

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

USDA
OALJ/OHC

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Docket No. 14-0109 (PACA-D)

In re:

ALLENS INC., also known as
VEG LIQUIDATION INC.¹,

Respondent.

Appearances:

Charles Kendall, Esq., for Complainant

Jason Klinowski, Esq., for Respondent

Before:

Administrative Law Judge Janice K. Bullard

**DECISION AND ORDER;
ORDER CONSOLIDATING MATTERS FOR HEARING**

I. INTRODUCTION

The instant matter involves a complaint filed by the United States Department of Agriculture (“Complainant”; “USDA”) against Allens Inc. (“Respondent”), alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et seq. (“PACA”; “the Act”). The complaint alleged that Respondent failed to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities during the period from October 3, 2013, through January 6, 2014. Complainant asserted that Respondent’s alleged violations of PACA warranted revocation of Respondent’s license to conduct business pursuant to that statute.

¹ The caption is hereby amended to conform to Respondent’s assertions in its answer filed June 24, 2014.

This Decision and Order is issued pursuant to Complainant's motion for a Decision Without Hearing, which I hereby GRANT.

II. PROCEDURAL HISTORY

On May 8, 2014, Complainant filed a complaint against Respondent alleging violations of PACA. On June 3, 2015², Respondent's counsel entered appearance and moved for an extension of time to file an Answer, which was granted by Order issued June 4, 2014. On June 24, 2015, Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ") for the United States Department of Agriculture ("Hearing Clerk").

On June 24, 2014, Chapter 7 Bankruptcy Trustee R. Ray Fulmer, II, filed correspondence together with a copy of a notice of Chapter 7 Bankruptcy and Creditor's meeting for "All Veg, LLC"³ and requested additional time to file an answer. On July 17, 2014, Complainant's counsel requested a hearing in this matter. The case was reassigned to me on that date. On August 13, 2014, counsel Samuel T. Sessions, Esq. and counsel Stephen P. Leara, Esq, both filed entry of appearance on behalf of Chapter 7 Trustee R. Ray Fulmer, II.

On September 9, 2014, I held a telephone conference with counsel, who noted the complexities of the case and the pending bankruptcy proceeding. Counsel asked me to stay the matter. By Order issued September 10, 2014, I granted that motion and set a schedule for the submission of a status report regarding the parties' positions. On December 9, 2015, counsel for Complainant filed a status report notifying that the parties' positions remained unchanged.

On February 3, 2015, Complainant filed a motion for the issuance of an Order directing Respondent to show cause why a decision without hearing should not be issued. On February 26, 2015, and February 27, 2015, Respondent's counsel moved for extensions to respond to

² The notice and motion were originally filed by facsimile, and the originals were filed by regular mail and docketed on June 11, 2014.

³ According to Respondent's Answer, Mr. Fulmer was the Chapter 7 Trustee for "Veg Liquidation, Inc.", formerly known as "Allens, Inc.", which was in bankruptcy and was being administered in conjunction with "All Veg, LLC".

Complainant's motion, which I granted by Order issued February 27, 2015. On March 23, 2015, Attorney Klinowski, on behalf of all counsel, filed an opposition to Complainant's motion, together with a supporting brief.

On March 31, 2015, Complainant filed an opposed motion for leave to reply to Respondent's response in opposition. By Order issued April 1, 2015, I granted Complainant's motion, notwithstanding Respondent's objection. On April 23, 2015, Complainant filed its response to Respondent's opposition, and on April 28, 2015, filed a corrected response. On May 15, 2015, Respondent filed an unopposed motion to extend the time within which to file a surreply, which was filed on June 1, 2015.

Upon review of the documents and arguments submitted by the parties, I conclude that Complainant's motion is fully supported by the pleadings and documents submitted by both parties. Therefore, a hearing in this matter is not necessary. I hereby admit to the record the Attachments to Complainant's motion for decision on the record and the Appendices to Complainant's complaint, and the Attachment to the Chapter 7 Trustee's answer.

Pursuant to my telephone conference with counsel for the parties on September 9, 2015, the actions brought by Petitioners associated with this Respondent against USDA are hereby consolidated for purposes of a hearing pursuant to 7 C.F.R. § 1.137(b). Those cases are: Roderick L. Allen (15-0083); Joshua C. Allen (15-0084); Nicholas E. Allen (15-0085); and Mark Towry (15-0095).

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Discussion

1. **Respondent's Affirmative Defenses**

Respondent contends that by participating in Respondent's bankruptcy proceedings as a creditor, Complainant USDA has deprived me of jurisdiction to consider Complainant's

administrative complaint. I reject Respondent's "election of remedies" argument as lacking in merit. An administrative disciplinary proceeding is provided for by the PACA. Similarly, I find no grounds for the assertion that USDA has failed to state a claim for which relief can be granted. In filing the instant action, USDA is not seeking relief, but is exercising its regulatory enforcement powers under the PACA. USDA has not waived its right to enforce PACA because of Respondent's conduct viz-a-viz third parties.

2. **Decision on the Record**

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 et seq., apply to the adjudication of the instant matter. Pursuant to 7 C.F.R. §1.139, the Rules allow for a Decision Without Hearing by Reason of Admissions: "...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." *H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729, 1998 WL 667268 (U.S.D.A. September 17, 1998).

In its response to Complainant's motion, reiterated in its surreply, Respondent contends that a material issue of fact exists because Complainant failed to plead that Respondent willfully violated PACA, which failure impacts the sanction that may be imposed. Further, Respondent maintains that Complainant's mistakenly relies on the holding in *Scamcorp, Inc. d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 548-549, 1998 WL 92817 (U.S.D.A. January 29, 1998), because the holding in that matter was reached in conflict with sanction authority imposed by the Administrative Procedures Act, 5 U.S.C. §551(10)(A)-(G). Respondent also suggests that Complainant failed to introduce sufficient evidence of outstanding balances that Respondent failed to pay promptly to suppliers, other than Respondent's bankruptcy schedules which list

unpaid sellers of agricultural commodities, which Respondent asserts do not demonstrate intentional or negligent conduct that would result in willfulness as understood by 5 U.S.C. §558(c). Respondent contends that the Chapter 7 trustee is entitled to a hearing to address the merits of the instant case.

PACA requires payment by a buyer of perishable agricultural commodities within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice; is repeated whenever there is more than one violation of the Act; and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678, 1994 WL 643691(U.S.D.A. October 7, 1994).

Respondent's bankruptcy schedules corroborate that Respondent had failed to make prompt payments as contemplated by the PACA, and as interpreted by the Judicial Officer for the Secretary of USDA, who concluded that the "PACA requires full payment promptly, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of PACA at all times...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", and Respondent's license shall be revoked where violations are flagrant or repeated. *Scamcorp*, 548-549.

USDA adopted the holding in *Scamcorp* and issued a policy addressing enforcement of "no-pay" and "slow-pay" violations of the PACA. Complainant cites the policy, which may in

essence states that any case where a Respondent fails to pay for products in accordance with the PACA and is not in full compliance with the PACA within the earlier of 120 days after a complaint is served on the Respondent, or the date of hearing, shall be treated as a “no-pay” case. Any disciplinary proceeding in which a Respondent admits the material allegations in the complaint and does not assert that it has achieved compliance with the PACA, or will achieve compliance within the time frame stated shall be treated as a “no-pay” case. In 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. In addition to being current on payments for purchases, a respondent must not have credit agreements with produce sellers for more than 30 days. *Scamecorp*, 548-549.

A notice of appearance by counsel was filed with the Hearing Clerk for OALJ on June 3, 2014, which demonstrates that the complaint was served on Respondent before that date. In its Answer to the Complaint, Respondent did not specifically deny that it failed to promptly pay sellers of perishable agricultural commodities, but rather, tacitly admitted that it had failed to pay at least some buyers. By filing for bankruptcy protection and including in a schedule of unsecured creditors the unpaid balances for purchases of perishable agricultural commodities, Respondent further admits that it had failed to comply with the prompt payment requirements of the PACA. USDA conducted an investigation that disclosed that the amounts identified in the complaint as unpaid to sellers remained unpaid as of October 2, 2014. In its adversary action in bankruptcy court, as of November 10, 2014, Respondent admitted to debts of no less than \$24,850,743.05 due to produce suppliers. Accordingly, Respondent remained non-compliant with the PACA more than 180 days after being served notice of the complaint in this matter.

I need not determine the exact amount that Respondent failed to pay, as Respondent’s bankruptcy filings demonstrate that the outstanding balance due to sellers is in excess of

\$5,000.00, which represents more than a *de minimis* amount. “[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed”. *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83, 1984 WL 55519 (U.S.D.A. December 4, 1984). I owe no duty to the Chapter 7 Trustee to make this determination for him.

Respondent argues that it failed to receive notice of USDA’s reliance upon Respondent’s bankruptcy filings and pleadings in violation of the Administrative Procedures Act. I find little merit in that argument, as the complaint set forth sufficient information regarding the violations alleged by Complainant so as to allow Respondent to specifically address them. Respondent is not prejudiced by Complainant producing Respondent’s own bankruptcy pleadings as admissions of its non-compliance with prompt payment requirements of PACA. I take official notice of schedules and pleadings filed in connection with Respondent’s bankruptcy petition.

Administrative Law Judges presiding over hearings in matters initiated by the Secretary of USDA shall take official notice “of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, commercial fact of established character. . .” 7 C.F.R. § 1.141(h)(6). Documents filed in bankruptcy proceedings by debtors that are involved in PACA disciplinary proceedings may be officially noticed. *KDLO Enterprises, Inc.*, 70 Agric. Dec. 1098, 2011 WL 3503526, (unpub. 9th Cir. 2011, affirming Decision and Order of Judicial Officer for USDA, *KDLO Enterprises, Inc.*, 70 Agric. Dec. 1118 (U.S.D.A. September 21, 2011)).

I also reject Respondent’s theory that the Administrative Procedures Act (APA) mandates consideration of a variety of sanctions. See, 5 U.S.C. §551(10). I find no inherent conflict between the APA’s description of sanctions available to agencies, and the sanctions provided by the PACA. Congress vested USDA with the authority to impose specific sanctions for violations of the Act. See, 7 U.S.C. §§499h. Further, the Secretary’s interpretation of statutes and

regulations that Congress has enacted is entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respondent asserts that a material issue of fact remains because it may be argued under some court decisions that its conduct is not “willful”, thereby potentially impacting the sanction apportioned in this case. However, I find that Respondent’s arguments are not supported by the statutory, regulatory, and policy requirements that determine what constitutes willful, flagrant, and repeated violations of section 2(4) of PACA. The Judicial Officer has concluded that cases of repeated failure to promptly make payments required by the PACA demonstrate willful violations, because Respondent knew or should have known that it could not meet its payment obligations. *Scarpaci Bros., Inc.*, 60 Agric. Dec. 874, 883-884, 2001 WL 1891230 (U.S.D.A. August 6, 2001). The Judicial Officer observed, “Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirement in section 2(4) of the PACA (7 U.S.C. 499b(4)), and Respondent’s violations are, therefore, willful.” *Scarpaci*, 883-884

In order to reach “full compliance” with the PACA, Respondent would have to have paid all produce sellers within 120 days of being served with a complaint. *Scamcorp*, at 549. Failure to meet this obligation results in a “no-pay” case. *Id.* The preponderance of the evidence demonstrates that Respondent has not paid sellers within that time, and therefore, Respondent has failed to reach full compliance with PACA. Respondent suggests that its use of PACA trust assets to improve the position of trust beneficiaries negates a finding of willfulness. However, nothing refutes the fact that Respondent failed to make prompt payment in many instances over a long period of time. Complainant need not establish that Respondent deliberately intended not to make prompt payment for produce purchases. Payment violations similar to those established

herein are willful violations of PACA because they represent gross neglect of PACA's mandate to make prompt payment. See, *Five Star Food Distributor, Inc.*, 56 Agric. Dec. 880, at 896-7, 1997 WL 41357 (U.S.D.A. January 23, 1997). Respondents' actions were willful, and represent repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

It is appropriate to consider the instant matter as a "no-pay" case, warranting revocation of Respondent's license under the PACA.

B. Findings of Fact

1. Veg Liquidation, Inc., formerly known as Allens, Inc. ("Respondent") is a corporation organized and existing under the laws of the state of Arkansas and at all times material hereto, its business address was 305 East Main Street, Siloam Springs, Arkansas 72761-0250.
2. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number No. 19202120, issued on September 23, 1963.
3. Respondent's license was due for renewal on September 23, 2015.⁴
4. During the period from October 3, 2013, through January 6, 2014, Respondent failed to make full payment promptly to 40 sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of \$9,759,843.86.
5. On October 28, 2013, Respondent filed a petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.) in the United States Bankruptcy Court for the Western Division of Arkansas.

⁴ The record does not disclose whether Respondent has renewed or attempted to renew its license.

6. Respondent's case and that of its parent company All Veg LLC are jointly administered under Case No. 13-73597.
7. In the amended Schedule F that Respondent filed with the bankruptcy court, Respondent listed unsecured debts to all 40 produce suppliers listed in Appendix A attached to the complaint filed herein, for a total amount of \$9,231,780.81.
8. On June 6, 2014, Respondent's bankruptcy petition was converted to a case under chapter 7 of the Bankruptcy Code, and Trustee R. Ray Fulmer, II, was appointed Chapter 7 Trustee.
9. An investigation conducted by USDA disclosed that as of October 2, 2014, the amount of due to the 40 sellers identified in Appendix A attached to the complaint, remained unpaid.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's admissions in its bankruptcy filings and pleadings, and its failure to outright deny the allegations of the complaint in the answer filed with OALJ, constitute admissions of the allegations set forth in the complaint and provide reason to dispense with a formal hearing in this matter.
3. The unpaid balances due to produce sellers represent more than *de minimis* amounts.
4. Because the unpaid balances are more than *de minimis*, and because there are no disputes of material fact regarding the issue of payment due to Respondent's admissions, a hearing in this matter is not necessary. [REDACTED]
5. Respondents' failure to make full payment promptly of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted by Respondent in

interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. The violations are flagrant because of their number, the amount of money involved, and the lengthy period of time during which the violations occurred.
7. The violations are repeated because there was more than one violation.
8. The violations were willful because Respondent failed to make prompt payments or otherwise arrange for payments in compliance with the Act and regulations, within 120 days after the complaint was served on Respondent.

ORDER


Respondent Veg Liquidation Inc., formerly known as Allens, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b), and Respondent's PACA license shall be revoked.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order shall 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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 8th day of October, 2015, in Washington, D.C.


Janice K. Bullard
Administrative Law Judge