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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
C&D Produce Outlet, Inc.,	)	PACA Docket No. D-17-0268
	)	
Respondent.	)	

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearance:

Christopher P. Young, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250, for the Complainant, Agricultural Marketing Service ("AMS").

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499 *et seq.*) ("PACA"); the regulations promulgated pursuant to PACA (7 C.F.R. §§ 46.1 through 46.45) ("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 Associate Deputy Administrator for the Specialty Crops Program, PACA Division, Agricultural Marketing Service ("Complainant"), initiated this proceeding against C&D Produce Outlet, Inc. ("Respondent") by filing a disciplinary complaint on September 22, 2017. The Complaint alleged that, during the period May 2015 through October 2016 (on or about the dates and in the transactions set forth in Appendix A to the Complaint, attached hereto and incorporated by reference), Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to seven sellers, in the total amount of $104,595.20, for sixty-two lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

The Complaint requested that an Administrative Law Judge find that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order the revocation of Respondent's PACA license pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).[1]

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 9, 2018, former Chief Administrative Law Judge Bobbie J. McCartney[3] 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.[4] On January 26, 2018, Complainant filed a Response to Show Cause Order and Request for Decision Without Hearing by Reason of Default ("Motion for Default") and a proposed Decision Without Hearing

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[1] *See* Scamcorp, Inc., 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

[2] United States Postal Service records reflect that a copy of the Complaint was sent to Respondent's owner via certified mail and delivered on April 2, 2018. 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 was due by April 23, 2018. Respondent has not filed an answer.

[3] Judge McCartney retired from federal service in January 2018, and the case was reassigned to my docket.

[4] The Hearing Clerk's records reflect that a copy of the Complaint was initially sent to Respondent's owner via certified mail on September 25, 2017 but was returned unclaimed on November 20, 2017. In accordance with the Rules of Practice, the Complaint was re-mailed via ordinary mail to the same address on November 21, 2017. 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 by December 11, 2017, which prompted Judge McCartney to issue a Show Cause Order in the matter. However, Complainant's counsel subsequently provided the Hearing Clerk's Office with an updated address for Respondent. United States Postal Service records reflect that a copy of the Complaint was sent to Respondent's updated address and delivered on April 2, 2018. *See supra* note 2.

by Reason of Default ("Proposed Decision"). Respondent failed to respond to the Show Cause Order within the required time.[5] As of this date, Respondent has not filed any objections to Complainant's Motion for Default.[6]

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. 7 C.F.R. § 1.136(c). As Respondent failed to answer the Complaint, 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 was a corporation organized and existing under the laws of the state of Florida. Respondent's mailing address was 3313 Lake Worth Road, Palm Springs, Florida 33461.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of PACA. License number 20030320 was issued to Respondent on December 9, 2002.
3. Respondent, during the period May 2015 through October 2016, on or about the dates and in the transactions set forth in Appendix A attached hereto and incorporated herein by reference, failed to make full payment promptly to seven sellers for sixty-two lots of

[5] The Show Cause Order was issued on January 9, 2018; therefore, the parties were required to file responses on or before January 29, 2018. Respondent did not respond to the Show Cause Order by that date.

[6] The Hearing Clerk's records reflect that the Motion for Default and Proposed Decision were sent via certified mail to Respondent's owner and delivered on June 29, 2018. Respondent had twenty (20) days from the date of service to file objections to Complainant's motion. 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 work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent's objections were due by July 19, 2018. Respondent has not filed any objections.

perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of $104,595.20.

4. On May 14, 2016, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court, Southern District of Florida. The petition was designated Case No. 16-15760. Respondent admits in its bankruptcy Schedule F that six of the seven creditors/sellers listed in Appendix A to the Complaint are owed undisputed unsecured produce debt in the amount of $87,316.45.[7]

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Official notice is taken of the Schedule F filed by Respondent in the United States Bankruptcy Court, Southern District of Florida (Case No. 16-15760), which lists $87,316.45 of produce debt that Respondent owed to six sellers for perishable agricultural commodities.
3. Respondent's admissions in its bankruptcy filings constitute admissions of the allegations set forth in the Complaint and provide reason to dispose with a formal hearing in this matter.[8]
4. The total unpaid balance due to produce sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter.[9]

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[7] *See* Compl. Appx. B.

[8] *See* The Square Group, LLC, 75 Agric. Dec. 689, 694 (U.S.D.A. 2016); Perfectly Fresh Farms, Inc., 68 Agric. Dec. 507, 525 (U.S.D.A. 2009).

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

5. Respondent's failure to pay promptly with respect to the transactions referenced in Finding of Fact No. 3 above, as set forth in Appendix A to the Complaint, constitutes willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)), for which the below Order is issued.

ORDER

1. Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)).
2. Respondent's license is revoked in accordance with section 8(a) of PACA (7 U.S.C. § 499h(a)).

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 by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 26th day of July, 2018

[redacted]

Channing D. Strother
Acting Chief Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776
SM.OHA.HearingClerks@OHA.USDA.GOV

	Seller & Location	No. Lots	Commodity	Date Accepted	Date Payment Due	Amount Past Due & Unpaid
1	Sotolongo Farms Royal Palm Beach, FL Origin: MX	9	MXFV	05/04/15 to 06/24/15	05/25/15 to 07/15/15	$28,533.80
2	Freedom Fresh Miami, FL Origin: CN, MX, China	13	MXFV	06/27/15 to 07/16/15	07/18/15 to 08/06/15	$19,091.60
3	Naam Produce Miami Shores, FL	7	MXFT	08/05/15 to 08/28/15	08/15/15 to 09/07/15	$3,293.00
4	J. Sanchez Produce, Inc. Hialeah, FL Origin, MX	9	MXFV	07/30/15 to 09/01/15	08/20/15 to 09/22/15	$8,841.00
5	Mr. D Fruit & Produce, Inc. Miami, FL	3	MXFV	08/20/15 to 08/30/15	08/30/15 to 08/31/15	$12,745.00
6	Fresko Foods Miami, FL	20	MXFV	09/19/15 to 01/11/16	09/29/15 to 01/21/16	$31,061.80
7	Coosemans Miami Inc. Miami, FL	1	MXFV	10/11/2016	10/21/2016	$1,029.00
7	**Sellers**	**62**	**Lots**		**Total**	**$104,595.20**

APPENDIX A