

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-04-0008
)	
Diversified Food Export, Inc.,)	
)	Decision Without Hearing by Reason
Respondent)	of Default

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter, "PACA"), instituted by a complaint filed on March 8, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period July 2000 through September 2002, failed to make full payment promptly to nine sellers of the agreed purchase prices in the total amount of \$302,165.55 for 87 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

A copy of the complaint was mailed, by certified mail, to Respondent's business address at c/o Kenneth S. Rappaport, Esq., 709 N.W. 12th Terrace, Pompano Beach, Florida 33069 and Respondent's mailing address at 1300 North Federal Highway, Boca Raton, Florida 33432. The complaint was received and accepted at both addresses on March 18, 2004, and March 13, 2004, respectively. According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. §

1.136(a)) (hereinafter, "Rules of Practice"), an answer is due within 20 days after service of the complaint. As Respondent has failed to file an answer to the complaint within the time allowed for that purpose, Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

On March 25, 2004, Respondent filed a document entitled "Suggestion of Bankruptcy". The document asserts that, on September 30, 2002, Respondent filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Florida, Case Number 02-27368-BKC-PGH. The document asserts further that, pursuant to section 362 of the Bankruptcy Code (11 U.S.C. § 362), an automatic stay is in effect. However, Respondent's "Suggestion of Bankruptcy" does not meet the requirements of an answer to the complaint that are set forth in section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)):

(b) *Contents.* The answer shall:

- (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
 - (2) State that the respondent admits all the facts alleged in the complaint;
- or
- (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

Respondent's "Suggestion of Bankruptcy" does not admit, deny or explain any of the allegations of the complaint. Moreover, the claim in the "Suggestion of Bankruptcy" that the automatic stay is in effect is not an adequate affirmative defense to the allegations of the complaint, as it is well established that disciplinary proceedings to enforce the PACA are not subject to the automatic stay provision in the Bankruptcy Code.

Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. § 362(b)(4)) states that the filing of a bankruptcy petition does not stay “the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . .” The purpose of this disciplinary action is to enforce the regulatory power of the Department of Agriculture against a firm that has committed serious violations of the PACA by failing to make full and prompt payment for produce purchases. Section 525(a) of the Bankruptcy Code (11 U.S.C. § 525(a)) provides that a governmental unit may not deny, revoke, suspend or refuse to renew a license to a debtor who has filed for bankruptcy, with a few limited exceptions, one of which is when there is a disciplinary action brought under the PACA:

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the

commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [emphasis supplied]

The Department's Judicial Officer has held that PACA disciplinary proceedings are unaffected by the automatic stay, stating as follows, in In re Ruma Fruit and Produce Co., Inc., 55 Agric. Dec. 642, 654-655 (1996):

Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. Melvin Beene Produce Co. v. Agricultural Marketing Service, 728 F.2d 347, 351 (6th Cir. 1984); In re Fresh Approach, Inc., 49 B.R. 494, 496- 98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. Marvin Tragash Co. v. United States Dep't of Agric., 524 F.2d 1255 (5th Cir. 1975); Zwick v. Freeman, 373 F.2d 110 (2d Cir. 1967), cert. denied, 389 U.S. 835 (1967); In re Fresh Approach, Inc., supra, 49 B.R. at 496.

As Respondent's "Suggestion of Bankruptcy" does not constitute an answer, and an answer has not been filed within the time period allowed for that purchase, upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following

Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Diversified Food Export, Inc., (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Florida. At all times material herein, Respondent's business address was 709 N.W. 12th Terrace, Pompano Beach, Florida 33069. Respondent's mailing address is c/o Kenneth S. Rappaport, Esq., 1300 North Federal Highway, Boca Raton, Florida 33432.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 971814 was issued to Respondent on July 14, 1997. This license was renewed on an annual basis, but terminated on July 14, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), due to Respondent's failure to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period July 2000 through September 2002, failed to make full payment promptly to nine sellers of the agreed purchase prices in the total amount of \$302,165.55 for 87 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 3 above constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the

Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

this 26th day of May, 2005

Peter M. Davenport
Administrative Law Judge