

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA Docket No. D-03-0032  
Tomatoes N Chiles R Us, )  
Respondent )

DECISION

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a et seq.; hereinafter, the “Act” or “PACA”), the Regulations issued pursuant to the Act (7 C.F.R. Par 46; hereinafter, the “Regulations”), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 et seq.; hereinafter, the “Rules of Practice”). This proceeding was instituted by the filing of a Notice to Show Cause and Motion for Expedited Hearing, on September 8, 2003, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”). The Notice required Respondent to Show Cause why Respondent’s August 8, 2003, application for a license under the Act should not be refused. The Notice to Show Cause alleged that Respondent had engaged in practices of the character prohibited by the Act by failing to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of \$65,737.95 for 61 lots of perishable agricultural commodities, \$27,883.75 of which Respondent purchased, received, and accepted in foreign commerce. The Notice to Show Cause requested that the Administrative Law Judge find Respondent unfit to engage in the business of a commission merchant, dealer, or broker and, on behalf of the

Secretary of Agriculture, refuse to issue a license to Respondent. The Motion for Expedited Hearing cited the requirement that a PACA license applicant be given an opportunity for a hearing within 60 days of the date of its initial application—in this case, October 7, 2003—as per section 4(d) of the Act, 7 U.S.C. § 499d(d).

#### Procedural Background

A copy of the Notice to Show Cause and the Motion for Expedited Hearing were served upon Respondent, which filed an answer to the Notice to Show Cause on September 16, 2003. On September 29, 2003, I conducted a telephone conference with the parties. During the telephone conference, Patricia Mendez-Romero, president and sole stockholder of the Respondent, represented herself. Since Ms. Mendez-Romero does not speak English, Tom Leming of the PACA Branch provided English-Spanish translation for her. At this conference, Ms. Mendez-Romero waived Respondent's right to a hearing within 60 days of the filing of its application and agreed to a hearing date on November 5, 2003. Ms. Mendez-Romero stated that she needed the extension so that she could have time to retain counsel.

On October 30, 2003, I conducted another telephone conference with the parties in this case. Ms. Mendez-Romero was again unrepresented by counsel. Everett Gonzales of the PACA Branch provided translation services, and PACA was represented, as they were at the previous conference, by Christopher Young-Morales and Jeffrey Armistead. Once again the Respondent requested a continuance so that she could hire an attorney. Although Complainant vigorously opposed her request, citing the fact that she already had sufficient time to hire an attorney, and that license denial proceedings are required to be conducted expeditiously, I granted her request, emphasizing that no additional continuance would be granted to Respondent under any

circumstances. Ms. Mendez-Romero indicated that she understood that no further continuances would be granted. The hearing was set for December 15, 2003 through December 17, 2003 in Los Angeles, California. On December 12, 2003, all parties were notified via Fax that the hearing was set to commence on December 16, 2003, instead of December 15, 2003.

On December 15, 2003, literally as I was preparing to board a flight to Los Angeles, I received notice by telephone that a motion was filed by Rosendo Gonzalez, Esq. informing Complainant and me for the first time that he had been retained to represent Respondent. The Motion requested a continuance. Mr. Gonzalez stated that because he was scheduled to appear in five different hearings on December 16, 2003, he would be unable to attend the hearing in this case. I denied the motion on December 15, 2003.<sup>1</sup>

Respondent failed to appear at the oral hearing on December 16, 2003, either in person or by counsel. Complainant was represented by Jeffrey Armistead and David Richman. Failure of a respondent to appear at a hearing triggers the provision of §1.141(e)(1) of the Rules, which allows Complainant to elect whether to “follow the procedure set forth in 1.139 or whether to present evidence in whole or in part, in the form of affidavits or by oral testimony before the Judge.” In this case, Complainant elected to present evidence. Two witnesses testified and thirteen exhibits were admitted.

On February 11, 2004, Respondent’s attorney was mailed the Complainant’s proposed

Findings of Fact, Conclusions of Law, and Proposed Order. Respondent did not file a response

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<sup>1</sup> I dictated an order denying the motion from the airport, which was served by fax that afternoon.

within the allotted time.

### DISCUSSION

Respondent has failed to show cause as to why Complainant's denial of its application for a license to buy and sell perishable commodities under PACA should be overturned. The evidence overwhelmingly shows that Complainant properly denied Respondent's PACA license application because Respondent is unfit to engage in the business of a commission merchant, dealer or broker because its failure to make full payment promptly for produce in both foreign and intrastate commerce and its financial irresponsibility are practices of the character prohibited by the Act.

Complainant may deny the license application of a corporation, such as Respondent, if it finds that the applicant, prior to the date of filing of the application, has "engaged in any practice of the character prohibited by the Act." 7 U.S.C. § 499d(d). See In re Power Tomato, Inc., and Power Produce Co., 52 Agric. Dec. 662 (1993); In re Tony Kastner and Sons Produce Co., Inc., 51 Agric. Dec. 741 (1992); In re Williamsport Purveyors, Inc., 48 Agric. Dec. 1092 (1989) [aff'd, 916 F.2d 82 (3d Cir. 1990), reprinted in 49 Agric. Dec. 1148 (1990)]; In re Robert W. Casto, d/b/a Prima Citrus & Fruit Exchange, 46 Agric. Dec. 602 (1987); In re Pappas Produce, Inc., 36 Agric. Dec. 684 (1977); In re Ludwig Casca, 34 Agric. Dec. 1917 (1975).

Complainant's investigation established that from July 19, 2003 through August 11, 2003, Respondent purchased, received, and accepted eight lots of perishable agricultural commodities from Sergio Guzman Ramirez of Tijuana, Mexico in the amount of \$27,883.75.

(CX 4; CX 10; Tr. 34-40).<sup>2</sup> Brian Wright, an investigator for the PACA Branch, testified that he asked Respondent to submit to PACA past due and unpaid invoices for produce from Mr. Guzman. Tr. 36-37. In response to this request, Ms. Mendez-Romero, on behalf of Respondent, submitted invoices used to determine the above past due debt in the amount of \$27,883.75 for shipments of produce due on July 29, 2003 through August 29, 2003. (Tr.36-40). Mr. Guzman corroborated that Respondent owed him at least this amount. (Tr. 45-46).

Section 2(4) of the Act (7 U.S.C. § 499b(4)) requires that full payment be made promptly for transactions made in interstate and foreign commerce. The Regulations promulgated pursuant to the PACA define prompt payment generally as payment made within 10 days of acceptance, unless the parties agree to other terms in writing prior to the transaction. (7 C.F.R. § 46.2(aa)). This failure by Respondent to pay promptly for produce in foreign commerce violated Section 2(4) of the Act.

Failing to make full payment promptly for produce in interstate and foreign commerce is unlawful under the Act, and therefore a practice of the character prohibited by the Act. See In re Fresh Approach, 44 Agric. Dec. 2043, 2058 (1985). In transactions in interstate or foreign commerce, “failure to pay for produce is a very serious violation of the Act.” In re Gilardi Truck and Transportation, Inc., 43 Agric. Dec. 118, 123 (1984). The prompt payment provisions of the PACA are meant to ensure that produce shipped cross country or great distances, transactions that are subject to “opportunities for sharp practices and irresponsible business conduct,” are

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<sup>2</sup> Complainant’s exhibits will be referred to as “CX” and the hearing transcript will be referred to as “Tr.”.

paid for expeditiously. Marvin Tragash Co. v. United States Dep't of Agric., 524 F.2d 1255, 1257 (5<sup>th</sup> Cir. 1975); see also Tri-County Wholesale Produce Co. v. United States Dep't of Agric., 822 F.2d 162, 163 (D.C. 1987). The Act's requirement of expeditious payment is necessary to prevent a domino effect where the failure to pay one seller leads to that seller's inability to pay its suppliers, with the potential to cause great harm to the produce industry. (Tr. 60-61). Indeed, the Judicial Officer has repeatedly confirmed that failure to pay for produce is a violation of the PACA, for which only the most severe sanction is appropriate. In re Scamcorp, Inc., d/b/a Goodness Greeness, 57 Agric. Dec. 527, 570 (1998); In re H. Schnell & Company, Inc., 58 Agric. Dec. 1002, 1010 (1999). Respondent's failure to pay for produce in foreign commerce in violation of Section 2(4) is alone sufficient grounds to deny it a PACA license.

In addition to failing to pay promptly for produce in **foreign** commerce, Respondent also failed to make full payment promptly for produce in **intrastate** commerce. This, too, is a practice of the character prohibited by the Act. Respondent failed to make full payment promptly to three sellers—V & L Produce (CX 8), Jalisco Fresh Produce (CX 9), and Del Sur Fresh (CX 11)-- of the agreed purchase prices, or balances thereof, in the total amount of \$37,854.20 for 53 lots of perishable agricultural commodities, which Respondent purchased, received and accepted in intrastate commerce. CX 4, CX8, CX 9, CX 11; Tr 19-33, 41-46. While intrastate produce transactions themselves are not subject to the PACA absent a showing that they were in contemplation of interstate or foreign commerce, the failure to pay for such produce is encompassed by the phrase “any practice of the character prohibited by the Act.”

Moreover, Complainant has broad discretion to refuse to issue a license to applicants who pose a risk to the produce industry. “The Act confers broad discretion upon the Secretary to bar

from the industry, inter alia, persons with a history of financial irresponsibility or other conduct of the type proscribed by the PACA.” See In re Williamsport Purveyors, Inc., 48 Agric. Dec. 1092, 1098 (1989). Failing to pay for produce in intrastate commerce is analogous to the very serious violation of failure to pay for produce in interstate and foreign commerce. Not only is failing to pay for produce in intrastate commerce a practice of a character prohibited by the Act, it also is an indication of financial irresponsibility. As such, it is a legitimate indicator as to how Respondent will conduct business with produce suppliers in interstate and foreign commerce if permitted to do so under the Act. Tr. 57-58.

Only those persons “financially responsible” should be engaged in the perishable agricultural commodities industry. See In re The Caito Produce Company, 48 Agric. Dec. 602, 612 (1989). It is the Agency’s responsibility to prevent future instances of harm to the produce industry because the “primary purpose of the PACA is to protect growers and producers from the ‘sharp practices of financially irresponsible and unscrupulous brokers’ in the produce industry.” In re Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery, 55 Agric. Dec. 1204, 1211 (1996) quoting In re Tony Kastner & Sons Produce Co., 51 Agric. Dec. 741, 745 (1992). Regardless of whether produce crosses state boundaries, the failure to pay promptly is an indication of financial irresponsibility that the Secretary may consider in any decision as to whether a license should be granted.

Respondent further demonstrated financial irresponsibility by failing to establish adequate financial reserves. Respondent began conducting business subject to the Act on June 30, 2003, but did not deposit any money into a bank account until July 23, 2003. CX 7, Tr. 50-53. The \$3,000 deposited on this date was left untouched until August 12, 2003 when all but

\$100 of that amount was withdrawn. These funds were facially insufficient relevant to the high volume of produce purchased by Respondent in July and August, 2003. Thus, in July Respondent purchased produce in the amount of \$285,664.84 and from August 1, 2003 though August 14, 2003, Respondent purchased produce in the amount of \$97,959.97. For the period of August 1 through August 14, 2003, Respondent's Profit and Loss Statement showed a net loss in the amount of \$26,962.59. Tr 50. Obviously, the \$100 in Respondent's bank account was insufficient to cover the net loss. (CX 3; CX 6; CX 7; Tr. 46-53). Undercapitalization is a "circumstance that is never condoned under the Act." In re Green Village Fruit and Vegetable, Inc., 45 Agric. Dec. 1202, 1210 (1986). In the produce industry, the financial circumstance of not paying promptly for produce because of undercapitalization has frequently led to the revocation of PACA licenses. See In re Potato Sales Co., Inc., TSL Trading, Inc., d/b/a SL International, an Ever Justice Corporation, 54 Agric. Dec. 1382, 1400 (1995); In re Hogan Distributing, Inc., 55 Agric. Dec. 622, 631 (1996). Respondent's financially irresponsible act of not adequately capitalizing its business, in conjunction with its failure to pay timely for produce, is a practice of the character prohibited by the Act and supports Complainant's refusal to issue a license to Respondent.

#### Findings of Fact

1. Tomatoes N Chiles R Us, Inc. (hereinafter, "Respondent"), is a corporation that is organized and incorporated under the laws of the State of California. Its business address is 746 Market Court, Los Angeles, California 90021. (CX 3).
2. Respondent is not and never has been licensed under the PACA.



3. Complainant received Respondent's PACA license application on August 8, 2003. Complainant has withheld the issuance of a PACA license based on its determination that Respondent is unfit to engage in the business of a commission merchant dealer or broker because it has engaged in practices of the character prohibited by the Act. (Tr. 57-61).
4. From July 29, 2003 to August 21, 2003, Respondent failed to make full payment promptly to Sergio Guzman of Tijuana, Mexico, of the agreed purchase prices in the total amount of \$27,883.75 for eight lots of perishable agricultural commodities, which Respondent purchased, received and accepted in foreign commerce. (CX 4; CX 10; Tr. 34-40).
5. From July 24, 2003 to September 1, 2003, Respondent failed to make full payment promptly to three other sellers of the agreed purchase prices in the total amount of \$37,854.20 for 53 lots of perishable agricultural commodities, which Respondent purchased, received and accepted in intrastate commerce. (CX 4; CX 8; CX 9; CX 11; Tr. 19-33, 41-46).
6. For the month of July, 2003, Respondent showed a net loss of \$174.73 on income from sales of \$310,378.72. For the period of August 1 to August 14, 2003, Respondent had a net loss of \$26,962.59 on income from sales of \$82,642.57. Respondent purchased produce during this period in a total amount of \$285,664.84 for July and \$97,959.97 for the period of August 1, 2003 to August 14, 2003. (CX 6, CX 12; CX 13; Tr 46-50).
7. Respondent began conducting business subject to the PACA on June 30, 2003, but did not open a checking account until July 23, 2003. On that date Respondent deposited an amount of \$3,000 and then on August 12, 2003, Respondent withdrew \$2,900 from this

sole bank account, leaving a balance of \$100. From the time the account was opened to August 12, 2003 there was no other activity in this account. (CX 3; CX 7; Tr. 51-53).

### Conclusion and Order

Respondent's failure to promptly pay for produce in foreign commerce, along with its failure to pay promptly for produce in intrastate commerce, and its failure to establish adequate financial reserves, support the decision of Complainant to deny it a PACA license.

Complainant's withholding of the issuance of a license to Respondent was proper and the issuance of a PACA license is denied.

This Order shall take effect 20 days after this Decision becomes final. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.  
this 16<sup>th</sup> day of March, 2004

Marc R. Hillson  
Marc R. Hillson  
Administrative Law Judge

## APPENDIX

### Pertinent Statutory Provisions

Section 4(d) of the Act (7 U.S.C. §499d(d)) provides:

*The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal court.... If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, ... or in case applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal court, ... the Secretary may refuse to issue a license to the applicant.*

Section 2(4) of the Act (7 U.S.C. § 499b(4)) provides in part:

*It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--*

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*(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or 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; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the*

*trust as required under Section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.*

