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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-17-0265
)
Fresh Growers Direct,)
) **Order Granting Requests to Withdraw**
Respondent) **Appeal Petition and Withdraw Appearance**

PROCEDURAL HISTORY

Melissa Bailey, Associate Deputy Administrator, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture [Deputy Administrator], instituted this proceeding by filing a Complaint on June 16, 2017. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Deputy Administrator alleges, during the period August 2015 through June 2016, Fresh Growers Direct willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly of the agreed purchase prices to five produce sellers in the total amount of \$244,508 for thirteen lots of perishable agricultural commodities, which Fresh Growers Direct purchased, received, and accepted in interstate and foreign commerce.¹

On July 3, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States

¹ Compl. ¶¶ III-IV at 2-3.

Department of Agriculture [Hearing Clerk], by certified mail, served Fresh Growers Direct with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated June 16, 2017.² Fresh Growers Direct failed to file an answer to the Complaint with the Hearing Clerk within twenty days after service, as required by 7 C.F.R. § 1.136(a). By letter dated August 3, 2017, the Hearing Clerk informed Fresh Growers Direct that it had not filed an answer to the Complaint within the time required by the Rules of Practice.³

On November 14, 2017, former Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed an Order to Show Cause Why Default Should Not Be Entered [Order to Show Cause] directing the parties to show cause in writing, not later than twenty days after issuance of the Order to Show Cause, why a default should not be entered pursuant to 7 C.F.R. § 1.136(c). On December 4, 2017, the Deputy Administrator filed Complainant's Response to Show Cause Order and Request for Decision Without Hearing by Reason of Default [Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Default [Proposed Default Decision]. Fresh Growers Direct failed to file a response to the Chief ALJ's Order to Show Cause and failed to file a response to the Deputy Administrator's Motion for Default Decision and Proposed Default Decision.

On January 9, 2018, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Decision and Order Without Hearing by Reason of Default in which the Chief ALJ: (1) found that Fresh Growers Direct committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (2) pursuant to 7 U.S.C. § 499h(a), ordered publication of the facts and circumstances of Fresh

² United States Postal Service Domestic Return Receipt for article number 7015 3010 0001 5187 5341.

³ Letter dated August 3, 2017, from Caroline Hill, Assistant Hearing Clerk, to Fresh Growers Direct.

Growers Direct's willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).⁴

On May 1, 2018, Mr. David M. Bradford, Bradford & Associates Attorneys, and Mr. Lee Pakulsky, Director Mediation & Settlements, CRS Consulting Mediation & Settlements, Manhasset, New York, entered an appearance on behalf of Fresh Growers Direct. On May 15, 2018, Fresh Growers Direct filed an appeal [Appeal Petition] of the Chief ALJ's January 9, 2018 Decision and Order Without Hearing by Reason of Default. On June 1, 2018, Fresh Growers Direct filed a Notice of Withdrawal in which Fresh Growers Direct gives notice of the withdrawal of "[a]ll documentation including notices of appearance, motions, appeals, and any letter correspondence[.]" On June 4, 2018, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of Fresh Growers Direct's Appeal Petition and Notice of Withdrawal. On June 6, 2018, counsel for the Deputy Administrator informed me, by telephone, that the Deputy Administrator does not oppose Fresh Growers Direct's Notice of Withdrawal.

DISCUSSION

A party does not have a right to withdraw its own appeal; however, a party's request to withdraw its own appeal is generally granted. When determining whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.⁵ Based on the

⁴ Chief ALJ's Decision and Order Without Hearing by Reason of Default at 4.

⁵ See *Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating, where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw the petition rests in the sound discretion of the court to be exercised in light of the circumstances of the case); *American Automobile Mfrs. Ass'n v. Commissioner, Mass. Dep't of Env'tl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to dismiss appeal); *Country Classic Dairies, Inc.*, 66 Agric. Dec. 1280, 1281-82 (U.S.D.A. 2007) (stating withdrawal of an appeal petition is not a matter of right); *Hartford Packing Co.*, 60 Agric. Dec. 851, 853 (U.S.D.A. 2001) (same); *Waller*, 34 Agric. Dec. 373, 374 (U.S.D.A. 1975) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; when determining whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

record before me, I find no reason for denying Fresh Growers Direct's request to withdraw its Appeal Petition. Moreover, I find no reason for denying Mr. Bradford and Mr. Pakulsky's request to withdraw their appearance on behalf of Fresh Growers Direct.


For the foregoing reasons, the following Order is issued.

ORDER

1. Fresh Growers Direct's June 1, 2018 request to withdraw its May 15, 2018 Appeal Petition, is granted.
2. Messrs. Bradford and Pakulsky's June 1, 2018 request to withdraw their May 1, 2018 appearance on behalf of Fresh Growers Direct, is granted.
3. The Chief ALJ's Decision and Order Without Hearing by Reason of Default, filed January 9, 2018, is the final decision in this proceeding. The Order issued by the Chief ALJ in the Decision and Order Without Hearing by Reason of Default, filed January 9, 2018, shall become effective thirty days after service of this Order on Fresh Growers Direct.

Done at Washington, DC

June 8, 2018


William G. Jenson
Judicial Officer