

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
Fresh Produce Inc.,) PACA-D Docket No. 20-J-0159
)
Respondent.)

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearances:

Buren W. Kidd, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”)

Julio Nolasco, representative of Respondent Fresh Produce Inc., appearing pro se

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (“PACA”); the regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.5) (“Regulations”); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice”).

The Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”), initiated this proceeding by filing a complaint against Fresh Produce Inc. (“Respondent”) on September 17, 2020. The Complaint alleges that during the period May 2018 through August 2019, Respondent violated PACA section 2(4) (7 U.S.C. § 499b(4)) by failing to make full payment promptly to fifteen sellers for ninety lots of perishable agricultural commodities that Respondent purchased,

received, and accepted in interstate and foreign commerce, in the total amount of \$374,069.20.¹

Further, the Complaint requests:

1. That *unless Respondent fails to file an answer within the time allowed*, or admits all the material allegations of this Complaint, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the PACA; and
2. That the Administrative Law Judge find that Respondent has willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and publish the facts and circumstances of Respondent's violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Complaint at 3-4 (emphasis added).

Respondent was duly served with a copy of the Complaint and did not file an answer within the twenty-day period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).²

On October 27, 2020, Complainant filed a Motion for Decision without Hearing by Reason of Default ("Motion for Default") and Proposed Decision Without Hearing by Reason of Default ("Proposed Decision"). Respondent has not filed any objections to Complainant's Motion for Default or Proposed Decision.³

¹ See Complaint at 2-3.

² United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on September 28, 2020. Respondent had twenty days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's answer was due on or before October 19, 2020. Respondent has not filed an answer.

³ United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent via certified mail and delivered on November 2, 2020. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's objections would have been due by November

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision.⁴ Other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an unfiled answer where, as in the present case, no meritorious objections have been filed.⁵

As Respondent failed to file an answer the Complaint, and upon Complainant's motion for the issuance of a decision without hearing by reason of default, this Decision and Order is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Fresh Produce Inc. was incorporated and exists under the laws of the state of Texas. Respondent's business address is 2525 Logan Street, Dallas, Texas 75215. The Complaint in this case was served on Respondent's business address and its sole principal's home address, which was provided to the Office of the Hearing Clerk for service purposes; it is withheld from this Decision and Order to protect the principal's personal information and privacy.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of PACA. License 20131182 was terminated on August 8, 2020, pursuant to

23, 2020; however, on November 30, 2020, I issued an order extending Respondent's filing deadline to January 26, 2021. *See* Order Granting in Part Respondent's Request for Extensions of Time. Nonetheless, Respondent has not filed a response to Complainant's Motion for Default.

⁴ 7 C.F.R. § 1.136(c).

⁵ 7 C.F.R. § 1.139; *see supra* note 3 and accompanying text.

PACA section 4(a) (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period May 2018 through August 2019, on or about the dates an in the transactions set forth in Appendix A to the Complaint (attached hereto and incorporated by reference), failed to make full payment promptly to fifteen sellers for ninety lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$374,069.20.
4. On November 12, 2019, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court, Northern District of Texas. This petition was designated Case No. 19-33802-sgj7. Respondent identifies in its bankruptcy Schedule F⁶ all fifteen creditors/sellers listed in Appendix A to the Complaint as creditors who have unsecured claims.⁷ Respondent lists claims for all fifteen creditors/sellers that are greater to or equal than the amounts listed in Appendix A, except Pacific Tomato Growers Ltd., CH Robinson Inc., and Maya Fresh Harvest LLC.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent Fresh Produce Inc.'s failure to make full payment promptly with respect to the ninety lots of perishable agricultural commodities referenced in Finding of Fact No. 3 above and set forth in Appendix A to the Complaint constitutes willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)), for which the below Order is issued.

⁶ Official notice is taken of Respondent's Voluntary Bankruptcy Petition (designated Case No. 19-33802-sgj7) and Schedule F. 7 C.F.R. § 1.141(h)(6); *see Five Star Food Distribs. Inc.*, 56 Agric. Dec. 880, 893 (U.S.D.A. 1997).

⁷ *See* Complaint, Appendix B.

3. The total unpaid balance due to sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter.⁸
4. As Respondent's license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Respondent's violations.⁹

ORDER

1. Complainant's Motion for Decision Without Hearing by Reason of Default is GRANTED.
2. A finding is made that Respondent Fresh Produce Inc. has committed willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)).
3. The facts and circumstances of Respondent's PACA violations, as set forth above, shall be published pursuant to PACA section 8(a) (7 U.S.C. § 499h(a)).

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (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 and Order shall be served upon the parties and counsel by the Hearing Clerk.

Done at Washington, D.C.,
this 1st day of February 2021


Channing D. Strother
Chief Administrative Law Judge

⁸ 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).

⁹ See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

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