

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-05-0018
)	
Coronet Foods, Inc.,)	
Wheeling, West Virginia,)	
)	
And)	
)	
Coronet Foods, Inc.,)	
Salinas, California,)	
Respondents)	Proposed Decision Without
)	Hearing Based on Admissions

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a - §499f) (“PACA”), instituted by a complaint filed on August 12, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”) alleging that Respondents Coronet Foods, Inc. of Wheeling West Virginia (“Coronet East”), and Coronet Foods, Inc., of Salinas, California (“Coronet West”), (collectively “Respondents”) have willfully violated the PACA.

The Complaint alleged that during the period July 2003 through October 2004, Coronet West failed to make full payment promptly to twenty-one sellers of the agreed purchase prices in the total amount of \$2,235,283.80 for 565 lots of perishable agricultural commodities, which Coronet West purchased, received and accepted in interstate or foreign commerce or in contemplation of interstate or foreign commerce. In addition, the Complaint alleged that during the period September 2003 through October 2004, Coronet East failed to make full payment promptly to twenty-one sellers of the agreed purchase prices in the total amount of

\$3,028,297.76 for 557 lots of perishable agricultural commodities, which Coronet East purchased, received and accepted in interstate or foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (“Rules of Practice”) *See* 7 C.F.R. § 1.139.

The Complaint was served upon Respondents on Aug. 17, 2005. Respondents requested an extension of the time to answer the Complaint on September 1, 2005, and Respondents were granted the extension on September 2, 2005. On September 26, 2005, through their attorneys, Respondents filed an Answer and Affirmative Defenses to the Complaint (“Answer”).

Respondent’s Answer denied violations of the PACA while admitting that they owed on October 10 and October 11 2004 the amounts set forth in the Complaint (*see* Answer ¶¶ III-V) and that only some of the produce sellers had been paid as part of the Respondent’s pending bankruptcy cases. (*See* Answer ¶¶ III-IV., pg. 3 ¶ 8, pg. 4 ¶ 6.) Respondent attributes any untimely payments and unpaid balances owed to remaining sellers to the fact that many of the suppliers had extended payment terms. (*See* Answer ¶¶ III-IV, First Affirmative Defense pg. 2)

On December 18, 2005, Complainant filed a “Motion for Decision Without Hearing in Based on Admissions.” Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant’s motion is hereby granted and the following decision is issued in the disciplinary case against Respondents Coronet East and Coronet West without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

In this case, Respondent has failed to deny or otherwise respond to the jurisdictional allegations in the complaint, including an allegation that it was operating subject to a PACA license at the time of alleged violations. Pursuant to the Rules of Practice, if an answer fails to deny or otherwise respond to specific complaint allegations, they are deemed admitted. *See* 7 C.F.R. § 1.136(c).

Respondents, in the Answer at paragraphs III and IV, admitted that some of the produce suppliers had been paid in connection with their respective bankruptcy cases. Coronet West additionally asserts that the produce sellers listed in the Complaint were paid in connection with California Bulk Sales Law. (Answer at ¶ IV.) The Respondents, in their individual Bankruptcy proceedings, have reached settlements with the PACA produce sellers that were approved by the bankruptcy court. Section 2(4) of the PACA requires produce dealers to make full, prompt payment for fruit and vegetable purchases at the agreed contract prices to all of their sellers, usually within ten days of acceptance unless the parties agreed in writing to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa). In both cases, Respondents' bankruptcy settlements have not resulted in full payment to the all of the produce sellers listed in the Complaint.

In Coronet East's Bankruptcy proceeding in the Northern District of West Virginia Bankruptcy Court, case no. 04-03822, Coronet East admitted through its June 16 account report that for eleven produce sellers Coronet East admitted that it owed \$984,027.46 in the Answer, only \$712,014.61 was paid in settlement, leaving a remaining \$272,012.85 in unpaid produce to those eleven produce sellers. (*See* Answer ¶ III; PACA Account Report, *In re: Coronet Foods, Inc.*, Case No. 5:04-bk-03822 (June 16, 2005) (ECF Docket No. 402).) In addition, for the

following produce sellers Coronet East admitted that it owed the amounts listed in the Complaint, but has failed to make any payment:

<i>Seller Name</i>	<i>Produce Acceptance Dates</i>	<i>No. of Lots</i>	<i>Amount Unpaid</i>
The Sanson Co.	03/31/04	1	\$ 2,812.50
The Herbal Garden	05/06/04	1	\$ 120.00
Weis Buy Farms	07/22/04 – 08/20/04	6	\$ 80,245.80
Murakami Produce	09/07/04 – 09/18/04	6	\$ 32,376.75
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Total		14	\$115,555.05

In Coronet West’s Bankruptcy proceeding in the Northern District of West Virginia Bankruptcy Court, case no. 05-00151, Coronet West admitted in its Monthly Operating Report dated August 9, 2004 that for fourteen produce sellers Coronet West admitted it owed \$1,915,587.54 in the Answer, only \$1,613,512.54 was paid in settlement, leaving a remaining \$302,075.00 in unpaid produce. (See Answer ¶ IV; Monthly Operating Report for the Period July 1, 2005 through July 31, 2005 *In re: Coronet Foods, Inc. – Western Division*, Case No. 5:05–bk-00151 (August 9, 2004)(ECF Docket No. 188).) In addition, for the following produce sellers Coronet West admitted that it owed the amounts listed in the Complaint, but Coronet West has failed to make any payment:

<i>Seller Name</i>	<i>Produce Acceptance Dates</i>	<i>No. of Lots</i>	<i>Amount Unpaid</i>
Los Angeles Salad	10/23/04 – 06/04/04	9	\$ 1,890.00
Andrew Smith	05/01/04 – 07/08/04	27	\$ 125,663.59
Taylor Farms	05/18/04 – 09/11/04	3	\$ 2,895.40

Total	103	\$130,448.99
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It has long been held that bankruptcy discharge does not prevent disciplinary enforcement on debts that were the subject of the bankruptcy. *See, e.g., In re The Caito Produce Co.*, 48 Agric. Dec. 602, 623 (1988) (“Bankruptcy law expressly preserves the right of the Secretary [of Agriculture] to revoke a bankrupt’s license under the Perishable Agricultural Commodities Act because of debts dischargeable in bankruptcy”) In this case, the admissions in the Answer and the bankruptcy filings demonstrate that Respondents have failed to make full payment as required by the PACA.

In summary, Coronet East failed to pay \$387,567.90 to fifteen of its produce creditors and Coronet West failed to pay \$432,523.99 to seventeen of its produce creditors. In total, the bankruptcy documents show that Respondents failed to pay \$820,091.89 to thirty-two of their produce creditors.

The Department’s policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “no-pay” case. In any “no-pay” case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

See In re Furr's Supermarkets Inc., 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)). Here, Respondents admit that they have failed to pay fully thirty-two of the sellers listed in paragraphs III and IV of the Complaint in the amount of \$790,091.89 for 751 lots of perishable agricultural commodities that Respondents purchased, received and accepted in interstate commerce during the period of July 2003 to September 2004. Respondents have each failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA and do not assert that they will achieve full compliance with the PACA by making full payment within 120 of the service of the complaint. Nor do Respondents assert that they will pay these sellers by the date of the hearing. This is a “no-pay” case.

The only appropriate sanction in a “no-pay” case is license revocation, or where there is no longer any license to revoke, as is the case here, the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violation of the PACA and publication of the facts and circumstances of the violations. *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. at 386 - 387. A civil penalty is not appropriate in this case because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA” and it would not be consistent with the Congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid. *See In re Scamcorp, Inc.*, 57 Agric. Dec. at 570 - 571. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See 7 C.F.R. § 1.139.*¹

¹ A hearing is only required where an issue of material fact is joined by the pleadings. *See 7 C.F.R. § 1.141(b).*

Respondents have defended on several grounds that are without merit.

First, Respondents have defended that “Through custom and practice, Coronet East and Coronet West historically and routinely paid PACA payables in accordance with terms agreed to by Coronet East’s produce vendors. There was a well-established course of dealings between the Respondents and their suppliers that supported payment on terms other than normally required by PACA.” (Answer at pg. 2.) This defense is without legal merit because the regulations require that payment agreements for terms other than those specified in the regulations must be in writing before the transaction. 7 C.F.R. § 46.2(aa)(5), (11). Oral and implied agreements are not a possible defense to disciplinary action under the PACA because the agency has specified times for payment through the administrative rulemaking. *Caito Produce Co.*, 48 Agric. Dec. at 610 (citing 37 Fed. Reg. 14,561 (1972) and 49 Fed. Reg. 45,735, 45,740 (1984)). Respondents have failed to assert that the agreements were in writing before the transactions at issue as the regulations require, and therefore Respondent’s “custom and practice” defense fails.

Second, Respondents have defended that their bankruptcy cases have discharged the debts associated with the Complaint. (Answer at pg. 3-4 ¶ 8, pg. 4 ¶ 6.) Bankruptcy discharge does not alter the Respondents’ duty under the PACA to pay fully and promptly. *See Marvin Tragash Co. v. United States Department of Agriculture*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967). Partial payment is not sufficient under section 2(4) of the PACA. *Finer Foods Sales Co.*, 708 F.2d at 782; *Marvin Tragash Co.*, 524 F.2d at 1258. In this case, Respondents have failed to pay all of their produce creditors, and bankruptcy discharge does not alter this fact. Further, in disciplinary cases, the settlement of claims after the

respondent has already failed to pay fully and promptly for produce is irrelevant. *See, e.g., In re Tom's Quality Produce, Inc.*, 56 Agric. Dec. 1033, 1033 (1996); *Full Sail Produce*, 52 Agric. Dec. at 619; *see also In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989) *aff'd* 923 F.2d 862 (9th Cir. 1991) (citing cases). Therefore, Respondents' bankruptcy defenses fail.

Finally, Respondents have argued that the sequence of events leading to the filing of Bankruptcy lead to an "unexpected and severe loss of business." (Answer at pg. 3 ¶ 4.) "Even 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 flagrant or willful." *Caito Produce Co.*, 48 Agric. Dec. at 614.

Respondents have failed to pay for fully and promptly for produce. Respondent's loss of customers because of the unexpected Salmonella poisoning of several of Respondent's ultimate consumers does not excuse Respondents from remaining undercapitalized so that they were unable to pay their produce creditors. *See, e.g., In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 n.2 (1989) (rejecting a respondent's defense that a city's exercise of eminent domain caused the respondent's customers to reduce their dealings with the respondent). In addition, the circumstances of this case do not negate the willfulness of the Respondents' action.

While a finding of willfulness is not required for a finding of repeated and flagrant violations of the PACA and the publication of the facts and circumstances of those violations, Respondents' violations were willful. *See In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 628-29 (1996); *Full Sail Produce*, 52 Agric. Dec. at 622 (1993). The Department follows the rule generally stated by *Hogan Distributing, Inc.*, 55 Agric. Dec. at 629: "A violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally,

irrespective of evil intent, or done with careless disregard of statutory requirements.” To determine willfulness one looks to a respondent's violations of express requirements of the PACA and the regulations, the length of time during which the violations occurred, and the number and dollar amount of the transactions involved. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998).

The Fourth Circuit and the Tenth Circuit define the word "willfulness," as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent standard, Respondents' actions were willful because Respondents knew or should have known that they were incapable of making full payment promptly. *See Five Star Food Distributors*, 56 Agric. Dec. 880, 897 (1997).

Respondents have failed to make full payment for over half a million dollars of over 700 lots of produce. This is an express violation of Sec. 2(4) of the PACA, which requires full payment promptly. Under these circumstances, Respondents violations are willful, repeated and flagrant.

Findings of Fact

1. Respondent Coronet East is a corporation organized and existing under the laws of the State of West Virginia. Respondent Coronet East's business address is 15th & McColloch Sts, Wheeling, West Virginia 26003. Its mailing address is P.O. Box 6688, Wheeling, West Virginia, 26003.

2. Respondent Coronet East's PACA license was issued on January 18, 1966. This license terminated January 18, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)) when Respondent Coronet East failed to pay the required annual renewal fee.
3. Respondent Coronet West is a corporation organized and existing under the laws of the State of California. Respondent Coronet West's business address is 20800 Spence Rd, Salinas, California 93219. Its mailing address is P.O. Box 6862, Wheeling, West Virginia, 26003.
4. Respondent Coronet West's PACA license issued April 25, 1990. This license terminated April 25, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)) when Respondent Coronet West failed to pay the required annual renewal fee.
5. Respondent Coronet East has failed to make full payment promptly to 15 of the 21 sellers listed in paragraph III of the Complaint in the amount of \$357,567.90 for 306 lots of perishable agricultural commodities that Coronet East purchased, received and accepted in interstate commerce or foreign commerce during the period of September 2003, to September 2004.
6. Respondent Coronet West has failed to make full payment promptly to 17 of the 21 sellers listed in paragraph IV of the Complaint in the amount of \$790,091.89 for 445 lots of perishable agricultural commodities that Coronet West purchased, received and accepted in interstate commerce during the period of July 2003 to September 2004.

Conclusions

Respondents' failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 5 and 6 above constitutes willful flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondents Coronet East and Coronet West are found to have committed willful, repeated and flagrant violations of section 2(4) of the PACA, and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service of it unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision shall be served upon the parties.

Done at Washington, D.C.,

this _____ day of _____, 2005

Administrative Law Judge