

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Cruisin' On, Inc., d/b/a The Produce Network (PACA-D Docket No. **20-J-0020**); and
Diamond Produce Wholesalers & Packers, Inc. (PACA-D Docket No. **20-J-0021**),
Respondents.

Decision and Order Without Hearing by Reason of Admissions

Appearances:

Christopher P. Young, Esq.; and Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave SW, Washington D.C. 20250-1413, for the Complainant ("AMS")¹; and

Joseph M. Thornton, for the Respondent Cruisin' On, Inc., doing business as The Produce Network; and for the Respondent Diamond Produce Wholesalers & Packers, Inc.

Preliminary Statement

1. 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 pursuant to the PACA (7 C.F.R. § 46.1 through 46.45); and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. § 1.130 through 1.151).

¹ The Complainant is the Associate Deputy Administrator, Fair Trade Practices Program, PACA Division, Agricultural Marketing Service, United States Department of Agriculture ("AMS").

Procedural History

2. The Associate Deputy Administrator, Fair Trade Practices Program, PACA Division, Agricultural Marketing Service, United States Department of Agriculture (“AMS”) initiated this proceeding against the Respondent Cruisin’ On, Inc., doing business as The Produce Network (“Cruisin’ On”); and against the Respondent Diamond Produce Wholesalers & Packers, Inc., (“Diamond Produce”), by filing a Complaint on November 29, 2019, alleging that the Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2016 and 2017 to five (5) sellers, for produce the Respondents purchased, received and accepted in interstate and foreign commerce.
3. AMS seeks a finding that the Respondents willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and AMS requests an order that the facts and circumstances of the Respondents’ violations be published, pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).
4. The Respondents filed their Answer to the Complaint both on December 29, 2019, and on December 30, 2019.
5. AMS filed a Motion for Decision Without Hearing by Reason of Admissions on January 17, 2020 (“AMS’s Motion”) pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). AMS relies on admissions by each Respondent in Voluntary Petitions pursuant to Chapter 7 of the Bankruptcy Code filed on December 15, 2017 in the United States Bankruptcy Court, Southern District of Florida; on admissions by each Respondent in their Answer to the Complaint filed on December 29, 2019 and December 30, 2019; and on the Compliance Investigation conducted on January 13-15, 2020.

6. The Respondents did not file a response to AMS's Motion.

Discussion

7. Each Respondent admitted in their Answer that they violated the PACA by failing to pay produce sellers fully and promptly. The Answer is thoughtful and sorrowful for the losses caused by the Respondents' failures to pay. The Answer explained that there had been nearly 28 years of successful business; and that the opening of a Packing Facility for packing Potatoes and Onions in 2015 became a financial drain from which the Respondents did not recover. The Answer explained that personal monies and borrowed money to keep operating were not enough. The Answer explained that the attempt to obtain a small business loan, with a projected closing date in November 2017, ultimately failed; and that Cruisin' On, Inc. which had opened in 1992, had to close its doors on November 14, 2017. The Answer identified November 14, 2017 as the day all papers for each Respondent were presented to the lawyer for filing bankruptcy, and acknowledges that attempts to complete paying PACA vendors had failed. The Answer agrees with the Complaint that the bankruptcy filings were on December 15, 2017, and explains that the Respondents' assets were lost during bankruptcy proceedings to lenders with blanket liens.

8. The Respondents acknowledge owing monies to the 5 produce sellers listed on Appendix A to the Complaint. A compliance investigation conducted by AMS on January 13-15, 2020, determined that the current balance owed to 4 of the 5 produce sellers listed on the Appendix A to the Complaint totaled **\$1,135,650.91**. The fifth produce seller is out of business, and the owner was reported to be deceased in 2018. See Attachment C to AMS's Motion filed January 17, 2020.

Authority

9. The amount verified during January 2020 as monies currently owed **(\$1,135,650.91)** is more than a *de minimis* amount. See the USDA Judicial Officer's Ruling on Certified Question filed December 4, 1984 in *Fava & Company, Inc.* (reported in the 1987 volume of Agriculture Decisions) (" . . . so that the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000"). 46 Agric. Dec. 79, 81, 1984 WL 55518 (U.S.D.A. 1987); final decision, 44 Agric. Dec. 870, 1985 WL 63176 (U.S.D.A. 1985).
10. The Respondents' violations were flagrant and repeated. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 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).
11. The Respondents' 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 a careless disregard of statutory requirements. *Ocean View Produce, Inc.*, 2009 WL 218027 (U.S.D.A. 2009). A violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (U.S.D.A. 1996). Here, the Respondents knew or should have known that they could not make prompt payment for the large amounts of perishables they ordered, yet they continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.

Findings of Fact

12. The Respondent Cruisin' On, Inc., doing business as The Produce Network, is or was a corporation organized and existing under the laws of the State of Florida. The Respondent Cruisin' On's business and mailing address was 16421 NW 84th Court, Miami, Florida 33016.

13. At all times material herein, the Respondent Cruisin' On was licensed and/or operating subject to the provisions of the PACA. On April 26, 2012, license number 2012 0926 was issued to the Respondent Cruisin' On. The license was terminated due to bankruptcy.

14. The Respondent Diamond Produce Wholesalers & Packers, Inc. is or was a corporation organized and existing under the laws of the State of Florida. The Respondent Diamond Produce's business and mailing address was 2260 NW 13th Avenue, Miami, Florida 33142.

15. At all times material herein, the Respondent Diamond Produce was licensed and/or operating subject to the provisions of the PACA. License number 2015 0202 was issued to the Respondent Diamond Produce on December 15, 2014. The license was terminated due to bankruptcy.

16. The Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2016 and 2017 for produce the Respondents purchased, received and accepted in interstate and foreign commerce. The Respondents, during the period May 2016 through September 2017, on or about the dates and in the transactions set forth in Appendix A to the Complaint and incorporated by reference, failed to make full payment promptly to at least four of the five sellers listed in Appendix A to the Complaint

for 146 lots of perishable agricultural commodities which Respondents purchased, received, and accepted in interstate and foreign commerce, in the total amount of **\$1,135,650.91**.

17. On December 15, 2017, the Respondent Cruisin' On 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. The petition was designated Case No. 17-24938. The Respondent Cruisin' On admits in its Schedule E/F that all five of the PACA creditors listed in Appendix A to the Complaint hold unsecured produce debt claims against the Respondent Cruisin' On in the amount of \$1,243,525.481.²

18. On December 15, 2017, the Respondent Diamond Produce 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. The petition was designated Case No. 17-24940. The Respondent Diamond Produce admits in its Schedule E/F that all five of the PACA creditors listed in Appendix A to this Complaint hold unsecured produce debt claims against the Respondent Diamond Produce in the amount of \$1,243,525.482.³

Conclusions

19. The Secretary of Agriculture has jurisdiction over the parties and the subject matter.

² The amounts admitted in the Respondent Cruisin' On's Schedule E/F for PACA creditor Frank M. Minardo, LLC (\$92,408.75) and PACA creditor Bushman's Inc. (\$1,022,771.38) are larger than the amounts listed in Appendix A to the Complaint (\$59,235.50) and (\$1,005,438.06) respectively.

³ The amounts admitted in the Respondent Diamond Produce's Schedule E/F for PACA creditor Frank M. Minardo, LLC (\$92,408.75) and PACA creditor Bushman's Inc. (\$1,022,771.38) are larger than the amounts listed in Appendix A to the Complaint (\$59,235.50) and (\$1,005,438.06) respectively.

20. The failure of the Respondents, Cruisin' On, Inc., doing business as The Produce Network; and Diamond Produce Wholesalers & Packers, Inc., to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that they 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)).

21. The Respondent Cruisin' On, Inc., doing business as The Produce Network; and the Respondent Diamond Produce Wholesalers & Packers, Inc., have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Order

22. AMS's Motion for Decision Without Hearing by Reason of Admissions is GRANTED.

23. A finding is made that the Respondent Cruisin' On, Inc., doing business as The Produce Network; and the Respondent Diamond Produce Wholesalers & Packers, Inc., have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

24. The facts and circumstances of these violations shall be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Finality

This Decision and Order shall be final and effective 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 section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, See Appendix A).

Copies of this Decision and Order Without Hearing by Reason of Admissions shall be served by the Hearing Clerk on each of the parties.

Issued this 4th day of March 2020 at Washington, D.C.



Jill S. Clifton
Administrative Law Judge

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

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145