UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 14-0054

In re: Mid-South Produce Co., Inc.

Respondent

Appearances: Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC for the Complainant
Judy H. White, President, Mid-South Produce Co., Inc. for the Respondent

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*.) (the Act or PACA), instituted by a Complaint filed on December 30, 2013 by Bruce W. Summers, the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA). The Complaint alleges that Respondent, during the period of December 2010 through May 2013, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of $346,880.15 for 80 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Complaint and a copy of the Rules of Practice were served upon Respondent at two (2) addresses via certified mail on January 2, 2014. On January 23, 2014, the Hearing Clerk's Office received a letter written on Respondent's letterhead signed by Judy H. White erroneously

indicating that it had contacted PACA's "designated attorney of record Mr. Jamaal Clayburn"[1] and been given a 30-day extension and stating that it "disagree[d] with the monetary amounts and customers [in the Complaint]." On May 8, 2014, there having been no objection from the Complainant, Respondent was given until June 9, 2014 in which to file an Answer.

Respondent's Answer filed on June 9, 2014 denied failing to pay produce suppliers or being in violation of the PACA, and on July 3, 2014, Complainant filed a Motion for Hearing. Respondent filed its objection to the Motion for Hearing, expressing the thought that a hearing would be a waste of time and money for all parties involved.

On September 5, 2014, after reviewing the record and being of the opinion that the matter could be decided on the record without the need for a hearing, I directed the parties to file cross motions for summary judgment. Upon discovering that the September 5, 2014 Order was not properly served on the parties, I supplemented it with an Order dated September 25, 2014 that extended the dates for filing the cross motions.

On October 23, 2014, Complainant filed a Motion for Decision Without Hearing and Memorandum in support thereof. Respondent failed to respond to the Motion, and the matter is now before me for disposition.

The Summary Judgment Standard

In moving for a Decision Without Hearing,[2] Complainant relies upon Respondent's Answer, the filings in Bankruptcy initiated by Respondent, and information obtained during a

[1] Mr. Clayburn is a Legal Assistant in the Hearing Clerk's Office; the Complainant is represented in this action by Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC.

[2] Although not denominated a Motion for Summary Judgment, as it the Motion filed by Complainant is supported by appropriate supporting documentation, I will consider it to be such.

compliance check conducted by PACA. Taken together, Complainant met its burden of proving a *prima facie* case that the violations alleged were in fact committed by Respondent.

While the Department's Rules of Practice do not specifically provide for the use or exclusion of summary judgment, its Judicial Officer has consistently ruled that hearings are futile and that summary judgment is appropriate where there is no factual dispute of substance. *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *In re Bauck*,[3] 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009).

While not an exact match, "no factual dispute of substance" may be equated with the "no genuine issue as to any material fact" language found in the Supreme Court's decision construing FED. R. CIV. P. 56 in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). *See also In re Massey,* 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment, because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

[3] *See In re* Bauck, 68 Agric. Dec. 853, 858-59 nn.6 & 7 (U.S.D.A. 2009) (discussing use of summary judgment in a variety of cases).

If a moving party supports its motion for summary judgment,[4] the burden then shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In providing such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. FED. R. CIV. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler*, 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts or on speculation or suspicions, and the non-moving party may not avoid summary judgment on a hope that some issue may surface at trial. *Conaway v. Smith*, 853 F2d. 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment, all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor. *Anderson*, 477 U.S. at 254; *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 158-59 (1970). In the instant case, after filing an Answer, Respondent failed to file any response to Complainant's Motion for Decision Without Hearing, leaving Complainant's *prima facie* case untouched and unrebutted.

As discussed in *Anderson*, the judge's function is not to himself weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. The standard to be used mirrors that for a directed verdict under FED. R. CIV. P. 50(a): "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250; *see also Sartor v. Arkansas*

[4] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Gas Corp., 321 U.S. 620, 624 (1944). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250-52; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Discussion

Initially, it will be observed that the Answer filed in this action denies only not paying sellers but falls short of indicating that "full payment promptly" was made in a timely manner as is required by the PACA. While the Answer does allude to accounts being in "good standing" and a "satisfactory agreement [being] in place," the Answer fails to identify the seller(s) with whom agreements might have been negotiated, and in any event none were produced.

Despite Respondent's denial that produce suppliers had not been paid,[5] the evidence reflects that Respondent filed a Voluntary Petition (Case No. 14-13699) pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101, *et seq.*) in the United States Bankruptcy Court for the Northern District of Mississippi. Respondent's Bankruptcy initial filings include a schedule of the twenty largest unsecured creditors, which lists two (2) of the sellers identified on Schedule A to the Complaint herein as being owed significant produce debt.[6] A third seller is included as a creditor; however, the amount is not included.[7] The other four (4) sellers identified as not being timely paid in the Complaint were not mentioned in the Bankruptcy documents.[8]

[5] The Answer indicates in polysemous fashion that Respondent was unable to find any evidence that four (4) of the seven (7) produce providers ever "had involvement with PACA," listing Proffer Wholesale Produce, Inc., General Produce, McCartney Produce and Kontos Brokerage Company, LLC. Docket Entry No. 5.

[6] Proffer Wholesale Produce, Inc. was listed as being owed $41,341.50, and First Fruit Farms, Inc. was listed as being owed $7,531.40. Exhibit B, p.1-2, Docket Entry No. 12.

[7] GM Brokerage was listed without any amount specified. Exhibit B, p. 4, Docket Entry No. 12.

[8] As noted by Complainant in the Memorandum accompanying the Motion for Decision Without Hearing, Respondent was directed to file all of its schedules on or before October 27, 2014 at which time the full amount of past-due and unpaid produce debt would have been disclosed. Exhibit C, p. 1, Docket Entry No. 12.

The practice of taking official notice of documents filed in Bankruptcy proceedings that have a direct relationship to matters in PACA disciplinary cases is well established. *In re: Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *In re: KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538, 2010 WL 5584369 (U.S.D.A. 2010); *In re: Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *In re: Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A. 1997); *In re: Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609, 1613-14 (U.S.D.A. 1993); *see In re: Caito Produce Co.*, 48 Agric. Dec. 602, 625-26 (U.S.D.A. 1989).

"Section 1.141(g)(6) of the Rules of Practice (7 CFR § 1.141(g)(6)) provides that official notice shall be taken of such matters as are judicially noticed by federal courts." *In re: S W F Produce Co.*, 54 Agric. Dec. 693, 1995 WL 122034 at *5 (U.S.D.A. 1995). Federal courts take judicial notice of official court records, including Bankruptcy proceedings and other cases[9] involving "the same subject matter or questions of a related nature between the same parties." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (citing *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 755 (1943)); *see also Magnolia Fruit & Produce Co., Inc. v. U.S. Dep't of Agric.*, 50 Agric. Dec. 854, 860 (U.S.D.A. 1991) ("The law appears to be settled that a court may take judicial notice of other cases including the same subject matter or questions of a related nature.") (internal citations omitted). Moreover, "[j]udicially noticed facts often consist of matters of public record, *such as prior court proceedings*; administrative materials; city ordinances; or other court documents." *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 67 Agric. Dec. 1212, 1218 (U.S.D.A.

[9] Federal courts also "may 'take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'" Lion Raisins, Inc. v. U.S. Dep't of Agric., 67 Agric. Dec. 1212, 1218 (U.S.D.A. 2008) (citing United States *ex rel.* Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (quoting St. Louis Baptiste Temple, Inc. v. Fed. Deposit Ins. Corp., 605 F.2d 1169, 1172 (10th Cir. 1979)).

2008) (emphasis added).

Even were the Bankruptcy filings not sufficient admissions of PACA violations, Complainant's position is supported by the Declaration (executed under penalty of perjury) of Sharlene Evans, a Senior Marketing Specialist in the Washington, DC Office of PACA. Ms. Evans conducted a compliance investigation during the period October 15 through October 30, 2014 and, in the course of the investigation, contacted each of the seven (7) sellers identified in Exhibit A to the Complaint in this action to discuss the amounts listed in the exhibit[10] and to determine the current balance of any debt owed as past due. Of the seven (7) sellers, three (3) (Proffer Wholesale Produce, Inc.; McCartney Produce; and Kontos Brokerage Company, LLC) indicated that they had been paid in full. One (1) seller, Bama Tomato Company, Inc., stated that a settlement had been reached with Respondent but that new debt was currently owed.[11] The remaining three (3) sellers (General Produce; GM Brokerage; and First Fruit Farms, Inc.) each indicated that all or portions of the debt alleged to be due in the Complaint were still owed.[12]

"Full payment promptly" in accordance with the PACA requires full payment by the buyer within ten (10) days after the day on which produce is accepted unless: (1) the parties agree to different terms and (2) the different payment terms are reduced to writing prior to entering into the transaction. 7 C.F.R. §§ 46.2(aa)(5) and 46.2(aa)(11). The burden of proof is on the party claiming existence of such an agreement. *See In re Scamcorp, Inc.*, 57 Agric. Dec. 527,

[10] Ideally, the Declaration could have confirmed both that as of the date of the filing of the Complaint that the amounts listed on Exhibit A to the Complaint were accurate and that there was no written agreement between the parties altering the settlement period set forth in the Regulations. Significantly, the discussion did not result in corrections being made to Exhibit A.

[11] Bama Tomato Company, Inc. advised Ms. Evans that Respondent had $17,500.00 in unpaid and past-due debt. Exhbit A, p.2, Docket Entry No. 12.

[12] General Produce indicated that $1,745 was remained unpaid, with the last payment having been received on September 19, 2014; GM Brokerage indicated that the entire $118,177.00 contained on Exhibit A to the Complaint was still owed; and First Fruit Farms, Inc. indicated that it was still owed $7,531.40.

547-49 (U.S.D.A. 1998).

Consistent with prior decisions, it is abundantly clear that no hearing need be held in this case as the amounts admitted to be owed are obviously more than *de minimis*. *In re: H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) ("there is no need for complainant to prevail as to each of the transactions, since the same order [revoking the license] would be entered in any event, as long as the violations are not *de minimis*."); *In re: Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984). The admitted outstanding balance owed to produce sellers well exceeds $5,000 and axiomatically represents more than the *de minimis* threshold. *See In re: Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1987); 44 Agric. Dec. 879 (U.S.D.A. 1985).

On the basis of the entire record, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

1. Respondent Mid-South Produce Co., Inc. is a corporation organized and existing under the laws of the state of Mississippi with a last-known business address in Grenada, Mississippi.

2. At all times material herein, Respondent was licensed under the provisions of the PACA or operated subject to those provisions. License No. 19173233 was issued to Respondent on October 15, 1957.

3. Respondent, during the period of December 2010 through May 2013, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of $346,880.15 for 80 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

4. On October 1, 2014, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101, *et seq.*) in the United States Bankruptcy Court for the Northern District of Mississippi. The Petition was designated as Case No. 14-13699.

5. Respondent's Bankruptcy initial filings included a schedule of the twenty largest unsecured creditors, including two (2) of the seven (7) sellers identified on Schedule A to the Complaint herein, as being owed significant produce debt. A third seller is included as a creditor; however, the amount of debt was not included.

6. A compliance investigation conducted during the period of October 15 through October 30, 2014 documented the fact that although full payment had been received by three (3) of the sellers listed on Exhibit A to the Complaint herein and a settlement had been reached with one (1) seller (but new debt was currently owed), three (3) sellers still had all or at least portions of the debt alleged in the Complaint still owed.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Order

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

2. Respondent's PACA License No. 19173233 is revoked.

3. This Order shall take effect on the date that this Decision becomes final.

4. Pursuant to the Rules of Practice Governing Procedures Under the Act, this Decision will become final without further proceedings 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 shall be served upon the parties by the Hearing Clerk.

November 21, 2014

Peter M. Davenport

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Peter M. Davenport
Chief Administrative Law Judge