

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-08-0064
)	
Ocean View Produce, Inc.)	
)	
)	
Respondent)	

Decision Without Hearing by
Reason of Admissions

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.; hereinafter “PACA”), the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-46.45; hereinafter “Regulations”), instituted by a Complaint filed on February 22, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter “Complainant”).

Complainant alleged that Respondent Ocean View Produce, Inc., a corporation organized and existing under the laws of the State of Florida (hereinafter “Respondent”), committed willful, flagrant, and repeated violations section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to make payment promptly to 19 sellers in the amount of \$208,863.17 for 58 lots of perishable agricultural commodities that the Respondent had purchased, received, and accepted in interstate commerce during the period August 20, 2005 through July 13, 2007. Because Respondent’s license had terminated due to Respondent’s failure to pay the required annual renewal fee, Complainant requested the issuance of a finding that Respondent committed willful, flagrant, and repeated violations

section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances be published. Complainant has filed a Motion for a Decision Without Hearing by Reason of Admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.139; hereinafter “Rules of Practice”).

On March 21, 2008, Respondent, acting through counsel, filed an Answer to Complaint admitting that it “owes 7 suppliers an estimated total of \$67,647.10.” (Answer ¶ III.) Respondent further admitted that “the remaining suppliers listed in the Complaint have either been paid in full or have settled or otherwise compromised their claims.” (Id.) These admissions demonstrate that Respondent is in violation of the prompt payment requirements of the PACA.

Under section 2(4) of the PACA, it is unlawful for any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and make full payment promptly in respect to any transaction involving a perishable agricultural commodity purchased, received, or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4); see also Magnolia Fruit & Produce Co. v. U.S. Dep’t of Agric., 50 Agric. Dec. 854, 857 (5th Cir. 1991) (“[A] merchant violates the PACA simply by failing to ‘Make full payment promptly’ in an interstate transaction, for any perishable agricultural commodity.” (citing 7 U.S.C. § 499b(4))); “Full payment promptly” is defined by the Regulations as payment within 10 days of acceptance, unless the parties agree in writing to different payment terms *before entering into the transaction* and full payment occurs within the period upon which the parties agree. 7 C.F.R. § 46.2(aa)(5), (11). In other words, the prompt payment provisions of the statute and the Regulations apply to all

transactions subject to the PACA unless there is “an express agreement at the time the contract is made . . . [and] the agreement [is] in writing.” In re: The Caito Produce Co., 48 Agric. Dec. 602, 610 (1989) (citing 7 C.F.R. § 46.2(aa)(11)).

There is no evidence that Respondent and its produce sellers had written agreements at the time of the transactions allowing for a different payment schedule than that specified in the PACA and the Regulations, nor was this defense offered by Respondent in its Answer. Instead, Respondent admitted it “incurred significant debt through non-payment by [its] clients, some of whom have simply vanished or otherwise gone out of business, and that [it has] instituted credit and collection procedures to avoid such problems in the future.” (Answer, page 2).

Settlement or compromise of a PACA produce debt for a reduced amount based on the receiver’s financial difficulties does not constitute full payment under the Act. In re: Tuscany Farms, Inc., 2007 WL 3170429, 11 (U.S.D.A. Aug. 2007); United Fruit and Vegetable Co., Inc. v. Director of the Fruit and Vegetable Division, et al., 41 Agric. Dec. 89, 91 (1982) (finding that even if United Fruit had provided the court with records proving the company had entered into compromises with the sellers, “such compromises would not have changed the fact that United Fruit had, on numerous occasions, failed to pay in full for perishables that had been ordered and delivered. Thus, there were still violations of 7 U.S.C. § 499b (4) which makes it unlawful “to fail or refuse truly and correctly to account and make full payment promptly * * *”).

Respondent admitted in its Answer that although “there are monies owed on certain listed accounts . . . the remaining suppliers listed in the Complaint have either been paid in full or have settled or otherwise compromised their claims.” (Id.) The settlement

and/or compromise of several of the outstanding claims by the shippers does not ameliorate Respondent's violations of the PACA.

On March 17, 2006, Evans Fruit Company, Inc., (hereinafter "Evans") filed a PACA trust action against Respondent and Manuel Lopez in the United States District Court, Southern District of Florida (Case No. 06-20679). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of \$80,206.25 due and owing to Evans. On April 6, 2006, Respondent entered a Stipulation and the Court issued an Order for Judgment against Respondent. The Order states that Respondent has stipulated and agreed that "judgment shall be entered in favor of Evans in the aggregate amount of \$95,150.46, inclusive of interest and attorney's fees."

On January 8, 2007, Western Pacific Produce (hereinafter "Western") filed a PACA trust action against Respondent in the United States District Court, Southern District of Florida (Case No. 07-20043). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of \$81,383.67 due and owing to Western. On February 1, 2008, the United States District Court, Southern District of Florida, entered an Order Granting Motion for Entry of Default Final Judgment against Respondent. The Judgment was entered on behalf of Western Pacific Produce against Respondent "in the amount of \$72,991.27 (from the invoices), \$5,638.00 in interest through July 1, 2007, and an additional \$4,708 in interest through today's date." The total judgment amounted to \$83,337.27.

On April 9, 2008, Corona College Heights Orange and Lemon Association (hereinafter "CCH") filed a PACA trust action against Respondent and Manuel Lopez in

the United States District Court, Southern District of Florida (Case No. 08-20962). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of \$11,911.60 due and owing to CCH. On June 13, 2008, CCH and Respondent entered into a Stipulation for Entry of Judgment. The parties stipulated that on or about August 2007, Respondent paid CCH “the sum of \$2,000.00, thereby reducing the principal amount owed to CCH to \$9,911.60.” The parties further stipulated that “the total balance due to Plaintiff CCH from Defendant Ocean View is \$18,740.89, including principal in the amount of \$9,911.60 and interest in the amount of \$3,074.92, plus attorneys’ fees and costs totaling \$5,754.37.” On June 19, 2008, the Court entered an Order of Judgment against Respondent stating that CCH “is a valid trust beneficiary under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §449e(c), against [Respondent] and Manuel Lopez in the aggregate amount of \$18,748.89.”

On December 6, 2006, Del Monte Fresh Produce N.A., Inc., (hereinafter Del Monte) and Associated Potato Growers, (hereinafter “Associated”) filed an Amended PACA trust complaint in an action against Respondent in the United States District Court, Southern District of Florida (Case No. 06-22636). In its Complaint, Del Monte alleged that it sold and shipped to Respondent perishable agricultural commodities in the course of interstate and/or foreign commerce from July 14, 2006 through September 7, 2006. Associated alleged it sold and shipped to Respondent perishable agricultural commodities in the course of interstate and/or foreign commerce on January 17, 2006. The trust complaint further alleged that Respondent failed to make full payment

promptly, leaving the combined sum of \$27,786.60 due and owing to Del Monte and Associated.

On October 25, 2007, Del Monte and Associated moved for Entry of Judgment against Respondent for \$35,000 in the United States District Court, Southern District of Florida. Attached to the motion was a stipulated judgment signed by Respondent which stated that “between January 17, 2006 and July 14, 2006, Plaintiff[s] sold on credit and delivered perishable agricultural commodities to [Ocean View Produce], all of which remains due and owing.” However, on October 31, 2007, the motion was denied because the parties failed to file the settlement agreement in a timely manner.

As to all of the sellers identified in the above stipulations and Orders, the amounts identified and allowed pursuant to the judgments and stipulations were greater than or equal to the amounts alleged as owed to PACA produce sellers in disciplinary complaint:

Seller	Amount of Produce Debt Alleged in Complaint	Amount Admitted in Answer	Amount of Produce Debt in Stipulation and/or Court Judgment	Amount Claimed by Sellers as still owing as of 11/4/08
Evans	\$14,399.30	\$7,000	\$80,206.25	
Les Jardins	\$3,125.50	\$3,125.50		\$13,665.00
Associated Potato Growers	\$9,194.00		\$9,275.00	\$11,164.75
Del Monte	\$8,045.50		\$18,511.60	
Gemini Farms	\$11,469.20	\$9,469.20		\$24,000.00
Nuchief	\$18,847.00	\$15,847.00		
Western Pacific	\$72,548.57		\$72,991.27¹	

¹ Default Judgment

Corona-College	\$11,911.60	\$9,991.60	\$9,991.60	
Pismo-Oceano	\$13,383.30	\$13,383.30		
New Limeco	\$13,870.00	\$8,710.50		
Sun America	\$4,233.40			
Global Unlimited	\$2,545.50			
De Bruyn	\$22,565.05			\$166,450.43
Chicago Produce	\$758.25			
A&A Produce	\$297.00			
National Garden	\$15.00			
Cuba Tropical	\$655.00			
Naam Produce	\$616.00			
La Dona American	\$384.00			
TOTALS	\$208,863.17	\$67,647.10	\$190,975.72	\$215,280.18

Respondent's admitted failures to pay are willful, repeated, and flagrant as a matter of law. In its Answer to Complaint, Respondent admitted failing to make full payment promptly to at least 7 of the 19 sellers for purchases of perishable agricultural commodities. (Answer ¶ 4.) Respondent's admitted failures to pay are violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)). In its Answer, Respondent stated that "any failure to promptly resolve delinquencies was not willful nor delayed for a fraudulent purpose." (*Id.*) However, Respondent's violations are willful, repeated, and flagrant as a matter of law.

Violations are repeated when they include multiple, non-simultaneous violations. See *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *In re: Scarpaci Bros.*, 60 Agric.

874, 882 (2001); In re: Five Star Food Distribs., Inc., 56 Agric. Dec. 880, 895 (1997).

Respondent's violations are repeated because it failed to pay or promptly pay 19 individual sellers for a total of 58 lots of perishable agricultural commodities for a two-year period.

Whether a violation is flagrant is determined by looking at “the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.” In re: Five Star Food Distrib., Inc., 56 Agric. Dec. (1997) at 895; see also Reese Sales Co. v. Hardin, 458 F.2d 183, 185, 187 (9th Cir. 1972) (finding that a respondent who failed to pay \$19,059.08 to nine sellers involving 26 separate transactions over two and one-half months committed repeated and flagrant violations of the PACA); In re: Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1205, 1232 (1996) (finding that a respondent who failed to pay \$245,873.41 to 11 sellers involving 113 separate transactions over a one year period committed repeated and flagrant violations of the PACA). Decisions have held “that whenever the total amount due and owing for produce exceeds \$5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act.” In re: Veg-Mix., Inc., 48 Agric. Dec. 595, 599 (1989) (citing Fava & Co., 46 Agric. Dec. 79, 81 (1984)). Respondent has admitted in its Answer that it “owes suppliers an estimated total of \$67,647.10.” (Answer ¶3.) By failing to pay \$67,647.10, a sum well over \$5,000, to 7 sellers in 20 separate transactions over an eleven month period, Respondent committed flagrant violations of the PACA.

The Department's policy regarding willfulness is that “[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.” In re: Hogan Distrib., Inc., 55 Agric. Dec. 622, 629 (1996). Willfulness is determined by looking at a respondent’s violations of the provisions of the PACA and the Regulations, the length of the time period in which the violations occurred, and the number and total dollar amount of the transactions at issue. In re: Scamcorp, Inc., 57 Agric. Dec. 527, 552-53 (1998). A more stringent definition of “willfulness” is used in the Fourth and Tenth Circuits where willfulness is defined as “an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof.” E.g., Capital Produce Co. v. United States, 930 F.2d 1077, 1079 (4th Cir. 1991); Hutto Stockyard, Inc. v. U.S. Dep’t of Agric., 903 F.2d 299, 304 (4th Cir. 1990); Capitol Packing Co. v. United States, 350 F.2d 67, 78-79 (10th Cir. 1965). Regardless of the standard applied, Respondent’s violations are willful.

Respondent’s violations are willful because, based on the large number of transactions, the size of the debt, and the continuation of these violations over two-year period, Respondent knew or should have known that it did not possess sufficient funds to comply with the prompt payment provisions of the PACA. See Five Star Food Distribs., 56 Agric. Dec. (1997) at 897 (finding that a respondent willfully violated the PACA when it knew or should have known that it could not make prompt payment for the produce that it ordered, yet continued to make orders over an 11 month period thereby deliberately shifting the risk of nonpayment onto the produce sellers). Respondent began failing to pay for produce in August 2005 and continued to accept shipments of produce, for which it could not pay, through July 2007. Respondent’s failure to pay its produce debt is a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which requires full

payment promptly. Under these circumstances, Respondent's violations, in addition to being repeated and flagrant, are willful.

In its Answer, Respondent states that its "failure to promptly resolve delinquencies was not willful nor delayed for a fraudulent purpose." (Answer, p. 1.) Intentionality is relevant to a finding of willfulness, but "[i]t is not necessary to find that Respondent made any of the purchases alleged with a deliberate intent not to pay for such purchases in order to conclude that its actions were willful." In re: Scarpaci Bros., Inc., 60 Agric. Dec. (2001) at 883. A finding of willfulness is warranted solely by a showing that Respondent "recklessly and negligently" or with "careless disregard" of the payment requirements of the PACA continued to purchase produce for many months after it knew it could not pay for its prior purchases. See id. at 884; In re: Five Star Food Distribs., Inc., 56 Agric. Dec. (1997) at 897. The Department's Judicial Officer has determined that payment violations similar to the violations established by Respondent's admissions would be willful as both intentional acts and acts performed with careless disregard of statutory requirements. See In re: Tolar Farms and/or Tolar Sales, Inc., 57 Agric. Dec. 775, 782-83 (1998) (finding that a respondent who failed to pay seven sellers fully and promptly for 46 lots of produce totaling \$192, 089.03 over a three month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA); In re: Five Star Food Distribs., Inc., 56 Agric. Dec. (1997) at 896-97 (finding that a respondent who failed to pay 14 sellers fully and promptly for 174 lots of produce totaling \$238,374.08 over an 11 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA); In re: Hogan

Distrib., Inc., 55 Agric. Dec. (1996) at 631 (finding that a respondent who still owed \$283,201.12 to 9 sellers on purchases of 224 lots of produce over a 16 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA).

III. The issuance of a Decision Without Hearing by Reason of Admissions is warranted

Respondent has admitted in its Answer that it has failed to make full payment promptly as required by section 2(4) of the PACA (7 U.S.C. § 499b(4)). It has been repeatedly held that a hearing may be dispensed with when no material issues of fact are in dispute. E.g., Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607-08 (D.C. Cir. 1987); In re: H. Schnell & Co., Inc., 57 Agric. Dec. 1722, 1729 (1998). The Rules of Practice section 1.139 (7 C.F.R. § 1.139) provide for a decision without hearing when no answer is filed, or when the answer contains admissions to all the material allegations of fact contained in the complaint. Decisions without hearing by reason of admissions have been granted upon the motion of a complainant based on admissions made in a respondent's answer. E.g., In re: Tolar Farms and/or Tolar Sales, Inc., 57 Agric. Dec. 775, 776-77 (1998); In re: Adan O. Tinajera d/b/a Inter-Distrib., 56 Agric. Dec 1040, 1040-41 (1996); In re: Nationwide Produce Co., d/b/a/ Natural Choice, 55 Agric Dec 1412, 1412-13 (1996); In re: Austin J. Merkel Co., 54 Agric. Dec. 759, 759, 763 (1995). Accordingly, based on Respondent's admissions that it failed to pay 7 sellers for produce it had purchased in interstate or foreign commerce, there is no material fact in dispute warranting a hearing and the issuance of a Decision Without Hearing By Reason of Admissions is warranted.

The appropriate sanction is the finding of repeated and flagrant violations of the PACA and the publication of the facts and circumstances of those violations. Cases involving the failure to pay produce debt are classified as either “slow pay” or “no-pay.” See In re: Scamcorp, Inc., 57 Agric. Dec. 527, 562 n.13 (1998). In determining whether a violation should be classified as a “no-pay” violation, the Department follows the following policy:

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. Id.

As stated in Scamcorp, the appropriate sanction in this case is revocation of Respondent’s PACA license. However, the PACA license of Respondent terminated on August 23, 2007, pursuant to section 4(a) of the PACA (7 U.S.C. § 499a), when Respondent failed to pay the annual required fees, and thus, publication is the appropriate sanction in this disciplinary case.

The Complaint in this matter was filed on February 22, 2008. According to the Judicial Officer’s policy set forth in Scamcorp (Id. At 548-549) Respondent had 120 days from the date the Complaint was served upon it, or until on or about June 30, 2008, to come in full compliance with the PACA. The Judicial Officer stated in Scamcorp that “full compliance” requires “not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in

accordance with *In re Carpentino Bros., Inc., supra*, that a respondent have no credit agreements with produce sellers for more than 30 days.” Id at 549.

As indicated in the affidavit of Josephine Jenkins of the PACA Branch, Agricultural Marketing Service (attached hereto as Attachment 1 and incorporated by reference), follow-up investigation revealed that as of November 4, 2008, Respondent still owed at least 6 sellers \$78,584.05 of the amount listed in the Complaint. Therefore, pursuant to Scamcorp, Respondent was not in full compliance with the PACA by June 30, 2008 and this case should be treated as “no-pay” case for purposes of sanction. In re: Scamcorp, 57 Agric. Dec. (1998) 548-9.

Respondent’s violations in this case were flagrant and repeated. In re: D.W. Produce, Inc., 53 Agric. Dec. 1672, 1678 (1994) (a finding of repeated violations is appropriate whenever there is more than one violation of the Act, and a finding of flagrant violation of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00). Respondent’s violations were also willful. In re: D.W. Produce, 53 Agric. Dec. (1994) at 1678 (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). 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 over a lengthy period of time, and could not pay produce suppliers. Respondent’s actions in this case constitute violations that were willful. See In re: D.W. Produce, 53 Agric. Dec. (1994) at 1678.

Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant’s Motion for a Decision Without Hearing by Reason of Admissions

is granted and the following Decision and Order is issued in the disciplinary case against Respondent without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R § 1.139).

Findings of Fact

1. Ocean View Produce, Inc. is a corporation organized and existing under the laws of the state of Florida. Respondent's business and mailing address is 1201 NW 23rd Street, Miami, Florida 33142-7622. Respondent's mailing address, through counsel, is c/o David P. Reiner, Reiner & Reiner, P.A., 9100 South Dadeland Boulevard, Suite 901, Miami, Florida, 33156-7415.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20051197 was issued to Respondent on August 23, 2005. This license was suspended on February 23, 2007 pursuant to section 7(d) of the PACA (7 U.S.C. § 499g (d)), when Respondent failed to pay a reparation reward. The license was subsequently terminated on August 23, 2007, 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 failed to make full payment promptly to 19 sellers in the amount of \$208,863.17 for 58 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period August 30, 2005 through July 25, 2007.

4. Respondent failed to pay at least \$78,554.05 as of 120 days after service of the Complaint.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions alleged in the Complaint 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

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding 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, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

this 15th day of January, 2009

Victor W. Palmer
Administrative Law Judge

