

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0423

In re: Oasis Corporation
d/b/a One of a Kind Produce,

Respondent

Appearances: Charles L. Kendall, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC
Rosendo Gonzalez, Esquire, Gonzalez & Associates, Los Angeles, California

Decision and Order

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)(PACA) and the regulations issued thereunder (7 C.F.R. Part 46)(Regulations), instituted by a Complaint filed on May 7, 2012, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that Respondent Oasis Corporation, d/b/a One of a Kind Produce (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 for 255 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce from 9 sellers, in the total amount of \$1,628,479.54. Complainant requested findings that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that the facts and circumstances of the alleged violations be published.

A copy of the Complaint and the Rules of Practice were sent by certified mail to the Respondent's last known address; however, the mail was returned by the US Postal Service for reasons other than "unclaimed" or "refused." Counsel for the Complainant provided a new address to the Hearing Clerk's Office and service by certified mail was made to that address on June 1, 2012. On June 26, 2012, the Hearing Clerk's Office received a letter from Michelle R. Iovino requesting an extension of time "on the filings" as her PACA attorney was on vacation out of the country.¹

By letter to counsel for the Complainant June 28, 2012, Rosendo Gonzales, Esq., Gonzales & Associates of Los Angeles, California, indicated that Respondent had filed a petition under Chapter 7 of the Bankruptcy Code, including as an attachment a PACER docket report from Case number 11-17246 in the U.S. Bankruptcy Court for the District of Nevada. On August 15, 2012, Chief Administrative Law Judge Peter M. Davenport issued an Order directing the Hearing Clerk to enter the Gonzales's June 28, 2012 letter as the Respondent's Answer.

Complainant filed a motion with supporting memorandum, seeking a Decision Without Hearing by Reason of Admissions, based on the admissions made by Respondent in its Answer and in its bankruptcy petition. In that motion, Complainant noted that official notice may be taken of the documents that Respondent has filed in connection with its Chapter 7 bankruptcy proceeding.

Opposition to the Motion was filed by Michelle Iovino, a former officer, director, and shareholder of Respondent. In the Opposition, Iovino (without complying with the Rules of Practice which contain requirements for the contents of an Answer) asserts that the Doctrines of Due Process and Fairness dictate that she should be permitted to conduct discovery and suggests that the basis for seeking the Decision without a hearing is that Respondent filed for bankruptcy

¹ Although Iovino (identified in subsequent filings as a former officer, director, and shareholder of Respondent) filed the request for extension of time, to date, no Answer has been received.

protection and that although she did not specifically deny the allegations contained in the Complaint, the Complainant has not established violations of the PACA.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (Emphasis added)

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

(a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

(aa) “Full payment promptly” is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”, *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it . . .

Discussion

Iovino’s invocation of the Doctrines of Due Process and Fairness are without merit. To the extent that the Gonzalez correspondence constitutes an Answer, it does not deny any of the allegations of the Complaint, but rather points to the bankruptcy filings of Respondent and of Respondent’s principal.

Even were Complainant not entitled to entry of a Decision and Order based upon Respondent’s failure to file either a timely Answer or one which specifically addresses each of the allegations of the Complaint as required by Rule 1.136(b), 7 C.F.R. §1.136(b), in the Bankruptcy Schedule F filed by Respondent, a true and correct copy of which appears of record, Respondent listed undisputed debts to 7 of the 9 produce vendors referenced in paragraph III and in Appendix A of the Complaint, in the total amount of \$776,654.87. A table comparing the past due amounts alleged in the Complaint with the amounts admitted in Respondent’s Schedule F was attached to Complainant’s Motion for Decision without Hearing as Appendix B.²

The practice of taking official notice of documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings is of long standing and well established. *In re Tanikka Watford, Tanikka Watford and Latisha Watford d/b/a Southern Solutions Produce LLC*, 69 Agric. Dec. 1533, 1535 (2010); *In re KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538 (2010), *aff’d by Judicial Officer*, 69 Agric. Dec. ____ (Aug. 3, 2011),

Pet for Reconsideration denied, 69 Agric. Dec. ____ (Oct. 21, 2011), 2011 WL 3503526, *4; (citing *In re Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 764 (2007); *In re Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir, 1991)(Table), *printed in* 50 Agric. Dec. 854 (1991); *In re Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammara, Inc.*, 46 Agric. Dec. 173, 175-176 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Dales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept 29, 1986; *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601(D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

Similarly, the use of information contained in bankruptcy filings as the basis for decisions without hearing is also well established. *In re Tanikka Watford, Tanikka Watford and Latisha Watford d/b/a Southern Solutions Produce LLC, supra*; *In re Northern Michigan Fruit Co.*, 64 Agric. Dec. 1793, 1796 (2005); *In re Holmes*, 62 Agric. Dec. 254, 254-255 (2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373, 374-375, 378 (2002); *In re Scarpaci Bros.*, 60 Agric. Dec. 874, 875-876 (2001); *In re Matos Produce Corp.*, 59 Agric. Dec. 904 (2000); *In re Peter DeVito Co.*, 57 Agric. Dec. 830, 831 (1997); *In re D & D Produce, Inc.*, 56 Agric. Dec. 1999, 2000 (1997); *In re Five Star Food Distribs, Inc, supra*; *In re Billy Newsom Produce Co.*, 55 Agric. Dec. 1438, 1438-1440 (1996).

² Motion for Decision without Hearing, Docket No. 8

According to the Department's Judicial Officer's 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 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.³

As Respondent does not have a valid PACA license, the proper sanction for its violations is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published. Based upon a careful consideration of the pleadings and Departmental precedent cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Oasis Corporation (Respondent) is a corporation organized and existing under the laws of the State of Nevada.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20001132 was issued to Respondent on April 21, 2000. This license terminated on April 21, 2011, 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. On April 26, 2010, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §101 *et seq.*) in the United States Bankruptcy Court for the District

³See *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, at 562 (1998).

of Nevada. The petition was designated Case No. 11-17246. In the Schedule F filed by Respondent, Respondent listed undisputed debts to 7 of the 9 produce vendors referenced in paragraph III and in Appendix A of the Complaint in a total amount of \$776,654.87.

4. Respondent purchased, received, and accepted perishable agricultural commodities in interstate commerce from 7 of the sellers named in the Complaint.

5. Respondent failed to make full payment promptly, during the period of April 30, 2009, through July 9, 2010, to those sellers of the agreed purchase prices in the total amount of \$776,654.87.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Official notice is taken of the bankruptcy schedules filed under penalty of perjury by Respondent, listing the \$776,654.87 produce debt that Respondent owed those 7 sellers for perishable agricultural commodities.

5. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The violations are “flagrant” because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. Respondent’s violations are “repeated” because repeated means more than one.⁴ Also,

⁴See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 41 Agric. Dec. 2422 (1982), *aff’d.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations involving \$19,059.08 occurring over 2 ½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967) (concluding that because the 295 violations did not occur simultaneously, they must be considered “repeated” violations within the context of the PACA and finding 295 violations to be “flagrant” violations of the PACA in that they occurred over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), *aff’d.*, 136 F.3d (2d Cir. 1997) (Havana’s failure to pay 66 sellers \$1, 960, 958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes wilful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo’s failure to pay 6 sellers \$101, 577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes wilful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least \$238, 374.08 over a 11 month period were “wilful, repeated, and flagrant, as a matter of law”).

Respondent's failures to pay for its purchase obligations, which Respondent has acknowledged as liquidated, undisputed and non- contingent debts, within the time limits established by a substantive regulation – 7 C.F.R. §46.2(aa) – duly promulgated under the PACA are willful.⁵

Order

1. The facts and circumstances of Respondent's violations set forth herein shall be published.

2. This Order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

October 26, 2012

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Charles L. Kendall, Esquire
Rosendo Gonzalez, Esquire

⁵*Id.*