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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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Docket No. 16-0031 (PPA)

In re:

FRANCISCO CORTEZ, doing business as
F&C PALLETS, Inc.,

Respondent.

**ORDER GRANTING MOTION FOR DECISION AND ORDER
BY REASON OF ADMISSIONS**

I. PRELIMINARY STATEMENT

The instant matter involves allegations by the Administrator, Animal and Plant Health Inspection Service of the United States Department of Agriculture (“APHIS”; “USDA”; “Complainant”) that Francisco Cortez, d/b/a F & C Pallets, Inc. (“Respondent”) violated provisions of the Plant Protection Act as amended and supplemented, (7 U.S.C. § 7701 et. seq.)(“the Act”)

II. ISSUES

1. Whether entry of Decision and Order by reason of default or admissions is appropriate, and if so;
2. Whether Complainant’s recommended action should be upheld.

III. PROCEDURAL HISTORY

On December 22, 2015, Complainant filed a complaint with the Hearing Clerk, Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”), alleging that Respondent had violated the Act. On December 23, 2015, the Hearing Clerk sent a copy of the complaint to Respondent by certified and regular mail. The complaint was accompanied by correspondence that informed

Respondent that an Answer should be filed pursuant to the Rules of Practice Governing Formal Adjudications before the Secretary of USDA (“the Rules of Practice”). On February 2, 2016, an individual, Nelly Gtez, signed the certified mail return receipt, thereby acknowledging receipt of the complaint.

On December 29, 2015, Carolina Nava sent an email to the Office of the Hearing Clerk, referring to the complaint and identifying herself as Respondent’s daughter-in-law. She attached a copy of a check and a partially executed indemnification agreement between Francisco Cortez on behalf of F & C Pallets and the entity Package Research Laboratory, LLC. Ms. Nava also exchanged email correspondence with my staff in which she stated that Respondent was out of state, and implied that she could not contact him. See, copies of emails, Attachment A.

On February 3, 2016, Complainant filed a motion for the adoption of a proposed default decision and Order, which was sent by certified mail signed for once again by Nelly Gtez. Respondent did not file an objection to the motion,

IV. AUTHORITIES AND DISCUSSION

1. Default and Admissions

Pursuant to the Rules of Practice, a respondent is required to file an Answer within twenty (20) days after service of a Complaint. 7 C.F.R. § 1.136(a). The Rules of Practice also state that “[t]he failure to file an answer ... shall constitute a waiver of the hearing. Upon such failure to file, complainant shall file a proposed decision along with a motion for the adoption thereof... Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto.” 7 C.F.R. § 1.139. The Rules of Practice provide that a document sent by the Hearing Clerk “shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail. . .” 7 C.F.R. § 1.147(c)(1).

Although there is no evidence that Respondent's daughter-in-law is a "party to a proceeding" with authority and responsibility to file an answer to the complaint in this matter, the record establishes that both the complaint and the motion for default decision and Order were delivered to the last known principal place of business of Respondent, and therefore, those pleadings are "deemed to be received by" Respondent. 7 C.F.R. § 1.147(c)(1).

Pursuant to the Rules of Practice, an Answer "shall . . . [c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent." 7 C.F.R. § 1.136(b)(1). The failure to timely file an Answer or failure to deny or otherwise respond to an allegation asserted in the Complaint shall be deemed admission of all the material allegations in the Complaint, and in such situation, default shall be appropriate. 7 C.F.R. § 1.136(c).

The correspondence filed by Respondent's daughter-in-law did not address the allegations set forth in the complaint, which charge Respondent with counterfeiting a certificate required under the Act. (7 U.S.C. § 7734(b)). Complainant alleged that Respondent caused the creation of two fraudulent certificates required by the International Plant Protection Convention (IPPC) in compliance with 7 C.F.R. § 353.7. The partially executed indemnification agreement provided by Respondent's daughter-in-law addresses IPPC standards and USDA regulations, but does not specifically deny the allegations in the complaint. Therefore, Respondent is deemed to have admitted the allegations of the complaint.

For good cause shown, Complainant's motion for default is hereby GRANTED. I find it appropriate to enter a decision and Order by reason of admissions.

2. Sanctions

7 U.S.C. § 7734 (b)(1) sets forth the penalties for violation of the statute in pertinent part:

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) \$50,000 in the case of any individual (except that the civil penalty may not exceed \$1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), \$250,000 in the case of any other person for each violation, \$500,000 for all violations adjudicated in a single proceeding if the violations do not include a willful violation, and \$1,000,000 for all violations adjudicated in a single proceeding if the violations include a willful violation; or (B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss to another.

7 U.S.C. § 7734 (b)(1).

The Act sets forth the factors to consider in determining civil penalty:

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator— (A) ability to pay; (B) effect on ability to continue to do business; (C) any history of prior violations; (D) the degree of culpability; and (E) any other factors the Secretary considers appropriate.

7 U.S.C. § 7734(b)(2).

“The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28. The validity of the Secretary’s order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States”. 7 U.S.C. § 7734(b)(4).

The Secretary seeks the imposition of a civil penalty in the amount of twenty thousand dollars (\$20,000.00) against Respondent. Respondent’s business is defunct, and therefore, it is difficult to determine Respondent’s ability to pay the penalty. However, the penalty is consistent with penalties imposed upon other parties, is warranted by the nature and gravity of

Respondent's counterfeiting actions, and is sufficient to act as a deterrent to others similarly situated to Respondent.

V. FINDINGS OF FACT

1. At all times relevant to this Decision and Order, Respondent Francisco Cortez was President and registered agent of F & C Pallets, Inc.
2. Respondent was doing business as F & C Pallets, Inc.
3. F & C Pallets, Inc. was incorporated in the state of California and was dissolved in 2012.
4. F & C Pallets, Inc. remained a dissolved corporation at the time this Decision and order was issued.
5. On or about May 27, 2011, Respondent counterfeited a certificate required by the Act when he caused two fraudulent IPPC stamps to be created.

VI. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Entry of a Decision and Order by reason of admissions is appropriate, and Respondent is deemed to have admitted the allegations set forth in the complaint.
3. Respondent's acts of fraud and counterfeit violated 7 U.S.C. § 7734(b).
4. Respondent's conduct warrants the imposition of civil money penalties.

ORDER

Respondent Francisco Cortez is hereby assessed a civil penalty of twenty thousand dollars (\$20,000.00).

This penalty is payable to the "Treasurer of the United States" by certified check or money order, and shall be remitted within thirty (30) days from the effective date of this Order.

Respondent shall forward payment to:

United States Department of Agriculture
APHIS
U.S. Bank
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall be referenced: P.Q. Docket No. D-16-0031.

Pursuant to the Rules of Practice, this Decision becomes final without further proceedings 35 days after service, in accordance with 7 C.F.R. §§ 1.142 and 1.145. The provisions of this Order shall become effective on the first day of the month after this Decision shall become final.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 22nd day of April, 2016, in Washington, DC.



Janice K. Bullard
Administrative Law Judge