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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P. & S. Docket No. D-05-0018

In re: SAMMY and WENDY SIMMONS, d/b/a
PEOPLES LIVESTOCK OF CARTERSVILLE

Respondents

DEFAULT DECISION AND ORDER

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.), (hereinafter “the Act”). On July 14, 2005, a Complaint was issued against Respondents alleging that Respondents sold livestock on a commission basis, and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

The Complaint further alleged that Respondents failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43), in the amount of \$ 5,902.20, in violation of section 312(a) (7 U.S.C. §§ 213(a)) and section 201.43 of the regulations (9 C.F.R. § 201.43).

On August 15, 2005, Respondents' Answer was filed. Respondents stated in their Answer, *inter alia*, that:

We do operate People Livestock of Cartersville as a sole proprietorship in the state of Georgia and have done so since October 2000. We are a market agency registered with the Dept. Of Agriculture and sell livestock on a commission basis. We do admit our previous bank, Unity National Bank, returned the nine checks listed on page 2 of the complaint totaling \$5,902.20 unpaid.

Based on the admissions contained in Respondents' Answer,¹ Complainant has moved for a decision without hearing or further procedure in this case pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (the "Rules of Practice"). *See* 7 C.F.R. § 1.130 *et seq.* *See In re: Pryor Livestock Market, Inc., Jim W. Deberry and Douglas A. Landers*, 56 Agric. Dec. 843, 845 (January 7, 1997).

Respondents have admitted in their Answer the material allegations of the Complaint, specifically that Respondents sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented. Respondents further admitted in their answer that they failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R.

¹ Sammy and Wendy Simmons both signed the answer.

§ 201.43), in the amount of \$ 5,902.20, the exact dollar amount listed in the disciplinary complaint filed against Respondents on July 14, 2005.

In proceedings before the Secretary, it is unnecessary to hold a hearing when there is no material fact in dispute, and no valid defense is presented. *See, e.g., Veg-Mix, Inc. v. United States Department of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987). No material fact is at issue in this case, and the Secretary has consistently held that both the issuance of insufficient funds checks in purported payment, and failure to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis within the time period required by Section 201.43 of the regulations, are unfair and deceptive practices in violation of 312 (a). *In re: Joshua L. Martin d/b/a Martin Livestock*, 64 Agric. Dec. 919 (January 11, 2005); *In re: Sarcoxie Community Sales, Inc.*, 47 Agric. Dec. 1290, 1300 (1988); *In re: C.J. Edwards*, 37 Agric. Dec. 1880 (1978).

Respondents' primary defenses to the factual allegations in this case are that the violations were not willful and that the violations were outside of Respondents' control. These defenses are without merit.

Under the Administrative Procedure Act (APA) when license suspension or termination is a sanction, the violator must have notice and an opportunity to cure except in cases in which the violating action is willful. 5 U.S.C. § 558(c). Notice is not required in this proceeding because Complainant does not seek the suspension or termination of Respondents' registration; however, assuming, *arguendo*, that Complainant did seek suspension or termination of Respondents' registration in this case, notice of the violations is not required here because Respondents have previously received notice in writing of the violations with opportunity to

demonstrate or achieve compliance. *See* 5 U.S.C. § 558(c); *In re: Jeff Palmer*, 50 Agric. Dec. 1762, 1780 (1991). There, the Judicial Officer wrote:

It is clear that only one notice is required by section 9(b) of the Administrative Procedure Act [(5 U.S.C. § 558(c)], that is, once a licensee has been adequately warned, if he subsequently violates the Act, the agency may proceed to suspend his license without any further warning, notice, or opportunity to demonstrate informally that he did not violate the Act.

In re: Jeff Palmer 50 Agric. Dec. at 1782.

In a prior case, Respondent Sammy Simmons consented to the entry of a cease and desist order that restrained Respondent from paying for livestock with checks returned for non-sufficient funds. *See In re: Samuel Gail Simmons d/b/a Sammy Simmons Livestock*, P&S Docket No. D-94-15 (August 31, 1995). This prior order serves as notice to Respondents of the violation.²

Given the prior history of violation as evidenced by the above Consent Decision, Respondents' violations will be found willful within the meaning of that term in USDA precedent. *In re: D.W. Produce*, 53 Agric. Dec. at 1678 (a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute). The Respondents knew or should have known that they had insufficient funds to write checks in purported payment for the net proceeds due from the sale price of livestock on a commission basis and accordingly constitute violations that were willful. *See In re: D.W. Produce*, 53 Agric. Dec. at 1678.

Respondents Answer suggests that they issued insufficient funds checks and failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission

² *In re: Jeff Palmer*, 50 Agric. Dec. at 1782

basis, within the time period required by Section 201.43 of the regulations, because “they did not receive checks from the buyers quickly enough.” As the damage done to livestock producers is the same regardless of the reasons underlying Respondent’s payment violations, their claim is immaterial. *In re Great American Veal*, 48 Agric. Dec. 183, 211 (1989). The Judicial Officer has addressed similar excuses for non-payment under the Perishable Agricultural Commodities Act: “[e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered . . . willful.” *In re: The Caito Produce Co.*, 48 Agric. Dec. 602, 614 (1989).

Under the admitted facts of this case, Respondents have committed serious violations of the Act by issuing insufficient funds checks and failing to remit, when due, the amount of the net proceeds due from the sale price of livestock on a commission basis for livestock in nine transactions. *In re: Joshua L. Martin d/b/a Martin Livestock*, 64 Agric. Dec. 919 (January 11, 2005); *In re: Sarcoxie Community Sales, Inc.*, 47 Agric. Dec. 1290, 1300 (1988); *In re: C.J. Edwards*, 37 Agric. Dec. 1880 (1978).

Accordingly, Complainant’s motion will be granted and the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Sammy and Wendy Simmons, d/b/a Peoples Livestock of Cartersville (hereinafter “Respondents”), are partners in a partnership organized and existing under the laws of Georgia, doing business in the State of Georgia. Its business mailing address is P.O. Box 964, Cartersville, Georgia 30120. Respondents’ full names are Samuel Gail Simmons and Wendy Dawn Simmons.

2. Respondents are, and at all times material herein were:
 - (a) Engaged in the business of conducting and operating Peoples Livestock of Cartersville, a posted stockyard subject to the provisions of the Act;
 - (b) Engaged in the business of a market agency selling livestock on a commission basis;
 - (c) Registered with the Secretary of Agriculture as a market agency selling livestock on a commission basis.
3. Respondents, between the dates October 25, 2003 and November 1, 2003, sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.
4. Respondents failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis in the transactions described in paragraph 3, above, in the amount of \$ 5,902.20, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43).
5. Respondent Sammy Simmons previously consented to the entry of a Consent Decision which contained cease and desist provisions from further violations of the Act.
6. Respondents operate a relatively sizeable business, selling at least 200 head of livestock per week according to their Answer.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. For the reasons set forth in the above Findings of Fact, the Respondents willfully violated the provisions of the Act.

ORDER

1. The Respondents Sammy and Wendy Simmons, their agents and employees, directly or through any corporate or other device, in connection with all their activities subject to the Act, shall cease and desist from 1) issuing checks to consignors or shippers of such livestock which are returned unpaid by the bank upon which they were drawn because Respondents does not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented, and 2) failing to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43).

2. Pursuant to Section 312 (b) of the Act (7 U.S.C. § 213(b)), Respondents are assessed a civil penalty in the amount of \$6,000.00, payable to the United States Treasury within 60 days of the effective date of this Order. Such amount should be paid by certified check or money order and mailed to:

Christopher Young-Morales, Esquire
Office of the General Counsel
Room 2309 South
1400 Independence Avenue, SW
Washington, D.C. 20250

The payment should indicate that it is in reference to P & S Docket D-05-0018.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
April 18, 2007

PETER M. DAVENPORT

Copies to: Christopher Young-Morales, Esquire
Sammy Simmons
Wendy Simmons