

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0290

In re:

ANSHIN PRODUCE CO., INC.,

Respondent.

DECISION AND ORDER ON THE RECORD
BY REASON OF ADMISSIONS

I. Preliminary Statement

The instant matter involves a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“PACA”; “the Act”) and the regulations issued thereunder (7C.F.R. Part 46) (“Regulations”), pursuant to a Complaint filed on March 13, 2012, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (“AMS”; “Complainant”). Complainant alleged that Respondent Anshin Produce Co., Inc. (“Respondent”) had 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 for 75 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce from 8 sellers, in the total amount of \$302,000.48.

II. Procedural History

In the Complaint, Complainant alleged that Respondent had willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). On April 27, 2012, Respondent’s principal, Peggi M. Ortiz, filed an Answer (“Ortiz Answer”). On May 21, 2012,

Respondent's principal Jay McWaters filed an Answer to the Complaint ("McWaters Answer"). These pleadings are identified respectively as RX-1 and RX-2.

By Order issued May 15, 2012, I set deadlines for the submission of documents and exchange of evidence. On May 22, 2012, Ms. Ortiz submitted a "mediation brief", which is hereby identified as RX-3. On June 12, 2012, Complainant filed a motion for an extension of time of those deadlines, pending ruling on Complainant's motion for a Decision and Order on the Record, also filed on June 12, 2012. By Order issued June 15, 2012, I suspended the deadlines for submissions and exchanges. Complainant's motion for a Decision and Order on the Record was served by certified mail, signed for by Peggi M. Ortiz on June 21, 2012. The motion was served by certified mail, signed for by Jay McWaters on June 30, 2012. On July 13, 2012, Ms. Ortiz filed correspondence explaining the problems she encountered operating Anshin Produce Inc. That document is hereby identified as RX-4.

I admit to the record the above-described documents. I also admit to the record Attachments to the complaint, identified as Attachments "A" and "B". Those attachments are included as attachments to this Decision and Order, but shall be referred to as CX-1 and CX-2 for purposes of discussion herein.

Findings of Fact and Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 et seq., apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. §1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default

shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that “an opposing party may file a response to [a] motion” within twenty days after service (7 C.F.R. §1.143(d)). The Rules state that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. §1.147(h.).

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11).

In their Answer to the amended Complaint, Respondent did not deny that it had failed to timely pay sellers for perishable agricultural commodities. Ms. Ortiz admitted that only four (4) of the eight (8) vendors in question had been paid in full, and stated in pertinent part: "Your records will show that we paid off four vendors and were doing our best to pay the others." See, Ortiz Answer, ¶ 7. In his Answer, Mr. McWaters referred to an adversary case brought by a group of produce creditors in the United States Bankruptcy Court for the Central District of California (Dkt. No. 10-02447), alleging violations of the PACA. Mr. McWaters stated, "When the facts became evident and my legal budget had exhausted the plaintiffs settled for \$4,050 out of the \$179,000." See, McWaters' Answer, last ¶.

On April 26, 2010, Respondent filed a Voluntary Petition No. 10-26068 pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. CX-2. In Schedule F of the Petition, Respondent listed undisputed debts owed to the eight (8) produce vendors in the aggregate sum of \$289,997.54, identified by Complainant. See, CX-2; CX-1.

The outstanding balance due to sellers is in excess of \$5,000.00, and axiomatically represents more than a *de minimis* amount. See, In re: Fava & Co., 46 Agric. Dec. 798, 81 (1984); 44 Agric. Dec. 879 (1985). “[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed”. In re: Tri-State Fruit & Vegetable, Inc., 46 Agric. Dec. 81, 82-83 (1984); 46 Agric. Dec. 83 (1985). Ergo, I find that a hearing is not necessary in this matter.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. In re: D.W. Produce, Inc., 53 Agric. Dec. 1672, 1678 (1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. In re: D.W. Produce, Inc., 53 Agric. Dec. at 1678. In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents’ actions were willful, and the violations are repeated and flagrant.

Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, “it is well-settled under the Department’s sanction policy that the license of a produce dealer...is revoked...” In re: Scamcorp, Inc., *supra*; In re: Veg-Mix, Inc., 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (1985), *aff’d* and remanded, 832 F.2d 601 (D.C. Cir. 1987); In re: Tri-State Fruit & Vegetable, Inc., *supra*. There is no legitimate dispute regarding Respondents’ failure to make prompt payments under the PACA, as evidenced by the admissions in Respondent Anshin’s bankruptcy pleadings.

Ms. Ortiz’ submissions make it clear that she was not entirely familiar with PACA rules and regulations, and that she left many business decisions to others. I find that her statements are not

relevant to this action against the corporate entity, since the action has not sought any sanction against Ms. Ortiz or Mr. McWaters. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. In re: Great American Veal Inc., supra. at 211. Moreover, the Secretary has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondent. In re: Hardin County Stockyards, Inc., 53 Agric. Dec. 654, 656 (1994). The failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. In re: Great American Veal, Inc., 48 Agric. Dec. 183, 202-203 (1989).

Respondent was issued PACA license number 19701061 on February 2, 1970.

Respondent's PACA license terminated on February 2, 2010 when Respondent failed to pay the annual required fees pursuant to section 4(a) of the PACA (7 U.S.C. § 499a). Therefore, publication of the facts and circumstances of Respondent's violations is an appropriate sanction.

B. Findings of Fact

1. Anshin Produce Co., Inc. (Respondent) is a corporation organized and existing under the laws of the State of California. Respondent's business and mailing address was 130 S. Myers Street, Los Angeles, California, 90033.

2. At all times material herein, Respondent Anshin Produce Co., Inc. was licensed under the provisions of the PACA, License number 19701061, which was issued on February 2, 1970.

3. Respondent's PACA license terminated on February 2, 2010, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

4. Respondent, during the period of January 20, 2009, through November 22, 2009, on or about the dates and in the transactions set forth in CX-1 failed to make full payment promptly

of the agreed purchase prices, or balances thereof, for 75 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce from eight (8) sellers, in the total admitted amount of \$289,997.54.

5. On April 26, 2010, Respondent filed a voluntary petition in Bankruptcy in the U.S. Bankruptcy Court for the Central District of California, Case No. 10-26068, pursuant to 11 U.S.C. § 101 et seq.

6. In the petition at Schedule F, Respondent listed undisputed debts to the eight (8) produce vendors identified by Complainant as sellers to whom Respondent failed to make full payment in the amount of \$289,997.54 during the period from January 20, 2009 through November 22, 2009. CX-1; CX-2; Attachments A & B to this Decision and Order.

7. Respondents admittedly failed to make full payment promptly to eight (8) sellers for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

8. The unpaid balances due to the sellers represent more than *de minimis* amounts, thereby obviating the need for a hearing.

C. Conclusions of Law

1. Respondent has admitted, in its Answers and in its Bankruptcy petition, that it purchased, received, and accepted perishable agricultural commodities in interstate commerce from the eight (8) sellers named in the Complaint filed by USDA.

2. I take official notice of the Respondent's Bankruptcy petition and Schedule F. In re: Five Star Food Distributors, Inc., 56 Agric. Dec. 880 (1997).

3. By scheduling the produce debt in its Bankruptcy petition, Respondent has implicitly asserted that there is no prospect of full payment of that debt at any future date, because the \$289,997.54 produce debt that Respondent owes to the eight (8) named sellers for perishable agricultural commodities is part of the acknowledged unsecured debt for which Respondent has

sought discharge from the Bankruptcy Court.

4. Respondent also admitted that it failed to make full payment promptly, during the period from January 20, 2009, through November 22, 2009, to those eight (8) sellers of the agreed purchase prices in the total amount of \$289,997.54.

5. Respondent's admissions establish that Respondent Anshin Produce Co., Inc. failed to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. §499(b)(4)).

6. Respondent's violations of the PCA were willful, flagrant and repeated violations of Section 2(4) of the PACA 7 U.S.C. § 499b(4)).

7. Because Respondent does not have a valid PACA license, the appropriate sanction of revocation cannot be imposed, but rather, it is appropriate that the facts and circumstances of Respondent's violations be published.

ORDER

The facts and circumstances underlying Respondent's violations shall be published. This Order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall 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 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 9th day of August, 2012 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge