Whalen

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-02-0005
	)	
	)	
D & C Produce, Inc.	)	
	)	
Respondent	)	

Decision Without Hearing by Reason of Admissions

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.; hereinafter referred to as the "Act" or "PACA") and the regulations issued thereunder (7 C.F.R. Part 46; hereinafter referred to as the "Regulations"), instituted by a Complaint filed on January 8, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

Complainant alleged that Respondent D & C Produce, Inc., (hereinafter "Respondent"), during the period May 2000 through June 2001, failed to make full payment promptly to 8 sellers of the agreed purchase prices in the total amount of $454,017.20 for 47 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. Complainant also alleged that PACA license number 000960, which was issued to Respondent on April 5, 2000, terminated on April 5, 2001, when it was not renewed. The Complaint requested a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published.

On March 21, 2002, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Middle District of North Carolina pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 et seq.), designated Case Number 02-80864, in which Respondent admitted owing the 8 sellers named in the Complaint amounts totaling $545,125.60.

On March 22, 2002, Respondent filed an Answer to the Complaint with the Department hearing clerk. In that Answer, Respondent's counsel William L. Yaeger wrote "It is my understanding that Chad Barnett, the President of the now bankrupt [Respondent] D & C Produce, Inc., *admits to the material allegations* of the complaint and will consent to the sanctions dictated by PACA, including that he will be barred for up to two years from holding a license under PACA regulations (emphasis added)..." In the attachment to that Answer, President Barnett wrote, "I, Chad Barnett, agree to the consent work out [sic] by Bill Yagers [sic] office and the PACA, concerning my rights and responsibilities in any business governed by the PACA."

Complainant also filed a motion with supporting memorandum seeking a Decision Without Hearing by Reason of Admissions made by Respondent in its Answer and in its bankruptcy petition. In that motion, Complainant also noted that official notice may be taken of the documents that Respondent has filed in connection with its Chapter 7 bankruptcy proceeding. Based upon a careful consideration of the pleadings and precedent decisions cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the following Decision is issued without further procedure or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had;* or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (emphasis added)

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

(a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

(aa) "Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party claiming the

existence of such an agreement for time of payment shall have the burden of proving it...

Findings of Fact

1. D & C Produce, Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of North Carolina. Its business address while operating was 2145 Foxfire Road, Suite 12-B, Jackson Springs, North Carolina 27281. Its mailing address while operating was P.O. Box 1016, Vass, North Carolina 28394. Its current addresses are: c/o Chad Barnett, 1607 Hoffman Road, Jackson Springs, North Carolina 27821; and c/o Chad Barnett, 153 Vivian Street, West End, North Carolina 27376.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. PACA license number 000960 was issued to Respondent on April 5, 2000. That license terminated on April 5, 2001, when Respondent failed to pay the applicable annual fee to renew its license.

3. Respondent, during the period May 2000 through June 2001, on or about the dates and in the transactions set forth in paragraph III of the Complaint, failed to make full payment promptly to 8 sellers of the agreed purchase prices in the total amount of $454,017.20 for 47 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

4. On March 21, 2002, 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 for the Middle District of North Carolina. That petition has been designated Case Number 02-80864.

5. Respondent's bankruptcy documents[1] included Schedule F - Creditors Holding Unsecured

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[1]Official notice is hereby taken of those documents as authorized by In re Five Star Food Distributors, Inc., 56 Agric. Dec. 880 (1997); In re Granoff's Wholesale Fruit & Produce, Inc., 54 Agric. Dec. 1375 (1995); In re Veg-Mix, Inc., 44 Agric. Dec. 1583 (1985), remanded on other grounds, Veg-Mix, Inc. v. U.S. Dept. of Agriculture, 832 F.2d 601 (D.C. Cir. 1987).

Nonpriority Claims (hereinafter "Bankruptcy Schedule F"). In that bankruptcy schedule, Respondent admitted that it owes fixed amounts for debts that total $545,125.60 to the 8 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of $454,017.20 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 55 creditors named are the 8 firms listed in the Complaint, along with the amounts of their respective claims. A comparison with the table set forth in paragraph III of the Complaint reveals that the amounts acknowledged as owed by Respondent are identical for two (2) of the produce sellers, higher for another two (2) of the produce sellers, and lower for four (4) of the produce sellers. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent are as follows:

Seller	Complaint	Schedule F
DiMare Ruskin, Inc.	$124,555.55	$120,000.00
DiMare Johns Island	30,008.00	30,008.00
East Coast Brokers & Packers, Inc.	42,640.00	77,000.00
R & V Warren Farms, Inc.	41,727.00	141,571.50
Classie Produce (A Div. of Classie Growers)	104,464.00	90,000.00
Impact Brokerage	50,815.20	29,022.40
Big Red Tomato Packers	10,960.00	10,960.00
Nova Produce, Inc.	48,847.45	46,563.70
	$454,017.20	$545,125.60

6. Respondent reported in the Summary of Schedules to the voluntary petition filed in its bankruptcy proceeding that it had total assets of $56,620.00 and total liabilities of $1,217,502.09 as of March 21, 2002.

7. Respondent's President Chad Barnett declared under penalty of perjury that the information provided in Respondent's bankruptcy petition was true and correct when he signed that petition.

8. On March 22, 2002, Respondent filed an Answer in which it admitted to the material allegations of the Complaint.

Conclusions

Respondent has admitted, in its Answer, that it purchased, received, and accepted 47 lots of perishable agricultural commodities in interstate commerce from the 8 sellers named in the Complaint. Respondent also admitted that it failed to make full payment promptly, during the period May 2000 through June 2001, to those 8 sellers of the agreed purchase prices in the total amount of $454,017.20. Respondent's admissions in its Answer and the admissions made in Respondent's bankruptcy documents, of which official notice has been taken, establish that the $454,017.20 produce debt that Respondent owes those 8 sellers for 47 lots of perishable agricultural commodities is part of the acknowledged unsecured debt for which Respondent has sought relief from the Bankruptcy Court. By so scheduling that produce debt, Respondent has implicitly asserted that there is no prospect of full payment of that debt at any future date. A decision and order that relies upon such admissions may be issued in disciplinary proceedings brought under the PACA.[2]

Respondent's admitted failures to make full payment promptly are violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's violations are willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)) as a matter of law. The violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. Respondent's violations are "repeated" because repeated means more than one.[3] Also, Respondent's failures to pay for its

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[2]See, In re Kirby Produce Company, 58 Agric. Dec. 1011 (1999); In re Five Star Food Distributors, Inc., 56 Agric. Dec. 880 (1997); In re Granoff's Wholesale Fruit & Produce, Inc., 54 Agric. Dec. 1375 (1995); In re Veg-Mix, Inc., 44 Agric. Dec. (1985), remanded on other grounds, Veg-Mix, Inc. v. U.S. Dept. of Agriculture, 832 F.2d 601 (D.C. Cir. 1987).

[3]See, e.g., Melvin Beene Produce Co. v. Agricultural Marketing Service, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); Reese Sales Co. v. Hardin, 458 F. 183 (9th Cir. 1972) (finding 26 violations involving $19,059.08 occurring over 2 ½ months to be repeated and

purchase obligations, which Respondent has acknowledged as liquidated, undisputed and non-contingent debts, within the time limits established by a substantive regulation–7 C.F.R. § 46.2(aa)--duly promulgated under the PACA are willful as a matter of law.[4] Accordingly, Respondent's admitted failures to make full payment promptly, to the 8 sellers named in the Complaint, constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

According to the Department Judicial Officer's policy, in any PACA disciplinary proceeding in which it is alleged that a Respondent has failed to pay in accordance with the PACA and Respondent admits the material allegations in the Complaint and makes no assertion that the Respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the Complaint was served on Respondent or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.[5]

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flagrant); Zwick v. Freeman, 373 F.2d 110, 115 (2d Cir. 1967) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000); In re Havana Potatoes of New York Corp. and Havpo, Inc., 55 Agric. Dec. 1234 (1996), aff'd, 1997 WL 829211 (2d Cir. December 19, 1997), court decision printed at 56 Agric. Dec. 1790 (1997), (Havana's failure to pay 66 sellers $1, 960, 958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers $101, 577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and In re Five Star Distributors, 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least $238, 374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

[4]Id.

[5]See, In re Scamcorp. Inc., d/b/a Goodness Greeness, 57 Agric. Dec. 527, at 562 (1998).