

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY

Docket No. 13-0115

In re:

JOSEPHINE E. BONACCURSO, INC.,
d/b/a SALEM PACKING COMPANY,

and

SAMUEL BONACCURSO,

Respondents.

Appearances:

Thomas N. Bolick, Esq., for Complainant

Robert N. Agre, Esq., for Respondent

Before:

Janice K. Bullard, Administrative Law Judge

DECISION AND ORDER BY REASON OF DEFAULT

I. INTRODUCTION

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”; “Complainant”) against Josephine E. Bonaccurso, Inc., d/b/a Salem Packing Company and Samuel Bonaccurso (“Respondents”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”). The Complaint alleges that Respondents failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

Upon consideration of the record¹ in this matter, I find it appropriate to issue a Decision by Reason of Default².

II. ISSUES

1. Whether default should be entered in this matter;
2. Whether a hearing is necessary in this matter;
3. Whether Respondents failed to timely pay sellers for the purchase of livestock in willful violation of the Act;
4. Whether Respondents failed comply with the terms of a consent decision with PACA; and
5. If Respondents willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. STATEMENT OF THE CASE

1. Procedural History

On December 12, 2012, Complainant filed a complaint against Respondents with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On January 24, 2013, Respondents timely filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”).

The matter was assigned to me for adjudication. By Order issued February 1, 2013, I set deadlines for the exchange of evidence and submission of lists. On February 13, 2013, Respondents’ office manager, Nancy Norton, sent an email to my staff, expressing uncertainty about Respondents’ obligations. On February 20, 2013, Complainant moved for a Decision on the

¹ Complainant’s renewed motion for default refers to evidence that was exchanged with Respondent, but has not been filed. Accordingly, I have been unable to consider those documents and arguments. Ultimately, as I have determined that default is warranted, my consideration of all of Complainant’s evidence is not necessary, and does not prejudice either party.

² In this Decision and Order, I have renamed and denoted Complainant’s evidence as “CX-#” and Respondents’ evidence as “RX-#”. Because Respondents have not filed any evidence, I have designated certain pleadings and documented attached to Complainant’s renewed motion for default as Respondents’ evidence, sua sponte.

record by reason of default and moved to toll the deadlines for submissions. Because of the email, I held a telephone conference on February 28, 2013 with counsel for Complainant and Samuel Bonaccorso and Ms. Norton, representing Respondents. I encouraged Respondents to consult counsel, because Respondents had been represented by counsel in a prior matter that resulted in a consent decision. I also suspended filing deadlines and advised that Respondents needed to address Complainant's motion in accordance with the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings ("the Rules").

On March 13, 2013, Robert N. Agre, Esq., entered an appearance as counsel for Respondents. On March 28, 2013, Attorney Agre moved for leave to file an Amended Answer to the Complaint and objected to Complainant's motion for decision by reason of default. On April 2, 2013, Complainant objected to Respondents' motions. By Order issued April 4, 2013, I found good cause to defer ruling on Complainant's motion for a decision by reason of default. On April 12, 2013, Complainant moved for an Order tolling deadlines for exchanging evidence pending ruling on the motion for default. On April 29, 2013, Respondents filed a statement agreeing with Complainant's statement that by deferring ruling on the motion for default, I had ipso facto denied the motion.³

I held a conference call with the representatives for the parties, during which Respondents' counsel corroborated the information in Respondents' answer that they anticipated selling real property to satisfy the debts involved in this matter. On May 5, 2013, Complainant filed its list of exhibits and witnesses. Nothing was filed by Respondents and on August 20, 2013, I issued an Order to show cause why Complainant's motion for default should not be entered. On September

³ This pleading makes it clear to me that Respondents did not understand that a ruling on that motion would have been appealable to the Judicial Officer for the Secretary of Agriculture, an outcome that I hoped to avoid in consideration of the parties' representations of involvement in settlement negotiations. Moreover, as this Decision and Order establishes, I disagree that a deferral of a motion for default is tantamount to a ruling that denies the motion.

17, 2013, Respondents filed correspondence that advised that the sale of real property was imminent and that the proceeds would resolve outstanding balances due on transactions that Respondents had engaged in pursuant to the Act. On September 25, 2013, Complainant advised that Respondents' proposed use of sale proceeds was insufficient to satisfy all of the unpaid balances listed in its complaint. Complainant renewed its motion for default. Respondents have not responded to that pleading.

2. Statutory and Regulatory Authority

Pursuant to 7 C.F.R. § 1.136(c), the failure to file an answer within the time frame set forth by to 7 C.F.R. § 1.136(a) constitutes an admission of the allegations in the Complaint, and the failure to deny or otherwise respond to an allegation of the Complaint shall be deemed an admission of the allegation. In such instances, the entry of default against Respondents is appropriate.

7 C.F.R. § 1.139 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.139.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. Id. The deadline for making payment in full by the next business day can only be circumvented by express written agreement

between the buyer and the seller. Id. Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. See, S.S. Farms Linn County, 50 Agric. Dec. 476 (1991).

3. Summary of the Evidence

A. Documentary Evidence

- CX-1 GIPSA Schedule of Failure to Pay for Livestock
- CX-2 Outstanding Invoices for Fillippo Livestock Inc. dated 9/17/13
- RX-1 Letter dated 9/10/13 from Respondents' counsel
- RX-2 HUD Settlement sheet
- RX-3 Satisfaction of Debt, New Holland Sales Stables, Inc.; letter 9/10/13

4. Discussion

A. Whether Default Decision is Appropriate

In the instant matter, a non-attorney representative for Respondents filed a document that was deemed an Answer in accordance with the Rules applying to adjudications before the Secretary. The correspondence acknowledged outstanding debts that Respondents intended to satisfy by applying the proceeds from the sale of real estate against the outstanding balance. I infer from this response to the Complaint served upon Respondents that the debts related to the allegations of non-payment for livestock purchases covered by the Act and regulations.

In response to my pre-hearing Order, Respondents' non-attorney representative contacted my staff, asking for assistance in how to proceed. Complainant then filed a motion for default based

upon the Answer, which did not specifically address the allegations set forth in the Complaint, pursuant to 7 C.F.R. § 1.1.39. I conferred with the parties' representatives and suggested that Respondents engage counsel. I was aware that Respondents had been represented by counsel in a prior complaint that resulted in a consent decision. Within the time I had allowed Respondents to consult an attorney, Respondents' counsel entered an appearance.

I have given wide latitude to Respondents, upon the representations of counsel that the outstanding balances would be paid, and believing that the issue of civil money penalties could be negotiated between the parties. Respondents failed to file an amended Answer or provide timely status reports of the real estate sale, and when Ordered to show cause why Complainant's motion for default should not be entered, Respondents filed a letter with a HUD settlement sheet. No response was made to Complainant's renewed motion.

Respondents have had ample opportunity to explain their position and defend Complainant's recommended civil penalties. Respondents' pleadings have not satisfactorily done so.

Accordingly, I find that the gravamen of Complainant's allegations have been admitted by Respondent, thereby obviating the need for a hearing in this matter. I further find it appropriate to enter a decision on the record by reason of default.

B. Violations of the Act

There is no dispute that Respondents failed to timely pay for livestock purchases under the Act. The Secretary has concluded that Respondents who admit to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. In re: Hardin County Stockyards, Inc., 53 Agric. Dec. 654, 656 (1994). I adopt GIPSA's inventory of transactions that were not paid timely as required by the Act. CX-1.

The undisputed evidence establishes that Respondents violated the prompt payment provisions of the Act. I find that Respondents have willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. In re: Great American Veal, Inc., 48 Agric. Dec. 183, 202-203 (1989). Respondents withheld payments in multiple transactions, despite having previous notice from GIPSA that should have made it aware that their payment practices violated the Act. I conclude that Respondents continued practice of making late payments despite notice constitutes substantial evidence of willfulness.

C. Failure to Comply with Consent Decision

I take official notice that on February 28, 2013, Respondents entered into a Consent Decision with Complainant in Docket No. 11-0402, in which Respondents agreed to pay a civil money penalty to the Secretary of nineteen thousand and five hundred dollars (\$19,500.00) under the terms of a payment plan. Respondents have failed to comply with the terms of the plan and at least eleven thousand and five hundred (\$11,500.00) of the penalty remains unpaid. Respondents acknowledged an outstanding balance due to GIPSA in the Answer to the Complaint filed on January 22, 2013. The record establishes outstanding balances due on a previously agreed upon penalty for violations of the Act.

D. Sanctions

The record confirms that some of the outstanding balances have been satisfied by the proceeds of the sale of Respondents' real property. RX-2; RX-3. However, the record also establishes that balances remained unpaid. CX-2. In his status letter addressed to me and dated September 10, 2013, counsel for Respondents advised that Respondents had satisfied its debt to New Holland Sales

Stables Inc. (RX-3) and to Ken Emery. See, RX-1. Respondents did not address outstanding balances listed as due to Frank Fillippo on the schedule of unpaid livestock transactions compiled by GIPSA. CX-1.

Respondents have repeatedly failed to pay for livestock transactions in a timely manner. Respondents have failed to abide by an injunction to comply with the Act issued by the U.S. District Court for the District of New Jersey and have failed to comply with consensually agreed upon Orders by the Secretary to cease and desist from violating the Act. Respondents assured Complainant that the proceeds of the sale of real property would satisfy all outstanding balances due for livestock transactions and satisfy the civil money penalty they negotiated in an earlier case, but they have failed to satisfy the balances.

Complainant imposed a civil money penalty of \$462,000.00 in the instant matter. Considering the long history of Respondent's failure to comply with the Act, failure to comply with Orders of the Secretary and U.S. District Court, and failure to meet the terms of a consent decision in which Respondents negotiated civil money penalties and a payment schedule, I find that penalty appropriate. Complainant has not proposed suspending or otherwise hampering Respondents' ability to engage in the business of buying and selling livestock, despite its authority to do so. See, In re: Jeff Palmer, 50 Agric. Dec. 1762 at 1780 (1991). Respondents' actions also support the imposition of an Order directing them to cease and desist their practice of late payment.

IV. FINDINGS OF FACT

1. Respondent Josephine A. Bonaccurso, Inc., doing business as Salem Packing Company ("Salem"), is a corporation organized and existing under the laws of the State of New Jersey, with a principal place of business located in Salem, New Jersey.

2. Respondent Samuel Bonaccorso is an individual with a business mailing address in Salem, New Jersey, who is the president and owner of the corporate Respondent.
3. At all times pertinent hereto, Respondent Samuel Bonaccorso was responsible for the direction, management and control of the corporate Respondent, including responsibility for the violations of the Act and regulations described herein.
4. At all times pertinent hereto, Respondents were engaged in the business of operating Salem and engaged in the business of buying livestock in commerce for the purposes of slaughter and the manufacturing and preparation of meats and meat food products for sale and shipment in commerce.
5. At all times pertinent hereto, Respondents were engaged in business as a packer within the meaning of that term as defined in the Act and subject to the provisions of the Act and regulations.
6. On June 24, 2003, Salem and its then owner Anthony Bonaccorso entered into a consent decision in Docket No. 02-0015, which ordered Salem, its owners, agents and employees, and Anthony Bonaccorso, directly or through any corporate or other device, to cease and desist from: (1) failing to pay for livestock purchases when due; (2) failing to pay the full purchase price of livestock; and (3) failing to maintain an adequate bond.
7. On October 19, 2007, the U.S. District Court for the District of New Jersey entered a consent decision that permanently enjoined Salem and Samuel Bonaccorso from “violating the provisions of the Secretary of Agriculture’s June 24, 2003 Order”, the terms of which are set forth at ¶ 6, supra.
8. In 2011, GIPSA filed an administrative complaint against Respondents alleging that they had violated the Act and regulations by operating while insolvent on three occasions in 2010

and 2011, and by failing to pay, when due, for over \$700,000.00 worth of livestock in multiple livestock purchase transactions from the period commencing October, 2007, through July, 2010.

9. On December 16, 2011, the U.S. District Court of the District of New Jersey entered into a consent preliminary injunction that enjoined Respondents “from purchasing livestock except to the extent that such purchases comply with Section 409(a) of the Act, 7 U.S.C. § 228b(a).” The consent preliminary injunction ordered Respondents to comply with the specific language of the prompt payment provisions of the Act.
10. On February 28, 2012, Respondents entered into a consent decision in Docket No. 11-0402 that ordered them, their agents and employees, to cease and desist from purchasing livestock unless they delivered to the seller or his duly authorized representative the full amount of the purchase price, in U.S. currency or by wire transfer, by close of the next business day following said purchase and transfer of possession of the livestock; to cease and desist from failing to pay, when due, the full amount of the purchase price of livestock as required by section 409 of the Act, 7 U.S.C. § 228b(a); and to pay a civil penalty of nineteen thousand and five hundred dollars (\$19,500.00).
11. Respondents and Complainant entered into an “Understanding Regarding Consent Decision” with respect to Docket No. 11-0402, which required Respondents to make an initial payment towards the total penalty of seven thousand and five hundred dollars (\$7,500.00) within sixty (60) days of the entry of the consent decision and to pay the remaining twelve thousand dollars (\$12,000.00) in twelve (12) monthly payments of one thousand dollars (\$1,000.00), the first of which was due no later than May 1, 2012, and the last of which is due no later than April 1, 2013.

12. Respondents have paid only six thousand dollars (\$6,000.00) of the assessed civil penalty, and are eleven thousand and five hundred dollars (\$11,500.00) in arrears on that penalty.
13. During the period from January 23, 2012, through April 20, 2012, in twenty-one (21) transactions with three (3) different livestock sellers, Respondents purchased four hundred and sixty-two (462) head of livestock for five hundred and sixty-one thousand, five hundred and thirty-nine dollars and ninety-seven cents (\$561,539.97) and failed to pay when due, the full purchase price of the livestock within the time period required by the Act.
14. During the period from January 2, 2012, through May 22, 2012, in twenty-seven (27) transactions with five (5) different livestock sellers, Respondents purchased three hundred and eighty-one (381) head of livestock for three hundred thousand and eighty-eight, two hundred and forty-seven dollars and thirty-six cents (\$388,247.36) and failed to pay when due, the full purchase price of the livestock within the time period required by the Act.
15. During the period from April 9, 2012, through June 19, 2012, in fourteen (14) transactions with four (4) different livestock sellers, Respondents purchased one hundred (100) head of livestock for eighty-nine thousand, thirty-one dollars and seventy-nine cents (\$89,031.79) and paid the livestock sellers with non-certified checks.
16. In the summer of 2013, Respondents sold real property and applied four hundred and fifty-nine thousand dollars (\$459,000.00) against the balances it owed for unpaid livestock purchases.
17. The proceeds of the sale were not sufficient to satisfy all of the balances due for unpaid livestock transactions.
18. The proceeds of the sale were not sufficient to satisfy the outstanding balance of the civil money penalty that Respondents had agreed to pay GIPSA.

V. CONCLUSIONS OF LAW

1. Respondents have willfully violated 7 U.S.C. §§ 192(a) and 228b of the Act and regulations set forth at 9 C.F.R. §201.43, by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.
2. Respondents have failed to comply with the terms of consent decisions and court injunctions by continuing to fail to pay the full amount of the purchase price for livestock within the time period required by the Act.
3. Respondents failed to comply with the terms of a consent decision by making payments by other than by cash, wire transfer, or certified check, and by failing to pay civil money penalties timely.
4. Sanctions are appropriate to deter Respondents and others from willfully failing to make prompt payments pursuant to 7 U.S.C. §193(b) and from failing to comply with the terms of consent decisions.

ORDER

Respondents Josephine E. Bonaccorso, Inc., d/b/a Salem Packing Company and Samuel Bonaccorso, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist purchasing livestock except under the condition that Respondents must deliver to the seller or his duly authorized representative the full amount of the purchase price by payment in United States currency, by certified check, or by wire transfer before the close of the next business day following the purchase of said livestock and transfer of possession. This condition shall continue until application to the Packers & Stockyards Administration for a supplemental order modifying said condition.

Respondents, Josephine E. Bonaccorso, Inc., d/b/a Salem Packing Company and Samuel Bonaccorso, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from failing to pay the full purchase price of livestock before the close of the next business day following each purchase of livestock, as required by sections 2020(a) and 409 of the Act (7 U.S.C. §§ 192(a) and 228b).

Pursuant to 7 U.S.C. § 193(b), Respondents are hereby assessed, jointly and severally, a civil penalty in the amount of four hundred and sixty-two thousand dollars (\$462,000.00). Respondents shall send a certified check or money order made payable to the “U.S. Department of Agriculture” and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335 within sixty (60) days of the effective date of this Order. Respondents shall include on the payment instrument a reference to this case, Docket No. 13-0115.

In addition to the civil penalty assessed in this default Decision and Order, Respondents shall continue to be liable for the remainder of the nineteen thousand and five hundred dollar (\$19,500.00) civil penalty assessed against them in the consent decision in Docket No. 11-0402. Respondents shall make full payment of the nineteen thousand and five hundred dollar (\$19,500.00) civil penalty on or before April 1, 2013, per the terms of the consent decision executed on February 28, 2012.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 25th day of November, 2013, in Washington, D.C.

Janice K. Bullard
Administrative Law Judge