

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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Docket No. PACA-D 16-0084

In re:

Gourmet Express, LLC,

Respondent.

DECISION AND ORDER ON THE RECORD

This is a disciplinary proceeding instituted pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“Act” or “PACA”), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151 (“Rules of Practice”).

The Specialty Crops Program, Agricultural Marketing Service of the United States Department of Agriculture (“Complainant” or “AMS”), initiated this proceeding against Gourmet Express, LLC (“Respondent”) by filing a disciplinary complaint alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499(b)(4)). The Complaint alleged that, during the period of February 2015 to March 2015, Respondent failed to make full payment promptly in the aggregate amount of \$178,580.04 to two (2) sellers for three (3) lots of perishable agricultural commodities.

Procedural History

On March 24, 2016, Complainant filed a Complaint against Respondent alleging violations of the PACA. On April 13, 2016, Respondent filed with the Hearing Clerk for the Office of

Administrative Law Judges (“OALJ”) for USDA (“Hearing Clerk”) an Answer and “Defenses to Complaint,” wherein Respondent admitted several material allegations of the Complaint.

By Order issued April 29, 2016 (“Show Cause Order”), I directed Complainant to file a motion supporting the relief requested in the Complaint¹ and directed Respondent to show cause why a decision should not be entered without a hearing. On May 18, 2016, Respondent filed a “Response to Order to Show Cause Why Decision Without Hearing Should Not Be Entered” (“Response to Show Cause Order”). On May 19, 2016, Complainant filed a Motion for Decision Without Hearing based upon admissions of fact that Respondent had made in its Answer. Although Respondent had the opportunity to file objections to Complainant’s Motion within twenty (20) days of service, Respondent has filed no such response. 7 C.F.R. § 1.139. The twenty-day period elapsed on June 8, 2016.² Pursuant to the Rules, it is proper for me to issue a decision without hearing. *See* 7 C.F.R. § 1.139 (“If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.”).

Further, and perhaps more importantly, Respondent has provided no new information that would impact the appropriateness of a decision on the record. Upon review of the documents and arguments submitted, I find that Respondent has admitted the gravamen of Complainant’s allegations, thereby obviating the need for a hearing in this matter. Therefore, this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Authorities

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (“Rules of Practice” or “Rules”), set forth at 7 C.F.R. § 1.130 *et*

¹ Complainant requested that I issue a finding that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that I order that the facts and circumstances of Respondent’s PACA violations be published pursuant to section 8(a) of the Act (7 U.S.C. § 499h(a)).

² Complainant’s Motion was served on May 19, 2016; thus, twenty (20) days had passed on June 8, 2016.

seq., apply to the adjudication of this matter. Pursuant to the Rules, a respondent is required to file an answer within twenty (20) days after service of a complaint. 7 C.F.R. § 1.136(a). The Rules also state that “[t]he 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.” 7 C.F.R. § 1.139 (emphasis added). The Rules further provide:

Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for adoption thereof. . . . Within 20 days 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.*

Id. (emphasis added).

Also applicable to the present matter are sections 2(4) and 8(a) of the PACA (7 U.S.C. § 499b(4)). Section 2(4) requires merchants and dealers to make “full payment promptly” for perishable agricultural commodities, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 C.F.R. §§ 46.2(aa)(5) and (11).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

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 commerce 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 5(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 Act.

7 U.S.C. § 499b(4) (emphasis added).

Further, section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) 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.

7 U.S.C. § 499h(a) (emphasis added).

In cases where a PACA licensee has failed to make full or prompt payment of perishable agricultural commodities, the Department's policy is straightforward:

PACA requires *full payment promptly*, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times. . . . 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 PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA will be treated as a "slow-pay" case.

Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (emphasis added). Further, "[i]n 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." *Id.* at 549.

Discussion

1. Respondent Has Admitted To Material Allegations of the Complaint Which Establish Violations of PACA.

Upon review of the documents and arguments submitted, I find that Respondent has admitted the gravamen of Complainant's allegations relating to Respondent's violations of PACA, thereby obviating the need for a hearing in this matter.

"Full payment promptly" in accordance with the PACA means "payment for produce purchased by a buyer, within 10 days after the day on which produce is accepted." 7 C.F.R. § 46.2(aa)(5). *See Scamcorp, Inc.*, 57 Agric. Dec. at 549 ("PACA requires *full payment promptly*, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times.") (emphasis added). Here, Respondent has specifically admitted that, as of the date the Answer was filed, it owed at least \$137,355.54 to the produce creditor Kywa, the full amount alleged as owed in Appendix A to the Complaint ("Appendix A").³ Further, a follow-up compliance investigation reveals that as of May 17, 2016, the creditor/seller Kywa was still owed the entire \$137,355.54 listed in Appendix A. During the compliance investigation, Complainant's marketing specialist, Phyllis Hall, examined the following records: (1) unpaid invoices to sellers; and (2) the summary table of total amounts owed to sellers, which formed the basis of Appendix A. Ms. Hall contacted the creditor/seller Kywa and discussed with Kywa's 100-percent owner the amount listed as owed in Appendix A; she was told that the current balance of the debt owed was past due and unpaid. Ms. Hall learned that, as of the date of the compliance investigation, out of the \$137,355.54 alleged as owed to Kywa in the Complaint and

³ Respondent has also admitted that it did not pay its creditor, Dongsheng, until December 1, 2015, well after the time that payment was due in accordance with the PACA.

as listed in Appendix A, the entire amount was still owed. Under the policy enunciated in the *Scamcorp* case, Respondent failed to promptly pay for more than a *de minimis* amount of produce; accordingly, publication of the facts and circumstances of the violations are warranted. *Scamcorp, Inc.*, 57 Agric. Dec. 548-49; *see also supra*.

Respondent made no assertion in its Answer, in its Response to Show Cause Order, or in any filing thus far that full payment would be made or that full compliance would be achieved pursuant to the parameters set by the *Scamcorp* case. *See Scamcorp, Inc.*, 57 Agric. Dec. at 548-49. Moreover, it is unlikely that full payment can or will be made, as Respondent is currently in bankruptcy and has made clear in its Answer that it believes that Kywa is not entitled to PACA trust protection. Upon my instruction to show cause why I should not enter a decision without a hearing, Respondent relied its April 13, 2016 Answer to the Complaint wherein it stated, *inter alia*:¹ "Respondent admits that on March 16, 2016, it filed a voluntary petition for protection under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Maryland ...Case No. 15-13674"... "Respondent admits that it identified Dongsheng as the holder of an undisputed, unsecured nonpriority claim in the amount of \$41,224.50 and Kywa as the holder of an undisputed, unsecured nonpriority claim in the amount of \$137,355.54 in its Schedule F filed in the Bankruptcy case" (Respondent's Answer, g. 2) but "state[d] that, as a matter of law" it was unable to make payments on Kywa's claim because "there [was] neither a confirmed plan nor any other bankruptcy court authorization providing for such payment." (Resp. to Show Cause Order at 2).

Respondent's bankruptcy argument is not an acceptable defense to a disciplinary proceeding in which a complaint has been filed alleging violations of section 2(4) of the PACA. It is well established that the filing of a bankruptcy petition does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's

police or regulatory power; accordingly, because this is a governmental disciplinary proceeding in which the Complainant is not seeking payment but rather to enforce Complainant's regulatory power, any asserted "stays" imposed by the Bankruptcy Court would not extend to this proceeding. *In Re: Diversified Foods, Inc.*, 64 Agric. Dec. 1209 (U.S.D.A.), 2005 WL 6231892. (See *In Re Diversified Foods*, at 1211 "the filing of a bankruptcy petition does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.") Because the filing of a voluntary bankruptcy petition and subsequent proceeding does not stay or extinguish this disciplinary action, Respondent's argument to the contra must be rejected. Further, the purpose of this proceeding is not for Complainant to collect payment for unpaid debt as admitted in Respondent's Answer and bankruptcy filings; rather, its purpose is to have the facts and circumstances of Respondent's PACA violations published. Whether those sellers/creditors owed monies by Respondent have perfected trust claims or are entitled to trust protection on the basis of trust filings is not relevant to the Complaint at hand.

2. Respondent's Violations of the PACA Are Flagrant, Repeated, and Willful.

Because the record in this case supports a finding that Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet it continued to make purchases and could not pay produce suppliers, Respondent's violations in this case must also be found to be flagrant and repeated. See *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994) (a finding of repeated violations is appropriate whenever there is more than one violation of the Act, and a finding of flagrant violations of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00).

Respondent's violations were also willful. *Id.* (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). 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 with careless disregard of statutory requirements. *See Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2nd Cir. 1974), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3rd Cir. 1960); *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 896 (U.S.D.A. 1997); *Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (U.S.D.A. 1996).

A more stringent definition of the word “willfulness,” as the term is used in 5 U.S.C. § 558(c), has been followed by the Fourth and Tenth Circuits in cases that originated in the USDA forum. These Circuits have defined “willful violation” as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *See 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); and *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, the Department’s Judicial Officer has determined that payment violations similar to the violations established by Respondent’s Answer would still be willful due to gross neglect of the express provisions of the PACA, known by Respondent (who held a PACA license for over three years prior to the violation) to require prompt payment. In *Five Star Food Distributors, Inc.*, the Judicial Officer explained:

Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 11 month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and

consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.

Five Star Food Distributors, Inc., 56 Agric. Dec. at 897 (citations omitted). Here, Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet it continued to make purchases and could not pay produce suppliers. *Id.* Respondent's actions in this case constitute violations that are willful, flagrant, and repeated. *See D.W. Produce*, 53 Agric. Dec. at 1678.

Having carefully considered the pleadings, relevant authorities, and arguments of the parties, the following Findings of Fact, Conclusions of Law, and Order are entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Texas. Respondent's business and mailing address is or was 600 Greene Street, Greeneville, Kentucky 42342.
2. At all times material herein, Respondent was operating subject to the provisions of the PACA. License number 20110981 was issued to Respondent on May 25, 2011. The license terminated on May 25, 2014, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period February 2015 through March 2015, on or about the dates and in the transactions set forth in Appendix A (attached hereto and incorporated by reference), failed to make full payment promptly to two (2) sellers for three (3) lots of perishable agricultural commodities which Respondent purchased, received, and accepted

in interstate and foreign commerce, in the total amount of \$178,580.04.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).
3. Respondent's failure to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. Complainant's Motion for Decision on the Record is GRANTED.
2. Respondent Gourmet Express, Inc. is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).
3. The facts and circumstances of the violations set forth above shall be published.
4. This Order shall take effect on the date that this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (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 by the Hearing Clerk.

So ORDERED this 17th day of June, 2016, in Washington, D.C.


Bobbie J. McCartney
Chief Administrative Law Judge

APPENDIX A

<u>Seller's Name</u>	<u>No. Lots</u>	<u>Commodity</u>	<u>Dates Accepted</u>	<u>Dates Payment Due</u>	<u>Amounts Past Due & Unpaid</u>
Kywa International 1 Group LLC Lake Oswego, OR	2	Mushrooms	01/19/15 to 01/25/15	02/18/15 to 03/27/15	\$137,355.54
Dongsheng Foods, 2 USA Sunnyvale, CA	1	Baby Corn	2/9/2015	3/4/2015	\$41,224.50
2 Sellers	3 Lots			Total	<u>\$178,580.04</u>