UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-01-0023
Baiardi Chain Food Corp.	)	
	)	
Respondent	)	
	)	

Decision

In this decision, I find that Respondent Baiardi Chain Food Corp. (Baiardi) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities.

Procedural History

On August 1, 2001, a complaint was issued by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint charged respondent with failure to make full payment promptly to 67 sellers in the amount of over $830,000 for 343 lots of perishable agricultural commodities. Respondent filed an answer, denying the violations, on October 15, 2001. On May 31, 2002, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be issued. In its July 17, 2002 Opposition to the motion, Respondent contended that it was entitled to a

hearing because there were contested issues of fact, and because it had "made payment" and because written agreements took the dispute "outside the jurisdiction of the PACA." Former Chief Judge James Hunt denied the Motion and the matter was set for hearing.

After several postponements and the eventual reassignment of the case to the undersigned judge, a hearing was conducted on February 2, 2004, in New York City. Complainant was represented by David Richman, and Respondent was represented by Paul Gentile. The hearing was completed on May 25, 2004.[1] Both parties subsequently filed briefs.

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948 until its license terminated when it failed to pay the annual renewal fee on June 8, 2001. David Axelrod owned respondent from at least 1998 until the license terminated. CX 1. Complainant received a number of reparation complaints, generated by Baiardi's alleged nonpayment for produce, between October 2000 and January 2001, and so began an investigation of Baiardi in early January 2001. Carolyn Shelby, a marketing specialist with Complainant, personally conducted the investigation and met with Mr. Axelrod on January 8, 2001. Tr. 38. At her request, he produced an "entire sack of unpaid invoices," Tr. 41, and confirmed that each was a "past due and unpaid produce transaction." Id. These unpaid invoices involved 67 different companies and 343 separate transactions. CX 5-71, and totaled over $830,000. Axelrod also printed out for Ms. Shelby a copy of Baiardi's accounts payable aging. CX 72. After Ms. Shelby copied the records and

[1] At the hearing, Complainant presented the testimony of four witnesses. Respondent called no witnesses. Complainant's exhibits (CX) 1-3, 5-72, 74-76, and 78 were admitted. Respondent's exhibits (RX) 1-50, 150-154 were also admitted.

returned the originals to Mr. Axelrod, he confirmed that Respondent's unpaid invoice records were accurate. Tr. 41-42.

Ms. Shelby conducted two brief follow-up investigations in March 2002 and November 2003, where she contacted several of Respondent's creditor companies to determine whether Respondent still owed them money. Tr. 64, CX 74, 77. She was told by employees or agents of nine companies in March 2002 that Respondent still owed them over $342,000, and in November 2003 was told by employees or agents of seven companies that Respondent still owed them over $166,000 in unpaid produce transactions. Tr. 65, CX 74, 77.

Many of the creditor companies eventually received partial payment. Thus, while at the time of the initial investigation by Ms. Shelby, Agrexco (USA), Ltd. was owed over $21,000, a portion of the debt, $11, 791.45, was paid to Agrexco in 2002. Tr. 14-15, 24-25. This amount was paid by Summit Business Capital Corp., which apparently had the rights to Respondent's receivables, and was involved in using Respondent's remaining assets to pay off part of Respondent's debt now that Respondent was no longer engaged in the produce business. Tr. 14-15. The remainder of the debt has never been paid.

Ira Nathel testified that his company, Wishnatski & Nathel, agreed on January 17, 2001, to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. He testified that this settlement was appropriate because he knew that Respondent was having financial difficulties and that if he did not accept foregoing half the debt he thought he would not get paid anything by respondent. Tr. 121-26, CX 78. The agreement between the two companies stated that "Baiardi is

closing its doors for business." CX 78. The amount owed was approximately $30,000, of which just under $15,000 was paid in accord with this agreement.

At the hearing, Respondent chose to call no witnesses, but rather essentially presented its case through cross-examination of Complainant's witnesses. All of Respondent's exhibits were likewise admitted through cross-examination, so I did not have the benefit of any direct Respondent testimony as to the preparation and meaning of these documents. Most of the documents I admitted were similar to CX 78, in that they were a final settlement of claims against Respondent based on Respondent's representation that it was going out of business, and constituted settlements in the general range of 50 cents for each dollar owed by Respondent to each creditor with whom such an agreement was executed. While counsel for Complainant voiced a continuing objection to my admitting these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents) I have no basis to doubt that they do constitute agreements with numerous creditors to settle claims for a reduced amount in recognition that that was the best deal they could get from Respondent under the circumstances.[2]

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

[2] Interestingly, representatives from several of the creditors told Ms. Shelby that the original amount listed in the complaint were still due, even though in at least several of the cases, the matter had been compromised and presumably paid off (at 50 cents on the dollar) long before the disciplinary case was even filed by PACA.

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b of this title"

> the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

Findings of Fact

1. Baiardi Chain Food Corp. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 114748 from June 8, 1948 until the license terminated on June 8, 2001, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Ms. Carolyn Shelby, a marketing specialist for Complainant, went to Respondent's place of business on January 8, 2001 and requested copies of various of Respondent's business records. David Axelrod, president of Respondent, provided the requested records to Ms. Shelby on January 11, 2001.

3. The records, which Axelrod represented were accurate, demonstrated that between the period March 2000 and January 2001 Respondent had received and not paid for 343 lots of perishable agricultural commodities from 67 produce sellers, and that the amount owed was over $830,000.

4. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers by paying 50 cents for each dollar owed. At least two other accounts were settled through court dispositions. There is no evidence that any sellers were paid, either in a timely fashion or otherwise, the original amounts owed at the time of the purchase of the perishable agricultural commodities.

Discussion

Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 67 sellers of produce listed in the complaint. Respondent's contentions that the agreements to settle claims for a reduced amount are the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the statute and the clear, long-standing case law that governs these matters. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful, flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

Respondent failed to timely pay any of the 67 sellers the initial agreed upon purchase price for perishable agricultural commodities. There is no legitimate dispute that Respondent failed to pay 67 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Each of the 67 sellers was identified by Mr. Axelrod as having unpaid invoices at the time of Ms. Shelby's investigation. Respondent has demonstrated that six of the 67 creditors signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims, and that at least two other creditors were resolved by other court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other companies to which it owed payment for produce, under similar terms. Respondent contends that these agreements to accept reduced

payments on a delayed basis, made after it had been delinquent in its produce payments and in the face of its decision to close the business, take these transactions out of the scope of the PACA. Resp. Br. at 4-5.

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is In re Scamcorp, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in Scamcorp that he was distinguishing "slow-pay" cases, where generally only civil penalties would be assessed, from "no-pay" cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve "full compliance" with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case. Id., at 548-9.

Actions to change the terms and conditions of payment subsequent to the initial transaction do not negate the PACA's prompt payment provisions. While Respondent contends that the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in In re Full Sail Produce, 52 Agric. Dec. 608, 619 (1993), " . . . it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to settling within ten days of the transaction, the regulations specify that such terms must be negotiated prior to the transaction, and be in writing. 7 C.F.R. § 46.2 (aa)(11). Respondent's contention that a creditor's choice to accept half-payment, when the other choice is to accept no payment at all, renders the situation not governable

by the PACA and the debtor not subject to disciplinary action is not consistent with either the PACA or its underlying regulations, nor is it consistent with the case law. Indeed, the type of situation faced by Respondent's creditors—accepting half payment or nothing—is just the type of situation that the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that because Agrexco and Ocean Mist may have received partial payment of the debt owed them by Respondent as a result of litigation of these claims due to their non-payment, that the prompt payment provisions of the PACA cease to apply to those transactions.

The unpaid balance is substantial. The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original amount that was due for the perishable produce. Witnesses testified that at the time of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over $830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar,

Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Respondent's Violations are Willful, Flagrant and Repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. In re. Frank Tambone, Inc., 53 Agric. Dec. 703 (714-15)(1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA," Id., and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. In re. N. Pugatch, Inc., 55 Agric. Dec. 581 (1995), Scamcorp, supra. Both Pugatch and Scamcorp, as well as the other cases cited by Complainant in its opening brief at page 15, involved fewer transactions with fewer sellers for a lesser amount of money than is involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 10-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 343 occurrences.

Given the nature and number of the violations, a significant penalty is warranted. Normally, under the Scamcorp rule, license revocation would be one aspect

of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Baiardi Food Chain Corp. has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 8th day of April, 2005

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MARC R. HILLSON
Chief Administrative Law Judge