

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
)	
K & A PRODUCE,)	PACA Docket No. D-17-0252
)	
Respondent)	

DECISION WITHOUT HEARING BY REASON OF DEFAULT

Appearances:

Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Agricultural Marketing Service [AMS]; and

Lee Pakulski, Esq., of Farmingdale, NY, for the Respondent, K & A Produce.

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) [PACA], the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45) [Regulations], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Specialty Crops Program, Agricultural Marketing Service, initiated this proceeding against K & A Produce [Respondent] by filing a disciplinary complaint on April 3, 2017, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to eight (8) sellers of the agreed purchase prices, or balances thereof, in the total amount of \$199,937.86 for forty-eight (48) lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce. The Complaint alleges the violations occurred in commerce

during the period of November 2014 through July 2015, on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference.

The Complaint requests that I find that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order that the facts and circumstances of the violations be published.

Respondent was duly served with the Complaint and did not file an answer to the Complaint within the twenty-day time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).¹

On June 15, 2017, Complainant filed a “Motion for Decision Without Hearing by Reason of Default” [Motion for Default] and “Proposed Decision Without Hearing by Reason of Default” [Proposed Decision]. On June 21, 2017, Complainant filed a corrected “Motion for Decision Without Hearing by Reason of Default” [Corrected Motion for Default]. Respondent has not filed any objections to the Motion for Default or Corrected Motion for Default.²

As Respondent failed to file an answer within the twenty-day time period prescribed by the Rules of Practice, and upon motion of Complainant for issuance of a decision without hearing by

¹ United States Postal Service records reflect that Respondent’s counsel received a copy of the Complaint on April 27, 2017. Respondent had twenty (20) days from the date of service to file a response. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent’s answer was due by May 17, 2017. Respondent did not file an answer on or before that date. Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision. 7 C.F.R. § 1.136(c). Regrettably, other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer.

² The Hearing Clerk’s records reflect that the Corrected Motion for Default and Proposed Decision were sent to Respondent’s counsel on June 21, 2017. Respondent had twenty (20) days from the date of service to file objections to Complainant’s motion. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent’s objections were due by July 11, 2017. Respondent did not file any objections by that date.

reason of default, the following Decision and Order is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of New York. Respondent's business and mailing address is 173 Colifax Avenue, Staten Island, New York 10306. This is the last known business address of Respondent. For service purposes, service may be made upon Respondent's legal counsel, Lee Pakulski, at Attard and Associates, 475 Main Street, Suite 1F, Farmingdale, New York 11735.
2. At all times material herein, Respondent was licensed under the provisions of the PACA or operating subject to those provisions. License number 20131082 was issued to Respondent on July 9, 2013. This license terminated on July 9, 2015, 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. Respondent, during the period of November 2014 through July 2015, on or about the dates and in the transactions set forth in "Appendix A," attached hereto and incorporated by reference, failed to make full payment promptly to eight (8) sellers for forty-eight (48) lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce, in the total amount of \$199,937.86.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly with respect to the forty-eight (48) transactions referenced in Finding of Fact No. 3 above, and set forth in Appendix A to the

Complaint, constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the below Order is issued.

ORDER

A finding is made that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

It is hereby ORDERED that the facts and circumstances of these violations be published.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 18th day of July, 2017


Bobbie J. McCartney
Chief Administrative Law Judge

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