

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0512

In re: Action Produce, Inc.,

Respondent

**Decision and Order**

Appearances: Shelton S. Smallwood, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC for Complainant  
Michael Martin-Johnston, Esquire, Johnston Law Firm, PC, Lake Barrington, Illinois for Respondent

**Preliminary Statement**

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.*) (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).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Action Produce, Inc. (Respondent) by filing a disciplinary Complaint on July 5, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 12 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$543,195.84 for 83 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. The Complaint alleges the violations

occurred in commerce between February 27, 2010, and November 5, 2010 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference.

The Complaint requested that findings be made that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of those violations be published.

On July 25, 2012, Respondent filed a Request for Extension of Time to File an Answer to the Complaint. On July 31, 2012, I granted Respondent's request which gave Respondent until August 31, 2012 to file an answer.

Respondent failed to answer the Complaint in a timely manner and on September 7, 2012, Complainant moved for issuance of a Decision without Hearing by Reason of Default. Although Respondent indicated that the Answer was mailed on August 31, 2012, it was not received by the Hearing Clerk until September 10, 2012, ten days after the extended deadline. On September 18, 2012, Respondent filed a Response in Opposition to Complainant's Motion for Default Without Hearing. In that Response, while conceding that the Answer was untimely filed, Respondent requests that the Answer be deemed timely filed, *instanter*, or otherwise on the day of receipt by Counsel for the Complainant and the Hearing Clerk..

### **Discussion**

Rule 1.147(g) of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.147(g)) provides:

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part shall be deemed to be filed at the time when it reaches the Hearing Clerk;.....

The Judicial Officer has consistently held that the Rules of Practice are binding upon Administrative Law Judges and the Judicial Officer and that they possess very limited authority to modify the Rules of Practice in a proceeding. *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351, 361 (2000); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982).

Similarly, neither an Administrative Law Judge nor the Judicial Officer can provide the type of equitable relief which Respondent seeks. *In re Carolyn & Julie Arends, et al.*, 70 Agric. Dec. \_\_\_\_ (2011) (slip op. at 22, n.23 (citing *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976)).

Even were Complainant not entitled to entry of a Decision and Order based upon Respondent's failure to file a timely Answer, in the Bankruptcy Schedule F filed by Respondent, Respondent listed undisputed debts to 10 of the 12 produce vendors in Appendix A of the Complaint, in the total amount of \$529,254.00. The practice of taking official notice of documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings is of long standing and well established. *In re Tanikka Watford, Tanikka Watford and Latisha Watford d/b/a Southern Solutions Produce LLC*, 69 Agric. Dec. 1533, 1535 (2010); *In re KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538 (2010), *aff'd by Judicial Officer*, 69 Agric. Dec. \_\_\_\_ (Aug. 3, 2011), *Pet for Reconsideration denied*, 69 Agric. Dec. \_\_\_\_ (Oct. 21, 2011), 2011 WL 3503526, \*4; (citing *In re Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 764 (2007); *In re Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d

916 (5<sup>th</sup> Cir, 1991)(Table), *printed in* 50 Agric. Dec. 854 (1991); *In re Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175-176 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Dales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601(D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

Similarly, the use of information contained in bankruptcy filings as the basis for decisions without hearing is also well established. *In re Tanikka Watford, Tanikka Watford and Latisha Watford d/b/a Southern Solutions Produce LLC, supra*; *In re Northern Michigan Fruit Co.*, 64 Agric. Dec. 1793, 1796 (2005); *In re Holmes*, 62 Agric. Dec. 254, 254-255 (2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373, 374-375, 378 (2002); *In re Scarpaci Bros.*, 60 Agric. Dec. 874, 875-876 (2001); *In re Matos Produce Corp.*, 59 Agric. Dec. 904 (2000); *In re Peter DeVito Co.*, 57 Agric. Dec. 830, 831 (1997); *In re D & D Produce, Inc.*, 56 Agric. Dec. 1999, 2000 (1997); *In re Five Star Food Distribs, Inc, supra*; *In re Billy Newsom Produce Co.*, 55 Agric. Dec. 1438, 1438-1440 (1996).

According to the Department's Judicial Officer's policy, in any PACA disciplinary proceeding in which it is alleged that a Respondent has failed to pay in accordance with the PACA, and Respondent admits the material allegations in the Complaint and makes no assertion that the Respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the Complaint was served on Respondent, or the date of the hearing, whichever occurs first, the PACA case will 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.<sup>1</sup>

As Respondent no longer possesses a valid PACA license, the proper sanction for its violations is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published. Based upon a careful consideration of the pleadings and Departmental precedent cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Action Produce, Inc. (Respondent) was a corporation organized and existing under the laws of the State of California. Its business and mailing address was in San Francisco, California.

2. At all times material herein, Respondent was licensed under the provisions of the PACA, License 2006-1077, issued to Respondent on July 17, 2006. This license terminated on April 28, 2011, when Respondent was discharged as a bankrupt pursuant to 4(a) of PACA (7 U.S.C. § 499d(a)).

3. Respondent, during the period of February 27, 2010, through November 5, 2010, on or about the dates and in the transactions set forth in Appendix A appended to the Complaint and incorporated herein by reference, failed to make full payment promptly to 12 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$543,195.56, for 83 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the

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<sup>1</sup>See *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, at 562 (1998).

course of interstate and foreign commerce.

4. On January 24, 2011, Respondent filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the Northern District of California Bankruptcy Court. The petition was designated Case No. 11-30260. The Schedule F filed by Respondent under penalty of perjury indicates that 10 of the 12 sellers listed in Appendix A, hold unsecured claims for unpaid produce debt totaling \$529,254.00<sup>2</sup>.

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

### **Order**

1. A finding is made that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.
2. This Decision will become final without further proceeding 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).

Copies of this Decision shall be served upon the parties.

November 1, 2012

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**Peter M. Davenport**  
Chief Administrative Law Judge

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<sup>2</sup> The amount of the claims listed on the Schedule F for three of the ten sellers is less than the amount listed in Appendix A to the Complaint.