

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
So Ono Food Products, LLC,) PACA-D Docket No. 20-J-0124
)
Respondent.)

REC'D - USDA/OALJ/OHC
2021 FEB 12 PM 3:13

DECISION AND ORDER WITHOUT HEARING

Appearance:

Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, the Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”); and

Bruce W. Akerly, Esq., and Carrie R. McNair, Esq., Akerly Law PLLC, Coppell, TX, counsel for Respondent So Ono Food Products, LLC.

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. Part 46) (“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 Complainant, Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”), United States Department of Agriculture, initiated this proceeding against Respondent So Ono Food Products, LLC by filing a complaint on May 5, 2020. The Complaint alleged that Respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to seven (7) sellers for purchases of 230 lots of perishable agricultural commodities in the course of

interstate and foreign commerce in the amount of \$1,344,944.87 during the period March 2018 through March 2019. The Complaint sought the issuance of an order finding that Respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and publication of the facts and circumstances surrounding the violations.¹

Respondent timely filed an Answer on June 1, 2020, which generally denied the allegations in the Complaint pertaining to its failure to make full payment promptly.

On September 22, 2020 Complainant filed a motion requesting the issuance of a Decision Without Hearing due to Respondent's failure to make full and prompt payment for produce purchases, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

On November 18, 2020, after being granted an extension to file,² Respondent filed its Response to Complainant's Motion for a Decision Without a Hearing ("Respondent's Response") in which Respondent, at 2, requests a hearing and states that the Complaint and Complainant's Motion are "not accurate." Respondent, *id.*, claims that there "is a material fact in this case that is in dispute—the amount owed to produce vendors" and Respondent "*denies* that it willfully, flagrantly, or repeatedly violated the" PACA and Regulations (emphasis in original). Respondent, *id.*, also contends that it has "agreements with each of its vendors to pay any purported debt owed over time" but stated that "facts surrounding agreements made between the parties or the PACA trust rights of any purportedly unpaid supplier have also not been

¹ Complainant sought publication of the facts and circumstances surrounding Respondent's PACA violations, rather than revocation of Respondent's PACA license, as Respondent's PACA license terminated on March 8, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

² See October 14, 2020 Orders Granting Respondent's Motions for Extension of Time to File Submissions and to Respond to Complainant's Motion for a Decision Without a Hearing.

determined at this time.” Respondent’s Response failed to address the four reparations Default Orders issued in 2019 by the USDA Judicial Officer, wherein Respondent admitted to PACA violations and outstanding balances of over \$921,000 by failing to file a timely answer.³ Respondent’s Response also failed to address Mr. Nwoko’s Affidavit, wherein Respondent admitted that as of November 2020, Respondent still owed five (5) of the seven (7) sellers over \$604,000.⁴

A telephone conference was held on December 2, 2020,⁵ during which the parties agreed to provide any supplemental documentation to support their positions. Specifically, during the call Complainant was asked to provide additional information regarding reparation complaints creditors had initiated against Respondent, and Respondent was asked to provide information showing whether and when any payment agreements with Respondent’s creditors were entered into.

In accordance with the Summary and Filing Order, Complainant filed its Supplemental Information to Motion for Decision Without Hearing (“Complainant’s Supplement”) on December 11, 2020, in which Complainant reiterates the conversation between the parties during the December 2, 2020 telephone conference, in particular that “Respondent’s alleged decision to enter into settlement agreements with PACA creditors, after the creditors initiated reparation complaints against Respondent with the Department, did not negate the PACA violations of failing to pay *promptly* and in full.”⁶ In its Supplement, at 5, Complainant explains that “all

³ See Complainant’s Supplement Attachment C; 7 C.F.R. 47.8(c).

⁴ See November 16, 2020 Respondent’s Witness List and Exhibits List (with “RX-#1” Affidavit of Uzor Nwoko attached); Complainant’s Supplement Attachment A.

⁵ See Summary of December 2, 2020 Telephone Conference and Filing Order (“Summary and Filing Order”).

⁶ Complainant’s Supplement at 4 (citing 7 U.S.C. § 499b(4)) (emphasis in original).

seven [footnote omitted] of the produce creditors listed in Appendix A to the Complaint filed reparation complaints against Respondent” and that, of the seven (7), four (4) “of the reparation complaints resulted in the filing of formal complaints and issuance of default orders by the Judicial Officer” (referencing Attachment C) and one (1) resulted in “resulted in the filing of a formal complaint and issuance of an Order Requiring Payment of Full Admission of Liability due to Respondent’s admissions” (referencing Attachment D).⁷

On February 8, 2021, after being granted an extension to file,⁸ Respondent filed its Supplemental Response to Motion for Decision Without Hearing (“Respondent’s Supplement”), in which Respondent states:⁹

5. At the time the Court requested a supplement and granted an extension, Mr. Nwoko, co-owner of So Ono, and by extension, the undersigned counsel for Mr. Nwoko, understood that additional information could be provided demonstrating that the seven vendors had specific payment arrangements prior to receipt of produce.

6. However, since the Hawaii-based business has closed, and because Mr. Nwoko was not responsible for the day-to-day business or financial operations of So Ono, Mr. Nwoko has been unable to attain relevant records to supplement at this time.

7. Accordingly, at this time, Respondent has nothing additional to produce and therefore relies on its previously filed *Response to Complainant’s Motion for a Decision Without Hearing*, filed November 18, 2020.

⁷ *Id.* As attachments to its supplement, Complainant provided the Affidavit of Uzor Nwoko (Attachment A); three (3) reparation complaints from Prime Produce Inc. dated December 21, 2018, Freska Produce International, LLC dated December 21, 2018, and Arellano Farms dated March 13, 2019 (Attachment B); copies of four (4) reparation Default Orders against Respondent (Attachment C); and the Order Requiring Payment of Full Admission of Liability and Order Vacating Order Requiring Payment of Full Admission of Liability and Reissuing Order Requiring Payment of Full Admission of Liability (Attachment D).⁸ See January 11, 2021 Orders Granting Respondent’s Motion Requesting Extension of Time to Respond.

⁸ See January 11, 2021 Orders Granting Respondent’s Motion Requesting Extension of Time to Respond.

⁹ Respondent’s Supplement at 2, paras. 5-6 (emphasis in original).

Respondent's Supplement again failed to address the four default orders finding Respondent violated PACA and Mr. Nwoko's Affidavit admitting amounts owed to sellers as of November 2020.

Respondent was served with the Complaint on May 11, 2020. According to the Judicial Officer's policy set forth *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 548-549 (1998), Respondent in this case had 120 days from the date the Complaint was served upon it, or until September 8, 2020, to come into full compliance with the PACA. The Judicial Officer stated that "full compliance" requires "not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re: Carpentino Bros., Inc.* [46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988)], that a respondent have no credit agreements with produce sellers for more than 30 days."¹⁰ Respondent, despite an extended opportunity to provide any additional information demonstrating an issue of material fact to support its contentions, has not done so.

Thus, based on the admissions of Mr. Uzor Nwoko, an owner of Respondent, to the more than *de minimus* amounts owed to produce sellers as of November 16, 2020, and the default orders finding Respondent violated PACA, a hearing in this matter is not necessary.¹¹

Respondent's violations in this case were flagrant and repeated.¹² Respondent's

¹⁰ *Id.* at 549.

¹¹ See Attachments A and C to Complainant's Supplement. See also *Fava & Co.*, 46 Agric. Dec. 79, 81 (1984) (ruling on certified question) (no hearing required unless "the amount presently due and unpaid would be de minimis, e.g., less than \$5,000"), final decision, 44 Agric. Dec. 870 (1985).

¹² See *Melvin Beene Produce Co.* 41 Agric Dec. 2422 (U.S.D.A. 1992), *aff'd* 728 F.2d 347 (6th Cir. 1984); (In a series of transactions over a period of several months involving a deficit in excess of a quarter of a million dollars, it is inconceivable that Respondent was unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of PACA. It is hard to imagine clearer examples of "flagrant" violations of the statute than exemplified by respondents conduct). See also *D.W. Produce, Inc.*,

violations were also willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. §558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with a careless disregard of statutory requirements.¹³ In other words, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.¹⁴ Here, Respondent knew or should have known that it could not make prompt payment for the large amounts of perishables it ordered, yet it continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.¹⁵

Respondent's actions are willful because Respondent intentionally withheld full and prompt payment from seven (7) sellers listed in Appendix A to the Complaint for produce it purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. Complainant need only demonstrate that Respondent failed to make full payment promptly to sellers for produce it purchased, received, and accepted in more than a *de minimis* amount. Complainant has met that burden. Respondent has admitted by submission of Mr. Uzor Nwoko's Affidavit that, as of November 2020, Respondent still owed at least five (5) of the seven (7) sellers listed in Appendix A to the Complaint over \$604,000, more than a *de minimis* amount.¹⁶

53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994) (a finding of repeated violations is appropriate whenever there is more than one violation of the Act, and a finding of flagrant violations of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00).

¹³ *Ocean View Produce, Inc.*, 2009 WL 218027 (U.S.D.A. 2009).

¹⁴ *Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (U.S.D.A. 1996).

¹⁵ See Appendix A to the Complaint which lists continuing transactions between March 2018 and March 2019 totally over \$1 million dollars.

¹⁶ See *Fava & Co.*, *supra* note 7, 46 Agric. Dec. at 81 (finding that anything over \$5,000 is more than a *de minimis* amount); *D.W. Produce, Inc.*, *supra* note 12, 53 Agric. Dec. at 1678.

Pursuant to the Department's policy set forth in the *Scamcorp* decision, and upon the motion of Complainant for the issuance of a Decision Without Hearing, the following decision and order is issued without further procedure or hearing pursuant to section 1.139 (7 C.F.R. § 1.139) of the Rules of Practice.

Findings of Fact

1. Respondent is or was a limited liability company organized under the laws of the State of Hawaii. Respondent's business address is 3129 Ualena Street, Honolulu, Hawaii 96819. The Complaint was served on Respondent's business address and on Respondent's principals, whose addresses were provided to the Office of Hearing Clerk for service purposes; they were withheld from the Complaint to protect the principals' personal information and privacy.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 2017 0547 was issued to Respondent on March 8, 2017. The license terminated on March 8, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period March 2018 through March 2019, on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference, failed to make full payment promptly to seven (7) sellers for 230 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$1,344,994.87.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent's failure to make full payment promptly with respect to the 230 transactions referenced in Finding of Fact No. 3 above, and set forth in Appendix A to the Complaint, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

ORDER

1. Complainant's Motion for Decision Without Hearing is GRANTED.
2. A finding is made that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and I hereby order that the facts and circumstances of these violations be published.

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 by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 12th day of February 2021

Tierney Carlos /S/

Tierney Carlos
Administrative Law Judge

Hearing Clerk's Office
United States Department of Agriculture
Stop 9203, South Building, Room 1031
1400 Independence Avenue, SW

Washington, DC 20250-9203

Tel: 1-202-720-4443

Fax: 1-844-325-6940

SM.OHA.HearingClerks@USDA.GOV