

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

In re:)
)
National Produce Sales, Inc.,) PACA Docket No. 20-J-0007
)
Respondent.)

REC'D - USDA/OALJ/OHC
2020 SEP 16 PM 1:08

Decision and Order Without Hearing by Reason of Admissions

Appearances:

Christopher P. Young, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington D.C., for Complainant, the Associate Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”); and

Ariel Weissberg, Esq., with Weissberg and Associates, Ltd., Chicago, IL, counsel for Respondent National Produce Sales, Inc.

This is a disciplinary proceeding brought pursuant to the provisions of 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), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice”).

The Complaint alleges that during the period January 2016 through February 2018, on or about the dates and in the transactions set forth in Appendix A to the Complaint, failed to make full payment promptly to seven (7) sellers for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$820,456.93. In its Answer, paras. I and III-V, Respondent does not deny that it violated the PACA by failing to pay produce sellers fully and promptly but denies that “it or its agents *willfully* violated” the PACA (emphasis added). Further, Respondent admitted in its Answer, at para. IV, that it filed for bankruptcy and therein admits in its Schedule F (Appendix B to the Complaint) that the creditors/sellers listed in Appendix A to the Complaint were owed

undisputed, unsecured produce debt in the total amount \$874,820.43. The amount determined is more than a *de minimis* amount. *See Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (filling on Certified question) (no hearing required unless “the amount presently due and unpaid Would be de minimus, e.g., less than \$5,000”), final decision, 44 Agric. Dec. 870 (U.S.D.A. 1985).

Respondent’s violations in this case were flagrant and repeated. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (1994) (a finding of repeated violations is appropriate whenever there is more than one violation of the Act, and a finding of flagrant Violations of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00). Respondent’s violations were also willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. §558(c)) if a prohibited act is done with a careless disregard of statutory requirements, or is done intentionally, regardless of the violator’s intent in committing those acts and irrespective of evil intent. *See Ocean View Produce, Inc.*, 2009 WL 218027 (U.S.D.A. 2009); *Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (U.S.D.A. 1996). Here, Respondent knew or should have known that they could not make prompt payment for the large amounts of perishables they ordered, yet they continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly. *See Complaint*, para. III. Respondent’s actions were willful because Respondent intentionally withheld full and prompt payment from seven (7) sellers listed in Appendix A to the Complaint for produce they purchased, received and accepted in the course of or in contemplation of interstate and foreign commerce.

Complainant need only demonstrate that Respondent failed to make full payment promptly to sellers for produce they purchased, received, and accepted in more than a *de minimis* amount. *See 7 U.S.C. § 499b(4); Fava & Co., supra*, 46 Agric. Dec. at 81. Complainant has met that burden. By Respondent’s own admissions provided in its Answer filed on October 28, 2019,

as well as Schedule F of Respondent's bankruptcy filings (*see* Appendices A and B to Complaint), Respondent has violated the prompt payment provisions of the PACA.

Based on the admission of all material allegations of the Complaint in Respondent's Answer, no hearing is warranted in this matter.

Procedural History

Complainant initiated this proceeding against Respondent, National Produce Sales, Inc., by filing a disciplinary Complaint on October 2, 2019, 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 seven (7) sellers for produce they purchased, received, and accepted. The Complaint seeks a finding of flagrant, repeated, and willful violations of the PACA and publication of the facts and circumstances of Respondent's violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Respondent filed a timely Answer to the Complaint on October 28, 2019 that did not deny the allegations in the Complaint.

In response to Respondent's Answer, on May 7, 2020 Complainant moved for a decision without hearing ("Complainant's Motion") pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant made its motion based on admissions of fact that Respondent have made in their Answer to the Complaint.

Respondent did not submit a response to Complainant's Motion.¹

¹ United States Postal Service records reflect that the Motion for Decision Without Hearing by Reason of Admissions was sent to Respondent via certified mail on May 7, 2020 and was returned to the USDA Hearing Clerk's Office due to "insufficient address." The United States Postal Service records reflect that the Motion for Decision Without Hearing was mailed again by certified mail on June 29, 2020 and on August 18, 2020, but the status for each certified mailing has indefinitely remained "Awaiting Delivery Scan." Once served, Respondent has twenty (20) days from the date of service to file responses thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the

Findings of Fact

1. Respondent is or was a company incorporated and existing under the laws of the state of Illinois. Respondent's business address is or was 90 Old Mill Grove Road, Lake Zurich, Illinois 60047. The Complaint was served on Respondent's officer and majority owner of record, and on Respondent's attorney of record.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 20121269 was issued to Respondent on July 24, 2012. The license terminated on July 24, 2018, 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 January 2016 through February 2018, on or about the dates and in the transactions set forth in Appendix A to the Complaint, failed to make full payment promptly to seven (7) sellers for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$820,456.93.

Legal Conclusion

The failure of Respondent to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that they purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section

due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following workday. 7 C.F.R. § 1.147(h). Due to the ongoing pandemic and office closures, USPS mail services are experiencing indefinite delays. Thus, courtesy copies of the filings were sent to the parties via email by the Hearing Clerk's Office.

On September 15, 2020, I had a telephone conference with counsel for each party. During the call, counsel for Respondent confirmed receipt of Complainant's Motion and proposed Decision and Order via email from the USDA Hearing Clerk. Respondent accepted service of such via email and also stated that Respondent would not be filing a response to Complainant's Motion.

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

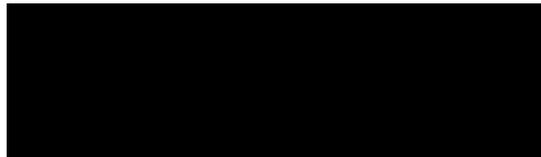
Order

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

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceeding thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (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).

Copies of this Decision and Order Without Hearing by Reason of Admissions shall be served by the Hearing Clerk on each of the parties.

Done this 16th day of September 2020, at Washington, D.C.



Tierney Carlos
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
Stop 9203, 1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 1-844-325-6940
SM.OHA.HearingClerks@USDA.GOV