

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

REC'D - USDA/OALJ/DHC
2020 JUL 21 PM 12:00

In re:)
)
PK Produce, Inc.,) PACA-D Docket No. 20-J-0113
)
Respondent.)

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearance:

Shelton 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").

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 PK Produce, Inc. ("Respondent") on April 8, 2020. The Complaint alleges that during the period November 2017 through October 2018, Respondent violated PACA section 2(4) (7 U.S.C. § 499b(4)) by failing to make full payment promptly to fourteen sellers for ninety-seven lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce, in the total amount of \$827,222.47.¹ Further, the

¹ See Complaint at 2-3.

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 publish the facts and circumstances of Respondent's violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Complaint at 3-4 (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 June 9, 2020, Complainant filed a Motion for Decision Without Hearing by Reason of Default ("Motion for Default") and Proposed Decision Without Hearing by Reason of Default ("Proposed Decision"). Respondent has not filed objections to the Motion for Default or Proposed Decision.³

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the

² United States Postal Service records reflect that the Complaint was sent to Respondent's attorney, George J. Argie, Esq., and delivered on April 22, 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 was due on or before May 12, 2020. Respondent has not filed an answer.

³ United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent's attorney, George J. Argie, Esq., via certified mail and delivered on June 15, 2020. 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 July 6, 2020. Respondent has not filed any objections.

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.⁴ 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.⁵

As Respondent failed to file an answer to 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 PK Produce, Inc. was a corporation organized and existing under the laws of the state of Ohio, and its mailing address is 5304 S Cleveland Street, Canton, Ohio 44707. The Complaint was served on Respondent's mailing address and on Respondent's attorney, George J. Argie, Esq., whose business and mailing address is 6449 Wilson Mills Road, Mayfield Village, Ohio 44143.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of PACA. License number 20161129 was issued to Respondent on September 7, 2016. Respondent's license was suspended on May 6, 2019 due to unpaid reparation awards. On October 25, 2019, the license was terminated, pursuant to PACA section 4(a) (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period November 2017 through October 2018, on or about the dates and in the transactions set forth in Appendix A (attached hereto and incorporated by

⁴ 7 C.F.R. § 1.136(c).

⁵ 7 C.F.R. § 1.139; *see supra* note 3 and accompanying text.

reference), failed to make full payment promptly to fourteen sellers for ninety-seven lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce, in the total amount of \$827,222.47.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent PK Produce, Inc.'s failure to make full payment promptly with respect to the ninety-seven transactions referenced in Finding of Fact No. 3 above, and as set forth in Appendix A to the Complaint, constitutes willful, flagrant, and 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.⁶
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.⁷

ORDER

1. Complainant's Motion for Decision Without Hearing by Reason of Default is GRANTED.
2. A finding is made that Respondent PK Produce, 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)).

⁶ 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).

⁷ 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 21st day of July 2020



Channing D. Strother
Chief Administrative Law Judge

Hearing Clerk's Office
United States Department of Agriculture
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1400 Independence Avenue, SW
Washington, DC 20250-9203
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20-J-0113

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2020 APRIL 8 AM 8:30

No Pay Table: A-2019-0025 PK Produce Inc.

| | Seller's Name & Address | No. Trans | Commodity | Dates Accepted | Dates Payment Due | Amounts Past Due & Unpaid |
|----|--|-----------|-------------|------------------------|----------------------|---------------------------|
| 1 | Wada Farms Marketing Group Idaho Falls, Idaho | 1 | Potatoes | 11/10/17 | 11/20/17 | \$ 12,474.40 |
| 2 | Shuman Produce Inc. Reidsville, Georgia | 4 | Onions | 05/18/18 to 08/23/2018 | 06/15/18 to 09/20/18 | \$ 23,502.00 |
| 3 | JohnCo Distributing Inc. Indianapolis, Indiana | 2 | Apples | 06/08/18 to 06/25/18 | 06/18/18 to 07/05/18 | \$ 17,925.65 |
| 4 | Titan Farms Ridge Spring, South Carolina | 4 | MXF | 06/11/18 to 07/20/18 | 06/21/18 to 07/30/18 | \$ 25,714.10 |
| 5 | McMelon Inc. Lake Wales, Florida | 7 | Watermelons | 06/25/2018 to 06/30/18 | 07/16/18 to 09/20/18 | \$ 30,134.00 |
| 6 | Harris Fresh Inc. Coalinga, California | 3 | Onions | 07/08/18 to 08/01/18 | 07/16/18 to 08/11/18 | \$ 27,542.50 |
| 7 | Naam Produce, Inc. Miami Shores, Florida | 6 | Watermelons | 06/25/18 to 08/30/18 | 07/16/18 to 09/20/18 | \$ 32,723.80 |
| 8 | B&D Produce Sales Uvalde, Texas | 30 | MXFV | 06/25/18 to 08/30/18 | 07/16/18 to 09/20/18 | \$ 328,661.22 |
| 9 | Farm-Wey Produce, Inc. Lakeland, Florida | 22 | MXF | 07/02/18 to 08/10/18 | 07/23/18 to 08/31/18 | \$ 122,156.00 |
| 10 | Torrey Farms, Inc. Elba, New York | 3 | MXV | 08/15/18 to 10/13/18 | 08/25/18 to 10/23/18 | \$ 23,370.00 |
| 11 | R&R Produce, Inc. Aptos, California | 8 | MXFV | 08/27/18 to 10/12/18 | 09/06/18 to 10/22/18 | \$ 131,983.30 |
| 12 | Original Produce Dist, Inc. Plainfield, Illinois | 1 | MXF | 08/24/18 | 09/23/18 | \$ 9,504.00 |
| 13 | Victory Farm Sales Hudsonville, Michigan | 4 | MXV | 09/10/18 to 09/22/18 | 10/10/18 to 10/22/18 | \$ 29,201.50 |
| 14 | Southern Valley Fruit & Vegetable Norman Park, Georgia | 2 | MXV | 09/14/18 to 09/17/18 | 10/14/18 to 10/17/18 | \$ 12,330.00 |
| 14 | Sellers | 97 | Lots | | | \$ 827,222.47 |

Appendix A