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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
The Produce Connection, Inc.,	)	PACA Docket No. D-18-0028
	)	
Respondent	)	

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR DECISION WITHOUT HEARING BY REASON OF ADMISSIONS

Appearances:

Shelton S. Smallwood, 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"); and

Philip S. Vova, Esq., for the Respondent, The Produce Connection, Inc.

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) ("PACA"), the regulations promulgated pursuant to PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice").

The Fair Trades and Practices Program, Agricultural Marketing Service of the United States Department of Agriculture ("Complainant"), initiated this proceeding by filing a complaint alleging that The Produce Connection, Inc. ("Respondent") willfully violated PACA. On May 18, 2018, 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).

For the reasons discussed herein, I find that no hearing is warranted in this matter and a decision on the record is appropriate.

Procedural History

On April 10, 2018, Complainant filed a disciplinary complaint against Respondent. The Complaint alleged that Respondent willfully violated section 2(4) of PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to fifty-eight sellers for the agreed purchase prices, or balances thereof, in the total amount of $1,488,447.46 for 745 lots of perishable agricultural commodities it purchased, received, and accepted in interstate and foreign commerce. The Complaint also alleged that, on December 6, 2017, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court of the Southern District of Florida, Miami Division (Case No. 16-26156). The Complaint requested that: (1) I find that Respondent willfully, flagrantly, and repeatedly violated section (4) of PACA (7 U.S.C. § 499h(a)); and (2) the facts and circumstances of Respondent's violations be published pursuant to section 8(a) of PACA (7 U.S.C. § 499h(a)).

On May 1, 2018, Respondent filed a timely answer[1] to the Complaint.[2] Respondent either admitted to or stated that it could not admit or deny the jurisdictional allegations of the Complaint. In response to the material allegations of the Complaint, Respondent submitted:

III

> The Respondent would dispute the issue as to the dates of payment and would indicate that any delayed payment was due to the unreasonable behavior of the U.S. government through the Department of Defense which made allegations and

[1] Respondent titled the document, "Answer and Affirmative Defenses."

[2] United States Postal Service records reflect that the Complaint was sent to Respondent's counsel, Philip S. Vova, via certified mail and delivered on April 16, 2018. The same was also sent via certified mail to Respondent's bankruptcy attorney, Robert A. Stok, and delivered on April 16, 2018. Respondent had twenty days from the date of service to file a response. 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 May 7, 2018.

withheld payments without adequate reason or proof. This behavior by the U.S. government in failing to pay its bills of approximately $350,000.00 resulted in any delay alleged. Additionally, any sums alleged are not agreed by the Respondent since there are funds available through the bankruptcy and other collection efforts which would give an accurate amount of deficiency, if same exists.

IV

The Respondent admits filing the bankruptcy as alleged but would indicate the schedules of creditors with PACA claims needs to be adjusted for credits due, payments not credited and parties who did not perfect a proper PACA claim. Therefore, the sums due to PACA creditors needs to be determined upon a final accounting through the bankruptcy and funds collected through litigation.

V

The Respondent would deny this allegation based upon the affirmative defense set forth below that here has been no violation of section 2(4) of the PACA [7 U.S.C. § 499b(4)].

VI

The Respondent would affirmatively state that any delay or nonpayment was the result of the U.S. government through the Department of Defense refusing to make payments due and improperly accusing the Respondent with fraud which was proved by investigation to be false. The U.S. government is still refusing to pay their bill and litigation has or will be initiated shortly. This behavior is the contributory factor in any of the delay allegations made in this petition.[3]

On May 18, 2018, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions ("Motion for Decision Without Hearing") and proposed Decision Without Hearing Based on Admissions ("Proposed Decision") pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Motion was based upon admissions of fact contained in Respondent's Answer. Respondent has not filed any objections thereto.[4]

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[3] Answer at 1-2.

[4] United States Postal Service records reflect that the Motion for Decision Without Hearing and Proposed Decision were sent to Respondent's counsel, Philip S. Vova, via certified mail and delivered on May 30, 2018. The same were also sent via certified mail to Respondent's bankruptcy attorney, Robert A. Stok, and delivered on May 29, 2018. Respondent had twenty days from the date of service to file objections

Authorities

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary ("Rules of Practice" or "Rules"), set forth at 7 C.F.R. §§ 1.130 *et seq.*, apply to the adjudication of this matter. Pursuant to section 1.136, a respondent is required to file an answer within twenty days after service of a complaint.[5] The Rules provide that an answer shall "[c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."[6] Moreover, "[t]he failure to file an answer, *or the admission by the answer of all the material allegations of fact contained in the complaint*, shall constitute a waiver of hearing."[7]

Also applicable to the instant proceeding are sections 2(4) and 8(a) of PACA (7 U.S.C. §§ 499b(4), 499h(a)). Section 2(4) requires merchants and dealers to make "full payment promptly" for perishable agricultural commodities, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase.[8] Specifically, Section 2(4) makes it unlawful "[f]or any commission merchant, dealer, or broker to . . . fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had."[9] Section 8(a)

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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 work day. 7 C.F.R. § 1.147(h). In this case, Respondent's objections were due by June 19, 2018. Respondent did not file any objections on or before that date.

[5] 7 C.F.R. § 1.136(a).

[6] 7 C.F.R. § 1.136(b)(1).

[7] 7 C.F.R. § 1.139 (emphasis added).

[8] *See* 7 C.F.R. §§ 46.2(aa)(5), (11).

[9] 7 U.S.C. § 499b(4).

provides:

> Whenever . . . the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . . *the Secretary may publish the facts and circumstances of such violation* and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, *if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.*[10]

In cases where a PACA licensee has failed to make full or prompt payment of perishable agricultural commodities, the Department's policy is straightforward:

> In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. *In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case.* . . . In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case.[11]

Further, "[i]n any 'no-pay' case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked."[12]

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[10] 7 U.S.C. § 499h(a) (emphasis added).

[11] Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (emphasis added).

[12] *Id.* at 549.

Discussion

1. Respondent Has Admitted the Material Allegations of the Complaint That Establish Violations of PACA.

PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases with ten days after the produce is accepted, provided that the parties may elect to use different payment terms so long as the terms are reduced to writing prior to the transaction.[13] In cases where a respondent has failed to make full payment promptly and "admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served . . . or the date of hearing, whichever occurs first, the [matter] will be treated as a no-pay case."[14]

In its Answer, Respondent did not deny that it failed to timely pay sellers for perishable agricultural commodities.[15] In fact, Respondent admitted to "filing the bankruptcy as alleged,"[16] disputing only the dates of payment and the total sums owed.[17] "It is well established that a PACA respondent's admissions in documents filed in a bankruptcy case may be treated as admissions in a related PACA proceeding."[18] Here, in the Schedule E/F it filed with the United States Bankruptcy Court for the Southern District of Florida, Respondent listed fifty-five

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[13] 7 C.F.R. § 46.2(aa)(5), (11).

[14] *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

[15] *See* Van Buren Cnty. v. Fruit Exch., Inc., 51 Agric. Dec. 733, 740 (U.S.D.A. 1992) (holding that the failure to deny an allegation of the complaint is deemed admitted by virtue of the respondent's failure to deny the allegation); Kaplinsky, 47 Agric. Dec. 613, 617 (U.S.D.A. 1988).

[16] Answer ¶ IV.

[17] Answer ¶¶ III, IV.

[18] The Square Group, LLC, 75 Agric. Dec. 689, 694 (U.S.D.A. 2016); *see* Perfectly Fresh Farms, Inc., 68 Agric. Dec. 507, 525 (U.S.D.A. 2009) ("Documents filed in bankruptcy cases which list produce sellers holding claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings.") (internal citations omitted).

produce vendors, or creditors, to whom it owed money in the aggregate amount of $1,657,473.71[19] for perishable agricultural commodities it purchased, received, and accepted in interstate and foreign commerce.[20] Pursuant to section 1.141 of the Rules of Practice, I take official notice of Respondent's bankruptcy proceeding and the documents—including the Schedule E/F—filed therein.[21] I find that Respondent has admitted to owing more than $1.6 million to fifty-five produce sellers and, therefore, has admitted to violating PACA.

Moreover, Respondent has made no assertion—in its Answer or in any filing thus far—that full payment would be made or full compliance would be achieved pursuant to the parameters set by *Scamcorp*.[22] To achieve "full compliance" with PACA, Respondent would need to pay all of its produce sellers and "have no credit agreements with produce sellers for

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[19] Complainant describes the Schedule E/F as listing fifty-five sellers whom Respondent owed a total of $1,657,473.71 but notes: "Some of the amounts listed in the Schedule E/F for PACA creditors are larger than the amounts listed in Appendix A to the Complaint." Compl. ¶ IV n.1. Upon close inspection, the Schedule E/F appears to include fifty-six of the fifty-eight sellers identified in Appendix A and reflects an outstanding balance of $1,671,040.21. Nonetheless, such distinctions are inconsequential in this proceeding as the unpaid debt exceeds a *de minimis* amount. *See infra* notes 28-29, 47-49 and accompanying text.

[20] Compl. Appx. B.

[21] 7 C.F.R. § 1.141(h)(6); *see* KDLO Enters., Inc., 70 Agric. Dec. 1098, 1103-04 (U.S.D.A. 2011) ("[U]nder 7 C.F.R. § 1.141(h)(6), an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Documents filed in a bankruptcy proceeding that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings."); Judith's Fine Foods Int'l, Inc., 66 Agric. Dec. 758, 770-71 (U.S.D.A. 2007) (holding that the respondent's Schedule F – Creditors Holding Unsecured Nonpriority Claims, filed in U.S. bankruptcy court, "ha[d] a direct relation to the matters at issue in the [PACA disciplinary] proceeding.").

[22] *See* Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) ("In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations of the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a 'no-pay' case.").

more than 30 days."[23] As Respondent failed to address whether or when it expects to pay its vendors fully, this is a "no-pay" case.[24] There is no indication that any payments have been made, which might have converted the case to a "slow-pay" case.[25]

Further, the explanations in Respondent's Answer do not provide an acceptable defense to liability in a case such as this, wherein a complaint has been filed alleging violations of section 2(4) of PACA due to the failure to make full payment promptly. Respondent submits that "the sums due to PACA creditors needs [sic] to be determined upon a final accounting through the bankruptcy and funds collected through litigation"[26] and "dispute[s] the issue as to the dates of payment."[27] Neither argument constitutes a material denial of engaging in practices that violate PACA. Complainant is not required to prove—and I am not required to find—the exact number of unpaid produce sellers or the exact amount Respondent owes each seller.[28] The outstanding balance far exceeds $5,000.00 and axiomatically represents more than a *de minimis* amount.[29]

2. Respondent's PACA Violations Were Repeated, Flagrant, and Willful.

The Secretary of Agriculture may revoke the license of a dealer who is found to have

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[23] *Id.* at 549.

[24] *Id.* at 548-49.

[25] *See* Kirby Produce, Inc. v. U.S. Dep't of Agric., 256 F.3d 830, 831 (D.C. Cir. 2001); Kanowitz Fruit & Produce Co., 56 Agric. Dec. 942, 945 (U.S.D.A. 1997).

[26] Answer ¶ IV.

[27] Answer ¶ III.

[28] Baiardi Chain Food Corp., 64 Agric. Dec. 1822, 1835-36 (U.S.D.A. 2005); *see also* Hunts Point Tomato Co., 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

[29] *See* H.M. Shield, Inc., 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) ("[T]here is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, so long as the violations are not *de minimis*."); Moore Mkt'g Int'l, Inc., 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988); Fava & Co., 46 Agric. Dec. 79, 81 (U.S.D.A. 1984); Tri-State Fruit & Vegetable, Inc., 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

committed repeated, flagrant, and willful PACA violations.[30] Where a dealer has committed repeated, flagrant, and willful PACA violations but has no license to revoke, the appropriate sanction is publication of the facts and circumstances of the violations.[31]

First, Respondent's violations in this case were repeated. Violations are "repeated" under PACA when they are committed multiple times, non-simultaneously.[32] As Respondent failed to pay at least fifty-five sellers promptly and in full for 745 lots of perishable agricultural commodities over a two-year period, its violations were clearly repeated.

Respondent's PACA violations were also flagrant. Flagrancy is determined by evaluating the number of violations, total money involved, and length of time in which the violations occurred.[33] Respondent admitted in its Schedule E/F that it owes produce sellers an estimated total of $1,657,473.71. By failing to pay that money—far more than a *de minimis* amount—to fifty-five sellers over a two-year period, Respondent committed flagrant PACA violations.[34]

Lastly, Respondent's violations were 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 careless disregard of statutory requirements. Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of

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[30] *See* 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); Norinsberg v. U.S. Dep't of Agric., 47 F.3d 1224, 1225 (D.C. Cir. 1995).

[31] *Baiardi Food Chain Corp.*, 64 Agric. Dec. at 1832.

[32] *See* H.C. MacClaren, Inc. v. U.S. Dep't of Agric., 342 F.3d 584, 592 (6th Cir. 2003); Zwick v. Freeman, 373 F.2d 110, 115 (2d Cir. 1967); Five Star Food Distribs., Inc., 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

[33] *Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895; Havana Potatoes of N.Y. Corp., 55 Agric. Dec. 1234, 1270 (U.S.D.A. 1996); *see* Reese Sales Co. v. Hardin, 458 F.2d 183, 185, 187 (9th Cir. 1972).

[34] *See supra* note 28 and accompanying text.

violative transactions involved.[35]

Given the large number of transactions, significant amount of debt, and continuation of violations over a two-year period in this case, I find that Respondent's violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of PACA.[36]

Respondent claims that "any delay or nonpayment was the result of the U.S. government through the Department of Defense refusing to make payments due" to Respondent in the approximate amount of $350,000.00.[37] Regardless of whether this unsubstantiated statement is true, it bears no consequence upon Respondent's liability in this case.[38] "Even if a Respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful."[39] Respondent's excuse does not negate the fact that Respondent failed to make full payment

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[35] Scamcorp, Inc., 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998).

[36] The Square Group, LLC, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016).

[37] Answer ¶¶ III, IV.

[38] *See* Judith's Fine Foods Int'l, Inc., 66 Agric. Dec. 758, 771 (U.S.D.A. 2007) ("The PACA requires full payment promptly and an excuse for the failure to make full payment promptly is not a defense to a respondent's failure to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)."); Moore Mk'tg Int'l, Inc., 46 Agric. Dec. 981, 981 (U.S.D.A. 1987) (Ruling on Certified Question) ("[T]his Department is not interested in respondent's excuses for its failure to pay."); Finer Food Sales Co., 41 Agric. Dec. 1154, 1171 (U.S.D.A. 1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983) ("[E]ven if it were determined that a respondent had a good excuse for the failures to pay involved here, it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations were willful since the Act calls for payment -- not excuses.").

[39] Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1214 (U.S.D.A. 1996). *See also* The Caito Produce Co., 48 Agric. Dec. 602, 614 (U.S.D.A. 1989) ("Even though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure from being considered flagrant or willful.").

promptly in accordance with PACA and cannot show that compliance will be achieved.[40] As the Judicial Officer has stated:

> Respondent['s] violations were very serious, repeated, flagrant, and willful violations of the PACA. Respondent['s] violations directly contravene one of the primary remedial purposes of the PACA, the financial protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even customers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay. These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.[41]

Accordingly, I reject Respondent's suggestion that the Department of Defense's "behavior" somehow negates its violations of the PACA prompt-payment provisions.[42]

3. A Decision Without Hearing Is Appropriate.

As previously discussed, section 1.139 of the Rules of Practice allows for a decision

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[40] *See* R.H. Produce, Inc., 43 Agric. Dec. 511, 523 (U.S.D.A. 1984) ("In disciplinary cases under the Perishable Agricultural Commodities Act, all excuses that have been offered as to why payment was not made promptly have been routinely ignored since the Act calls for payment not excuses.") (internal quotation marks omitted); *see also* John A. Pirello Co., 48 Agric. Dec. 565, 567-68 (U.S.D.A. 1989) (nonpayment not an excuse where respondent's customers ceased doing business with respondent when the city announced it was taking respondent's property be eminent domain; Magic City Produce Co., 44 Agric. Dec. 1241, 1246 n.3 (U.S.D.A. 1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment not an excuse despite being due to respondent's suffering $200,000 in losses over two-year period from theft of produce in his warehouse); Jarosz Produce Farms, Inc., 42 Agric. Dec. 1505, 1524-26 (U.S.D.A. 1983) (nonpayment not an excuse where respondent's bankruptcy was caused by failure of large purchaser to comply with contractual agreement); Kafcsak, 39 Agric. Dec. 683, 685-86 (U.S.D.A. 1980) (neither a strike nor the failure of others to pay respondent are defenses in a disciplinary action under PACA for failure to pay for produce), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table).

[41] Havana Potatoes of N.Y. Corp., 55 Agric. Dec. 1234, 1273-74 (U.S.D.A. 1996).

[42] *See supra* note 39 and accompanying text; *Andershock Fruitland, Inc.*, 55 Agric. Dec. at 1224 ("[E]xcuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.").

without hearing by reason of admissions: "The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing."[43] It is well settled that "a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held."[44]

I find no genuine issues of fact in this case that would require a hearing.[45] As previously discussed, Respondent's bankruptcy Schedule E/F constitutes an admission of the material allegations of the Complaint.[46] As the amount admittedly owed is not *de minimis*, I need not determine the exact amount Respondent failed to pay.[47] As the Judicial Officer stated in *Veg-Mix, Inc.*[48]:

> [I]n view of respondent's bankruptcy admissions . . . it is clear that there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations of the complaint. The same order would be issued in this case unless the proven violations were *de minimis*.[49]

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[43] 7 C.F.R. § 1.139.

[44] H. Schnell & Co., 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see, e.g.*, KDLO Enters., Inc., 70 Agric. Dec. 1098, 1104 (U.S.D.A. 2011).

[45] *See* Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) ("Common sense suggests the futility of hearings when there is no factual dispute of substance.").

[46] *See* The Square Group, LLC, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016) ("If a respondent in a PACA disciplinary proceeding admits the failure to pay for agricultural commodities in a related bankruptcy proceeding, no hearing is required in the PACA disciplinary proceeding.").

[47] *See id.* ("[E]ven if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total owed more than *de minimis*."); Tri-State Fruit & Vegetable, Inc., 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question) ("[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine the precise amount owed.").

[48] Veg-Mix, Inc., 44 Agric. Dec. 1583, 1590 (U.S.D.A. 1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *final decision on remand*, 47 Agric. Dec. 1486 (U.S.D.A. 1988).

[49] *Id.*

Furthermore, the appropriate sanction in a "no-pay" case is license revocation, or where there is no longer any license to revoke—as is the case here—the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violations of PACA and publication of the facts and circumstances of the violations.[50] A civil penalty is not appropriate in this case because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA," and it would not be consistent with congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid.[51] Because there can be no debate over the appropriate sanction, a decision may be entered in this case without hearing or further procedure based upon the admitted facts.[52]

Having carefully considered the pleadings, relevant authorities, and arguments of the parties, the following Findings of Fact, Conclusions, and Order are entered 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 is or was a corporation organized and existing under the laws of the State of Florida. Respondent's business and mailing address is or was 2200 NW 3rd Street, Miami, Florida 33142. The Complaint was served on Respondent's attorney, Philip Vora, at 4000 Hollywood Blvd., Suite 500N, Hollywood, Florida 33021. The Complaint was also served upon Respondent's bankruptcy attorney, Robert A. Stok, at Folk & Kon, P.A., 11851 Northeast 29th Avenue, Suite 1005, Aventura, Florida 33180.

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[50] *See* Baiardi Food Chain Corp., 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005); 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).

[51] *See Scamcorp, Inc.*, 57 Agric. Dec. at 570-71.

[52] *See* 7 C.F.R. § 1.139.

2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of PACA. License number 20160402 was issued to Respondent on February 17, 2016. On February 17, 2017, the license was terminated pursuant to section 4(a) of PACA (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period June 2015 through January 2017, on or about the dates and in the transactions set forth in Appendix A attached hereto and incorporated herein by reference, failed to make fully payment promptly to fifty-five sellers of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of $1,657,473.71.
4. On December 6, 2017, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court, Southern District of Florida, Miami Division. This petition was designated Case No. 16-26156.
5. In the Schedule E/F that Respondent filed with the bankruptcy court, Respondent listed 103 produce companies who have unsecured claims that are entitled to payment from the PACA statutory trust. Of the 103 produce companies listed in the Schedule E/F, fifty-five are listed in Appendix A to the Complaint and are owed unsecured produce debt in the amount of $1,657,473.71.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Official notice is taken of the Schedule E/F filed by Respondent in the United States Bankruptcy Court, Southern District of Florida, Miami Division (Case No. 16-26156), which lists $1,657,473.71 of produce debt that Respondent owed to fifty-five 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 dispense with a formal hearing in this matter.
4. The unpaid balances due to produce sellers represents more than *de minimis* amounts, thereby obviating the need for a hearing in this matter.
5. Respondent willfully violated section 2(4) of PACA (7 U.S.C. § 499b(4)).
6. 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 PACA (7 U.S.C. § 499b(4)).
7. As Respondent's PACA license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Respondent's violations.

ORDER

1. Complainant's Motion for Decision Without Hearing by Reason of Admissions is GRANTED.
2. Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)).
3. The facts and circumstances of Respondent's PACA violations, as set forth above, shall be published.

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).

Potentially interested or affected parties are alerted that any licensing and/or employment

sanctions attendant to this Decision and Order pursuant to PACA sections 4(b) and 8(b) will take effect on the eleventh (11th) day after this Decision and Order becomes final. Persons "responsibly connected" to Respondent during the period of Respondent's violations are hereby alerted that they will be subject to licensing restrictions under section 4(b) of PACA (7 U.S.C. § 499d) and the employment restrictions under section 8(b) of PACA (7 U.S.C. § 499h).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 20th day of June, 2018

Channing D. Strother
Acting Chief Administrative Law Judge

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