UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Mibo Fresh Foods, LLC,	)	PACA-D Docket No. 20-J-0022
	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S PETITION FOR REHEARING

Appearances:

Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Associate Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service ("AMS"); and

Bruce W. Akerly, Esq., Coppell (DFW), TX, for the Respondent, Mibo Fresh Foods, LLC.

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"). On February 11, 2020, the undersigned issued a decision and order without hearing by reason of default against the Respondent, Mibo Fresh Foods, LLC. On February 21, 2020, Respondent filed a petition for rehearing with respect to the Decision and Order. For the reasons discussed more fully herein below, Respondent's Petition for Rehearing is DENIED.

Procedural History

The Associate Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service, United States Department of Agriculture ("Complainant" or "AMS"),

initiated this proceeding by filing a complaint against Mibo Fresh Foods, LLC ("Respondent") on December 9, 2019. The Complaint alleged that Respondent violated PACA section 2(4) (7 U.S.C. § 499 b(4)) by failing to make full payment promptly to fourteen sellers, in the total amount of $1,861,502.93, for 165 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce during the period May 2018 through June 2019.[1] Further, the Complaint requested:

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

Complaint at 4.

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, 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 did not file objections to the Motion for Default or Proposed Decision.[3] However, on January 27, 2020, Mr. Uzor Nwoko, on behalf of Respondent,

---

[1] *See* Complaint at 2-3.

[2] United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on December 12, 2019. 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 January 2, 2020. Respondent did not file a response until January 27, 2020.

[3] United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent via certified mail and delivered on January 16, 2020. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and

filed an untitled document ("Response") stating in relevant part:

> This is a response to Docket 20-J-0022.
>
> Mibo Fresh Foods LLC ("mibo") and I disagree with the premises and conclusion presented in this case for the following reasons:
>
> - mibo does not owe fourteen (14) vendors the amount of $1,861,502.93 for their invoices, load and lots presented in the exhibit;
> - there is approximately $504,461.70 due vendors on this list which are on an agreed scheduled to be paid off before the end of July;
> - mibo has established payment agreements with its vendors for commodities purchased;
> - these payments vary in the number of days and is specific to each individual vendor; and
> - any outstanding payments from this lot of products will be on an existing and agreed to payment plans with the individual vendors.

Response at 1. Although Respondent did not specify whether it intended the filing to respond to the Complaint or to the Motion for Default, Respondent's reference to "the exhibit" suggested that Respondent was answering the Complaint.[4] The Response, therefore, was twenty-five days late.[5]

On February 11, 2020, the undersigned filed a decision and order granting Complainant's Motion for Default on the basis that Respondent failed to file a timely answer to the Complaint ("Default Decision").[6] The Default Decision also concluded, *inter alia*, that "[t]he total unpaid

---

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 by January 6, 2020. Respondent has not filed any objections.

[4] Attached to the Complaint was an "Appendix A," which lists the details of transactions wherein Respondent failed to make full payment promptly to produce sellers. Neither the Motion for Default nor the Proposed Decision included any attachments.

[5] *See supra* note 2.

[6] The Default Decision found that Respondent committed willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)) and ordered that the facts and circumstances of Respondent's PACA violations be published. *See* Default Decision at 4-5.

balance due to sellers represents more than a *de minimis* mount, thereby obviating the need for a hearing in this matter."[7]

On February 21, 2020, Mr. Bruce W. Akerly, Esq.[8] filed on Respondent's behalf a Verified Petition for Rehearing with Respect to Decision and Order Without Hearing by Reason of Default ("Petition for Rehearing").[9] On March 16, 2020, Complainant filed a response thereto.

Discussion

The undersigned correctly concluded that a decision and order without hearing was appropriate in this matter.

In its Petition for Rehearing, Respondent argues that service of the Complaint was ineffective or insufficient because Respondent's owner was on vacation when the Complaint was sent to his home address.[10] Under the Rules of Practice, however, service was properly made. Moreover, even if service of the Complaint was deemed ineffective and Respondent's Answer was considered timely filed, a hearing would not be necessary as the Answer admits the material allegations of the Complaint.

A. Respondent Was Properly Served with the Complaint on December 12, 2019.

Respondent asserts that since its owner, Mr. Uzor Nwoko, was on vacation until January 6, 2020, service of the Complaint cannot be assumed until that time.[11] Similarly, Respondent

---

[7] Default Decision at 5 (footnote omitted).

[8] Mr. Akerly has not filed a notice of appearance.

[9] *See* Petition for Rehearing at 5 ("Respondent seeks: (a) if necessary, reopening of the proceedings to allow Respondent's answer to the Complaint to be recognized as filed out of time; (b) a rehearing on the issues raised by the Complaint, including an opportunity for hearing and presentation of evidence regarding Respondent's position; and (c) reconsideration of the Decision.").

[10] *See* Petition for Rehearing at 2.

[11] *Id.* at 2-3.

argues that the copy of the Complaint that was served at Respondent's business address cannot be deemed to have been served on December 12, 2019 because "no one at Respondent advised [Mr. Nwoko] of the Complaint and he (and consequently Respondent) did not become aware of the Complaint prior to January 6, 2020."[12] Respondent's argument contradicts the service requirements set forth in the Rules of Practice.

> Regarding service, the Rules of Practice state in pertinent part:
>
> > Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]

7 C.F.R. § 1.147(c)(1). According to United States Postal Service records, the Complaint in this matter was delivered to Respondent's last known principal place of business on December 12, 2019.[13] Since Respondent was served with a copy of the Complaint at its last known principal place of business, Respondent was put on notice that a response was due within twenty days. That Respondent's owner might have been on vacation when the Complaint was served on Respondent's place of business is immaterial. As the Judicial Officer previously explained:

> An excuse occasionally given in an attempt to justify the failure to file a timely answer is that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer. That excuse has been (and will be) routinely rejected. As stated in *In re Bejarano*, 46 Agric. Dec. ___, slip op. at 7-9 (June 22, 1987):
>
> > Respondent contends that his sister signed the certified receipt card as to the complaint when he was out of town, and that she forgot to give him the letter when she saw him about 2 weeks later. However, the circumstances as to the serving of the complaint are controlled by prior decisions holding that *proper service is made* when respondent is served with a certified mailing at his last known address and someone signs for the document. *In*

[12] *Id.* at 2.

[13] *See supra* note 2.

> *re Carter*, 46 Agric. Dec. ___ (Mar. 3, 1987) (default order proper where timely answer not filed; respondent properly served where his mother signed the certified receipt card but failed to deliver the complaint to him); *In re Cuttone*, 44 Agric. Dec. [1575 (1985)] (respondent Carl D. Cuttone properly served where complaint was signed for by Joseph A. Cuttone, who failed to deliver it to him), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Buzun*, 43 Agric. Dec. [751 (1984)] (respondent Joseph Buzun properly served where complaint sent by certified mail to his residence and was signed for by someone named Buzun, who failed to deliver it to him).
>
> . . . .
>
> To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *And see NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972).
>
> . . . .
>
> Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (1982), the court held:
>
> > It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 399 U.S. 306, 214, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted].

Kaplinsky, 47 Agric. Dec. 613, 619-21 (U.S.D.A. 1988). Service was of the Complaint was therefore effectuated on December 12, 2019, and Respondent's failure to file an answer within twenty days thereafter warranted the issuance of a default decision.[14]

B. The Material Allegations of the Complaint Were Admitted, Thereby Obviating the Need for a Hearing.

Even if the undersigned were to accept Respondent's argument that the Complaint was

[14] *See* 7 C.F.R. § 1.139.

not properly served until January 6, 2020 and Respondent's answer was therefore timely, a rehearing would nevertheless not be warranted under the circumstances. As stated clearly in the Default Decision:

> Assuming, *arguendo*, the Response had been timely filed, Respondent admits to owing $504,461.70 to sellers—far more than a *de minimis* amount. *See H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1998) ("[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 Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1998); *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). A hearing, still, would not be necessary. *See Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

Default Decision at 3 n.5.

Furthermore, in its Petition for Rehearing, Respondent once again admits to owing more than a *de minimis* amount to the PACA creditors listed in Appendix A to the Complaint.[15] In this instance, Respondent admits to owing $474,476.15 to those creditors—an outstanding balance that far exceeds $5,000.00 and axiomatically represents more than a *de minimis* amount.[16] The admission further underscores the my earlier finding that a hearing is not necessary in this matter.[17] 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

---

[15] *See* Petition for Rehearing at 5.

[16] *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 Mktg. Int'l*, 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).

[17] As the amount owed is not *de minimis*, I need not determine the exact amount Respondent failed to pay. *See The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 1998) ("[N]o hearing is required if the sum of all undisputed debts is enough to make the total owed more than *de minimis.*").

when there is no material issue of fact on which a meaningful hearing can be held."[18] And as the Judicial Officer has held, "[u]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine the precise amount owed."[19] A decision and order without hearing was, therefore, properly issued in this case.

ORDER

Based on the foregoing, Respondent's "Verified Petition for Rehearing with Respect to Decision and Order Without Hearing by Reason of Default" is hereby DENIED.

Copies of this Order shall be served by the Hearing Clerk upon the parties and counsel.

Done at Washington, D.C.,
this 14th day of May 2020

[redacted]
Channing D. Strother
Chief Administrative Law Judge

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

[18] *H. Schnell & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998).

[19] *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. At 82-83.