

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

Docket No. 12-0221

Docket No. 12-0222

In re:

AMERSINO MARKETING GROUP, LLC,

and

SOUTHEAST PRODUCE LIMITED, USA,

Respondents.

DECISION AND ORDER ON THE RECORD

The instant matter involves complaints filed by the United States Department of Agriculture (“Complainant”) against Amersino Marketing Group, LLC (“Amersino”) and Southeast Produce Limited USA (“Southeast”)(“Respondents”) alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et seq.(“PACA”; “the Act”). The complaints alleged that Respondents failed to make full payment promptly to ten sellers of the agreed purchase prices for forty-three (43) lots of perishable agricultural commodities during the period December 22, 2008 through August 5, 2010. The Complainant further alleged that Respondents operated from the same building, shared the same office space, shared the same two principal officers and owners, and co-mingled business activities pertaining to the buying and selling of produce.

This Decision and Order is issued on unopposed motion of Complainant.

I. PROCEDURAL HISTORY

On February 1, 2011, Complainant filed a Complaint against Respondents alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et

seq. (“PACA”; ‘the Act’). On March 6, 2012, Complainant filed an amended complaint against Respondents. Respondents filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for the United States Department of Agriculture (“Hearing Clerk”) on March 20, 2012.

On April 2, 2012, I set a schedule for pre-hearing submissions. By motions filed on June 6, 2012, Complainant requested an extension of time to file submissions and moved for a Decision and Order on the record by reason of partial admissions. Henry Wang, one of the principals for Respondents, acknowledged receipt of service of the motion on June 8, 2012. I deferred ruling on the motion for extension pending Respondents’ response to Complainant’s motion for a Decision and Order on the record. Respondent failed to file a response to either motion, or to file submissions, which were due not later than July 13, 2012.

I admit to the record the Attachments to Respondents’ Answer, and Attachment 1 to Complainant’s motion.

II. FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (“Rules of Practice”), set forth at 7 C.F.R. § 1.130 et seq., apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. §1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that “an opposing party

may file a response to [a] motion” within twenty days after service (7 C.F.R. §1.143(d)). The Rules state that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. §1.147(h.).

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11).

In their Answer to the amended Complaint, Respondents did not deny that they had failed to timely pay sellers for perishable agricultural commodities. Respondents asserted that several sellers allowed Respondents time to pay off a balance due, and contended that they were making partial payments to one other seller. In addition, they contended that they had settled and paid a balance due to Cimino Brothers Produce, Inc. Respondents failed to address Complainant’s motion, in which it was alleged that several sellers continue to be owed more than a *de minimis* amount for the purchases.

It has been established that partial payments and agreements to make payments over time, as well as settlements of amounts due for produce purchases, do not constitute full payment under PACA. In re: Caito, 48 Agric. Dec. 602, 609-619 (1989); In re: Full Sail Produce, Inc., 52 Agric. Dec. 608, 618-61-19 (1993). PACA requires “full payment promptly” and where “respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the

[matter] will be treated as a no-pay case.” In re: Scamcorp, Inc., d/b/a Goodness Greeness, 57 Agric. Dec. 527, 547 - 549 (1998).

In order to reach “full compliance” with PACA, the respondent would have to have paid all produce sellers and “have no credit agreements with produce sellers for more than 30 days”. In re: Scamcorp, Inc., supra. at 549. Respondents admitted that as of the date they filed their Answer, they still owed \$151,883.50 out of the \$176,883.50 listed as due to sellers, exclusive of a purported “settlement” with Cimino Brothers. Respondents also admitted that they owed \$28,000 out of \$40,088.00 due to Morris Okun Inc. Respondents owed \$19,00.00 out of \$21,021.00 due to Center Maraicher. It appears from Respondents’ Attachments 2 and 3 that they have not made full payments to produce sellers for almost two years. Respondents did not address whether and when they intended to fully pay the sellers.

The outstanding balance due to sellers is in excess of \$5,000.00, and axiomatically represents more than a *de minimis* amount. See, In re: Fava & Co., 46 Agric. Dec. 798, 81 (1984); 44 Agric. Dec. 879 (1985). “[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed”. In re: Tri-State Fruit & Vegetable, Inc., 46 Agric. Dec. 81, 82-83 (1984); 46 Agric. Dec. 83 (1985). Ergo, I find that a hearing is not necessary in this matter.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. In re: D.W. Produce, Inc., 53 Agric. Dec. 1672, 1678 (1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. In re: D.W. Produce, Inc., 53 Agric. Dec. at 1678. In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay

the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful, and the violations are repeated and flagrant.

Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer...is revoked..." In re: Scamcorp, Inc., supra; In re: Veg-Mix, Inc., 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (1985), aff'd and remanded, 832 F.2d 601 (D.C. Cir. 1987); In re: Tri-State Fruit & Vegetable, Inc., supra.

Respondent Southeast's PACA license terminated on September 10, 2010, and Respondent Amersino's PACA license terminated on October 12, 2010, when Respondents failed to pay the annual required fees pursuant to section 4(a) of the PACA (7 U.S.C. § 499a). Therefore, publication of the facts and circumstances of Respondents' violations is an appropriate sanction.

B. Findings of Fact

1. Amersino Marketing Group, LLC is or was a corporation organized and existing under the laws of the state of New York and at all times material herein its business address was 580-45 47th Street, Maspeth, New York, 11378.
2. Respondent Amersino also used an address at 161 Gardner Avenue, Brooklyn, New York, 11237.
3. At all times material hereto, Respondent Amersino was licensed under and operated subject to the provisions of the PACA, under license number 20070047, issued on October 12, 2006.

4. Respondent Amersino's license terminated on October 12, 2010 when Respondent failed to pay the required annual fee.
5. Southeast Produce Limited USA is or was a corporation organized and existing under the laws of the state of New York and at all times material herein its business address was 580-45 47th Street, Maspeth, New York, 11378.
6. At all times material hereto, Respondent Southeast was licensed under and operated subject to the provisions of the PACA, under license number 20041226, issued on September 10, 2004.
7. Respondent Southeast's license terminated on September 10, 2010 when Respondent failed to pay the required annual fee.
8. Respondents operated from the same building, shared the same office space, and shared the same two principal officers and owners.
9. Respondents' business records and business activities, particularly with respect to the buying and selling of produce, were commingled.
10. During the period from December 22, 2008 through August 5, 2010, Respondents failed to make full payment promptly to at least four (4) sellers, as admitted by Respondents, of the agreed purchase prices in the aggregate of \$429,031.50 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.
11. The unpaid balances represent more than *de minimis* amounts, thereby obviating a need for a hearing.

C. Conclusions of Law

Respondents' failure to make full payment promptly to at least four (4) sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural

commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA 7 U.S.C. § 499b(4)).

ORDER

Respondent Amersino willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances underlying Respondent's violations shall be published.

Respondent Southeast willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances underlying Respondent's violations shall be published.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 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).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 16th day of July, 2012 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge