

# **UNITED STATES DEPARTMENT OF AGRICULTURE**

## **BEFORE THE SECRETARY OF AGRICULTURE**

PACA Docket No. D-06-0002

In re: FRESH AMERICA CORP.,

Respondent

### **DEFAULT DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the Motion of the Complainant for a Decision Without Hearing By Reason of Default. Opposition to the current Motion and a prior similar Motion has been filed by Cheryl A, Taylor, the Respondent's Executive Vice President, Chief Financial Officer and Secretary. In the two pleadings, Ms. Taylor through counsel, asserts that there are insufficient grounds to conclude that the Respondent has ever been served. Although the Motion for a Decision Without Hearing By Reason of Default has been responded to by Ms. Taylor, no answer has been filed by the Respondent corporation.

This action is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), (hereinafter referred to as the "Act"), instituted by a Complaint filed on October 25, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period February 2002 through

February 2003, Respondent Fresh America Corp., (“Respondent”), failed to make full payment promptly to eighty-two sellers in the amount of \$1,223,284.48 in 1,149 transactions for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce.

A copy of the Complaint was sent to Respondent Fresh America at its last known business address at 1049 Avenue H E, Arlington, Texas 76011 by certified mail on October 26, 2005. Because Fresh America was no longer operating at its former address, the Complaint was returned to the Hearing Clerk. The postal service had no forwarding address on file for Fresh America and was unable to forward the Complaint. On December 20, 2005, the Hearing Clerk sent the Complaint by regular mail to the same address. On December 29, 2005, the Hearing Clerk notified Complainant that its attempts to serve the Complaint had been unsuccessful with the mail being returned by the postal service as other than “unclaimed” or “refused.”

On January 26, 2006, Complainant filed a “Response to Unsuccessful Service Notice” which informed the Hearing Clerk’s Office that Fresh America was no longer operating and that its assets had been liquidated to satisfy creditors, including produce creditors, but that the corporation could be served via its registered agent, CT Corporation System (“CT System”), 350 N. St. Paul St., Dallas, Texas 75201. CT System is a company that provides registered agent services for corporations. Among the other benefits listed on its website, CT System notes that it helps its clients to avoid default judgments. See <http://ctadmin.stadvantage.com>.

On March 8, 2006, the Hearing Clerk served the Complaint on CT System via certified mail. CT System forwarded the Complaint to Fresh America’s counsel at the law firm McCarron

& Diess, which received the Complaint on March 14, 2006. By letter dated March 23, 2006, McCarron & Diess returned the Complaint to the Hearing Clerk stating that the firm was not authorized to accept service of process on behalf of Fresh America. On August 9, 2006, Complainant moved for a default decision asserting that the time for an answer to the Complaint had expired. On September 5, 2006, Ms. Taylor filed her opposition to Complainant's motion for default decision arguing, *inter alia*, that service of the Complaint on the corporation's registered agent in the State of Texas had not been effective because Fresh America had failed to maintain its registered agent. She also argued that service of the Complaint on the corporation's former officers and directors was equally ineffective.

The argument that service has not been effectuated through the corporation's registered agent is without merit. At the time that the Hearing Clerk served Respondent's registered agent, and at least until October 12, 2006, Fresh America, which has not been granted dissolution by the State of Texas, continued to designate CT System as its registered agent with the Texas Secretary of State.<sup>1</sup> Texas corporations, like Fresh America, are required to maintain a registered agent for service of process. *See* Tex. Bus. Corp. Act, Articles 2.09(A)(2) and 2.11(A). "Registered agents exist to receive process; they are in the business of receiving legal correspondence." *See Barr v. Zurich Insurance Co.*, 985 F. Supp. 701, 703 (S.D. Tex. 1997).

A corporation's registered agent is a "representative of record" for purposes of service of process under the Rules of Practice which states that a complaint served via registered or certified

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<sup>1</sup> There is no indication that CT Corporation ever notified the Texas Secretary of State that it was no longer serving as the corporation's registered agent.

mail “shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail to the . . . last known principal place of business of the . . . representative of record of such party. . . .” *See* 7 C.F.R. § 1.147(c)(1).<sup>2</sup> In this case, good service, via certified mail as required by the Rules of Practice, was made by the Hearing Clerk on CT System at its valid mailing address in the State of Texas on March 13, 2006. The Complaint was accepted by CT System and was not “returned marked by the postal service as unclaimed or refused,” which would have necessitated reservice by regular mail. *See* 7 C.F.R. § 1.147(c)(1). In fact, CT System forwarded the administrative Complaint to Respondent Fresh America’s counsel of record in several actions that are now pending against Respondent in the United States District Court for the Northern District of Texas thereby giving Respondent actual notice of this proceeding.

Even if service on Fresh America’s registered agent was in some way defective, in response to Respondent’s objections to service through the corporation’s registered agent, Complainant took the additional step of serving the Complaint on Fresh America through the Texas Secretary of State. When a Texas corporation like Fresh America fails to maintain a registered agent for service of process, the Texas Secretary of State becomes the corporation’s agent for purposes of service of process. *See* Tex. Bus. Corp. Act, Art. 2.11(B). Complainant served the administrative Complaint on Respondent’s substitute agent for process, the Texas

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<sup>2</sup> *See also, e.g., Reed Elsevier, Inc. v. Carrollton-Farmers Branch Independent School Dist.*, 180 S.W.3d 903, 905 (Tex. App. Ct. 2005) (a Texas corporation may be served through registered agent); *Harold-Elliott Co., Inc. v K.P./Miller Realty Growth Fund I*, 853 S.W.2d 752, 754 (Tex. App. Ct. 1993) (same).

Secretary of State, via certified mail, on or by October 31, 2006.<sup>3</sup> The Texas Secretary of State is as a “representative of record” for purposes of service of an administrative complaint on a Texas corporation under section 1.147(c)(1) of the Rules of Practice. *See* 7 C.F.R. § 1.147(c)(1). Despite this additional service on the Secretary of State, Fresh America has still failed to file an answer to the Complaint.

Respondent’s objections to service of the Complaint through the corporation’s officers and directors are equally without merit. Service of the Complaint in this case was made through Fresh America’s last known individual representatives of record, including many of the corporation’s directors and officers in conformity with sections 1.147 (c)(1) and (c)(3) of the Rules of Practice. Under Texas law, where Fresh America is incorporated, “[t]he president and all vice presidents of the corporation . . . shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.” *See* Tex. Bus. Corp. Act, Art. 2.11(A). Any president or vice president of a Texas corporation is a proper “representative of record” for purposes of service of process under the Rules of Practice. The Rules of Practice expressly authorize service of an administrative complaint on corporate representatives of record, including officers and directors. *See* 7 C.F.R. § 1.147(c)(3).

The Complaint was successfully served by the Hearing Clerk, via certified mail, on Fresh America through the corporation’s Executive Vice President Cheryl Taylor. At least until October 12, 2006, Fresh America continued to report Cheryl Taylor as the corporation’s Executive Vice President in its filings with the Texas Secretary of State. The return receipts from

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<sup>3</sup> The return receipt from the Texas Secretary of State was not dated. However, it was returned to Charles Spicknall, Attorney for Complainant, on October 31, 2006, showing that the Complaint was served on the Secretary of State at least by that date.

the Hearing Clerk's certified mailing to Cheryl Taylor show that she received the Complaint on June 5, 2006. The Complaint was also served on Fresh America, via Cheryl Taylor, a second time in accordance with section 1.147(c)(3)(i) and (ii), in her capacity as a representative of record and as an officer of Fresh America, by non-mail means, via Federal Express. The Complaint was also served on Ms. Taylor as an attachment to a letter notifying her of the PACA Branch's initial determination that she was responsibly connected to Respondent Fresh America. Cheryl Taylor has proceeded to challenge her status as responsibly connected, proving that service of the Complaint via Federal Express was effective. After receiving Ms. Taylor's opposition to Complainant's motion for a default decision, Complainant served Ms. Taylor with the Complaint again, at the same address, via Federal Express, on October 26, 2006.

The Hearing Clerk also served the Complaint via certified mail on the Fresh America's former chief executive officer, Mark Prowell, and a former member of the Fresh America's board of directors, Arthur Hollingsworth. The return receipts from the certified mailings to Fresh America's principals show that the Complaint was received by Mark Prowell on June 14, 2006, and received by Arthur Hollingsworth on June 8, 2006. Complainant also served the Complaint on Fresh America's president of record with the Texas Secretary of State, Colon Washburn, and another corporate vice president, Steven Finberg, via Federal Express. As with Cheryl Taylor these individuals were served with the Complaint in November of 2005 and notified that they had been determined responsibly connected to the failed company. Like Cheryl Taylor, Steven Finberg proceeded to challenge his status as responsibly connected, proving that service of the Complaint via Federal Express was effective.

Finally, in response to Respondent's opposition to Complainant's default motion, Complainant once again served the Complaint on Fresh America, via Steven Finberg, who continued to be reported as Fresh America's vice president of record to the Texas Secretary of State as of October 12, 2006. The Complaint was served by non-mail means, in accordance with section 1.147(c)(3)(i) and (ii) of the Rules of Practice, on November 2, 2006. Complainant also served the Complaint on Luke Sweetser, who was a member of Fresh America's last known board of directors by Federal Express on October 26, 2006. Luke Sweetser served on Fresh America's board of directors, which was comprised of five individual directors from October 15, 2001 until January 24, 2003, when Fresh America ceased operations.

Service of the Complaint in this case has been exhaustive. Service has been made on Fresh America's registered agent and substitute agent for process in the State of Texas pursuant to the requirements of section 1.147(c)(1) of the Rules of Practice. Service of the Complaint has also been made on Fresh America through numerous individual representatives, directors and officers in conformity with sections (c)(1) and (c)(3) of Rule 1.147. Given the foregoing, it is abundantly clear that Respondent Fresh America has received notice of the Complaint and been afforded an opportunity to answer and interpose a defense to the allegations of the Complaint. Contrary to practice in other forums, motions to dismiss or the interposing of other defenses do not toll the requirement to file an answer. The time for filing an answer has long since expired and the Respondent is in default. *See* 7 C.F.R. § 1.136(c). Accordingly, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice. *See* 7 C.F.R. § 1.139.

## **FINDINGS OF FACT**

1. Respondent Fresh America is a corporation organized and existing under the laws of the State of Texas.

2. Pursuant to the licensing provision of the PACA, license number 1990-0329 was issued to Respondent on December 12, 1989. This license terminated on December 12, 2003, when Respondent failed to pay the required annual fee pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph III of the Complaint, incorporated by reference herein, during the period February 2002 through February 2003, Respondent failed to make full payment promptly to eighty-two sellers in the amount of \$1,223,284.48 in 1,149 transactions for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce.

## **CONCLUSIONS OF LAW**

Respondent Fresh America's failure to make full payment promptly with respect to the 1,149 transactions described in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

## **ORDER**

1. A finding is made that the Respondent Fresh America Corp. has committed willful and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

2. This Order shall take effect on the eleventh day after this Decision becomes final.



3. Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof 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 hereof shall be served upon the parties.

Done at Washington, D.C.  
January 19, 2007

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**PETER M. DAVENPORT**  
Administrative Law Judge