, 382 (1963); Palombi v. D&C Builders, 22 Utah 2d 297, 452 P.2d

325 (1969). In Palombi, this Court reversed a nonjury award of punitive damages because there was no record of willful, malicious conduct by defendant. In Nash, this Court reversed the ruling of the lower court that punitive damages were not available in a suit for specific performance of a contract. See 1979 Utah L.R., supra, at 368-69. See, also Elkington v. Foust, 618 P.2d 37 (Utah, 1980).

See, also, Linscott v. Ranier National Life Insurance Co., supra, at 962 (disregard of the known property or legal rights of others); Bank of New Mexico v. Rice, 78 N.M. 170, 429 P.2d 368, 378 (1967); State v. District Court, 149 Mont. 131, 423 P.2d 598 (1967) (violation of state law); Fousel v. Ted Walker Mobile Homes Inc., 60? P.2d 507, 510-11 (Ariz. App., 1979); Kiser v. Gilmore, 2 Kan. App. 2d 638, 587 P.2d 911 (1979) ("wanton disregard for the rights of others"); Vernon Fire & Casualty Insurance Co. v. Sharp, 316 N.E. 2d 381, 384 (Ind. App., 1974)(a "heedless disregard of the consequences, malice, gross fraud or oppressive conduct"); Amoco Production Co. v. Alexander, 594 S.W. 2d 467 (Tex. Civ. App., 1979)(failure to perform as a "reasonably prudent operator" under a lease agreement); Adams v. Whitfield, 290 So. 2d 49 (Fla., 1974)("gross negligence indicating a wanton disregard for the rights of others"); 31 The Hastings L.J., supra, at 651-59; 8 Indiana L.R., supra, at 681. In each of these cases, punitive damages were properly awarded for malicious and willful breach of contract.

In Defendant's contract there was an implied covenant of good faith and cooperation to prevent the parties from impeding the other's performance of his contractual obligation. Section 70A-1-203, U.C.A. (1953 as amended); Zion's Properties v. Holt, 538 P.2d 1319 (Utah, 1975); Whitfield Construction Company v. Commercial Development Corp., 392 F. Supp. 982, 1009 (D.C. V.I., 1975). John Clay had a contract with and a duty to Plaintiff Jorgensen. Defendant was not just "caught" in between Plaintiff and Monfort. (Tr. 105, 410, 735)

In Gruenberg v. Aetna Insurance Co., 108 Cal. Rtr. 480, 510 P.2d 1032, 1037 (1973), the California court stated that a party to a contract has "an implied duty to deal in good faith." The breach of such a duty may even give rise to an "independent tort," depending upon the nature and manner of the Defendant's conduct. Garrett v. American Family Mutual Insurance Co., 520 S.W. 2d 102, 121 (Mo. App.) First Security Bank of Bozeman v. Goddard, 593 p.2d 1040, 1047 (Mont. 1979)

The claim that there is "ample evidence" of Defendant's good faith is not supported by the facts, but is only Defendant's rationalizations from the facts. (Aplt. Brief at 29) Any evidence for and against the "good faith" argument of John Clay was properly weighed by the jury. For example, it was a jury decision whether Defendant's knowing violations of government regulations or its "compromise" offer after the market price had dropped to 60¢ per pound were "good faith" attempts to resolve the contract or were selfish acts without

regard to Plaintiff's rights. Based upon substantial evidence supporting Plaintiff, the jury and the trial court reasonably found that John Clay did not act in good faith or with justification. Appellant cannot now reargue the evidence.

Uintah Pipeline Corp. v. White Superior Co., 546 P.2d 885, 886 (Utah, 1976). Grybauskas v. Associated Estates Corp., 51 Ohio App. 2d 231, 367 N.E. 2d 881 (1976)

Another claim raised by Appellants is an alleged lack of sufficient evidence of the willful and malicious conduct of John Clay. Respondent submits that the record is replete with evidence of gross misrepresentations, conduct contrary to the established customs and practices in the industry, knowing violations of federal regulations, and an attitude of reckless disregard for Plaintiff's right to be treated honestly and fairly under the contract.

For example:

1. On at least five different days, John Clay and Monfort shipped Plaintiff's lambs from the Weber feedlot without prior notification, despite repeated promises to Plaintiff that he would be notified. (Tr. 375, 380, 501-2, 619)
2. The takings without notice to Plaintiff were a gross deviation from established custom and practice in the livestock industry and accepted dealings between the parties. (Tr. 173, 191-94, 202-203, 205, 404, 408, 682-83; 9 CFR, Section 203.16)
3. The lambs taken were not weighed on "the nearest public scale" and admittedly were not loaded or weighed according to

either long-established custom and practice nor Packers and Stockyards regulations. Defendant falsely stated the lambs were properly loaded and weighed. This resulted in unnecessary weight loss to the lambs before their weighing. (Tr. 354, 191, 548-51, 556, 609, 744-45, 752-54)

4. Defendant knowingly never provided official scale tickets to Plaintiff. (Tr. 176, 278; 9 CFR, Section 201.49)

5. Defendant intentionally and repeatedly failed to pay Plaintiff within the time required by Packers and Stockyards regulations. (Tr. 370, 577, 645-47; 9 CFR, Section 201.43)

6. Defendant refused to accept delivery of Plaintiff's lambs at 70¢ per pound after the market price had dropped to approximately 60 ¢ per pound. (Tr. 109, 177, 251, 580-81, 735)

7. Defendant attempted to intimidate Plaintiff to accept a lower discounted price for his lambs if he "planned to be in business" the next year. (Tr. 251-57, 271-72; 9 CFR Section 201.43(4))

8. Defendant attempted to "discount" the weight of Plaintiff's lambs, a business practice condemned as unfair by the Packers and Stockyards Administration. (Tr. 116, 557-58, 686-88)

9. Defendant failed properly to pay Plaintiff for lambs received under an oral contract at 73¢ per pound.

10. Defendant refused to pay timely Plaintiff for 274 lambs at 70¢ per pound and, instead, paid only 65¢ per pound after Defendant had determined not to take any more lambs from Plaintiff. (Tr. 113-117, 214, 370)

11. Sparrow admitted to Plaintiff that John Clay still had an obligation to take Plaintiff's lambs but that Plaintiff would have to sue. (Tr. 392, 410, 105)

12. John Clay asserted that just because Monfort wouldn't take the lambs, John Clay wouldn't take them. (Tr. 105)

Plaintiff believes that the above facts in the record supply more than adequate evidence of Defendant's egregious conduct. The finding by a jury of willful, wanton and malicious conduct is certainly supported by substantial evidence. Kiser v. Gilmore, supra; Whitehead v. Allen, 63 N.M. 63, 313 P.2d 335 (1957); Curtis v. Aetna Life Insurance Co., Supra. In fact, to imagine a greater demonstration of indifference and callous contempt for the parties' agreement is difficult.

This is not just a case of "nonfeasance," but of active "misfeasance" by Defendant John Clay. The decision in Dahl v. Prince, 119 Utah 556, 230 P.2d 328 (1951), cited by Appellant, is not at all inconsistent with the judgment herein. There was no finding in Dahl of any willful or malicious conduct and no punitive damage was awarded. The Court's opinion does suggest that if such a finding and award were made at trial, then an award of attorneys' fees would be entirely appropriate. 230 P.2d at 329.

There is no economic "injustice" to the Defendant nor "windfall" to the Plaintiff by the Findings and Judgment. Punitive damages are often necessary to fully compensate the

Plaintiff, particularly if the economic bargaining power of the Plaintiff is inferior to the "oppressors" (i.e., Defendant Clay and Monfort). To restrict Plaintiff to recover only the purchase price under the contract requires the Defendant to do no more than it was originally required to do in 1979. The most serious consequence to John Clay is that it will eventually have to pay only what it owed in the first place. In fact, the Defendant has now economically benefitted by not having to pay Plaintiff until after at least 2 1/2 years. Not only has the Plaintiff not been able to enjoy the benefit of his contract, but he has had to bear considerable expense of recovery in excess of the trial court's award. (R. 177-79) A person with a legitimate cause of action should not be discouraged from seeking relief because of substantial expense, particularly in light of the improper motive and conduct of a defendant. 8 Indiana L. Rev., supra, at 671-679 (1975); 61 Minn. L. Rev., supra, at 239-241 (1976); 31 Hastings L.J., supra, at 649-50, 662-68.

An award merely of conventional "compensatory" damages results in a net economic loss to the Plaintiff. Economic efficiency demands that the party intentionally breaching the contract bear the cost resulting from his actions. Otherwise, litigation costs and fees decrease the commitment of financial resources to the production of goods and makes a claim for damages impractical. Farber, "Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract," 66

Virginia L.Rev. 1443 (1980); Birmingham, "Breach of Contract, Damage Measures and Economic Efficiency," 24 Rutgers L.Rev. 273 (1970).

Defendants argue that the attorneys' fees must be proportional to the one dollar punitive damage award. By stipulation, the Pretrial Order reserved the issue of Plaintiff's attorneys' fee for consideration by the Court and not the jury. The jury did not have the opportunity to consider the extent of Plaintiff's costs and fees and interest as an element of his damage. Had they done so, their compensatory or punitive damage awards might well have been substantially different. 22 AmJur 2d, Damages, Section 168, p. 237.

Appellants' argument that the attorneys' fees awarded must be proportional to the amount of punitive damages awarded is not supported by Terry v. ZCMI, 605 P.2d 314 (Utah, 1980). It is the rule that punitive damages (including Plaintiff's attorneys' fees) must not be disproportionate to the actual damages suffered; "or perhaps more appropriately, to the nature of the wrong done and the injury caused." Kesler v. Rogers, 542 P.2d 354, 359 (1975). The attorneys' fees awarded here, although substantial, can hardly be considered disproportionate to the jury's verdict of \$191,000.00 nor the defendant's conduct.

In the case of Smith v. Great Basin Grain Co., 98 Ida. 266, 561 P.2d 1299, 1314 (1977), the defendant argued, however,

that the \$12,500.00 attorneys' fee awarded was not "reasonably related" to the \$10,434.00 jury fee awarded. There, an Idaho statute allowed attorneys' fees against a bonding company. The court stated:

We must also disagree with defendants' argument that the amount of an award of attorney's fees must bear a reasonable relationship to the amount of the judgment. It is the rule in this jurisdiction that where attorney's fees are to be awarded the amount thereof is to be that sum which the trial court in its discretion determines is reasonable. The factors to be considered have been previously stated by this Court.

"What is a reasonable attorneys' fee is a question for the determination of the court, taking into consideration the nature of the litigation, the amount involved in the controversy, the length of time utilized in preparation for and the trial of the case and other related factors viewed in the light of the knowledge and experience of the court as a lawyer and judge; it is not necessary in this connection that he hear any evidence on the matter although it is proper that the court may have before it the opinion of experts. . . ." [Citations omitted]

At the hearing held in these cases on the amount to be awarded plaintiffs as attorney's fees, evidence on these factors was introduced and considered by the trial court 561 P.2d, supra, at 1314.

Plaintiff did not receive an attorneys' fee award in an excessively "punitive" amount, but, in fact, less than the costs and expenses which he has actually incurred as a result of the Defendants' conduct.

Even aside from any punitive damage award here, it is the recently pronounced policy of this state to award attorneys' fees to a prevailing party when the defense to the action was without merit or good faith. Section 78-27-57, U.C.A (1953, as amended 1981). Based upon the finding and verdict below and

the inherent equitable power and discretion of this Court, it may also award additional attorneys' fees for the expense of this appeal. Swain v. Salt Lake Real Estate & Investment Co., 3 Utah 2d 121, 279 P.2d 709 (1955).

The judgment and award of attorneys' fees by the trial court should be affirmed and additional attorneys' fees awarded for this appeal.

POINT III

THE TRIAL COURT DID NOT ERR IN AWARDING PREJUDGMENT INTEREST TO THE PLAINTIFF.

When Appellant refused to honor its contract with Plaintiff, Plaintiff was left with some 6,300 lambs in Ault, being fed and cared for daily at Plaintiff's expense. To reduce this loss, Plaintiff resold them immediately to R. H. Rock Company. (Exhs. 8, 9 and 10) The jury awarded Plaintiff damages based upon the difference between what Plaintiff should have received under the contract (Exh. 1) and what he received from R. H. Rock.

Appellant claims the Court improperly awarded prejudgment interest thereon from March 24, 1979. March 24 was the date of the last shipment and delivery of lambs by Plaintiff to R. H. Rock.

Appellant does not dispute that portion of the interest related to Defendant's agreement to reimburse Plaintiff for the freight from California to Colorado and the difference between 274 lambs at 65/ and 70/ per pound (approximately \$2,000.00).

Respondent notes with interest that Appellant cites as authority the very cases upon which Respondent relied in the lower court to support the award. Bjork v. April Industries, Inc., 560 P.2d 315 (Utah, 1977); Uintah Pipeline Corp. v. White Superior Co., 546 P.2d 885 (Utah, 1976); and Jack B. Parson Construction Co. v. State, 552 P.2d 107 (Utah, 1976). These

cases affirm that when the amount due under a contract is ascertainable at a particular time (i.e., March 24, 1979), interest is proper from that date. Each of these cases awarded prejudgment interest in other similar contract or damage actions.

Respondent submits that Appellant has erroneously applied the principles evoked from these cases to the instant facts. Also, Anderson v. State Farm Fire and Casualty Co., 583 P.2d 101 (Utah, 1978), (miscited by Appellants in their brief), supports the award in this case.

In Anderson, the insured sued to recover the reasonable value of certain insured personal items such as clothing, liquor and a television set. This Court held that the owner of the lost items was entitled to give his opinion of the value thereof and the replacement cost. He need not prove an "actual cash value at the date of the loss." (583 P.2d at 104) The testimony is to be given such weight and credibility "as the trier of fact finds reasonable under the circumstances." Id. Therefore, this Court reiterated its general rule that:

Prejudgment interest should be awarded in a case, such as this, where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy, and plaintiff is entitled thereto. Id.

Defendants' argument as to what the jury might have decided is irrelevant since it did determine that Defendant John Clay breached the contract and the Plaintiff did not "interfere" with it and awarded Plaintiff damages. Just as in other cases, the liability or alleged good faith excuse of a defendant is an

issue for the jury and is not relevant here. Anderson-Prichard Oil Corp. v. Parker, 245 F.2d 831, 837 (10th Cir., 1957).

Following Defendant's breach, Plaintiff disposed of his lambs as quickly as possible and received \$70.20 per animal. Had he been able to receive the full contract price, he would have received an additional \$166,566.40. Appellant ignores the fact that even after Appellant's breach until the date of shipment of the last lambs, Plaintiff was required to continue to pay the feedlot charges for their care and feeding. When the last lambs were weighed and delivered, Plaintiff's damage was then capable of mathematical calculation. Appellants do not seem to have any difficulty making the calculations in their Brief. Instead, they attempt to reargue the "speculation" of what John Clay might have done had it not breached the contract. (Applt. Brief at 34-35)

In Jack B. Parsons Construction Co., the contract amount was sufficiently ascertainable by calculation even though there was a dispute as to the proper method of calculation of the damages. 552 P.2d at 109. In Bjork v. April Industries, Inc., supra, the court specifically listed those types of cases where damages would be "incomplete" or could not be calculated with "mathematical accuracy" (e.g., personal injury, false imprisonment, wrongful death, defamation, etc.). Such is not the case where, as here, the loss can be measured by facts and figures. Just as the market value of the stock was fixed in Bjork, the market price of the lambs here was fixed by contract and the weight then determined.

In U.S. Fidelity and Guaranty Co. v. Clover Creek Cattle Co., 452 P.2d 993, 1004 (Idaho, 1969), the Idaho court imposed prejudgment interest on the obligation which a cattle purchaser and his surety owed to the seller. The buyer owed for two shipments of a total of 137 head of cattle. The court stated that:

. . . [W]here the amount of liability is liquidated or capable of ascertainment by mere mathematical processes as it is here, this Court has allowed interest from a time prior to judgment, for in that event the interest in fully compensating the injured party predominates over other equitable considerations. 452 P.2d at 1004.

See, also, Automated Medical Laboratories Inc. v. Armour Pharmaceutical Company, 629 F.2d 1118, 1126 (5th Cir., 1980); and Anderson-Prichard Oil Corp. v. Parker, *supra*.

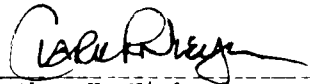
While a mere six percent annual interest cannot "fully compensate the injured party" when compared with present double digit interest and inflation rates, it is a proper step toward providing such complete and equitable compensation.

CONCLUSION

The jury's verdict in favor of Respondent and against the Defendants is supported by substantial evidence and should be affirmed. The funding by the jury and by the court of Defendant, John Clay's, willful malicious and oppressive conduct and the award of costs and attorneys fees as punitive damages should also be affirmed.

Venue was proper in Sanpete County and the trial court did not err or abuse its discretion in refusing to grant Defendant's Motion to Change Venue to Weber County.

The proceedings in lower court should be affirmed.
Respectfully submitted this 9th day of November, 1981.



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Wayne Beck
S. C. 7-8-80
Handwritten signature

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY,
STATE OF UTAH

NEIL JORGENSEN,)	
)	JUDGMENT ON THE VERDICT
Plaintiff,)	
)	
v.)	Civil No. C-7894
)	
JOHN CLAY AND COMPANY, a corporation,)	
and AETNA CASUALTY AND SURETY COMPANY,)	
a corporation,)	
)	
Defendants.)	

The jury duly impaneled in the above-entitled matter having returned a verdict in favor of the Plaintiff Neil Jorgensen and against the Defendant John Clay and Company in the sum of \$191,463.40 general damages and \$1.00 punitive damages; and the Defendant Aetna Casualty and Surety Company having stipulated, through its counsel, that in the event of a judgment in favor of the Plaintiff and against the Defendant that the said Defendant Aetna Casualty and Surety Company was and is liable to the Plaintiff in an amount of \$75,000.00, and there being no just reason why judgment should not be entered immediately upon said verdict,

NOW, THEREFORE, judgment is hereby entered in favor of the Plaintiff Neil Jorgensen and against the Defendant John Clay and Company in the sum of \$191,464.40, of which amount judgment is further entered in favor of the Plaintiff Neil Jorgensen and against the Defendant Aetna Casualty and Surety Company in the sum of \$75,000.00, together with interest on all of said judgment as shall hereafter be determined by the Court. Plaintiff is further awarded his costs incurred herein.

Pursuant to the Pretrial Order, the amount of interest, any, and whether Plaintiff is entitled to attorney fees and, so, the amount thereof are reserved for future determination by the Court.

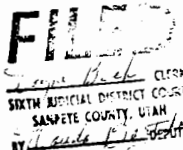
DATED this 8th day of July, 1980.


DISTRICT JUDGE



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 Clark R. Nielsen
 NIELSEN & SENIOR
 Attorneys for Plaintiff
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 36 South State Street
 Salt Lake City, Utah 84111

Telephone: 532-1900



IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY,
 STATE OF UTAH

NEIL JORGENSEN,)	
)	
Plaintiff,)	AMENDED SUPPLEMENTAL JUDGMENT
)	
v.)	Civil No. C-7894
)	
JOHN CLAY AND COMPANY, a)	
corporation, and AETNA)	
CASUALTY AND SURETY COMPANY,)	
a corporation,)	
)	
Defendants.)	
)	

JUDGMENT
 JUDGMENT
 No. 4 Page 4

The Court entered on July 8, 1980, its Judgment on the jury's verdict in favor of the Plaintiff Neil Jorgensen and against the Defendant John Clay and Company in the sum of \$191,463.40 general damages and \$1.00 punitive damages and against Defendant Aetna Casualty and Surety Company in the sum of \$75,000.00, reserving in said Judgment for future determination the amount, if any, to be awarded to Plaintiff as interest and attorneys' fees. Thereafter, said Judgment was appealed to the Utah Supreme Court by the Defendants, which court dismissed said appeal and returned the case to this Court for the purpose of determining the issues relating to interest and attorneys' fees. This Court having entered its Supplemental Judgment and considered the objections thereto by the Defendants and the memoranda submitted by the respective parties, and having entered its Amended Findings of Fact and Conclusions of Law, makes the following Amended Order:

NOW, THEREFORE, Plaintiff is hereby awarded further judgment against the Defendant John Clay and Company as follows:

1. Interest from March 24, 1979, to July 8, 1980, in the sum of \$14,822.37.

2. Interest from July 8, 1980, to January 25, 1981, in the amount of \$9,087.21 and further interest at the rate of \$45.21 per day thereafter.

3. Attorneys' fees in the amount of \$21,400.00.

The foregoing is supplemental and in addition to the Judgment heretofore entered by the Court on July 8, 1980, in the sum of \$191,463.40 general damages and \$1.00 punitive damages, together with Plaintiff's costs in the sum of \$276.30, of which \$75,000.00 was awarded against both Defendants.

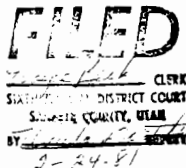
DATED this 23 day of February, 1981


DISTRICT JUDGE



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IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY,
STATE OF UTAH

NEIL JORGENSEN,)	
)	
Plaintiff,)	AMENDED FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
v.)	
)	
JOHN CLAY AND COMPANY, a)	Civil No. C-7894
corporation, and AETNA)	
CASUALTY AND SURETY COMPANY,)	
a corporation,)	
)	
Defendants.)	
)	

The Court entered on July 8, 1980, its Judgment on the jury's verdict in favor of the Plaintiff Neil Jorgensen and against the Defendant John Clay and Company in the sum of \$191,463.40 general damages and \$1.00 punitive damages and against Defendant Aetna Casualty and Surety Company in the sum of \$75,000.00, reserving in said Judgment for future determination the amount, if any, to be awarded to Plaintiff as interest and attorneys' fees. Thereafter, said Judgment was appealed to the Utah Supreme Court by the Defendants, which court dismissed said appeal and returned the case to this Court for the purpose of determining the issues relating to interest and attorneys' fees. This Court having entered its Supplemental Judgment and Findings of Fact and Conclusions of Law in support thereof, and having considered the objections thereto by Defendants and the memoranda submitted by the respective parties, now enters the following Amended Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The conduct of the Defendant John Clay and Company and

its officers and employees was wilful, malicious and oppressive, as found by the jury.

2. By reason of the wilful, malicious and oppressive conduct of Defendant John Clay and Company and its officers and directors, Plaintiff is entitled to a reasonable attorneys' fee for prosecuting this action.

3. From March 3, 1979, through October 31, 1980, Plaintiff's counsel have devoted in excess of 380 hours in representing Plaintiff's interest in seeking recovery from Defendants, including, among other things, numerous telephone calls; investigation; research of the law; photocopying; preparation and filing of pleadings; preparation and filing memoranda in opposition to Defendants' motion for change of venue; appearance in court re motion for change of venue; taking of depositions of Defendants' principal officers; representing Plaintiff in connection with depositions taken by Defendants of Plaintiff and his son in Salt Lake City and depositions of third-party witnesses in Greeley, Colorado; preparation for trial; preparation of trial memoranda; preparation of proposed instructions to the jury and trial of the case in Manti involving four days.

4. Also, Plaintiff's counsel has represented Plaintiff in Plaintiff's motion for attorneys' fees and interest, including the research, preparation and filing of memoranda and affidavits and oral argument of Plaintiff's motion.

5. This matter further involved unique questions of law and fact.

6. Considering the nature of the action, the amount of time and expertise involved, the result obtained and the usual and ordinary charges made by attorneys in the State of Utah and particularly in Sanpete County, an attorneys' fee of \$21,400.00 is a reasonable fee for the services rendered and includes the sum of \$1,400.00 of costs and expenses incurred for airline and automobile travel, hotel and motel expense in connection with

the trial and the taking of depositions in Greeley, Colorado.

7. The Plaintiff should be awarded interest on the amount of damages sustained by him from March 24, 1979, to July 8, 1980, at the rate of 6% per annum (\$31.47 per day) for 471 days for an amount of \$14,822.37 against the Defendant John Clay and Company.

8. The Plaintiff should be awarded interest from the date of the Judgment on the verdict (July 8, 1980) to the date of the entry of this Order at the rate of 8% per annum for an amount of \$9,087.21 to January 25, 1981, and \$45.21 per day thereafter against the Defendant John Clay and Company.

From the foregoing Findings of Fact, the Court makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Plaintiff should be awarded an additional judgment against Defendant John Clay and Company for interest from March 24, 1979, to July 8, 1980, in the amount of \$14,822.37.

2. Plaintiff should be awarded an additional judgment for interest against the Defendant John Clay and Company in the amount of \$9,087.21 to January 25, 1981, and \$45.21 per day thereafter.

3. The Plaintiff should be awarded an additional judgment against the Defendant John Clay and Company in the sum of \$21,400.00 as and for attorneys' fees.

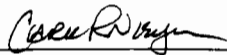
DATED this 23rd day of February, 1981.



DISTRICT JUDGE

CERTIFICATE OF SERVICE

SERVED the foregoing proposed Amended Findings of Fact and
Conclusions of Law and accompanying Amended Supplemental Judgment
by mailing a copy thereof, postage prepaid, to Mr. Richard H.
Campbell and Mr. Richard L. Stine, 2650 Washington Boulevard,
Ogden, Utah 84401, this 18 day of February, 1981.



LIVESTOCK CONTRACT

THIS CONTRACT made this 13 day of Nov, 1978, by and between
John Clay & Co. H. Oakes, Utah
 party of the First Part, and W.D. Johnson of Mt. Pleasant, Utah
 party of the Second Part,

WITNESSETH, That for and in consideration of the sum of Twenty thousand Dollars (\$20,000.00)
 in hand paid, the receipt of which is hereby acknowledged, and for the further consideration hereinafter mentioned, party of
 the Second Part, does hereby sell and agree to deliver to party of the First Part or his assigns, the following described Live-
 stock, and under condition as follows.

Number Purchased More or Less	Number to be Picked from More or Less	Brands	Condition	Stock	Shrink	Price	Per
<u>10,000</u>		<u>Chilloga Lamb</u>			<u>45</u>	<u>70.00</u>	<u>Cwt</u>
			<u>No Weight Stops</u>				

MARKS: The lamb are to be marked in the Blythe Cal Reg
they are to be sorted at Blythe, the number of Reg
marked are to be 9 every 100 on the right side of
the neck.
4000 to be marked on the left side of the neck.

Delivery to be F.O.B. cars at Utah 4000 subject to buyer being able to bill through
 to destination, between the 1st day of June, 1979, and the 15 day of March.

at party of the First Part's option. All charges before loading to be paid by party of the Second Part. Said Livestock
 to be weighed on day of loading, and said Livestock to be in good merchantable condition, and shall pass both Federal and
 State inspection as to all disease, brands and marks at the expense of the party of the Second Part, and shall be free from
 all liens and encumbrances, and party of the Second Part hereby warrants and agrees to defend title to same.

It is further agreed that said Livestock shall be gathered and taken off feed and water at M on date of weighing,
 and kept off feed and water until after weighing. Sheep to have full wool fleeces. Reasonable allowance shall be made for
 wet and muddy hides and feet, and sheep must be weighed with dry fleeces. Said Livestock are to be weighed at _____

Balance of Purchase Price shall be paid when Livestock are loaded on cars.

IN WITNESS WHEREOF, the parties have hereunto set their hands at _____
 State of _____ the day and year first above written.

WITNESS:
DEFENDANT'S EXHIBIT
#1
7894
John Clay & Co
H. Oakes
 Party of the First Part
W.D. Johnson
 Party of the Second Part

and the price of each kind of poultry sold, the date of sale, the name of the purchaser, the commission, and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

(b) *Prompt payment for livestock—terms and conditions.* (1) No packer, market agency, or dealer shall purchase livestock for which payment is made by a draft which is not a check, unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft. (In cases of packers whose average annual purchases exceed \$500,000, and market agencies and dealers acting as agents for such packers, see also § 201.200.)

(2)(i) No packer, market agency, or dealer purchasing livestock for cash and not on credit, whether for slaughter or not for slaughter, shall mail a check in payment for the livestock unless the check is placed in an envelope with proper first class postage prepaid and properly addressed to the seller or such person as he may direct, in a post office, letter box, or other receptacle regularly used for the deposit of mail for delivery, from which such envelope is scheduled to be collected (a) before the close of the next business day following the purchase of livestock and transfer of possession thereof, or (b) in the case of a chase on a "carcass" or "grade and yield" basis, before the close of the first business day following determination of the purchase price.

(ii) No packer, market agency, or dealer purchasing livestock for slaughter, shall mail a check in payment for the livestock unless (a) the check is made available for actual delivery and the seller or his duly authorized representative is not present to receive payment, at the point of transfer of possession of such livestock, on or before the close of the next business day following the purchase of the livestock and transfer of possession thereof, or, in the case of a purchase on a "carcass" or "grade and yield" basis, on or before the close of the first business day following determination of the purchase price; or unless (b) the seller expressly agrees in writing before the

transaction that payment may be made by such mailing of a check.

(3) Any agreement referred to in paragraphs (b) (1) or (2) of this section, shall be disclosed in the record of any market agency or dealer selling such livestock, and in the records of the packer, market agency or dealer purchasing such livestock, and retained by such person for such time as is required by any law, or by written notice served on such person by the Administrator, but not less than two calendar years from the date of expiration thereof.

(4) No packer, market agency or dealer shall, as a condition of purchase by him of livestock, impose, demand, compel or dictate the terms or manner of payment, or attempt to obtain a payment agreement from a seller through any threat of retaliation or other form of intimidation.

(c) *Purchasers to promptly reimburse agents.* Each packer, market agency, or dealer who utilizes or employs an agent to purchase livestock for him, shall, in transactions where such agent uses his own funds to pay for livestock purchased on order, transmit, or deliver to such agent the full amount of the purchase price before the close of the next business day following receipt of notification of the payment of such purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of the principal and in the records of any market agency or dealer acting as such agent.

(d) The provisions of paragraphs (b) (1) and (c) of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis, or by § 201.68 relating to financing packers by dealers or vice versa.

(Secs. 202, 307, 312, 401, 42 Stat. 161, 165, 167, 168; 7 U.S.C. 192, 208, 213, 221; sec. 409, as added by sec. 7, 90 Stat. 1250; 7 U.S.C. 228b; 7 CFR 2.17, 2.54; 42 FR 36425)

(19 FR 4528, July 22, 1954, as amended at 29 FR 1796, Feb. 6, 1964; 36 FR 2777, Feb. 10, 1971; 42 FR 36425, Sept. 22, 1977)

basis, to obtain therefrom the sums due the market agency or licensee as compensation for its services.

(c) *Custodial accounts for buyers' funds.* If the Secretary finds that any market agency or licensee has used for purposes of its own any funds received for the purchase of livestock or live poultry on a commission or agency basis, or any other funds which have come into its possession in its capacity as agent of the buyer, such market agency or licensee shall thereafter deposit any such funds in a separate bank account designated as "Custodial Account for Buyers' Funds," or by a similar identifying designation, which account shall be set up under terms and conditions with the bank where established, to disclose that the depositor is acting as a fiduciary with respect thereto and that the funds in the account are trust funds. Such accounts shall be drawn on only for payment of the purchase price of livestock or live poultry purchased on behalf of a principal and to obtain therefrom the sums due the market agency or licensee as compensation for its services, and for such sums as are necessary to pay all legal charges incurred in connection with the purchase of livestock or live poultry which the market agency or licensee may in its capacity as agent, be required to pay for and on behalf of its principal.

(f) *Accounts and records.* Every market agency and licensee shall keep such accounts and records as will at all times disclose the handling of the funds in the custodial account referred to in paragraphs (b) and (e) of this section, including without limitation, such accounts and records as will at all times disclose the names of the consignors and the amount due and payable to each from funds in the Custodial Account for Shippers' Proceeds, and the names of the principals, from whom funds have been received in the capacity of buyer for such principals, the amount of funds received from such principals, and the amount paid on behalf of such principals from funds in the Custodial Account for Buyers' Funds.

(g) *Insured banks.* The separate custodial accounts referred to in paragraphs (b) and (e) of this section shall

be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(h) *Certificates of deposit.* Any market agency or licensee which has established and maintains the separate custodial account referred to in paragraph (b) of this section may invest, in certificates of deposit issued by the bank in which such account is kept, such portion of the custodial funds as will not impair the market agency's or licensee's ability to meet its obligations to its consignors. Such certificates of deposit shall be made payable to the market agency or licensee in its fiduciary capacity as trustee of the custodial funds.

(32 FR 20921, Dec. 29, 1967)

ACCOUNTS AND RECORDS

§ 201.43 Payment and accounting for livestock and live poultry.

(a) *Market agencies and licensees to make prompt accounting and transmittal of net proceeds.* Each market agency shall, before the close of the next business day following the sale of any livestock consigned to it for sale, transmit or deliver to the consignor or shipper of the livestock, or his duly authorized agent, in the absence of any knowledge that any other person, or persons, has any interest in the livestock, the net proceeds received from the sale and a true written account of such sale, showing the number, weight, and price of each kind of animal sold, the name of the purchaser, the date of sale, the commission, yardage, and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction. Each licensee, acting as a broker, factor, or commission merchant, shall, before the close of the next business day following the sale of live poultry consigned to it for sale, transmit or deliver to the consignor or shipper of the live poultry, or his duly authorized agent, in the absence of any knowledge that any other person, or persons, has any interest in the live poultry, the net proceeds received from the sale and a true written account of such sale showing the number of pounds

(19 FR 4529, July 22, 1954)

§ 201.49 Requirements regarding scale tickets evidencing weighing of live-stock.

(a) When livestock is weighed for purpose of purchase or sale, a scale ticket shall be issued which shall show: (1) The name and location of the agency performing the weighing service; (2) the date of the weighing; (3) the name of the buyer and seller or consignor, or a designation by which they may be readily identified; (4) the number of head; (5) kind; (6) actual weight of the livestock; and (7) the name, initials, or number of the person who weighed the livestock, or if required by State law, the signature of the weighmaster. Scale tickets issued under this section shall be serially numbered and sufficient copies executed to provide a copy to all parties to the transaction.

(b) In instances where the weight values are recorded by means of automatic weighing and recording equipment directly on the account of sale or other basic record, this record may serve in lieu of a scale ticket.

(c) Stockyard owners, market agencies, and dealers who own or operate livestock scales shall be responsible for the accurate weighing of livestock and the execution and issuance of scale tickets.

§ 201.50 Records; disposition.

(a) Except as otherwise provided in paragraphs (b) and (c) of this section no stockyard owner, market agency dealer, or licensee shall, without the consent in writing of the Administrator, destroy or dispose of any book records, documents, or papers which contain, explain, or modify transactions in his business under the Act.

(b) Every stockyard owner, market agency, dealer, or licensee may destroy or dispose of the following categories of records after they have been retained for a period of 2 full calendar years:

STOCKYARD OWNERS

All feed records.
Dipping and spraying orders.
Vaccinating and testing orders.
Orders for special services.
Routine correspondence.
Railroad advance charges.
Bills to commission firms and others.
Records of shipments by States and markets.
Deposit slips.
Bank statements.
Cancelled checks and drafts.
Check stubs.
Railroad in-bound records.
Truck-in receipt records.
Delivery records.
Yarding receipts.
Pass-out and delivery orders.
Truck shipping orders.
Railroad shipping orders.
Scale yarding records.
Scale tickets.
Scale test reports.

MARKET AGENCIES

Scale tickets.
Bills from stockyard company.
Bills for livestock purchased.
Gate tickets.
Routine correspondence.
Way-bills and truckers tickets.
Accounts of sales.
Accounts of purchases.
Bills and invoices to buyers.
Deposit slips.
Bank statements.
Cancelled checks and drafts.
Check stubs.

Each market agency and licensee shall, promptly following the purchase of livestock or live poultry on a commission or agency basis, transmit or deliver to the person for whose account such purchase was made, or his duly authorized agent, a true written account of the purchase showing the number, weight, and price of each kind of animal purchased, or the weight and price of each kind of live poultry purchased, the names of the persons from whom purchased, the date of purchase, the commission and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

[19 FR 4528, July 22, 1954]

§ 201.45 Market agencies and licensees to make records available for inspection by owners, consignors, and purchasers.

Each market agency and licensee engaged in the business of selling or buying livestock or live poultry on a commission or agency basis shall, on request from an owner, consignor, or purchaser, make available copies of bills covering charges paid by such market agency or licensee for and on behalf of the owner, consignor, or purchaser which were deducted from the gross proceeds of the sale of livestock or live poultry or added to the purchase price thereof when accounting for the sale or purchase.

[19 FR 4528, July 22, 1954]

§ 201.46 Stockyard owners, market agencies, dealers, and licensees to keep daily record.

(a) Each stockyard owner, in addition to other necessary records, shall make and keep an accurate record of the number of head of each class of livestock received, shipped, or disposed of locally each day. Each market agency or dealer buying or selling livestock on a commission basis or otherwise, except packer buyers registered as dealers to purchase livestock for slaughter only, in addition to other necessary records, shall make and keep an accurate record of the number

and weight of livestock bought, sold, or otherwise disposed of each business day, the prices paid or received therefor, and the charges made for services.

(b) Each licensee buying or selling live poultry on a commission basis or otherwise, in addition to other necessary records, shall make and keep an accurate record of the number of pounds of live poultry bought or sold each business day, the prices paid or received therefor, and the charges made for services and facilities.

[19 FR 4528, July 22, 1954, as amended at 24 FR 3183, Apr. 24, 1959]

§ 201.47 Market agencies and licensees to disclose business relationships, if any, with purchasers.

No market agency or licensee acting as a broker, factor, or commission merchant shall knowingly sell or dispose of consigned livestock or live poultry to any person in whose business such market agency or licensee, or any stockholder, owner, officer, or employee thereof, has a financial interest, or to any person who has a financial interest in such market agency or licensee, unless the market agency or licensee discloses on the accounts of sales issued to the consignors concerned the nature of the relationship existing between the market agency or licensee and the buyers of the livestock or live poultry and then only if the livestock or live poultry has been offered for sale on the open market and the purchaser's bid exceeds that of other bidders. The provisions of this section shall not be construed to permit any transaction prohibited by §§ 201.57 and 201.60 relating to sales of livestock or live poultry out of consignments to owners, officers, agents, or employees of market agencies or licensees to which the livestock or live poultry was consigned.

[19 FR 4529, July 22, 1954]

§ 201.48 Sellers of live poultry to issue sales tickets at designated markets.

With respect to each purchase or sale of live poultry by licensees at designated markets a ticket shall be prepared by the seller at the time of sale. Each ticket shall show the name of the designated market, the date of the

shall be accepted in lieu of the forms furnished for this purpose by the Administrator. Provided, That the test and inspection forms used by the State or other governmental agency contain substantially the same information as that required by the official form.

(19 FR 4531, July 22, 1954, as amended at 24 FR 3183, Apr. 24, 1959; 26 FR 1626, Feb. 24, 1961; 29 FR 4646, Apr. 1, 1964; 32 FR 7700, May 26, 1967)

§ 201.76 Scales; repairs, adjustments, or replacements after inspection.

No scale shall be operated or used by any stockyard owner, market agency, dealer, or licensee unless it has been found upon test and inspection to be in a condition to give accurate weights. If any repairs, adjustments, or replacements are made upon such a scale it shall not be placed in use until it has again been tested and inspected in accordance with the regulations in this part.

(19 FR 4532, July 22, 1954, as amended at 24 FR 3184, Apr. 24, 1959)

§ 201.76 Reweighing.

Stockyard owners, market agencies, dealers, packers, and licensees, or their employees, shall reweigh livestock or live poultry on request of duly authorized representatives of the Secretary.

(24 FR 3184, Apr. 24, 1959)

§ 201.77 Weighing for purposes other than purchase or sale.

Every stockyard owner, market agency, dealer, packer, and licensee who weighs livestock or live poultry for purposes other than purchase or sale shall show on the scale tickets or other records used in connection with such weights the fact that they are not weights for the purpose of purchase or sale.

(24 FR 3184, Apr. 24, 1959)

§ 201.78 Packer scales.

(a) Packers owning or operating livestock or monorail scales on which livestock or livestock carcasses are weighed for purpose of purchase of livestock in commerce on a live or dressed weight basis shall install,

(b) Packers shall cause livestock and monorail scales to be installed in accordance with instructions of the Administrator and shall submit to the Area Supervisor copies of reports on at least two scale tests made during each calendar year. They shall employ only competent persons of good character and known integrity to operate such scales and shall require such employees to operate the scales in accordance with instructions of the Administrator. Any employee found to be operating scales incorrectly, carelessly, in violation of instructions or in such a manner as to favor or injure any party or agency through incorrect weighing or incorrect weight recording shall be removed from his weighing duties. No scale shall be used by any packer in weighing livestock or livestock carcasses for purpose of purchase of livestock on a live or dressed weight basis unless it has been found, upon test and inspection, to be in condition to yield accurate weights. If any repairs, adjustments, or replacements are made of a scale it shall not be used until it has been retested and found accurate.

(c) All livestock scales shall be equipped with a type-registering weighbeam, a dial with a mechanical ticket printer, or a similar device which shall be used for printing or stamping the weight values on scale tickets. For each draft of livestock weighed for purpose of purchase or sale a scale ticket shall be issued showing, in addition to the weight of the livestock and the amount of dockage, if any, the name of the seller, the name of the buyer, the species, number of head, initials of weigher, and date of weighing. Scale tickets shall be executed at least in duplicate, one copy being supplied to the seller or buyer as the case may be and one copy being retained by the packer.

(Secs. 202, 401, 42 Stat. 181 et seq., as amended; 7 U.S.C. 192, 221)

(30 FR 7649, June 12, 1965, as amended at 32 FR 7700, May 26, 1967)

NOTE: The reporting and record-keeping requirements contained herein have been approved by the Bureau of Budget in accordance with the Federal Reports Act of 1942.

...in a custom feedlot, or in combination with through any corporate or to have any ownership finance, or participate in ment or operation of such

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the services of all or any
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ing its own livestock fed for
its own slaughter, nor
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May 17, 1974)

SERVICES

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Sept. 20, 1967)

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be furnished to each stockyard owner,
market agency, dealer, or licensee.
(24 FR 3183, Apr. 24, 1959, as amended at 26
FR 1626, Feb. 24, 1961; 32 FR 7700, May 26,
1967)

§ 201.73 Scale operators to be competent.

Stockyard owners, market agencies, dealers, and licensees shall employ only competent persons of good character and known integrity to operate scales for weighing livestock or live poultry for the purpose of purchase or sale. They shall require such employees to operate the scales in accordance with instructions of the Administrator, copies of which will be furnished to each stockyard owner, market agency, dealer, or licensee who employs persons to operate scales used for the purposes herein indicated. They also shall require such employees to "rotate" in their weighing assignments at stockyards operating three or more scales. Any person found to be operating scales incorrectly, carelessly, in violation of instructions, or in such manner as to favor or injure any party or agency through incorrect weighing or incorrect weight recording shall be removed from his weighing duties.

(19 FR 4531, July 22, 1954, as amended at 24
FR 3183, Apr. 24, 1959; 26 FR 1626, Feb. 24,
1961; 32 FR 7700, May 26, 1967)

§ 201.74 Scales; reports of tests and inspections.

Each stockyard owner, market agency, dealer, or licensee who weighs livestock or live poultry for purposes of purchase or sale, shall furnish reports of tests and inspections of scales used for such purposes on forms which will be furnished by the Director on request. The stockyard owner, market agency, dealer, or licensee shall retain one copy of such form when executed, shall cause one copy to be retained by the agency conducting the test and inspection of the scales, and shall deliver the third copy to the Area Supervisor having charge of the work under the act in the particular area in which the scales being tested are located. In case the test and inspection of scales as herein required are conducted by an agency of a State or municipality or other governmental subdivision, the forms ordinarily used by such agency

(3) seller receives a copy of such acknowledgment.

(b) Purchasing livestock for which payment is to be made by a draft which is not a check, shall constitute purchasing such livestock on credit within the meaning of paragraph (a) of this section. (See also § 201.43(b)(1)).

(c) The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis, or by § 201.68 relating to financing packers by dealers or vice versa.

(Sec. 401, 42 Stat. 168 (7 U.S.C. 221); sec. 409, as added by sec. 7, 90 Stat. 1250 (7 U.S.C. 228b); 7 CFR 2.17, 2.54; 42 FR 35825) (42 FR 49929, Sept. 8, 1977)

PART 203—STATEMENTS OF GENERAL POLICY UNDER THE PACKERS AND STOCKYARDS ACT

Sec.

203.1 Statement of general policy with respect to lamb buying practices.

203.2 Statement of general policy with respect to the giving by meat packers of meat and other gifts to Government employees.

203.3 Statement with respect to meat packer sales promotion programs.

203.4 Statement with respect to the disposition of certain records made or kept by packers.

203.5 Statement with respect to market agencies paying the expenses of livestock buyers.

203.6 Statement with respect to the purchase of livestock by packers for export.

203.7 Statement with respect to meat packer sales and purchase contracts.

203.8 Statement with respect to regulations and practices of stockyard owners and market agencies.

203.9 Statement with respect to the handling of custodial funds by livestock market agencies and poultry licensees.

203.10 Statement with respect to insolvency; definition of current assets and current liabilities.

203.11 Statement with respect to vacation of rate orders under the Packers and Stockyards Act.

203.12 Statement with respect to providing services and facilities at stockyards on a reasonable and non-discriminatory basis.

Sec. 203.13 Statement with respect to voluntary filing of surety bonds under the Packers and Stockyards Act.

203.14 Statement with respect to advertising allowances and other merchandising payments and services.

203.15 Trust benefits under section 206 of the act.

203.16 Mailing of checks in payment for livestock purchased for slaughter, for cash and not on credit.

§ 203.1 Statement of general policy with respect to lamb buying practices.

(a) It has been brought to the attention of the Packers and Stockyards Administration, United States Department of Agriculture, that packers, dealers, and market agencies subject to the provisions of the Packers and Stockyards Act, are engaging in certain practices in connection with the purchase and sale of lambs in prominent lamb producing areas of the United States which are injurious to lamb producers. The practices relate to the discounting of prices by buyers in the purchase of heavy lambs.

(b) The following methods of buying lambs are considered to be unfair practices under the provisions of the Packers and Stockyards Act:

(1) A buyer limiting payment for lambs to a designated average weight and requiring the lamb producer to give any additional weight to the buyer without payment.

(2) A buyer subtracting weight from the true and actual weight of the lambs.

(c) The practices in paragraph (b) of this section result in misleading market information and the issuance of incorrect scale tickets, invoices, and other documents relating to the purchase and sale transaction. It is believed the provisions of the Packers and Stockyards Act, under Title II and Title III, prohibit all packers, dealers, and market agencies subject to the provisions of the Act from engaging in these practices.

(d) In addition, the Packers and Stockyards Administration has received complaints from lamb producers with respect to the practice of lamb buyers discounting prices paid for lambs where the weight of the

ale operators to be competent.
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all employ only competent
ood character and known
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38 Stat. 721, 42 Stat. 168, as
S.C. 222, 15 U.S.C. 46)
Jan. 23, 1971)

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38 Stat. 721, 42 Stat. 168, as
S.C. 222, 15 U.S.C. 46)
Jan. 23, 1971)

porting and recordkeeping re-
the revised regulations have
by the Office of Manage-
get in accordance with the
s Act of 1942.

Each packer or live poultry dealer or
handler shall, before the close of 5
business days following slaughter of
any poultry purchased, transmit or de-
liver to the seller of such poultry or
his duly authorized agent the full
amount of the purchase price thereof,
unless otherwise expressly agreed be-
tween the parties before the purchase
of the poultry. Any such agreement
shall be disclosed in such purchaser's
records and on all accountings or
other documents issued by such pur-
chaser relating to the transaction.

(18 FR 4384, Feb. 14, 1973)

§ 201.200 Sale of livestock to a packer on
credit.

(a) No packer whose average annual
purchases of livestock exceed \$500,000
shall purchase livestock on credit, and
no dealer or market agency acting as
an agent for such a packer shall pur-
chase livestock on credit, unless: (1)
Before purchasing such livestock the
packer obtains from the seller a writ-
ten acknowledgment as follows:

On this date I am entering into a written
agreement for the sale of livestock on credit
to _____, a packer, and I under-
stand that in doing so I will have no rights
under the trust provisions of section 206
of the Packers and Stockyards Act, 1921, as
amended (7 U.S.C. 196, Pub. L. 94-410), with
respect to any such credit sale. The written
agreement for such selling on credit

Covers a single sale.

Provides that it will remain in effect until
(date).

Provides that it will remain in effect until
canceled in writing by either party.
(Omit the provisions not applicable.)

Date _____

Signature _____

(2) such packer retains such ac-
knowledgegment, together with all other
documents, if any, setting forth the
terms of such credit sales on which
the purchaser and seller have agreed,
and such dealer or market agency re-
tains a copy thereof, in his records for
such time as is required by any law, or
by written notice served on such
person by the Administrator, but not
less than two calendar years from the
date of expiration of the written

if a promotion item purchased from a sponsoring packer during a specified period of time. At the end of such specified time, the accumulated points were redeemed by persons connected with the customer accounts for prizes and gifts selected from a gift catalog supplied by the sponsoring packer.

(b) Investigation by the Packers and Stockyards Administration has disclosed that sales promotion programs of the type in question, which are based on the giving of gifts to retail food store customer accounts or to the employees or agents of such customer accounts, constitute a marketing practice under which sellers tend to compete in the sale of their products on the basis of inducements offered to their customers in the form of personal gifts, rather than on the basis of the merits and prices of the competing products, and may result in (1) the lessening of competition by unduly hampering sales of competing products, and (2) the making or giving of undue or unreasonable preferences or advantages.

(c) It is the view of the Packers and Stockyards Administration that sales promotion programs, which are found in fact to produce any of the enumerated or similar results, constitute violations of section 202 of the Packers and Stockyards Act (7 U.S.C. 192), and that packers subject to the Act should voluntarily discontinue sponsoring or conducting any such program. In the future, if any packer sponsors or conducts a sales promotion program of the type in question, consideration will be given by the Packers and Stockyards Administration to the issuance of a complaint charging the packer with violation of section 202 of the Act. In the formal administrative proceeding initiated by any such complaint, the Judicial Officer of the Department will determine, after full hearing, whether the packer has violated the Act and should be ordered to cease and desist from continuing such violation.

(Secs. 202, 407; 42 Stat. 169; 7 U.S.C. 192, 228)

(27 FR 11254, Nov. 15, 1962; 27 FR 11547, Nov. 24, 1962, as amended at 32 FR 7700, May 26, 1967)

position of certain records kept by packers.

(a) Section 401 of the Packers and Stockyards Act (7 U.S.C. 221) in part, that every packer, such accounts, records, and data as fully and correctly of transactions involved in his including the true ownership business by stockholding or. This section contains no provision to the period of time such records to be retained. Apparently contemplated that records made or kept by a packer transactions involved in his should be retained for such time as may be necessary the Packers and Stockyard, tration a reasonable opportunity to examine such records in connection with its administration of the Act.

(b) In the course of investigations under the Act, the Packers and Stockyards Division has found that the practice varies among packers with respect to the retention of records made or kept by packers in connection with transactions involved in their business. Some packers retain such records for extended periods of time, while others dispose of their records after much shorter periods of time. For this reason the Packers and Stockyards Administration has formulated the following statement adopted for the guidance of packers. The following statement sets forth its views as to periods of time after which certain specified records relating to the purchase or sale of stock, meat, meat food products, stock products in unmarketable form, poultry or poultry products should be disposed of.

(c) It is the view of the Packers and Stockyards Administration set forth in paragraphs (c) (1), (2) and (3) of this section, are reasonable periods of time after which packers, in accordance with the provisions of the Packers and Stockyards Act, may dispose of records specified in paragraphs (c) (1), (2) and (3). The Packers and Stockyards Administration recognizes that packers do not find it feasible to make or keep all such records in order to comply with the provisions of the Act. On the other

weight. One example of this practice where a packer buys a lot of lambs at \$21 per hundredweight, provided that the average weight is not in excess of 105 pounds, but requires a discount of the \$21 per hundredweight price at the rate of 25 cents for each pound in excess of the 105 pounds. This type of buying practice results in the final sales price being made subject to a contingency based upon average weight. Where the weight is above the specified weight, the purchase price is not definite at the time the agreement to purchase is entered into, the discount to be applied is unknown until the lambs are weighed, and the final sales price, upon which payment to the lamb producer is based, can only be ascertained by weighing the lambs to the buyer. It is believed that this buying practice should be discontinued. This method of buying lends itself to unfair and deceptive practices under the Act since it has the tendency to mislead the producer with respect to the final sales price and can be used by a buyer to force a producer to take an unwarranted discount.

(Sec. 407(a), 42 Stat. 169; 72 Stat. 1750, 7 U.S.C. 228(a), 9 CFR 201.3)

[24 FR 4210, May 26, 1959, as amended at 29 FR 4645, Apr. 1, 1964; 32 FR 7700, May 26, 1967]

§ 203.2 Statement of general policy with respect to the giving by meat packers of meat and other gifts to Government employees.

(a) In recent months, the Department has received information, confirmed by investigation, that a number of packers subject to the Packers and Stockyards Act have made gifts of meat to Government employees responsible for conducting service activities of the Department. Such gifts have the implications of fraud, even if not made specifically for the purpose of influencing these employees in the performance of their duties.

(b) It is a violation of the Meat Inspection Act for any person, firm, or corporation to give to any employee of the Department performing duties under such act anything of value with intent to influence such employee in

employees to receive from any person, firm, or corporation engaged in interstate or foreign commerce any gift given with any intent or purpose whatsoever (21 U.S.C. 90). Under the Federal meat grading regulations, the giving or attempting to give by a packer of anything of value to any employee of the Department authorized to perform any function under such regulations is a basis for the withdrawal of Federal meat grading service (7 CFR 53.13). The receiving by an employee of the Department of any gift from any person for whom grading, inspection, or other service work is performed is specifically prohibited by Departmental regulations.

(c) Upon the basis of paragraphs (a) and (b) of this section, it is the view of the Department that it is an unfair and deceptive practice in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. 192(a)) for any person subject to the provisions of Title II of said Act to give or offer to give meat, money, or anything of value to any Government employee who performs inspection, grading, reporting, or regulatory duties directly relating to the purchase or sale of livestock or the preparation or distribution of meats, meat food products, livestock products in unmanufactured form, poultry or poultry products.

(Sec. 407, 42 Stat. 169; 7 U.S.C. 228; 9 CFR 201.3)

[26 FR 710, Jan. 25, 1961; 29 FR 4081, Mar. 28, 1964]

§ 203.3 Statement with respect to meat packer sales promotion programs.

(a) During the past several years, a number of packers subject to the Packers and Stockyards Act, 192], as amended (7 U.S.C. 181 et seq.), have sponsored meat and meat food product sales promotion programs under which valuable gifts ranging from articles of clothing to automobiles and outboard boats and motors have been offered and given to their retail food store customer accounts and to the employees of such customer accounts. Many of the promotion programs in question have been based upon a "point system" whereby so-called "participating customer accounts"

the purchaser, and may not wish to authorize a representative to receive such a check; or for other reasons such a seller may prefer that such a purchaser make payment by mailing a check within the time limit as prescribed in section 409(a) of the Act. In cases when the seller does not intend to be present, he may use the following form of notification to the purchaser:

I do not intend to be present at the point of transfer of possession of livestock sold by me to (name of packer, market agency, or dealer) for the purpose of receiving a check in payment for such livestock.

I hereby direct (name of packer, market agency, or dealer) to make payment for livestock purchased from me, by mailing a check for the full amount of the purchase price before the close of the next business day following the purchase of livestock and transfer of possession thereof or, in the case of a purchase on a "carcass" or "grade and yield" basis, not later than the close of the first business day following determination of the purchase price.

This does not constitute an extension of

dealer). This is subject to cancellation by me at any time, and if not cancelled by (date), it shall terminate on that date.

If the seller, for reasons other than not being present to receive payment, prefers to have the packer, market agency, or dealer make payment by mailing a check within the time limit as provided in section 409(a), he may use the above form but should not include the statement in the first sentence that he does not intend to be present.

(b) The Packers and Stockyards Administration believes that such an agreement would not constitute an extension of credit within the meaning of section 206 of the Act because it would not give the purchaser any more time to issue a check than is provided in section 409(a).

(Sec. 401, 42 Stat. 168 (7 U.S.C. 221); sec. 407, 42 Stat. 169 (7 U.S.C. 228); sec. 409, as added by sec. 7, 90 Stat. 1250 (7 U.S.C. 228b); 7 CFR 2.17, 2.54; 42 FR 35625)

(42 FR 49929, Sept. 28, 1977)

...program is not offered to all persons if offered, was not usable or suitable, or was otherwise administered in a discriminatory manner.

11 *Customer's liability.* A customer, subject to the Packers and Stockyards Act, who knows, or should know, that he is receiving payments or services which are not available on proportionally equal terms to his competitors engaged in the resale of the same packer's products may be in violation of the provisions of the Act. Also, customers (subject to the Packers and Stockyards Act) that make unauthorized deductions from purchase invoices for alleged advertising or other promotional allowances may be proceeded against under the provisions of the Act.

Example 1: A customer subject to the Act should not induce or receive an allowance in excess of that offered in the packer's advertising plan by billing the packer at "vendor rates" or for any other amount in excess of that authorized in the packer's promotion program.

12 *Meeting competition.* A packer charged with discrimination under the provisions of the Packers and Stockyards Act may defend his actions by showing that the payments were made or the services were furnished in good faith to meet equally high payments made by a competing packer to the particular customer, or to meet equivalent services furnished by a competing packer to the particular customer. This defense, however, is subject to important limitations. For instance, it is insufficient to defend solely on the basis that competition in a particular market is very keen, requiring that special allowances be given to some customers if a packer is "to be competitive."

13 *Cost justification.* It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a packer to show that such payment or service could be justified through savings in the cost of manufacture, sale, or delivery.

The foregoing are guidelines which set forth the general views of the Packers and Stockyards Administration regarding advertising allowances and other merchandising payments and services. In a particular situation in which the Administrator believes that the Act has been violated in connection with such activities, a complaint may be issued instituting a formal administrative proceeding under the Act. In such a proceeding, the Administrative Law Judge or the Judicial Officer of the Department will determine, after opportunity for full hearing, whether the packer has in fact violated the Packers and Stockyards Act and should be ordered to cease and desist from continuing such violation.

U.S.C. 192, sec. 409, 49 Stat. 188, as amended, 7 U.S.C. 222; sec. 407(a), 42 Stat. 189, amended, 7 U.S.C. 222(a); sec. 6(g), 38 Stat. 721, 15 U.S.C. 46(g.)
[38 FR 21173, Aug. 6, 1973]

§ 203.15 Trust benefits under section 206 of the Act.

(a) Within the times specified under section 206(b) of the Act, the seller, to preserve his interest in the statutory trust, must give written notice to the packer and file such notice with the Secretary. One of the ways to satisfy the notification requirement under this provision is to make certain that notice is given to the packer within the prescribed time by letter, mailgram, or telegram stating:

(1) Notification to preserve trust benefits;

(2) Identification of packer;

(3) Identification of seller;

(4) Date of the transaction;

(5) Date of seller's receipt of notice that payment instrument has been dishonored (if applicable); and

(6) Amount of money due;
and to make certain that a copy of such letter, mailgram, or telegram filed with a P&SA Area Office or with P&SA, USDA, Washington, D.C. 20250, within the prescribed time.

(b) While the above information is desirable, any written notice which informs the packer and the Secretary that the packer has failed to pay for livestock is sufficient to meet the above-mentioned statutory requirement if it is given within the prescribed time.

(Sec. 401, 42 Stat. 188, (7 U.S.C. 221); sec. 407, 42 Stat. 189, (7 U.S.C. 228); sec. 409, as added by sec. 7, 90 Stat. 1250, (7 U.S.C. 228b); 7 CFR 2.17, 2.54; 42 FR 35826)

[42 FR 49929, Sept. 28, 1977]

§ 203.16 Mailing of checks in payment for livestock purchased for slaughter, for cash and not on credit.

(a) The Packers and Stockyards Administration recognizes that one who sells livestock to a packer, market agency, or dealer, who is purchasing for slaughter, may not intend to be present at the point of transfer of possession of the livestock, to receive payment, at the time a check in payment

CERTIFICATE OF SERVICE

Served the foregoing Brief of Respondent by mailing copies thereof to Attorneys for Appellants, this 9th day of November, 1981.

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