

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) **PACA Docket No. D-09-0045**
)
Pets Calvert Company,)
) **Decision and Order by**
Respondent) **Reason of Admissions**

1. The Complaint, filed on December 23, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) (herein frequently the “PACA”).

Parties, Counsel, and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”). AMS is represented by Charles E. Spicknall, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2318, Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. The Complaint alleges that the Respondent, Pets Calvert Company (herein frequently “Pets Calvert” or “Respondent”), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay ten produce sellers for more than \$350,000 in produce purchases during the period of August 13, 2004, through June 17, 2008. The Complaint alleges that Pets Calvert willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. The Respondent is Pets Calvert Company, an Illinois corporation. Pets Calvert is represented by Michael F. O’Neill, Pets Calvert owner and officer.

5. Pets Calvert Company on March 2, 2009, filed an Answer to the Complaint.

Discussion

6. On September 23, 2009, this case was scheduled for hearing on December 3 and 4, 2009, in Chicago, Illinois. AMS then filed, on October 27, 2009, a Motion for Decision Based on Admissions. *See* 7 C.F.R. § 1.139. Pets Calvert had through November 30, 2009 to respond to AMS’s Motion and failed to respond. (*See* e-mail filed November 16, 2009.) Based upon careful consideration, AMS’s Motion is granted, and I issue this Decision and Order without hearing or further procedure.

7. Section 2(4) of the PACA requires licensed produce dealers to make “full payment promptly” for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).¹ Pets Calvert has admitted the material allegations in the Complaint. Pet Calvert’s owner, Michael O’Neill, states: “I . . . take full responsibility for the 10 vendors and the amount owned in your report.” “A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.” *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998).²

¹ *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining “full payment promptly”).

² *See also, In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (decision without hearing by reason of admissions).

8. The Complaint alleges that Pets Calvert is an Illinois corporation that was operating under a PACA license during the period of August 13, 2004, through June 17, 2008, when the company failed to pay produce sellers in violation of section 2(4) of the PACA. Pets Calvert admits that the company was operating subject to a valid PACA license. Pet Calvert's failure to deny or otherwise respond to the specific allegations concerning the company's incorporation and PACA license number constitutes an admission of those allegations. *See* 7 C.F.R. § 1.136(c) ("failure to deny or otherwise respond to an allegation of the Complaint shall be deemed . . . an admission of said allegation").

9. The Department's policy in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

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: Scamcorp, Inc., 57 Agric. Dec. 527, 549 (1998). Pets Calvert makes no assertion that the produce sellers listed in the Complaint have been paid or that the company will achieve

full compliance with the PACA within 120 days after having been served with the Complaint.³

10. Pets Calvert notes in its Answer that it received the Complaint on February 9, 2009. The 120-day period for compliance expired on or about June 10, 2009, prior to a hearing being set in this case. At the scheduling conference, held by telephone on September 23, 2009, more than 220 days after Pets Calvert admittedly received the Complaint, Pets Calvert's owner, Michael O'Neill, stated that although "some" of the sellers listed in the Complaint had been paid, Pets Calvert was still attempting to resolve legal actions by other unpaid suppliers listed in the Complaint.

11. One of the legal actions pending against Pets Calvert is in the United States District Court for the Northern District of Illinois, Case No. 08-cv-06684. I take official notice of that proceeding because Respondent's ability to satisfy the debts owed to the plaintiff produce creditors in that case, whose substantial unpaid debts are also at issue here,⁴ has a direct relation to Respondent's ability to assert that it has achieved full compliance with the

³ Rather than asserting that the Respondent's admitted debts will be quickly repaid, Pets Calvert only asserts that it is "in the process of getting the necessary financing and paying the old debts over time. . . ." Installment payment plans and debt reductions that are negotiated as a result of a buyer's insolvency cannot be used to avoid sanctions in PACA disciplinary proceedings. *See e.g., Scamcorp*, 57 Agric. Dec. at 566 (after-the-fact promissory notes do not satisfy the requirements of the PACA); *In re: Top Fresh, Inc.*, 53 Agric. Dec. 951, 953 - 954 (1994) (a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA); *In re: Caito Produce Co.*, 48 Agric. Dec. 602, 625-28 (1989) (seller's agreement to accept partial payment in full satisfaction of a produce debt is not full payment for purposes of the PACA and does not negate the violation).

⁴ In the trust action in the Northern District of Illinois, the produce creditor plaintiffs, Sunrise Orchards and Borzynski Bros. Distributing, are seeking to recover \$178,745.53 for past due invoices. *See* Pets Calvert's "Motion for Partial Summary Judgment" and "Memorandum of Law in Support," attached hereto as "Exhibit C." In this case, Respondent admitted owing these two sellers \$106,151. *See* Complaint at Appendix A and Exhibit A (Respondent's Answer). Regardless of which figure is correct, it is clear that Respondent still owes more than a *de minimus* amount to these sellers.

PACA. See section 1.141(h)(6) of the Rules of Practice (7 C.F.R. § 1.141(h)(6)), and see *Five Star Food*, 56 Agric. Dec. 880, 893 (1997) (taking official notice of proceedings in a bankruptcy court that had a direct relation to a PACA disciplinary case). The ongoing case by produce creditors in the Northern District of Illinois corroborates the fact that Respondent has been unable to assert that it has achieved full compliance with the PACA within the 120 day period established by the Department in *Scamcorp*, *supra*.⁵

12. Pets Calvert's inability to assert that it has achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. See *Scamcorp*, 57 Agric. Dec. at 549. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. See *id.* A civil penalty is not appropriate 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 are left unpaid. See *id.*, at 570-71.

13. Pet Calvert's violations of the PACA are repeated because there was more than one. See *id.*, at 551. The violations are flagrant "because of the number of violations, the amount of money involved, and the time period over which the violations occurred." See *id.* Pets

⁵ Pets Calvert's defense to the plaintiffs' trust claims in the Northern District of Illinois is not that the sellers have been paid in full, but rather that the unpaid suppliers lost the protection of the PACA trust (see 7 U.S.C. § 499e) by agreeing to accept payments over an extended period of time. The fact that Respondent's produce creditors were forced to accept payments over time, or even a fraction of what they were owed because of Respondent's financial problems, is no defense in this disciplinary action. See *Scamcorp*, 57 Agric. Dec. at 566 (after-the-fact promissory notes do not satisfy the requirements of the PACA); *Top Fresh*, 53 Agric. Dec. at 953 ("a seller's agreement to accept partial payment because of the buyer's insolvency does not negate the violation of the PACA"). As the Judicial Officer has stated in past cases under the PACA: "Full compliance requires . . . that a respondent have no credit agreements with produce sellers for more than 30 days." See *Scamcorp*, 57 Agric. Dec. at 549.

Calvert failed to make full payment promptly to ten sellers of the agreed purchase prices in the total amount of \$363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert purchased, received, and accepted in the course of interstate commerce.⁶ These failures to pay took place during the period of August 13, 2004, through June 17, 2008.

14. Pets Calvert's violations of the PACA are also willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *See Scamcorp*, 57 Agric. Dec. at 553.⁷ Despite knowing that the company did not have sufficient working capital to make full or prompt payment to suppliers of agricultural commodities, Pets Calvert continued to purchase more than \$350,000 worth of produce over a time period that spanned almost four years. Pets Calvert intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *See id.*, at 553.

⁶ *See In re: Coastal Banana & Tomato Co.*, 55 Agric. Dec. 617, 621 (1996) (holding that violations of the PACA were willful, flagrant and repeated where a produce merchant failed to make full payment promptly for \$150,723.03 worth of produce purchased in 27 transactions); *In re: Pugach, Inc.*, 55 Agric. Dec. 581, 587- 588 (1995) (holding that violations of the PACA were willful, flagrant and repeated where a produce buyer failed to make full payment promptly for \$384,979.33 in produce purchased in 166 transactions); *In re: Allsweet Produce Co., Inc.*, 51 Agric. Dec. 1455, 1458 (1992) (holding that violations of the PACA were willful, flagrant and repeated where a produce merchant failed to make full payment promptly for \$278,120.85 worth of produce purchased in 58 transactions); *In re: Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632 (1976) (holding that violations of the PACA were willful, flagrant and repeated where a produce dealer failed to make full payment promptly for \$29,000 worth of produce purchased in 64 transactions).

⁷ Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by Respondent or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983).

Findings of Fact

15. Pets Calvert Company is a corporation incorporated and existing under the laws of the State of Illinois. Pets Calvert's business and mailing address is 2455 S. Damen Avenue, Chicago, Illinois 60608-5231.

16. Pursuant to the licensing provisions of the PACA, Pets Calvert Company was issued license number 1975-0925 on January 10, 1974. The license was last renewed on January 10, 2008.

17. Pets Calvert Company failed to make full payment promptly to the ten produce sellers listed in paragraph III of the Complaint in the amount of \$363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert purchased, received, and accepted in interstate commerce during the period August 13, 2004, through June 17, 2008.

18. Pets Calvert makes no assertion that the produce sellers listed in the Complaint have been paid in full or that the company has achieved full compliance with the PACA within 120 days after having been served with the Complaint.

19. Official notice is taken of the PACA trust action brought against Pets Calvert by produce sellers in the United States District Court for the Northern District of Illinois, Case No. 08-cv-06684. As of October 14, 2009, that proceeding remained unresolved and the produce creditors, whose unpaid debts, or portions thereof, have been admitted by Respondent here, had not received payment in full from Pets Calvert Company.

Conclusions

20. The Secretary of Agriculture has jurisdiction over Pets Calvert Company and the subject matter involved herein.

21. Pets Calvert Company willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during August 13, 2004 through June 17, 2008, by failing to make full payment promptly of the purchase prices, or balances thereof, in the total amount of \$363,815.50 for fruits and vegetables, all being perishable agricultural commodities, which Pets Calvert Company purchased, received, and accepted in interstate commerce.

Order

22. Pets Calvert Company's PACA license is revoked. Section 8(a) of the PACA, 7 U.S.C. § 499h(a).

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

Finality

24. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk 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 22nd day of December 2009

/s/

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Ave SW
Washington DC 20250-9203
202-720-4443
Fax: 202-720-9776

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