

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

REC'D - USDA/OALJ/OHC
2019 MAY 16 AM 11:29

In re:)
)
Huxtable's Kitchen, Inc.,) PACA-D Docket No. 18-0007
)
Respondent.)
and

In re:)
)
Lewis Macleod,) PACA-APP Docket No. 18-0024
)
Petitioner.)

**DECISION AND ORDER AFFIRMING IN PART AND REVERSING IN PART
ALJ ORDER ON SUGGESTION OF BANKRUPTCY
AND SEGREGATING DOCKETS FOR REMAND**

Appearances:

Shelton S. Smallwood, Esq., and Joyce McFadden, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250, for the Complainant, Fair Trade Practices Program, Agricultural Marketing Service ("AMS");

Jason C. Manfredy, Esq., with Fox Rothschild LLP of Philadelphia, PA, for the Respondent, Huxtable's Kitchen, Inc.; and

John C. Gentile, Esq. and Jennifer R. Hoover, Esq., with Benesch, Friedlander, Coplan & Aranoff LLP of Wilmington, DE, for the Petitioner, Lewis Macleod.

On Appeal to the Judicial Officer, Judge Bobbie J. McCartney.

Appeal Petition

This is a disciplinary proceeding initiated by Complainant, Specialty Crops Program, Agricultural Marketing Service ("Complainant" or "AMS"), against Huxtable's Kitchen, Inc. ("Respondent") on October 24, 2017 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) ("Regulations"); and the

Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice” or “Rules”).

Complainant appeals the March 30, 2018 Order¹ issued by the Acting Chief Administrative Law Judge (“Chief Judge” or “ALJ”) denying Complainant’s Motion for Decision Without Hearing by Reason of Default (“Motion for Default”) based on a finding that service of the Complaint on Respondent was not properly effected under the Rules of Practice.

Relevant Procedural History as to PACA-D Docket No. 18-0007

The record reflects that during all times relevant to the alleged violations Respondent Huxtable’s Kitchen, Inc. was licensed and operating subject to the provisions of the PACA. License number 20120330 was issued to Respondent on October 6, 2011. This license was succeeded by license number 20160338, which was issued to Respondent on January 25, 2016. The license terminated on January 25, 2017, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), after Respondent failed to pay the required annual renewal fee.

Complainant filed a disciplinary complaint on October 24, 2017, 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 six sellers of the agreed purchase prices, or balances thereof, in the total amount of \$551,829.47 for 174 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce. The

¹ The March 30, 2018 Order also found that the Complaint in this matter is not barred by the Bankruptcy Code’s Section 362 automatic stay. *See* Order at 10. This finding, which was not appealed, is fully supported by statutory, regulatory, and judicial authority and is affirmed and adopted herein.

Complaint alleged that the violations occurred in commerce during the period of October 2015 through May 2016, on or about the dates and in the transactions set forth in Appendix A and B to the Complaint, attached thereto and incorporated therein by reference, which were documents referenced from the filings in Respondent's Voluntary Petition for Bankruptcy filed on June 4, 2016 under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court, District of Delaware (designated Case No. 16-11538) ("Chapter 7 Bankruptcy").

Respondent admits in Schedule F of its Chapter 7 Bankruptcy filings that the six creditors listed in Appendix A to the Complaint were collectively owed undisputed unsecured produce debt in the amount of \$535,954.79 for 174 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce. Accordingly, pursuant to section 1.141(h)(6) of the Rules of Practice,² Complainant respectfully requested that the ALJ take official notice of Respondent's Voluntary Bankruptcy Petition and Schedule F therein.

Based on these admissions, the Complaint also requested that an Administrative Law Judge find that Respondent has 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 the violations be published.*** It is important to note that the relief requested by the Complaint does not seek reparations, restitution, or any sort of money judgment of the underlying debts.

The Complaint was attached to a detailed letter from the Hearing Clerk's Office explaining the nature of the proceedings, providing a citation to the applicable Rules of Practice, explaining that under the Rules of Practice a written answer to the Complaint signed by

² 7 C.F.R. § 1.141(h)(6).

Respondent or his attorney of record must be filed within twenty days from the receipt of the letter and attached Complaint, providing information for the submission of filings to the Hearing Clerk's Office by means of email, providing the Hearing Clerk's Office email address, and providing a phone number for the Hearing Clerk Liaison Officer should Respondent wish to contact the Hearing Clerk's Office. The record reflects that the Hearing Clerk's letter and the Complaint were served on October 30, 2017 by means of the United States Postal Service ("USPS"), Certified Mail with Return Receipt Requested, to the last known principal place of business for Respondent's attorney of record, Jason R. Parish of Kirkland & Ellis, LLP, at 655 Fifteenth Street, NW, Washington, DC 20005.³

Complainant provided, as proof of service of the Complaint, a copy of the USPS Tracking Report⁴ downloaded from the USPS official website.⁵ The Tracking Report reflects that following several unsuccessful attempts, two because no authorized recipient was available, the Complaint was "delivered to an agent at 7:29am on October 30, 2017 in WASHINGTON, DC 20005."⁶ The full address was not reflected on the Tracking Report but was spelled out in full on the Certified Mail Receipt associated with the USPS Tracking number.

Respondent failed to file an answer to the Complaint; therefore, pursuant to section 1.139 of the Rules of Practice,⁷ on January 23, 2018, Complainant filed a Motion for Decision Without

³ Mr. Parish identified himself as counsel for Huxtable's Kitchen, Inc. and even attended the investigation's exit interview on the company's behalf. *See* Complainant's "RESPONSE TO [ACTING] CHIEF ALJ'S ORDER OF FEB. 28, 2018" (hereinafter "Complainant's Response") at 2.

⁴ USPS Certified Mail Tracking No. 7012 3460 0003 3833 6058.

⁵ U.S. POSTAL SERV., <https://www.usps.com/> (last visited May 14, 2019).

⁶ Copies of the USPS Tracking Report and the corresponding USPS Certified Mail Receipt were attached to Complainant's Appeal Petition as "Attachment A."

⁷ 7 C.F.R. § 1.139.

Hearing by Reason of Default (“Motion for Default”). The record reflects that Complainant’s Motion for Default was served by the Hearing Clerk’s Office via certified mail on January 24, 2018 to the same name and address and in the same manner as the Complaint.⁸

On February 2, 2018 the Hearing Clerk’s Office received and filed a Notice of Appearance from Jason C. Manfrey, Esq. of Fox Rothschild LLP for Alfred T. Guiliano, the Chapter 7 Trustee for the estate of Respondent Huxtable’s Kitchen, Inc.,⁹ dated February 1, 2018. The Notice of Appearance directed that:

All future communications, documents, notices, and copies of any pleadings, papers, and other materials relevant to this matter should be directed to and served upon the undersigned at the following address:

Fox Rothschild LLP, Attn: Jason C. Manfrey, Esq.
2000 Market Street, 20th Floor
Philadelphia, PA 19103[.]

Notice of Appearance at 1.

While Mr. Manfrey did not file an answer to the Complaint with his Notice of Appearance, he did file a “Suggestion of Bankruptcy” asserting that: (1) Complainant “is precluded from prosecuting the above-entitled case at this time”¹⁰ because Respondent filed for bankruptcy; and (2) Respondent was not properly served with the Complaint because:

Kirkland & Ellis, LLP has never been counsel of record for the Trustee or Debtor Huxtable’s Kitchen in its bankruptcy case. As the sole representative of Debtor Huxtable’s Kitchen and the only party with the capacity to sue or be sued, proper service of the Complaint was not made on the Trustee or Respondent.

⁸ USPS Certified Mail Tracking No. 7015 3010 0001 5187 3507.

⁹ The “Suggestion of Bankruptcy” advised that, on June 24, 2016, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, District of Delaware. The document also provided that “[o]n July 24, 2016, the Office of the United States Trustee appointed Alfred T. Giuliano as the Chapter 7 trustee for the estates of Huxtable’s Kitchen, Inc. and the other Debtors.” Suggestion of Bankruptcy at 1, 4.

¹⁰ *Id.* at 4.

Suggestion of Bankruptcy at 3.

Mr. Manfrey concludes this filing with the contention that “. . . [because] Complainant had knowledge of Debtor Huxtable’s Kitchen’s filing of its chapter 7 bankruptcy case at the time Complainant filed the Complaint and initiated these proceedings, Complainant knowingly and willfully violated the automatic stay under 11 U.S.C. § 362(a).”¹¹

Mr. Manfrey does not challenge that service of the Complaint was properly effected on Kirkland & Ellis, LLP by USPS as a procedural matter; rather, he simply asserts that as counsel for the Trustee in the Chapter 7 Bankruptcy he should have been served with a copy of the Complaint rather than Kirkland & Ellis; therefore, Respondent was not properly served with the Complaint. Notably, Mr. Manfrey affirms that he had knowledge of the disciplinary proceeding against Debtor Huxtable’s Kitchen as of January 31, 2018, yet he still declined to file an answer to the Complaint.

On February 28, 2018, the Acting Chief ALJ issued an order directing Complainant to address certain questions presented by the Suggestion of Bankruptcy. Complainant did so on March 20, 2018. As previously noted, the record reflects that Respondent made no further filings in this proceeding either before the ALJ or on appeal to the Judicial Officer.

On March 30, 2018 the Acting Chief ALJ issued an order that found that the Complaint in this matter is not barred by the Bankruptcy Code’s Section 362 automatic stay. However, the ALJ denied Complainant’s Motion for Default based on a finding that service of the Complaint on Respondent was not effected. The March 30, 2018 Order also consolidated this docket with the captioned docket *Lewis Macleod*, No. 18-0024, which involved a “potential” petition for

¹¹ *Id.*

review of the February 15, 2018 Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, determination that under PACA Mr. Macleod was responsibly connected to Huxtable's Kitchen, Inc., the Respondent in Docket No. 18-0007.

Discussion and Findings as to PACA-D Docket No. 18-0007

I. Assertions in Suggestion of Bankruptcy

The Suggestion of Bankruptcy makes two related sets of assertions: (1) the filing and continuation of this disciplinary proceeding against Debtor Huxtable's Kitchen violates the automatic stay afforded to Debtor Huxtable's Kitchen and its estate under 11 U.S.C. § 362(a)(1) ("Section 362"); and (2) service of the Complaint at the last known principal place of business of Respondent's named attorney of record, Jason R. Parish, Esq. of Kirkland & Ellis, LLC, was ineffective because Mr. Manfrey of Fox Rothschild LLP, as counsel for the Bankruptcy Trustee, is the sole representative of Huxtable's Kitchen, the only party with the capacity to sue or be sued, and therefore the only person upon whom service of the Complaint could be effected.

A. Bankruptcy Stay

The analysis and finding of the Acting Chief AIJ regarding the impact of the automatic stay provisions of the Bankruptcy Code on this regulatory disciplinary enforcement is well supported by the PACA statute, Regulations, and judicial precedent and is affirmed and adopted as provided herein below.

First, Mr. Manfrey's reference to 11 U.S.C. § 362(a) as a bar to the instant case is misplaced. Under the plain language of 11 U.S.C. § 362(b)(4), the automatic stay of paragraph (a) does not apply to:

. . . the commencement or continuation of an action or proceeding by a governmental unit . . . , 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.

11 U.S.C. § 362(b)(4).

The police and regulatory exception to the automatic stay has been applied to USDA actions to deny a PACA license¹² and to undertake and pursue an investigation for a debtor's failure to pay for livestock.¹³ In other settings, courts have recognized the authority of governmental agencies to strip a debtor of its broadcasting license or refuse to allow the broadcaster to transfer or assign its license,¹⁴ to suspend a debtor's license as a horse trainer based on demonstrated lack of financial responsibility,¹⁵ and to revoke a debtor's mobile home dealer's license.¹⁶

The Complaint in this case was issued based on Respondent's failure to make full payment promptly to six sellers of the agreed purchase prices, or balances thereof, in the total amount of \$551,829.47 for 174 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce during the period of October 2015 through May 2016 (on or about the dates and in the transactions set forth in Appendix A and B to the Complaint). As previously explained, this proceeding is a disciplinary enforcement action under the PACA and is a matter of Complainant AMS exercising police or regulatory power, not a matter of a government agency seeking collection of a debt. The Complaint seeks a finding that the Respondent's actions constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) as well as publication of the facts

¹² *In re Fresh Approach, Inc.*, 49 Bankr. 494, 496 (Bankr. N.D. Tex. 1985).

¹³ *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 784 (Bankr. E.D. Ark. 1984).

¹⁴ *In re D.H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983).

¹⁵ *In re Christmas*, 102 B.R. 447, 458-59 (Bankr. D. Md. 1989).

¹⁶ *Matter of Edwards Mobile Home Sales, Inc.*, 119 B.R. 857, 860-61 (Bankr. M.D. Fla. 1990).

and circumstances thereof in accordance with the congressional intent of the PACA: to protect the agricultural industry from insolvent participants.¹⁷

Second, the Secretary is expressly authorized by Bankruptcy Code § 525 to proceed under licensing provision of PACA. Section 525(a) of the Code states that:

Except as provided in the Perishable Agricultural Commodities Act, 1930 . . . a government unit may not deny revoke, suspend or refuse to renew a license . . . to a person that is or has been a debtor under this Title . . . solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable in the case under this title. . . .

11 U.S.C. § 525(a) (emphasis added).

Section 525(a) has been long and consistently held to except PACA proceedings such as the current one from a Section 362 stay.¹⁸ As the Judicial Officer stated in *Ruma Fruit & Produce Co., Inc.*:¹⁹

Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc.*, 49 B.R. 494, 496-98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there

¹⁷ The exception can even apply where, unlike here, the governmental action seeks disgorgement of funds by the debtor. A cause of action by the New Jersey Bureau of Securities, seeking to compel disgorgement, on unjust enrichment theory, of proceeds of alleged Ponzi scheme from Chapter 7 debtor in her capacity as innocent recipient of such proceeds, was excepted from automatic stay as a cause of action that the government brought in exercise of its "police and regulatory power." *In re D'Angelo*, 409 B.R. 296, 297-99 (Bankr. D.N.J. 2009). The state sought disgorgement not to remedy any pecuniary loss it had suffered but to recapture funds lost by victims of securities fraud in manner that fostered public purpose behind New Jersey securities law, though the debtor was not alleged to be guilty of any wrongdoing. *See id.*

¹⁸ *See* Complainant's Response at 4-5 (discussing and citing precedents interpreting 11 U.S.C. § 362(b)(4) as exempting PACA proceedings from a Section 362 stay). This proceeding is a matter of Complainant AMS exercising police or regulatory power, not a matter of a government agency seeking collection of a debt.

¹⁹ 55 Agric. Dec. 642, 655 (U.S.D.A. 1996).

is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967); *In re Fresh Approach, Inc.*, . . . , 49 B.R. at 496.

Ruma Fruit & Produce Co., Inc., 55 Agric. Dec. 642, 655 (U.S.D.A. 1996).

The “express authority in Code section 525 is a clearly defined exception inserted by Congress to the ‘fresh start’ otherwise available to a debtor in bankruptcy.”²⁰ “To apply the automatic stay of section 362, or to enjoin the administrative proceedings under section 105, would unfortunately be inconsistent with section 525 of the Code and would trample the plain Congressional intent that the Secretary have the ability to protect the agricultural industry from insolvent participants.”²¹

Accordingly, contrary to Respondent’s contentions in the Suggestion in Bankruptcy, there is no violation of the Section 362 bankruptcy automatic stay by the initiation, continuation, and resolution of the PACA Complaint filed by Complainant in the instant proceeding. Indeed, in light of this clear statutory, regulatory, and judicial authority, Respondent’s continued refusal to file an answer to the Complaint even after acknowledging receipt of the Complaint on January 31, 2018 is perplexing.

B. Service of Process

For the reasons discussed more fully herein below, service of the Complaint on Respondent was properly effected in accordance with the Rules of Practice applicable to this administrative disciplinary enforcement.

The Rules of Practice are very clear as to what constitutes effective service. In section

²⁰ *In re Fresh Approach, Inc.*, 49 Bankr. at 498.

²¹ *Id.*

1.147(c), the Rules state:

§ 1.147 Filing; service; extensions of time; and computation of time.

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the *date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party*, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date remaining by ordinary mail to the same address.

7 C.F.R. § 1.147(c) (emphasis added).

Respondent had an affirmative obligation, as a party licensed and operating under the provisions of the PACA, to apprise AMS of its contact information and failed to identify any person other than Mr. Parish of Kirkland & Ellis as its attorney of record, to provide change of address information, or to advise AMS of the Chapter 7 Bankruptcy. The PACA regulations specifically provide in pertinent part as follows:

§ 46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.

The licensee shall:

(a) Promptly report to the Director in writing;

(1) **Any change of address; [and]**

(5) *When the licensee, or if the licensee is a partnership, any partner is subject to proceedings under the bankruptcy laws. . . .*

7 C.F.R. § 46.13 (emphasis added). AMS is entitled to rely on the last know business address of Respondent or its attorney of record to effect service of the subject Complaint. The Complaint was delivered by certified mail to the last known principal place of business of the attorney of record, and the mailing was not returned to the Department by USPS. Accordingly, service was effected in accordance with section 1.147(c) of the Rules of Practice.²²

Indeed, as previously noted, Mr. Manfrey did not challenge the fact that service of the Complaint was effected as to Kirkland & Ellis, LLP but asserts that Respondent was not properly served with the Complaint because “proper service of the Complaint was not made on the Trustee” as “the sole representative of Debtor Huxtable’s Kitchen and the only party with the capacity to sue or be sued.”²³ Mr. Manfrey provides no authority to support his contention that simply because he serves as counsel for the Bankruptcy Trustee he is the sole representative of Huxtable’s Kitchen and therefore the only person who can be properly served with the subject disciplinary Complaint. Further, Mr. Manfrey seems to imply that when he was appointed as the Chapter 7 trustee for the estate of Huxtable’s Kitchen, Inc. on July 24, 2016, he was somehow automatically substituted for Respondent’s designated counsel of record. This position runs contrary to the above-referenced statutory, regulatory, and judicial authorities and is untenable given the complexity of the United States bankruptcy system and the sheer number of filings.²⁴

In response to the ALJ’s Order of February 28, 2016, Complainant provided, as proof of

²² 7 U.S.C. § 1.147(c).

²³ Suggestion of Bankruptcy at 3.

²⁴ In the twelve-year span from October 1, 2005 to September 30, 2017, about 12.8 million consumer bankruptcy petitions were filed in the federal courts with the number of filings continuing to grow. *Just the Facts: Consumer Bankruptcy Filings, 2006-2017*, USCOURTS.GOV (published Mar. 7, 2018), <https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017> (last visited May 14, 2019).

service of the Complaint, a copy of the USPS Tracking Report²⁵ downloaded from the USPS official webpage. The Tracking Report reflects that following several unsuccessful attempts, two because no authorized recipient was available, the Complaint was “delivered to an agent at 7:29am on October 30, 2017 in WASHINGTON, DC 20005.”²⁶ The full address was not reflected on the Tracking Report but was spelled out in full on the Certified Mail Receipt associated with the USPS Tracking number. Accordingly, the Complaint was served by means of USPS, Certified Mail with Return Receipt, to the last known principal place of business for Respondent’s attorney of record, Jason R. Parish, Kirkland & Ellis, LLP at 655 Fifteenth Street, NW, Washington, DC 20005 in accordance with the provisions of the Rules of Practice.²⁷

The March 30, 2018 Order may be read to imply that remailing of the Complaint by regular mail was required to effectuate service.²⁸ The additional step of remailing by ordinary mail to the same address is only necessary to effectuate service in cases where the original mailing was returned to the Department with either “unclaimed” or “refused” stamped on it by USPS.²⁹ Here, the Complaint was not returned but rather delivered by certified mail to the last

²⁵ USPS Certified Mail Tracking No. 7012 3460 0003 3833 6058.

²⁶ Copies of the USPS Tracking Report and the corresponding USPS Certified Mail Receipt were attached to Complainant’s Appeal Petition as “Attachment A.”

²⁷ See 7 C.F.R. § 1.147(c)(1) (“Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or an agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]”).

²⁸ See Order at 6-7.

²⁹ See 7 C.F.R. 1.147(c)(1) (“Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or an agent thereof, on the date of delivery by certified or registered mail to the . . . last known principal place of business of the attorney or representative of record of such party . . . *Provided that*, if any such document or paper is sent by

known principal place of business of Respondent's named attorney of record at the time and date specified above. Therefore, service was complete and met not only the requirements of the Rules of Practice but also the requirements of due process under the law.³⁰

Establishing that the Complaint was delivered by certified mail to the last known principal place of business of the attorney of record and that the mailing was not returned to the Department by USPS is sufficient to effectuate service under section 1.147(c) of the Rules of Practice.³¹ Complainant is not required to show "in hand delivery" to Respondent to effectuate service.

In an order denying a petition to reconsider filed in *Morgan*, 65 Agric. Dec. 1188 (U.S.D.A. 2006), the Judicial Officer held that:

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known

certified or registered mail but is *returned marked by the postal service as unclaimed or refused*, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.") (emphasis added).

³⁰ See, e.g., *Trimble v. U.S. Dep't of Agric.*, 87 F. App'x 456, 458 (6th Cir. 2003) ("Service by certified package is a constitutionally adequate method of notice. *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800 (1983). The fact that [the respondent] may not have received the certified package does not negate the constitutional adequacy of the attempt to accomplish adequate notice."); see *supra* note 32 and accompanying text.

³¹ 7 C.F.R. § 1.147(c).

address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Spiegel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79,455 N.E.2d 1344, 1346 (Ohio Ct. App. 1982), the court held: It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. See *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306,314, 70 S. Ct. 652, 94 L.Ed. 865.

Morgan, 65 Agric. Dec. 1188, 1191 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider).³²

Delivering the Complaint by certified mail to the last known principal place of business of the attorney of record was "reasonably calculated" to apprise interested parties of the pendency of this action. Doing so met the requirements of due process and satisfied service requirements in the applicable Rules of Practice. Not only was the mailing in this proceeding not returned to the Department by USPS, it is noteworthy that Complainant's Motion for Default, filed on January 23, 2018, was also served to the last know principal place of business of

³² See also *Trimble*, 87 F. App'x at 458 (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); *Harrington*, 66 Agric. Dec. 1061, 1067-68 (U.S.D.A. 2007) (stating proper service of a complaint is made under the Rules of Practice when the complaint is delivered by certified mail to the respondent's last known address and someone signs for the complaint); *Kwon*, 55 Agric. Dec. 78, 93 (U.S.D.A. 1996) (Order Den. Late Appeal) (stating proper service by certified mail is made when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); *Kaplinsky*, 47 Agric. Dec. 613, 619 (U.S.D.A. 1988) (stating the excuse, occasionally given in an attempt to justify the failure to file a timely answer, that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer has been and will be routinely rejected); *Bejarano*, 46 Agric. Dec. 925, 929 (U.S.D.A. 1987) (stating a default order is proper where the respondent's sister signed the certified receipt card as to a complaint and forgot to give it to the respondent when she saw him two weeks later).

Respondent's attorney of record in precisely the same manner as the Complaint³³ and was apparently received by the Respondent, as evidenced by the February 2, 2018 filing of a Notice of Appearance and Suggestion of Bankruptcy by the Chapter 7 Trustee affirming knowledge of this disciplinary proceeding as of January 31, 2018.

In his March 30, 2018 Order, the ALJ suggested that service of the Complaint may have been defective because "the certified mail green card has never been returned to her [Hearing Clerk's] office by the Post Office."³⁴ However, as Complainant correctly points out, the Rules of Practice do not require that the certified mail green card be returned in order to effectuate service. While the Rules do specify that the return of the certified or registered mail receipt (certified mail green card) is one way to prove service was effective, it is not the only way. In section 1.147(e), the Rules state, in pertinent part:

(e) *Proof of service.* **Any** of the following, in the possession of the Department, showing such service, shall be deemed to be **accurate**:

- (1) A certified or registered mail receipt returned by the postal service with a signature;
- (2) An official record of the postal service;

7 C.F.R. § 1.147(e) (emphasis added).

Regardless of whether or not the certified mail green card was returned to the Hearing Clerk's Office, the Department is in possession of "an official record of the postal service" that outlines the specifics of when the Complaint was delivered in this matter. The Tracking Report attached to Complainant's Appeal Petition as "Attachment A" provides proof that the Complaint was delivered by certified mail to the last know principal business address for Respondent's

³³ USPS Certified Mail Tracking No. 7015 3010 0001 5187 3507.

³⁴ Order at 6.

attorney of record. In accordance with the Rules of Practice, this official record of USPS “shall be deemed accurate,” and a “strong presumption” of effective service arises.³⁵

Relevant Procedural History as to PACA-D Docket No. 18-0024

The captioned docket *Lewis Macleod*, No. 18-0024, involves a petition for review of the February 15, 2018 determination of the Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, that under the PACA Lewis Macleod (“Mr. Macleod” or “Petitioner”) was responsibly connected to Huxtable’s Kitchen, Inc., the Respondent in Docket No. 18-0007.

On March 21, 2018, Mr. Macleod’s attorney of record, Mr. Gentile, sent an email to the Hearing Clerk’s Office indicating that Mr. Macleod intended to file a petition for review and requesting an extension of time to do so. The Acting Chief Judge directed the Hearing Clerk to open and assign a docket number to that expected petition to have an established docket in which to consider the request for extension. On March 22, 2018, the Acting Chief ALJ issued an Order Granting Extension of Time for Filing of Petition for Review providing Mr. Macleod until April 27, 2018 to file a petition for review.

Although no petition for review had yet been filed in Docket No. 18-0024, the Acting Chief ALJ’s March 30, 2018 Order “consolidated” Docket No. 18-0024 with Docket No. 18-0007 pursuant to Rule 1.137(b).³⁶

³⁵ See *Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (Interim Decision 3246), *superseded by statute on other grounds*, 8 U.S.C. § 1229(a)(1), *as stated in Patel v. Holder*, 652 F.3d 962, 968 n.4 (8th Cir. 2011) (“[I]n cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises. There is a presumption that public officers, including Postal Service employees, properly discharge their duties.”) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1 (1926); *Powell v. CIR*, 958 F.2d 53 (4th Cir. 1992), *cert. denied*, 506 U.S. 965 (1992)).

³⁶ See 7 C.F.R. § 1.137(b) (*Joinder*. The Judge shall consolidate for hearing with any proceeding

On April 27, 2018, Mr. Macleod, by and through his counsel and pursuant to section 47.49 of the Rules of Practice Under the Perishable Agricultural Commodities Act (“PACA Rules of Practice”)³⁷ and 7 C.F.R. § 1.135, filed a petition for review (“Petition”) of the decision of the Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, that Mr. Macleod was “responsibly connected” to Huxtable’s Kitchen, Inc. during the period of the alleged PACA violations.

Decision and Order

For the reasons discussed more fully herein above, it is the determination of the Judicial Officer that delivering the subject Complaint in this PACA disciplinary enforcement action (Docket No. 18-0007) by USPS Certified Mail to the last known principal place of business of Respondent’s attorney of record met the requirements of due process and satisfied the service requirements of the applicable Rules of Practice; that the time for Respondent to answer the Complaint under Rule 1.136(a)³⁸ has run; and that Respondent is in default under Rules 1.136(c) and 1.139 for failure to timely answer a complaint.³⁹ Based upon careful consideration of the record, the ALJ’s Ruling Denying Complainant’s Motion for Decision Without Hearing by Reason of Default in Docket No. 18-0007 is hereby **REVERSED**.

In accordance with the applicable Rules of Practice, it is the determination of the Judicial Officer that because of Respondent Huxtable’s Kitchen, Inc.’s failure to answer the Complaint

alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations.”).

³⁷ 7 C.F.R. § 47.49(d).

³⁸ 7 C.F.R. § 1.136(a).

³⁹ 7 C.F.R. §§ 1.136(c) and 1.139.

within the time prescribed in 7 C.F.R. § 1.136(a), the Respondent is in **DEFAULT**.⁴⁰ The material allegations of the Complaint are deemed admitted and are hereby adopted as findings of fact for all purposes in this proceeding,⁴¹ with the exception that I take judicial notice of the fact that Complainant has affirmed that the amount past due and unpaid as of January 19, 2018, after PACA conducted a compliance check, was \$159,985.87—down from the \$551,829.47 of the original Appendix A to the Complaint.⁴² The lesser balance still due to sellers does not impact the finding regarding Respondent’s repeated, willful, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).⁴³

It is also the Judicial Officer’s determination that the Petition for Review of the decision of the Director of the United States Department of Agriculture, Agricultural Marketing Service, PACA Division, that Petitioner Lewis Macleod (Docket No. 18-0042) was “responsibly connected” to Huxtable’s Kitchen, Inc. during the period of alleged PACA violations was timely filed in accordance with the extension of time granted by the Chief ALJ. Accordingly, Docket

⁴⁰ See 7 C.F.R. § 1.136(c) (“Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint[.]”).

⁴¹ See *McCoy v. U.S. Dep’t of Agric.*, No. 16-3842, slip op. at 4-6 (6th Cir. Aug. 21, 2017) (holding that the Judicial Officer “properly granted a default decision in favor of the USDA” and reversed the ALJ’s decision denying a motion for default where the respondent failed to file a timely answer to the complaint) (“The JO’s determination that the USDA was entitled to a default decision does not constitute an abuse of discretion and was not arbitrary or capricious. It is undisputed that McCoy did not file a timely answer to the complaint. . . . In addition, the JO found that the Hearing Officer provided McCoy with a cover letter that advised McCoy that he had 20 days to answer the complaint. The Rules of Practice also set forth the deadline for answer a complaint and explain that parties may appear in person or by an attorney. 7 C.F.R. §§ 1.136(a) and 1.141(c).”).

⁴² See Complainant’s Response at 6; 7 C.F.R. § 1.141(i)(6).

⁴³ The total unpaid balance due to sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter. See *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

Nos. 18-0007 and 18-0024 shall be segregated, and Docket No. 18-0024 shall be remanded to the Chief ALJ for further proceedings in accordance with the applicable Rules of Practice.

Based on the foregoing, the following Order shall be entered.

ORDER

1. The ALJ's Ruling on Suggestion of Bankruptcy that the Complaint filed in Docket No. 18-0007 is not barred by a Bankruptcy Code Section 362 automatic stay is **AFFIRMED**.
2. The ALJ's Ruling Denying Complainant's Motion for Decision Without Hearing by Reason of Default in Docket No. 18-0007 is **REVERSED**.
3. Because of Respondent Huxtable's Kitchen, Inc.'s failure to answer the Complaint within the time prescribed in 7 C.F.R. § 1.136(a), the Respondent is in **DEFAULT**.
4. Based on the material allegations of the Complaint, which are deemed admitted by reason of Respondent's default,⁴⁴ Huxtable's Kitchen, Inc. has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).
5. The facts and circumstances of Huxtable's Kitchen, Inc.'s PACA violations shall be published.
6. Docket Nos. 18-0007 and 18-0024 are hereby **SEGREGATED**.
7. Docket No. 18-0024 is **REMANDED** to the Chief Judge for further proceedings in accordance with the applicable Rules of Practice.

⁴⁴ With the exception of an adjustment to the unpaid balance due to the sellers based on Judicial Notice that Complainant has affirmed that the amount past due and unpaid as of January 19, 2018, after PACA conducted a compliance check, was \$159,985.87—down from the \$551,829.47 of the original Appendix A to the Complaint. *See* Complainant's Response at 6.

RIGHT TO SEEK JUDICIAL REVIEW

Huxtable's Kitchen, Inc. has the right to seek judicial review of this Decision and Order as it pertains to Docket No. 18-0007 in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Huxtable's Kitchen, Inc. must seek judicial review within sixty (60) days after entry of this Decision and Order as of the date reflected herein below.⁴⁵

Copies of this Decision and Order shall be served by the Hearing Clerk upon each party, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 16th day of May 2019


Judge Bobbie J. McCartney
Judicial Officer

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⁴⁵ 28 U.S.C. § 2344.