

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA DOCKET NO. D-06-0012

In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.

Respondent

DECISION WITHOUT HEARING
BY REASON OF ADMISSIONS

Preliminary Statement

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 May 2, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant") alleging that Respondent Judith's Fine Foods International, Inc. ("Respondent") has willfully violated the PACA.

The Complaint alleged that Respondent willfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of January 2005 through August 2005, by failing to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and 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.

A copy of the Complaint was sent to Respondent's business mailing address by

certified mail on May 2, 2006, and Respondent received it on June 3, 2006. On July 10, 2006, Respondent filed, through its Vice President John M. Lohner, a “Response to Complaint” (“Answer”). The Answer generally denied the allegations of the Complaint pertaining to its failure to make full payment promptly.¹ (Answer at 1.) On October 10, 2005, Respondent had filed a Voluntary Petition under Chapter 7, in the U.S. Bankruptcy Court of Puerto Rico 05-10629-SEK7. Complainant has now filed a “Motion for a Decision without Hearing Based on Admissions.” Complainant’s motion will be granted and the following decision is issued in the disciplinary case against Respondent without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

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 the alleged violations. Complainant is not required to summon witnesses to a hearing for the purpose of proving that Respondent was licensed under the Act during the relevant period simply because Respondent has declined to answer these allegations. 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).

In Respondent’s bankruptcy proceeding in the District of Puerto Rico Bankruptcy Court, case no. 05-10629-SEK7, Respondent admitted that it owed \$338,942.07 to the eight sellers of produce listed in the Complaint. Amended schedules: E and F, *In re: Judith’s Fine Food International, Inc.*, Case No. 05-10629-SEK7 (January 16, 2006) (ECF Docket No. 16). Bankruptcy documents are judicially noticed in proceedings

¹As the Respondent’s *pro se* Answer failed to allege that it would make full payment within 120 days of June 3, 2006, it must be considered a “no pay” case. Moreover, there is no indication that any payment has been made which might have converted the case to a “slow pay” as opposed to a “no pay” case.

before the Secretary. *See, e.g., In re: Five Star Food Distributors*, 56 Agric. Dec. 880, 893 (1997).

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.

In re Furr's Supermarkets Inc., 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)). In this instance, Respondent has made an admission in a Bankruptcy proceeding that it has failed to pay \$338,942.07 to the same produce creditors named in the Complaint. Respondent has failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA, and it has not asserted that it will achieve full compliance with the PACA by making full payment within 120 days of the service of the complaint. 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, where Respondent's license has terminated, 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 386-87. 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 570-71. 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.§1.139.²

Findings of Fact

1. Judith’s Fine Foods International, Inc. (Respondent) is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. Its physical business address was Urb Ind El Commandante, San Marcos Avenue, Carolina, Puerto Rico 00087. Its mailing address was P.O. Box 13301, Santurce, Puerto Rico 00908.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19961052 was issued to the Respondent on March 5, 1996. On September 5, 2006, the license was terminated for failure to pay the annual renewal fee.

3. During the period of January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,942.07 for 115 lots of perishable agricultural commodities, which it purchased, received and accepted in the course of interstate and foreign commerce.

² A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R.§1.141(b); *Veg. Mix, Inc. v. U. S. Dep’t of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987).

Conclusions of Law

Respondent's failure to make full payment promptly with respect to the 115 transactions set forth in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies of this Decision shall be served upon the parties.

Done at Washington, D.C.
October 25, 2006

PETER M. DAVENPORT

Administrative

Law Judge