

UNITED STATES DEPARTMENT OF AGRICULTURE
 BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
 Baker Walnut, Inc.,) AMAA Docket No. 18-0038
)
 Respondent.)

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearance:

Brian T. Hill, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250, for the Complainant, Agricultural Marketing Service ("AMS").

Preliminary Statement

This is a proceeding under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601 *et seq.*) ("AMAA"), 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 Administrator of the Agricultural Marketing Service ("AMS") initiated this proceeding against Baker Walnut, Inc. ("Respondent") by filing a complaint on May 31, 2018. The Complaint alleged that Respondent violated the AMAA and the Order Regulating the Handling of Walnuts Grown in California (7 C.F.R. §§ 984.1 *et seq.*) ("Walnut Order").¹ The Complaint also requested:

. . . [t]hat [an] order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order assessing a civil penalty against the Respondent in accordance with Section 608c(14)(B) of the Act (7 U.S.C. § 608c(14)(B)) and an order requiring that the Respondent cease and desist

¹ In the opening paragraph of the Complaint, AMS incorrectly cited the Walnut Order as "7 C.F.R. Part 981"; however, all subsequent references correctly cited 7 C.F.R. pt. 984.

from further violations.²

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).³

On August 7, 2018, I issued an order directing the parties to show cause (“Show Cause Order”), not later than twenty days after that date, why default should not be entered against Respondent.

On August 27, 2018, AMS filed a Response to Order to Show Cause (“Response”), Proposed Decision and Order (“Proposed Decision”), and Motion for Adoption of Proposed Decision and Order by Reason of Default (“Motion for Default”). The Motion for Default provided, *inter alia*:

Complainant seeks payment of unpaid assessments as well as a cease-and-desist order enjoining the respondent from failure to pay timely assessments. Complainant also seeks civil penalties, which are permissible under 7 U.S.C. § 608c(14)(B), a provision of the [AMAA], in an amount of \$532,400.00, which is based upon the maximum allowable amount of \$1,100, per day, per violation, for the 484 days that the Respondent is in arrears. Complainant offers that there is no circumstance in which a civil penalty of less than \$4,840.00 (or \$10 per day, per violation) against Respondent is justifiable.⁴

² Complaint at 1-2.

³ United States Postal Service records reflect that the Complaint was sent to Respondent’s business address via certified mail and delivered on May 31, 2018 but was returned for “insufficient address.” The Complaint was subsequently sent via certified mail to [REDACTED] Respondent’s president and chief executive officer, and delivered on July 9, 2018. 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 July 30, 2018. Respondent has not filed an answer in this matter.

⁴ Motion for Default at 2.

Respondent failed to respond to the Show Cause Order⁵ and has not filed any objections to AMS' Motion for Default or Proposed Decision.⁶

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 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.⁸

As Respondent failed to answer the Complaint, and upon AMS' 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. Baker Walnut, Inc. is a corporation whose address at all times relevant herein was 719 East Grayson Road, Modesto, California 95358.

⁵ The Show Cause Order was issued on August 7, 2018; therefore, the parties were required to respond on or before August 27, 2018. As of this date, Respondent has not filed a response.

⁶ United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Mr. [REDACTED] via certified mail on August 29, 2018 but were returned unclaimed. In accordance with the Rules of Practice, the Hearing Clerk re-mailed the documents to the same address via ordinary mail on October 1, 2018. *See* 7 C.F.R. § 1.147(c)(1). Respondent had twenty days from the date of service to file objections thereto. 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(h). In this case, Respondent's objections were due by October 22, 2018. Respondent has not filed any objections.

⁷ 7 C.F.R. § 1.136(c).

⁸ *See supra* note 6; 7 C.F.R. § 1.139.

2. At all times material herein, Baker Walnut, Inc. was operating as a “handler” of walnuts, as that term is defined in section 984.14 of the Walnut Order.⁹
3. The Walnut Order requires that handlers pay an assessment on walnuts they handle, pursuant to a rate established by the Secretary of Agriculture.¹⁰
4. The rate of assessment on walnuts handled from December 2014 through March 2015 was \$0.0189 per kernelweight pound of merchantable walnuts.¹¹ A subsequent rulemaking, with a final rule published on November 28, 2017 adopting a prior interim rule, has established the current rate of assessment at \$0.0400 per kernelweight pound of merchantable walnuts.¹²
5. During the months of December 2014, February 2015, and March 2015, Baker Walnut, Inc. accrued \$4,682.76 in assessments under the Walnut Order, which has not been paid. Specifically, Baker Walnut, Inc. failed to pay \$749.07 in assessments accrued in December 2014; \$1,918.86 in February 2015; and \$2,014.83 in March 2015.

Conclusions

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

⁹ 7 C.F.R. § 984.14.

¹⁰ See 7 C.F.R. §§ 984.69, 984.347.

¹¹ Walnuts Grown in California; Increased Assessment Rate, 78 Fed. Reg. 77,327, 77,327 (Dec. 23, 2013) (to be codified at 7 C.F.R. § 984.347).

¹² Walnuts Grown in California; Decreased Assessment Rate, 82 Fed. Reg. 56,151, 56,151 (Nov. 28, 2017) (to be codified at 7 C.F.R. § 984.347).

2. Baker Walnut, Inc., having failed to pay the assessments due on walnuts that it handled for three months during the 2014-2015 marketing year, is in violation of the Walnut Order.¹³
3. Pursuant to 7 U.S.C. § 608c(14)(B), Baker Walnut, Inc. may be assessed a civil penalty not exceeding one-thousand dollars (\$1,000) for each violation, with each day constituting a separate violation.¹⁴
4. Although civil penalties are appropriate in this case, AMS has not established that the maximum penalty amount is warranted under the circumstances.¹⁵

ORDER

1. Baker Walnut, Inc. shall immediately remit the four-thousand, six-hundred, eighty-two dollars, and seventy-six cents (\$4,682.76) of unpaid assessments to the California Walnut Board.

¹³ See 7 C.F.R. § 984.69.

¹⁴ Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461), rulemaking was undertaken that raised the maximum civil-penalty assessment to \$1,100 per violation, per day. See Department of Agriculture Civil Monetary Penalties Adjustment, 75 Fed. Reg. 17,555, 17,558 (Aug. 7, 2010). That amount was codified at 7 C.F.R. § 3.91(b)(1)(vii) until a subsequent rulemaking raised the maximum amount to \$2,806 per violation, per day. See Civil Monetary Penalty Inflation Adjustment for 2018, 83 Fed. Reg. 11,129, 11,130 (Mar. 14, 2018). However, that amount applies only to violations occurring after March 14, 2018. *Id.*

¹⁵ See *supra* note 4 and accompanying text. “In determining the amount of the civil penalty for violations of [a marketing order], certain factors should be considered including: [the] nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.” *Gerawan Farming, Inc.*, 67 Agric. Dec. 45, 58-59 (U.S.D.A. 2008) (internal citation omitted) (“significant civil penalty” of \$100,000 was “warranted to deter [the respondent], as well as other handlers, from committing similar violations in the future”).

2. Baker Walnut, Inc. is assessed a civil penalty of four-thousand, eight-hundred, and forty dollars (\$4,840) for the 484 days it was in violation of the Walnut Order.¹⁶ Payment shall be made by certified check or money order made payable to the Treasurer of the United States.
3. Baker Walnut, Inc., its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from failing to timely pay assessments due under the AMAA and the Walnut Order.
4. This Order shall be effective on the first day after this Decision becomes final.

This Decision and Order shall be final 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 24th day of October 2018


Channing D. Strother
Acting Chief Administrative Law Judge

¹⁶ The penalty represents ten dollars (\$10) per violation for each day Respondent was in arrears. *See* Motion for Default at 2 (“Complainant offers that there is no circumstance in which a civil penalty of less than \$4,840.00 (or \$10 per day, per violation) against Respondent is justifiable.”).

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