

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

Docket No. 13-0177

In re:

J & S PRODUCE CORP.,

Respondent.

Appearances:

Charles Kendall, Esq., for Complainant

Ariel Weissberg, Esq., for Respondent

Before:

Administrative Law Judge Janice K. Bullard

DECISION AND ORDER

The instant matter involves a complaint filed by the United States Department of Agriculture (“Complainant”) against J & S Produce Corp. (“Respondent”), alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et seq. (“PACA”; “the Act”). The complaint alleged that Respondent failed to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities during the period from December, 1975, through February, 2012.

This Decision and Order is issued pursuant to Complainant’s motion for a Decision Without Hearing by Reason of Admissions, which I hereby GRANT.

I. PROCEDURAL HISTORY

On February 11, 2013, Complainant filed a Complaint against Respondent alleging violations of PACA. Respondent’s motion for an extension of time to file an Answer was granted, and on March 28, 2013, Respondent filed an Answer with the Hearing Clerk for the

Office of Administrative Law Judges (“OALJ”) for the United States Department of Agriculture (“Hearing Clerk”).

By Order issued April 4, 2013, I set a schedule for pre-hearing submissions. On April 28, 2013, Complainant moved for a Decision on the record by reason of admissions. Respondent filed motions for extensions to respond, which were granted. On June 7, 2013, Respondent filed an objection to Complainant’s motion. Respondent also filed lists of witnesses and exhibits pursuant to my pre-hearing Order.

Upon review of the documents and arguments submitted by both parties, I conclude that a hearing in this matter is not necessary, and that Complainant’s motion is fully supported by the record. I hereby admit to the record the Attachments to Complainant’s motion and the Appendices to Complainant’s complaint, and the Attachments to Respondent’s Response to Complainant’s motion.

II. FINDINGS OF FACT & 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 7 C.F.R. §1.139, the Rules allow for a Decision Without Hearing by Reason of Admissions. “...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.” In re: H. Schnell & Company, Inc., 57 Agric. Dec. 1722, 1729 (1998).

Respondent’s admissions and the filed documentary evidence establish that there is no material issue of fact requiring a hearing. Additionally, it is uncontested that the outstanding

balance due to sellers is in excess of \$5,000.00, which 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.

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 its Answer to the Complaint, Respondent admitted that it had failed to timely pay sellers for perishable agricultural commodities. However, Respondent denied that it willfully violated PACA and further challenged the dates of transactions and amounts due to the 13 sellers identified by Complainant.

The documentary evidence filed by both parties reflects that on March 26, 2012, Respondent filed a petition in bankruptcy with the United States Bankruptcy Court for the Northern District of Illinois. (Petition # 12-12063). Respondent’s Schedule F filed in that matter listed undisputed debts in the aggregate amount of \$602,650.59 due to 11 of the 12 produce suppliers listed in Appendix A to Complainant’s complaint. See, also, Attachments to Respondent’s response to Complainant’s motion. In its Schedule D filed with the bankruptcy court, Respondent reported a disputed secured claim to another of the identified produce suppliers in the amount of \$726,829.00¹.

¹ Respondent made it clear in its argument that the dispute over this claim involved whether the claim was secured or unsecured as opposed to the fact of the debt.

Complainant asked that I take official notice of schedules filed in connection with Respondent's bankruptcy petition. Administrative Law Judges presiding over hearings in matters initiated by the Secretary of the Department of Agriculture shall take official notice "of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, commercial fact of established character. . ." 7 C.F.R. § 1.141(h)(6).

Documents filed in bankruptcy proceedings by debtors that are involved in PACA disciplinary proceedings may be officially noticed. KDLO Enterprises, Inc. v. USDA, 2011 WL 3503526, 4 (unpub. 9th Cir. 2011, affirming Decision and Order of Judicial Officer for USDA, In re : KDLO Enterprises, Inc., 70 Agric. Dec. 1098 (2011).

Respondent attached copies of its bankruptcy schedules to its response to Complainant's motion, and referred to the documents in its argument, thereby obviating the need for official notice. However, since Complainant did not have the benefit of Respondent's endorsement of its bankruptcy documents when the motion was filed, I hereby grant Complainant's motion for official notice of Respondent's bankruptcy filings.

PACA requires "full payment promptly" for produce purchases and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case." In re: Scamcorp, Inc., d/b/a Goodness Greeness, 57 Agric. Dec. 527, 547 - 549 (1998). In order to reach "full compliance" with PACA, the respondent would have to have paid all produce sellers and within 120 days of being served with a complaint. In re: Scamcorp, Inc., supra. at 549. Failure to meet this obligation results in a "no-pay" case. Id.

A comparison of the transactions allegedly not paid that were listed in the appendices to the complaint with the transactions listed in Respondent's bankruptcy filings demonstrate that as of the date the schedules were filed in March and April, 2012, transactions remained unpaid.

Respondent argued that it did not willfully fail to pay sellers, and explained that it experienced a liquidity crisis because its customers defaulted on accounts receivable. See, Transcript of testimony of Respondent's representative at a meeting of creditors, attached to Respondent's response to motion at Exhibit 2. Respondent reported that the 13 creditors identified in the complaint brought an action against Respondent in the United States District Court for the Northern District of Illinois² in which the total amount of the outstanding claims reported to the court in a PACA Trust Chart, \$2,107,091.00, was the equivalent of Respondent's unpaid accounts receivable. See, PACA Trust Fund chart, Exhibit 3, attached to Respondent's response to Complainant's motion.

Respondent also asserted that the characterization of a debt as disputed or undisputed in bankruptcy filings has no legal bearing on the outcome of the instant matter. In addition, Respondent demonstrated that it had paid some of its produce creditors large sums in advance of filing bankruptcy, and further showed that Respondent's principals deferred wages to do so.

I find that Respondent's arguments are supported by the record. However, the actions of Respondent's creditors do not present a valid defense in a PACA disciplinary action involving the failure to make full payment promptly to its produce supplier. The evidence supports Respondent's contention that uncollected accounts receivable led to its inability to pay produce suppliers. However, Respondent's financial predicament cannot represent a valid defense to potentially causing similar problems to suppliers. Congress enacted PACA in 1930 "to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices."

² Anthony Marano Company v. J & S Produce Corp., et al, Case No. 12-cv-01906.

Tri-County Whole-Sale Produce Co. v. USDA, 822 F.2d 162, 163 (D.C. Cir. 1987). The law was designed primarily to protect the producers of perishable agricultural products and to protect consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for. S. Rep. No. 84-2507, at 3 (1956).

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. 1672, 1678 (1994). 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. Id.

Respondent's contention that its actions were not willful or flagrant is refuted by the fact that Respondent failed to make prompt payment in many instances over a long period of time. Complainant need not establish that Respondent deliberately intended not to make prompt payment for produce purchases. It is enough to show that Respondent made purchases with full knowledge that its customers were defaulting on accounts, and cash flow was insufficient to meet payment obligations. That burden has been admittedly met. There is no evidence demonstrating that Respondent sought to avoid the consequences of violating PACA by seeking written agreements from providers to establish payment periods in excess of ten days, pursuant to 7 C.F.R. § 46.2(aa)(11). See, In re: Norinsberg Corp., 52 Agric. Dec. 1617, 1625 (1993), aff'd Norinsberg Corp. v. USDA, 47 F.3d 1224 (1995). It has long been held that payment violations similar to those established herein are willful violations of PACA because they represent gross neglect of PACA's mandate to make prompt payment. See, In re Five Star Food Distributor, Inc., 56 Agric. Dec. 880, at 896-7 (1997).

In addition, on Schedule D of the bankruptcy filings, Respondent listed 11 of the produce suppliers identified in the complaint as undisputed debts in the aggregate of \$602,650.59.

Respondent also reported a disputed secured claim to one (1) produce supplier in the amount of \$726,829.00³. Therefore, Respondent's own records show that sellers remained unpaid after Respondent had knowledge of its violations of PACA.

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 represent repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I have considered whether Respondent's unfortunate financial circumstances may serve as a factor that would mitigate sanctions. I find no persuasive argument in favor of Respondent's position. I accept that Respondent would have promptly paid all of its providers if Respondent's own customers had met their payment obligations. I further acknowledge that Respondent made efforts to make payments when it was able, to the detriment of its principals and perhaps at the risk of the company's viability. Nevertheless, Respondent continued to order and accept produce despite its inability to pay within the constraints of the Act and regulations. Accordingly, publication of the facts and circumstances of Respondents' violations is an appropriate sanction. See, Norinsberg Corp., supra.

³ Respondent made it clear in its argument that it disputed the nature of the claim ("secured") as opposed to the fact of the debt.

B. Findings of Fact

1. J & S Produce Corp. (“Respondent”) is a corporation organized and existing under the laws of the state of Illinois and at all times material herein its business address was 2300 W. Lake Street, Unit A, Chicago, Illinois 60612.
2. Respondent is not currently operating.
3. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number No. 1977 0152, issued on October 29, 1976.
4. Respondent’s license terminated on October 29, 2012 when Respondent failed to pay the required annual fee.
5. During the period from December 31, 2009, through April 10, 2012, Respondent failed to make full payment promptly to at least 11 or more sellers of the agreed purchase prices, or balances thereof, in the aggregate of \$602,650.59 for perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce.
6. On March 26, 2012, Respondent filed a petition in bankruptcy, designated Petition #12-12063, with the United States Bankruptcy Court for the Northern District of Illinois.
7. Respondent filed schedules with the court that listed unpaid balances of \$602,650.59 due on the agreed purchase prices of produce to 11 sellers.
8. Respondent also listed a debt to a produce seller in the amount of \$726,829.00, and disputed the creditor’s claim that the debt was secured.
9. Respondent’s President testified that the information provided by Respondent as debtor was true and correct.

10. On March 28, 2013, Respondent filed an Answer in the instant proceeding admitting that Respondent had failed to promptly pay produce providers.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's admissions provide reason to dispense with a formal hearing in this matter.
3. The unpaid balances due to produce sellers represent more than *de minimis* amounts.
4. Because the unpaid balances are more than *de minimis*, and because there are no disputes of material fact regarding the issue of payment due to Respondent's admissions, a hearing in this matter is not necessary.
5. Respondents' failure to promptly make full payment of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
6. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy period of time during which the violations occurred.
7. The violations are repeated because there was more than one violation.
8. The violations were willful because Respondent failed to make prompt payments or otherwise arrange for payments in compliance with the Act and regulations despite knowledge of its inability to make payments due to insufficient cash flow.

ORDER

Respondent J & S Produce Corp. has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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 proceedings 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 8th day of August, 2013 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge