

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-06-0007

In re: LUSK ONION, INC.

Respondent

**DECISION WITHOUT HEARING
BASED UPON ADMISSIONS**

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter, "PACA") and is before the Administrative Law Judge upon the Motion of the Complainant for a Decision Without Hearing Based on Admissions, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.139) (hereinafter, "Rules of Practice").

This proceeding was initiated by a complaint filed on March 14, 2006, alleging that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to two sellers in the amount of \$256,943.25 for 43 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce. Respondent accepted produce shipments from September 2004 through March 2005 with payments due during the period of October 2004 through April 2005. The Complaint requested the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and the revocation of Respondent's PACA license.

Respondent, through counsel, filed an answer admitting the jurisdictional allegations of the Complaint. In the Answer, Respondent admitted that the two sums owed to two produce suppliers alleged in the Complaint have not been paid. Respondent further admitted a Voluntary Petition filed pursuant to a Chapter 11 bankruptcy proceeding, that it owes the two produce sellers listed in the Complaint a total of \$225,076.25.

Respondent's actions were willful, repeated, and flagrant as a matter of law. 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 if it is done with careless disregard of statutory requirements. *In re: PMD Produce Brokerage Corp.*, 60 Agric. Dec 780 (2001). *See also Cox v. United States Department of Agriculture*, 925 F. 2d 1102 (8th Cir. 1991). Respondent knew, or should have known, that it could not make full payment promptly for the large amounts of perishable agricultural commodities it ordered, yet Respondent continued to make purchases. Respondent was aware of, or should have been aware of, the payment requirements of the PACA, yet continued to buy, knowing that each purchase would result in another violation. Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment provisions of the PACA.

The violations were flagrant due to the number of violations, the amount of money involved and the length of time over which the violations occurred. As stated in *In re: Veg-Mix, Inc.*, 48 Agric. Dec. 595, 599 (1989), “[Relevant decisions] hold that whenever the total amount due and owing exceeds \$5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act.” *Id.* (citing *In re: Fava & Co.*, 46 Agric. Dec. 79, 81 (1984)). Because Respondent's failure to pay violations involve numerous, non-simultaneous instances, they are also repeated. *See, e.g., Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967).

The Department's policy in PACA disciplinary cases with respect to the alleged failure to make full payment promptly is set forth in *In re: Scamcorp, Inc.*, 57 Agric. Dec 527, 549 (1988), as follows:

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.

Respondent has admitted in its Answer that it failed to pay the sellers the amount alleged in the Complaint, and confirmed through its Chapter 11 bankruptcy filing that it failed to pay produce creditors in amounts similar to the amounts alleged in the Complaint. Because 120 days have elapsed since the service of the Complaint, without any assertion from Respondent that it has achieved compliance with the requirements of the PACA, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's PACA license. Since Respondent's license terminated pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), Complainant requests a finding of willful, repeated, and flagrant violations of the Act and the publication of the facts and circumstances of the violations.

Based on careful consideration of the facts of this case and relevant precedent, Respondent's admissions in both its Answer and bankruptcy filing warrant the immediate issuance of a Decision Without Hearing Based on Admissions.

Findings of Fact

1. Respondent, Lusk Onion, Inc., is a corporation organized and existing under the laws of the State of New Mexico. Respondent's business mailing address is 5700 Mabry Drive, Clovis, New Mexico 88101.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1988-0844 was issued to Respondent on March 15, 1988. Based on Respondent's bankruptcy adjudication, in accordance with section 4(e) of the Act, Respondent's license was terminated on August 1, 2006.

3. Respondent filed a bankruptcy schedule, Schedule F- Creditors Holding Unsecured Non-Priority Claims, in which Respondent admitted that it owes both sellers named in paragraph III of the Complaint a total of \$255,076.25.

4. Respondent failed to make full payment promptly to two sellers in the amount of \$256,943.25 for lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce during the period September 2004 through March 2005.

Conclusions of Law

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 4 above, 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

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

2. 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.
November 29, 2006

PETER M. DAVENPORT
Administrative Law Judge

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