

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-05-0008
)
Northern Michigan Fruit Company,)
) **Decision and Order by**
) **Reason of Admissions**
Respondent)

[1] This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (frequently herein, “the PACA”), by the Complaint filed on April 1, 2005. Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently herein, “AMS”), is represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

[2] The Complaint was served upon Respondent Northern Michigan Fruit Company (frequently herein, “Northern Michigan Fruit” or “Respondent”) on April 25, 2005, and Northern Michigan Fruit’s Answer was timely filed on May 6, 2005, by James W. Boyd, Esq., of Traverse City, Michigan, on behalf of the Chapter 7 Bankruptcy Trustee for Northern Michigan Fruit. The Answer, among other things, requests that Attorney James W. Boyd, Attorney for Colleen M. Olson, duly appointed Chapter 7 Trustee, be properly noted as the Attorney for the

Bankruptcy Estate of Northern Michigan Fruit Company, Case no. GT02-10643, United States Bankruptcy Court, Western District of Michigan.

[3] The Complaint alleged that Northern Michigan Fruit, during the period August 1997 through August 2002, failed to make full payment promptly to 109 sellers of the agreed purchase prices in the total amount of \$545,021.42 for 982 lots of perishable agricultural commodities, which Northern Michigan Fruit purchased, received and accepted. The Complaint alleged further that Northern Michigan Fruit's business involved purchases from sellers, most of which were located within the State of Michigan, and sales to buyers, approximately two-thirds of which were located outside the State of Michigan; and that, therefore, Northern Michigan Fruit's purchases of the 982 lots of perishable agricultural commodities set forth in the Complaint were in interstate or foreign commerce, or in contemplation of interstate or foreign commerce.

[4] The Complaint alleged also that Northern Michigan Fruit had filed a Voluntary Petition (Case No. 02-10643) pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.) in the United States Bankruptcy Court, Western Division of Michigan. [Northern Michigan Fruit's Chapter 11 proceeding was converted to Chapter 7 on February 18, 2004.]

[5] The Complaint requested that a finding that Northern Michigan Fruit's failures to make full payment promptly were in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances of Northern Michigan Fruit's violations be ordered published.

[6] Northern Michigan Fruit's Answer neither admitted nor denied the averments set forth in the Complaint. Northern Michigan Fruit's Answer asserted that the "Automatic Stay" contained in Section 362 of the United States Bankruptcy Code (11 U.S.C. § 362) applied, and

“Complainant must obtain permission of the Bankruptcy Court prior to proceeding in this forum.”

[7] I find to the contrary, that disciplinary proceedings to enforce the PACA are not subject to the automatic stay pursuant to section 362 of the Bankruptcy Code. This action is a proceeding by a governmental unit, the United States Department of Agriculture, to enforce its regulatory power, by taking disciplinary action against a firm that is alleged to have committed serious violations of the PACA by failing to make full and prompt payment for produce purchases. 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. . .” Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. § 362(b)(4)).

[8] Further, section 525(a) of the Bankruptcy Code (11 U.S.C. § 525(a)) provides that a governmental unit may not deny, revoke, suspend or refuse to renew a license to a debtor who has filed for bankruptcy, with a few specified exceptions, including disciplinary actions brought under the PACA.

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment

of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [emphasis added]

[9] The Department of Agriculture's Judicial Officer has held that PACA disciplinary proceedings are unaffected by the automatic stay, stating as follows, in In re Ruma Fruit and Produce Co., Inc., 55 Agric. Dec. 642, 654-655 (1996):

Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. Melvin Beene Produce Co. v. Agricultural Marketing Service, 728 F.2d 347, 351 (6th Cir. 1984); In re Fresh Approach, Inc., 49 B.R. 494, 496- 98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. Marvin Tragash Co. v. United States Dep't of Agric., 524 F.2d 1255 (5th Cir. 1975); Zwick v. Freeman, 373 F.2d 110 (2d Cir. 1967), cert. denied, 389 U.S. 835 (1967); In re Fresh Approach, Inc., supra, 49 B.R. at 496.

[10] Where, as here, the respondent has filed a bankruptcy petition schedule in which the respondent admits owing produce creditors, in accordance with the allegations of a disciplinary complaint that alleges that the respondent has violated section 2(4) of the PACA by failing to make full payment promptly for produce purchases, there is no material fact in dispute which

warrants a hearing. The bankruptcy schedule constitutes an admission of liability which warrants the issuance of a Decision by Reason of Admissions, finding that the respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA. In re Furr's Supermarkets, Inc., 62 Agric. Dec. 385 (2003); In re D & C Produce, Inc., 62 Agric. Dec. 373 (2002); In re Scarpaci Brothers, Inc., 60 Agric. Dec. 874 (2001); In re State Produce Brokers, Inc., 60 Agric. Dec. 374 (2000); In re Matos Produce Corp., 59 Agric. Dec. 904 (2000); and In re Five Star Food Distributors, Inc., 56 Agric. Dec. 880 (1997). See also, Veg-Mix, Inc. v. U.S. Dept. Of Agriculture, 832 F.2d 601 (D.C. Cir. 1987).

[11] Of great significance here is Schedule F of Northern Michigan Fruit's Bankruptcy Petition, a copy of which is attached to AMS's Motion for a Decision, filed May 16, 2005. In that Schedule F, filed September 25, 2002, Northern Michigan Fruit has admitted its indebtedness to 108 of the 109 sellers of perishable agricultural commodities set forth in the Complaint for at least \$518,357.99 of the \$545,021.42 which the Complaint alleges Northern Michigan Fruit has failed to fully and promptly pay. Schedule F proves also that Northern Michigan Fruit does not dispute any of the debts it admittedly owes to the 108 sellers. The table attached to AMS's Motion for a Decision shows the comparison of Northern Michigan Fruit's admissions in Schedule F with the allegations in the Complaint, convincingly demonstrating the match.

[12] Northern Michigan Fruit has not denied Complainant's allegations that Respondent's business involves purchases from sellers, most of which are located within the State of Michigan, and sales to buyers, approximately two-thirds of which are located outside the State of Michigan; consequently, Respondent's purchases of perishable agricultural commodities were in interstate or foreign commerce, or in contemplation of interstate or foreign commerce.¹

[13] Accordingly, the within Decision and Order is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. § 1.130 et seq.

¹ *See, In re The Produce Place*, 53 Agric. Dec. 1715, 1757 (1994), *aff'd* 91 F.3d 173 (D.C. Cir. 1996): "Likewise, there is interstate commerce when there is evidence that a substantial portion of the buyer's products are eventually sold out of state, even if the commodity subject to this transaction might not have left the state."

Findings of Fact

[14] Respondent, Northern Michigan Fruit Company, is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7161 NW Bay Shore Drive, Omena, Michigan 49674, and its mailing address is P. O. Box 253, Omena, Michigan 49674-0253.

[15] At all times material herein, Northern Michigan Fruit Company was licensed under the provisions of the PACA. License number 19911771 was issued to Northern Michigan Fruit on September 30, 1991. That license terminated on September 30, 2004, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Northern Michigan Fruit failed to pay the required annual fee.

[16] Northern Michigan Fruit Company has admitted, through its filing of Schedule F of its Bankruptcy Petition, that Northern Michigan Fruit is indebted to 108 of the 109 sellers of perishable agricultural commodities set forth in the Complaint, for at least \$518,357.99 of the \$545,021.42 which the complaint alleges Northern Michigan Fruit has failed to fully and promptly pay for.

[17] As more fully set forth in paragraph III of the Complaint, in Schedule F of Northern Michigan Fruit's Bankruptcy Petition, and in the Table comparing the two, during the period August 1997 through August 2002, Northern Michigan Fruit Company failed to make full payment promptly to 108 sellers of the agreed purchase prices in the total amount of \$518,357.99, for numerous lots of perishable agricultural commodities, which Northern Michigan Fruit purchased, received and accepted in interstate or foreign commerce, or in contemplation of interstate or foreign commerce.

Conclusions

[18] The Secretary of Agriculture has jurisdiction.

[19] Northern Michigan Fruit Company's failure to make full payment promptly with respect to the transactions referred to in the above Findings of Fact, 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

[20] Northern Michigan Fruit Company committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during August 1997 through August 2002, and the facts and circumstances of the violations shall be published.

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

[22] This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 20th day of July 2005

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building Room 1031
1400 Independence Avenue, SW
Washington DC 20250-9203
202-720-4443
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APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145