

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
Kendall Frozen Fruits, Inc.) PACA-D Docket No. 21-J-0002
)
Respondent.)

REC'D - USDA/OALJ/OHC
2021 FEB 9 AM 11:23

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearance:

Buren W. Kidd, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”)

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (“PACA”); the regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.5) (“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) (“Rules of Practice”).

The Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”), initiated this proceeding by filing a complaint against Kendall Frozen Fruits, Inc. (“Respondent”) on October 21, 2020. The Complaint alleges that, during the period May 2017 through July 2018, Respondent violated PACA section 2(4) (7 U.S.C. § 499b(4)) by failing to make full payment promptly to two sellers for thirty-nine lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$2,166,335.50.¹ Further,

¹ See Complaint at 2-3.

the Complaint requests:

1. That *unless Respondent fails to file an answer within the time allowed*, or admits all the material allegations of this Complaint, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the PACA; and
2. That the Administrative Law Judge find that Respondent has willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order the publication of the facts and circumstances of Respondent's violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Complaint at 4 (emphasis added).

Respondent was duly served with a copy of the Complaint and did not file an answer within the twenty-day period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).²

On January 12, 2021, I issued an order directing the parties to show cause (“Show Cause Order”), not later than twenty days after that date, why default should not be entered against Respondent.³ On the same date, Complainant filed a Reply to the Show Cause Order, Motion for Decision Without Hearing by Reason of Default (“Motion for Default”), and Proposed Decision Without Hearing by Reason of Default (“Proposed Decision”). Respondent failed to respond to the Show Cause Order and has not filed any objections to Complainant’s Motion for Default or

² United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on November 2, 2020. Respondent had twenty days from the date of service to file a response. 7 C.F.R. § 1.136(a). 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(h). In this case, Respondent’s answer would have been due on or before November 23, 2020; however, on November 13, 2020, I issued an order extending Respondent’s answering deadline to December 28, 2020. *See* Order Granting Respondent’s Unopposed Request for an Extension of Time to Answer Complaint. Nonetheless, Respondent has not filed an answer.

³ The Show Cause Order also directed: “Unless the parties have agreed to a consent decision, Complainant’s response shall be accompanied by: (1) a proposed decision and order and (2) a motion for adoption of that proposed decision and order in accordance with the provisions of 7 C.F.R. § 1.139.” Show Cause Order at 2.

Proposed Decision.⁴

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.⁵ Other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an unfiled answer where, as in the present case, no meritorious objections have been filed.⁶

As Respondent failed to file an answer the Complaint, and upon Complainant's motion for the issuance of a decision without hearing by reason of default, this 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 Kendall Frozen Fruits, Inc. is or was a corporation organized and existing under the laws of the State of California. Respondent's business address is 130 Newport Center Drive #130, Newport Beach, California 92660. Respondent's mailing address is 9777 Wilshire Blvd. # 818, Beverly Hills, California 90212.

⁴ United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent via certified mail and delivered on January 19, 2021. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. 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(h). In this case, Respondent's objections were due on or before February 8, 2021. Respondent has not filed any objections.

⁵ 7 C.F.R. § 1.136(c).

⁶ 7 C.F.R. § 1.139; *see supra* note 4 and accompanying text.

2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of PACA. License number 1996 1474 was issued to Respondent on May 9, 1996. The license was terminated due to bankruptcy.
3. Respondent, during the period May 2017 through July 2018, on or about the dates an in the transactions set forth in Appendix A to the Complaint (attached hereto and incorporated by reference), failed to make full payment promptly to two sellers for thirty-nine lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$2,166,335.50.
4. On November 5, 2018, 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, Central District of California. This petition was designated Case No. 8:18-bk-14052-SC. Respondent admitted in its bankruptcy Schedule F⁷ that it owes two of the two creditors/sellers listed in Appendix A to the Complaint undisputed, unsecured produce debt in the amount of \$2,335,715.00.⁸ Respondent lists claims for all creditors/sellers listed in Appendix A that are equal to or greater than the amounts listed in Appendix A.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent Kendall Frozen Fruits, Inc.'s failure to make full payment promptly with respect to the thirty-nine lots of perishable agricultural commodities referenced in Finding of Fact No. 3 above and set forth in Appendix A to the Complaint constitutes willful, flagrant, and

⁷ Official notice is taken of Respondent's Voluntary Bankruptcy Petition (designated Case No. 8:18-bk-14052-SC) and Schedule F. 7 C.F.R. § 1.141(h)(6); *see Five Star Food Distribs. Inc.*, 56 Agric. Dec. 880, 893 (U.S.D.A. 1997).

⁸ *See* Complaint, Appendix B.

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

3. The total unpaid balance due to sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter.⁹
4. As Respondent's license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Respondent's violations.¹⁰

ORDER

1. Complainant's Motion for Decision Without Hearing by Reason of Default is GRANTED.
2. A finding is made that Respondent Kendall Frozen Fruits, Inc. has committed willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)).
3. The facts and circumstances of Respondent's PACA violations, as set forth above, shall be published pursuant to PACA section 8(a) (7 U.S.C. § 499h(a)).

⁹ See *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

¹⁰ See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

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 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 and counsel by the Hearing Clerk.

Done at Washington, D.C.,
this 9th day of February 2021


Channing D. Strother
Chief Administrative Law Judge

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

Appendix A

Appendix A: A-2019-0051 KENDALL FROZEN FRUITS, INC.

	Seller's Name & Address	No. of Trans.	Commodity	Dates Accepted	Dates Payment Due	Amounts Past Due & Unpaid
1	Agroindustrial Valle Frio Sociedad Anonima Curico, Chile	20	Mixed Berries	4/07/2017 to 10/31/2017	5/07/2017 to 11/30/2017	\$1,164,259.10
2	Sociedad Agricola Y Fruticola Leon Limitada Los Niches Curico, Chile	19	Mixed Berries	10/21/2017 to 4/17/2018	1/24/2017 to 7/18/2018	\$1,002,076.40
2	Sellers	39			TOTAL	\$2,166,335.50