

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

In re:)
)
Bain Distributors, Inc.,) PACA-D Docket No. 20-J-0035
)
Respondent.)

REC'D - USDA/OALJ/OHC
2021 JAN 4 AM 11:34

Decision and Order Without Hearing

Appearances:

Shelton S. Smallwood, 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”); and

Alfred Lares, representative of the Respondent, Bain Distributors, 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. Part 46) (“Regulations”), 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, filed January 31, 2020, alleges that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to nine (9) sellers for one hundred and seventy (170) lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$557,099.05 during the period from September 2015 through August 2018. Complainant requests the issuance of an order finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and publication of the facts and circumstances surrounding the violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

On February 21, 2020, Respondent filed its Answer, by and through its president and representative, Alfred Lares, appearing *pro se*. Respondent states, Answer at 1, that “Bain admits all allegations in the Complaint except that Bain does not owe \$557,099.05 as alleged in the Complaint, does not owe the amounts as alleged on Exhibit ‘A,’ and has not willfully violated any section of the PACA.” In its Answer, Respondent also raises three affirmative defenses stating: 1) “The Complaint is barred by the applicable statutes of limitations[;]”¹ 2) “The Complaint is barred by the doctrine of waiver[;]” and 3) “Plaintiffs are estopped by their own acts from asserting the claims alleged in the Complaint.” Aside from the cited California Code of Civil Procedure, which is not applicable here, Respondent does not provide any other authority on which it relies for its affirmative defenses.

An Order Setting Deadlines for Submissions was issued by the undersigned on April 9, 2020. Complainant timely filed its list of proposed exhibits and witnesses on May 26, 2020. Respondent timely filed a request for extension of time to file submissions on July 13, 2020, which was granted on the same day. Respondent filed a second request for extension to file submissions on August 11, 2020, which was granted on August 12, 2020.

On August 24, 2020, Complainant filed a Motion for An Order Requiring Respondent To Show Cause Why A Decision Without Hearing Should Not Be Issued (“Complainant’s First Motion”) and a proposed Order Requiring Respondent to Show Cause Why a Decision and Order Should Not Be Issued. In its First Motion, at 2, Complainant states that that Respondent’s Answer and general denial “is not an acceptable defense to liability in a case in which a Complaint a Complaint has been filed alleging the violation of section 2(4) of the PACA due to

¹ Citing California Code of Civil Procedure §§ 337, 339(1), 343 and 344.

the failure to make full payment promptly.”²

On September 23, 2020, Respondent, through Mr. Lares, filed a Declaration of Alfred Lares In Response to Order to Show Cause Why a Decision Without Hearing Should Not Be Issued (“Lares’ Declaration”). Therein, Mr. Lares states that he is the principal of Respondent, and claims that, regarding the debts with nine (9) sellers as alleged in the Complaint, Respondent “has paid and/or has agreements with most of the Sellers and thus does not owe \$557,099.05.” In his Declaration at 2-4, Mr. Lares explains the amounts outstanding, forgiven/settled, or disputed with each of the nine (9) sellers named in the Complaint. Mr. Lares does not dispute that payments were not made promptly as required by the PACA.

On October 14, 2020, Complainant filed a Motion for A Decision Without Hearing (“Complainant’s Second Motion”), which included Appendix A (which was also attached to the Complaint), Lares’ Declaration as Attachment A, and the Declaration of Steve Seo as Attachment B. With the Second Motion, Complainant also filed a proposed Decision and Order, asking that a decision and order without hearing be issued against Respondent due to its failure to make a full and prompt payment for produce purchases made in willful, flagrant, and repeated violation of PACA (7 U.S.C. § 499b(4)).³ In its Second Motion, Complainant argues, at 2, that

² Citing 7 C.F.R. § 1.136(b); *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547-549 (1998).

³ United States Postal Service records reflect that Complainant’s Second Motion was sent to Respondent via certified mail on October 14, 2020 but remained “in transit” without further explanation past October 28, 2020. United States Postal Service records reflect that Complainant’s Second Motion was again sent via certified mail to Respondent on November 19, 2020 but was returned “Unclaimed” on December 4, 2020. The USDA Hearing Clerk’s records reflect that Complainant’s Second Motion was then sent to Respondent via ordinary mail pursuant to 7 C.F.R. § 1.147 (c)(1) on December 4, 2020. Respondent had twenty (20) days from the date of service to file objections thereto. 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 workday. 7 C.F.R. § 1.147(h).

that Respondent admitted to violation of the PACA in its September 23, 2020 response, Lares' Declaration.

Complainant made its motion based on admissions of fact that Respondent has made in its Response to the Show Cause Motion. As Respondent's Response admits the material allegations of the Complaint, no hearing is warranted in this matter.

Respondent has admitted in its Response that it violated the PACA by failing to pay produce sellers fully and promptly when it admitted that "most of the Sellers" but not all produce sellers listed in Appendix A to the Complaint had been paid. Respondent, in its Response at 2-4, admits that there are at least three (3) produce sellers who are still owed at least \$322,653.655—more than a *de minimis* amount. In addition, after a compliance investigation was conducted on August 7, 2020, Complainant determined that \$463,816.55⁴ still remains owed. The amount Respondent admits as still owed and the amount Complainant determined as still owed are each more than a *de minimis* amount.⁵

Respondent's violations in this case were flagrant and repeated.⁶ Respondent's violations

In this case, Respondent's objections were due by December 26, 2020. To date, Respondent has not filed any objections.

⁴ Complainant alleges, Second Motion at 4, that the investigation revealed that respondent owes \$419,480.46. However, the balances owed as stated in Attachment B to the Second Motion amount to \$463,816.55, not including outstanding balances owed to CAB Produce Company, LLC and V&L Produce, Inc. which were unreachable during the investigation. Either amount is more than a *de minimis* amount, *see supra* note 5.

⁵ *See 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).

⁶ *See 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).

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.⁷ In other words, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.⁸ Here, Respondent knew or should have known that it could not make prompt payment for the large amounts of perishables it ordered, yet it continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.⁹

Respondent's actions are willful because Respondent intentionally withheld full and prompt payment from at least three (3) of the nine (9) sellers listed in Appendix A to the Complaint for produce it 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 it purchased, received and accepted in more than a *de minimis* amount. Complainant has met that burden. Respondent has admitted that there remains an amount still owing of at least \$322,653.65 to three (3) of the nine (9) sellers listed in Appendix A to the Complaint and Complainant has demonstrated that a total amount of \$463,816.55 is still owed to at least six (6) of the nine (9) sellers listed in Appendix A to the Complaint--each more than a *de minimis* amount.¹⁰

Respondent was served with the Complaint on March 16, 2020. According to the USDA Judicial Officer's policy set forth in *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec.

⁷ *Ocean View Produce, Inc.*, 2009 WL 218027.

⁸ *Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (1996).

⁹ See Complaint, pg. 2, ¶ III.

¹⁰ See *Fava*, *supra* note 5.

527, 548- 549 (1998), which states that when a complaint is filed alleging the failure to make full payment promptly under the PACA, if the Respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the Respondent or the date of the hearing, whichever occurs first, (July 14, 2020, in this matter) the case will be treated as a “no pay” case for which the sanction is license revocation.¹¹ Complainant moves that a Decision Without Hearing be issued, finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that the facts and circumstances of Respondent’s violations be published.

Pursuant to the Department’s policy set forth in the *Scamcorp* decision, upon the Complainant’s motion for the issuance of a decision and order without hearing, and due to Respondent’s failure to object to Complainant’s motion for a decision and order without hearing, the following decision and order is issued without further procedure or hearing pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent is or was incorporated and existed under the laws of the state of Delaware. Respondent’s business address is 11912 Rivera Road, Suite E, Santa Fe Springs, California 90670. Respondent has a secondary business address of P.O. Box 2427, Santa Fe Springs, California 90670 whereupon the Complaint was also served. Finally, the Complaint in this case was served on Respondent’s sole owner at his home address,

¹¹ In its First Motion at 1, fn. 1, Complainant notes that it seeks publication of the facts and circumstances surrounding Respondent’s PACA violations, rather than revocation of Respondent’s PACA license, as Respondent’s PACA license terminated on May 20, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

which was provided to the Office of Hearing Clerk for service purposes; it was withheld from the Complaint to protect the owner's personal information and privacy.

2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 19990719 was issued to Respondent on March 17, 1999. This license was suspended on May 15, 2019, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)). The license was terminated on May 20, 2019, 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 September 2015 through August 2018, on or about the dates and in the transactions set forth in Appendix A to the Complaint attached hereto and incorporated by reference, failed to make full payment promptly to at least three (3) of the nine (9) sellers listed in Appendix A to the Complaint for lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$322,653.65.

Legal Conclusion

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

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 4th day of January 2021, at Washington, D.C.

A solid black rectangular redaction box covering the signature of the Administrative Law Judge.

Tierney Carlos
Administrative Law Judge

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