

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
Fresh Growers Direct,) PACA Docket No. D-17-0265
)
Respondent)

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearances:

Christopher P. Young, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Agricultural Marketing Service (AMS); and

Fresh Growers Direct, pro se 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) (“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 Associate Deputy Administrator for the Specialty Crops Program, PACA Division, Agricultural Marketing Service (“Complainant”), initiated this proceeding against Fresh Growers Direct (“Respondent”) by filing a disciplinary complaint on June 16, 2017. The Complaint alleged that, during the period August 2015 through June 2016 (on or about the dates and in the transaction set forth in Appendix A to the Complaint, incorporated herein by reference), Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly

to five sellers, in the total amount of \$244,508.00, for thirteen lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce.

The Complaint requested that an Administrative Law Judge find 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 Respondent's PACA violations be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).¹

Respondent was duly served with a copy of the Complaint on July 3, 2017 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 November 14, 2017, I issued an order directing the parties to show cause, not later than twenty days after that date, why default should not be entered against Respondent ("Show Cause Order"). On December 4, 2017, Complainant filed a Response to Show Cause Order and Request for Decision Without Hearing by Reason of Default ("Motion for Default") and a proposed Decision Without Hearing by Reason of Default ("Proposed Decision"). Respondent failed to

¹ See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

² United States Postal Service records reflect that a copy of the Complaint was sent via certified mail and delivered to Respondent's owner on July 3, 2017. Respondent had twenty (20) 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 by July 24, 2017. Respondent did not file an answer on or before that date. 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. 7 C.F.R. § 1.136(c). Other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer where, as in the present case, no meritorious objections have been filed. 7 C.F.R. § 1.139; *see infra* note 4.

respond to the Show Cause Order within the required time.³ As of this date, Respondent has not filed any objections to Complainant's Motion for Default.⁴

As Respondent failed to answer the Complaint, and upon Complainant's motion for the issuance of a decision without hearing by reason of default, the following 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 is or was a corporation organized and existing under the laws of the state of New York. Respondent's business and mailing address is or was 10 S. Market Street, Brooklyn, New York 11236.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 20150596 was issued to Respondent on April 9, 2015. The license terminated on April 9, 2016, 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 August 2015 through June 2016, on or about the dates and in the transactions set forth in Appendix A to the Complaint, failed to make full payment promptly to give sellers for thirteen lots of perishable agricultural commodities that Respondent

³ The Show Cause Order was issued on November 14, 2017; therefore, the parties were required to file responses on or before December 4, 2017. Respondent did not respond to the Show Cause Order by that date. On December 5, 2017, Respondent sent an email to the Hearing Clerk's Office "requesting a copy of PACA Docket No: D-17-0265." Respondent has made no additional filings as of this date.

⁴ The Hearing Clerk's records reflect that the Motion for Default and Proposed Decision were sent to Respondent's owner on December 4, 2017. Respondent had twenty (20) days from the date of service to file objections to Complainant's motion. 7 C.F.R. § 1.139. Weekends and federal holidays shall not 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(g), (h). In this case, Respondent's objections were due by December 26, 2017. Respondent has not filed any objections.

purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$244,508.00.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to pay promptly with respect to the 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 below Order is issued.


ORDER

1. 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)).
2. The facts and circumstances of Respondent's violations shall be published pursuant to section 8(a) of the PACA (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 by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 9th day of January, 2018


Bobbie J. McCartney
Chief Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776
SM.OHA.HearingClerks@OHA.USDA.GOV