

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-02-0015

In re:

Michigan Repacking and Produce Co., Inc.

Respondent

**ORDER VACATING ORDER STAYING EFFECTIVE DATE OF
DECISION**

This matter is before the Administrative Law Judge upon the Motion of the Complainant seeking vacation of the Stay Order entered in this case by then Chief Administrative Law Judge James W. Hunt on May 8, 2003. This action was commenced on March 29, 2002 by the filing of a Complaint alleging willful violations of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. §499a, et seq.), hereinafter "PACA" and the Regulations issued thereunder (7 C.F.R. Part 46). After several attempts at service, service was finally effected on September 20, 2002 upon Robert Tringale, the President of Michigan Repacking and Produce Co., Inc. Although no formal answer appears of record, the file does contain correspondence dated October 7, 2002 from Mr. Tringale to Complainant's attorney advising him of the bankruptcy of the Respondent

and the automatic stay imposed by the bankruptcy proceedings. Following receipt of the letter, on October 25, 2002, the Complainant filed a Status Report and on January 9, 2003, the Complainant filed its Motion for Decision Without Hearing by Reason of Default. The attempt to deliver the Motion by certified mail was again unsuccessful and was resent pursuant to the Rules of Practice by first class mail on February 10, 2003. Mr. Tringale sought and received an Extension of Time until April 10, 2003 to file an Answer. Notwithstanding the extension granted, no Answer was received and on April 21, 2003, a Decision Without Hearing by Reason of Default was entered by Judge Hunt.

Belatedly, Mr. Tringale was again heard from in the form of correspondence dated and received on May 6, 2003. In it, he wrote:

I write to remind you of the fact this action has either been stayed or expressly barred. In other words, your office should have stopped pursuing this action or never have filed it in the first place. Either way, your actions are in direct violation of a federal court order. This order expressly states as follows:

Any and all pending claims by or on behalf of other persons or entities holding claims against any of the Defendants which arise under or relate to the PACA or unpaid deliveries of Produce are hereby stayed and all subsequent actions by any unpaid seller of Produce to the Company are hereby barred. *This prohibition shall apply to all action or proceedings before the USDA and in all courts or other forums pending further Order of this Court.* Except as set forth herein, all persons or entities having unsatisfied claims against the Defendants arising under or relating to the PACA for unpaid deliveries of Produce to the Defendants shall have the right to seek a recovery on such claims in this action only by following the procedure established herein. Counsel shall serve a copy of this Order upon the plaintiffs in any known actions promptly upon learning of any such further actions. (Emphasis in original)

Judge Hunt, construing the above correspondence as a Motion for Reconsideration, entered his Order Staying the Effective Date of the Decision on May 8, 2003. The Complainant filed a Rely to Respondent's Motion and on May 29, 2003, Judge entered an Order Continuing his Stay. A status update was filed by the Complainant

suggesting that clarification would be forthcoming; however, none was received and when directed to file a further Status Report, the Complaint reported that despite numerous attempts to obtain a clarification of the federal court order, none was now anticipated and at the same time renewed their Motion to Vacate the Stay Order. At the request of Mr. Tringale, Mary E. Gardner, an attorney for nine of the PACA creditors has advised that the consolidated cases against the Respondent in United States District Court for the Eastern District of Michigan were dismissed pursuant to a stipulation and settlement agreement between the parties.¹

As noted in the Complaint's Reply to Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Default, the instant action is a disciplinary hearing brought under the Perishable Commodities Act of 1930, as amended. Although actions by creditors are automatically stayed by the filing of a petition in bankruptcy, 11 U.S.C. § 362(b)(4) of the Bankruptcy Act expressly provides that the automatic stay does not extend to an action or proceeding by a governmental unit to enforce that unit's police or regulatory power:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

¹ AZ Puchi III Enterprises, Inc. vs. Michigan Repacking and Produce Co., Inc. Case No. 01-73853 and a case consolidated with it (Case No. 01-73942).

Moreover, 11 U.S.C. § 525(a) specifically excludes the Perishable Agricultural Commodities Act from the code's provisions limiting the revocation, suspension, or refusal of licenses:

Sec. 525. Protection against discriminatory treatment

(a) **Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant** to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or as been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. (Emphasis added)

As is clear from the legislative history, in carving out the above exceptions, Congress recognized the importance of having only financially responsible firms in the perishable agricultural commodity business and was well aware of the Department's well established policy of revoking one's license for failure to pay in full for produce purchases. The Departmental policy has repeatedly been upheld in the Federal Circuit Courts. *Carlton Fruit Co.*, 49 Agric. Dec. 513 (1990), *aff'd* 922 F. 2d 847 (11th Cir. 1990) (unpublished); *Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd* 728 F. 2d 347 (6th Cir. 1984); *Carpenito Bros. Inc.*, 46 Agric. Dec. 486 (1987), *aff'd* 851 F. 2d 1500 (D.C. Cir. 1988) (Table).

Accordingly, being sufficiently advised, it is **ORDERED** that the Order Staying Effective Date of Decision dated May 8, 2003 and the Order Continuing Stay dated May

29, 2003 are **VACATED** and the Decision Without Hearing by Reason of Default dated April 21, 2003 is reinstated as of this date.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.
March 15, 2005

PETER M. DAVENPORT
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 1081, South Building
Washington, D.C. 20250-2900
202-720-9443
Fax: 202-720-9776