

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:) PACA Docket No. D-16-0039
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Poppell's Produce, Inc.,)
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Respondent)

Decision Without Hearing Based on Admissions

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). Complainant, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding against Poppell's Produce, Inc. (Respondent) by filing a disciplinary Complaint on February 1, 2016, 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 twenty (20) sellers for produce it purchased, received and accepted, and seeking revocation of Respondent's PACA license. In response to Respondent's Answer, Complainant moved for a decision without hearing based on admissions 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 has made in its Answer to the Complaint. As Respondent's Answer admits the material allegations of the Complaint, no hearing is warranted in this matter. *See In re: Scamcorp, Inc. d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 548-549 (1980); *see also, In re: H.M. Shield, Inc.*, 48 Agric. Dec. at 581; *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83

By Respondent's own admissions provided in its Answer filed on February 26, 2016, Respondent has violated the prompt payment provisions of the PACA. Respondent has specifically admitted that as of February 26, 2016, the date of its Answer, it failed to promptly pay produce sellers listed in the Complaint at least a total of \$304,614.25 (the amount owed to 18 of the 20 sellers listed in Appendix A to the Complaint), more than a *de minimis* amount. *See In re: Fava & Co.*, 46 Agric. Dec. 79, 81 (1984) (ruling on certified question) (no hearing required unless "the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000"), final decision, 44 Agric. Dec. 870 (1985).

Further, based on Respondent's own admissions provided in its Answer filed on February 26, 2016, Respondent's violations in this case must be found to be flagrant and repeated. *In re: 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 intentionally, irrespective of evil intent, or done with a careless disregard of statutory requirements. *In re: Ocean View Produce, Inc.*, 2009 WL 218027. In other words, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (1996). Here, Respondent knew or should have known that it could not make prompt payment for the large amount of perishables they ordered, yet it continued to make purchases over a lengthy period of time, and could not pay produce suppliers. (See Complaint, pg. 2, ¶ III.) Respondent's actions are willful because Respondent intentionally withheld full and prompt payment from at least 18 of the 20 sellers

listed in Appendix A to the Complaint from whom it purchased, received and accepted perishable agricultural commodities 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 it purchased, received and accepted. Complainant has met that burden. Complainant has demonstrated and Respondent has admitted that at least 18 of the 20 sellers listed on the Appendix A to the Complaint did not receive full payment promptly in an amount due of \$304,614.25, more than a *de minimis* amount.

On January 31, 2014, Respondent filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*) in the U.S Bankruptcy Court, Southern District of Georgia, Brunswick Division. The petition was designated Case No. 2:14-bk-20073-JSD. On March 4, 2014, the case was converted to a Chapter 7 Bankruptcy. Respondent admits in its Schedule F that 18 of the 20 sellers listed in Appendix A, hold unsecured claims for unpaid produce debt totaling \$304,614.25. Respondent admits that the above-referenced voluntary petition was filed. (Answer, p. 2.) By admitting to filing the Schedule F, Respondent is, in turn, admitting to violation of the PACA. The amount admitted in the Schedule F is more than a *de minimis* amount. *See In re: Fava & Co.*, 46 Agric. Dec. 79, 81 (1984) (ruling on certified question) (no hearing required unless “the amount presently due and unpaid would be *de minimis*, *e.g.*, less than \$5,000”), final decision, 44 Agric. Dec. 870 (1985).

Nevertheless, Respondent asserts that the “Complaint fails to state a claim against Respondent upon which relief may be granted.” (Answer, p. 1.) The claim in this proceeding that the Complaint alleges is that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to twenty (20) sellers for produce it purchased, received and accepted. The relief that the Complaint seeks in this proceeding is

publication of the facts and circumstances of these violations. Therefore, I find that Respondent's affirmative defense is without merit and must be rejected.

Respondent also asserts that "[t]his case is stayed due to the pending Chapter 7 Bankruptcy of Respondent which is filed in the United States Bankruptcy Court for the Southern District of Georgia, Case No. 14-20073-JSD." (Answer, p. 1.) This affirmative defense must also be rejected in light of the fact that the purpose of this proceeding is not to collect payment for debt admitted in Respondent's bankruptcy filings but rather to seek publication of the facts and circumstances of Respondent's violations of the PACA. It is well established that the filing of a bankruptcy petition does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; accordingly, because this is a governmental disciplinary proceeding in which the Complainant is not seeking payment but rather to enforce Complainant's regulatory power, any asserted "stays" imposed by the Bankruptcy Court would not extend to this proceeding. *In Re: Diversified Foods, Inc.*, 64 Agric. Dec. 1209 (U.S.D.A.), 2005 WL 6231892. (See *In Re Diversified Foods*, at 1211 "the filing of a bankruptcy petition does not stay the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.") Because the filing of a voluntary bankruptcy petition and subsequent proceeding does not stay or extinguish this disciplinary action, Respondent's second affirmative defense must also be rejected.

Finally, Respondent asserts that "[m]oney was paid to numerous purported P.A.C.A. claimants under the Chapter 7 Bankruptcy of Respondent; some or all of such payments have not been properly credited to the accounts of the applicable providers." (Answer, p. 1.) Respondent neglects to specifically name which claims in Appendix A to the Complaint have been "paid".

In fact, Respondent does not even assert that all of the claims have been paid. Further, whether the claims have been “paid”, by eventual payment to the produce creditor or discharged in a bankruptcy proceeding, that payment does not negate Respondent’s failure to make full payment *promptly* which is the violation of the PACA alleged in the Complaint. The fact that the debt is being “paid” to “applicable providers” in the bankruptcy proceeding does not extinguish the violation of the PACA for failure to pay promptly. To the contrary, it precisely demonstrates the occurrence of each violation. The admitted amount owed of \$304,614.25 in the Schedule F of Respondent’s voluntary bankruptcy petition is not a *de minimis* amount. Therefore, Respondent’s third affirmative defense is without merit and is rejected.

FINDINGS OF FACT

1. Respondent is a corporation organized and existing under the laws of the state of Georgia. Respondent’s business and mailing address is 712 W Cherry Street, Jesup, Georgia 31545.

2. At all times material herein, Respondent was licensed under the provisions of the PACA, or operating subject to those provisions. License number 19950252 was issued to Respondent on November 17, 1994. This license terminated on November 17, 2016, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), after Respondent failed to pay the annual renewal fee.

3. Respondent, during the period September 2012 through December 2013, on or about the dates and in the transactions set forth in Appendix A to the Complaint, failed to make full payment promptly of the agreed price for perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and foreign commerce from at least 18 of 20 sellers, in the total amount of \$304,614.25.

CONCLUSIONS

The failure of Respondent to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it 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)) as described in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)). The purpose of this proceeding is not to collect payment for debt admitted in Respondent's Answer and bankruptcy filings but rather to seek publication of the facts and circumstances of Respondent's violations of the PACA to deter future violations by this Respondent and others similarly situated and therefore is a proper exercise of Complainant's regulatory power and an appropriate remedy for the violations of the PACA identified herein above.

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)), and that the facts and circumstances of these violations shall be published.

Copies of this Decision and Order shall be served upon the parties.

Issued in Washington D.C.

this 28th day of April, 2016


Chief Administrative Law Judge
Bobbie J. McCartney