

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-15-0102
)
The Square Group, LLC,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Melissa Bailey, Acting Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 28, 2015. The Deputy Administrator instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Deputy Administrator alleges that: (1) during the period October 2013 through August 2014, The Square Group, LLC [Square Group], failed to make full payment promptly to thirty-two sellers of the agreed purchase prices in the amount of \$1,190,177.70 for 658 lots of perishable agricultural commodities that Square Group purchased, received, and accepted in the course of interstate and foreign commerce;¹ (2) on July 21, 2014, Square Group filed a voluntary petition

¹ Appendix A of the Complaint identifies each of the thirty-two produce sellers that Square Group allegedly failed to pay in accordance with the PACA, the number of lots of perishable agricultural

under Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1532) in the United States Bankruptcy Court, Central District of California;² (3) Square Group admitted in its Schedule F – Creditors Holding Unsecured Nonpriority Claims, filed in the United States Bankruptcy Court, Central District of California, that twenty-three of the thirty-two sellers listed in Appendix A of the Complaint hold unsecured claims for unpaid produce debt totaling \$800,213.55;³ and (4) Square Group’s failure to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that Square Group purchased, received, and accepted in the course of interstate and foreign commerce constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) (Compl. ¶¶ III-V at 2-3).

On June 30, 2015, Square Group filed a timely⁴ Answer denying it willfully violated the PACA as alleged in the Complaint and asserting five affirmative defenses.⁵ On July 24, 2015, in

commodities each produce seller allegedly sold to Square Group, the types of perishable agricultural commodities each produce seller allegedly sold to Square Group, the dates Square Group allegedly accepted the perishable agricultural commodities from each produce seller, the dates that Square Group’s payment was allegedly due to each produce seller, and the amount allegedly past due and unpaid to each produce seller.

² Square Group’s bankruptcy petition is designated “Case No. 2:14-bk-23806-DS.”

³ Schedule F – Creditors Holding Unsecured Nonpriority Claims which Square Group filed in the United States Bankruptcy Court, Central District of California, is attached to the Complaint and identified as “Attachment A.”

⁴ On May 13, 2015, Square Group filed a “Request For Extension Of Time To File Answer To Complaint Pursuant to 7 C.F.R. §§ 1.143 and 1.147(f).” On May 18, 2015, Square Group filed a second “Request For Extension Of Time To File Answer To Complaint Pursuant to 7 C.F.R. §§ 1.143 and 1.147(f).” On May 19, 2015, Administrative Law Judge Jill S. Clifton [ALJ] issued an order extending Square Group’s time to file an answer through June 30, 2015. Square Group filed its “Answer and Affirmative Defenses” [Answer] on June 30, 2015.

⁵ Square Group asserts the following five affirmative defenses: (1) the \$358,927.15 claim of Moo Gung International, Inc., is not a violation of the PACA because the claim “is disputed, invalid, and subject to a valid counterclaim for the full amount stated in Appendix A to the Complaint”;

accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing by Reason of Admissions [Motion for Default Decision] and a proposed Decision Without Hearing Based on Admissions [Proposed Default Decision]. On September 10, 2015, Square Group filed an opposition to the Deputy Administrator's Motion for Default Decision. On March 22, 2016, the Deputy Administrator filed a request for a ruling on the Deputy Administrator's Motion for Default Decision.

On April 28, 2016, the ALJ issued a Decision and Order on the Written Record [Decision and Order] in which the ALJ: (1) found that, during the period February 22, 2014 through August 19, 2014, Square Group failed to make full payment promptly to twenty-three sellers of the agreed purchase prices in the total amount of more than \$767,000.00 for perishable agricultural commodities that Square Group purchased, received, and accepted in the course of interstate or foreign commerce; (2) concluded that Square Group willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4); and (3) revoked Square Group's PACA license.⁶

On June 8, 2016, Square Group appealed to the Judicial Officer by filing an Appeal Petition and a Brief in Support of Appeal Petition. The Deputy Administrator failed to file a response to Square Group's Appeal Petition, and, on June 29, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to

(2) the claims listed in Appendix A of the Complaint either have been resolved or are being disputed; (3) payment for each undisputed claim listed in Appendix A of the Complaint is being administered as part of Square Group's Chapter 11 reorganization in the United States Bankruptcy Court; (4) the Deputy Administrator failed to allege any facts in support of the Deputy Administrator's contention that Square Group's alleged violations of the PACA were intentional and/or willful; and (5) the Complaint "fails to allege any facts that [Square Group] is a financially irresponsible entity in the produce industry justifying action by the United States Department of Agriculture." (Answer ¶¶ 1-5, at 3-4).

⁶ ALJ's Decision and Order ¶¶ 1, 48, 50 at 1, 15, 17.

the Office of the Judicial Officer for consideration and decision. Based upon careful consideration of the record, pursuant to 7 C.F.R. § 1.145(i), I adopt the ALJ's April 28, 2016 Decision and Order as the final order in this proceeding.

DECISION

Square Group's Appeal Petition

Square Group raises three issues on appeal. First, Square Group asserts the ALJ erred by relying upon Square Group's bankruptcy Schedule F as "*confirmation* and admissions" that Square Group failed to make full payment promptly to certain produce sellers (Appeal Pet. at 2-5; Br. in Support of Appeal Pet. ¶ IV.A. at 3-4). Specifically, Square Group contends the ALJ erroneously found that Square Group's listing of the following "Potential PACA Claimants" in Square Group's bankruptcy Schedule F constituted "confirmation" of failure to make payment promptly:

- a. ABC Produce, Inc., in the amount of \$72,474.92;
- b. Advantage Produce, Inc., in the amount of \$12,484.75;
- c. Benito Turrubiarres, in the amount of \$16,300.00;
- d. E&DA Farm, in the amount of \$42,623.00;
- e. ETR Merchandises Co., in the amount of \$22,837.20;
- f. Green West Farm, Inc., in the amount of \$645.00;
- g. Harmoni International Spice, Inc., in the amount of \$15,115.00;
- h. House of Produce, in the amount of \$12,800.50;
- i. JML Produce, Inc., in the amount of \$15,879.58;
- j. L&C Distributing, Inc., in the amount of \$10,263.00;
- k. Lucky Hong Farm, Inc., in the amount of \$48,979.00;

- l. Lucky Taro, in the amount of \$18,124.35;
- m. Maui Fresh, in the amount of \$82,886.40;
- n. QSI, in the amount of \$43,788.00;
- o. Quality 1st Produce, Inc., in the amount of \$95,179.40;
- p. T Fresh Company, in the amount of \$81,161.30;
- q. T&C Company, in the amount of \$7,204.00;
- r. TAC Produce, Inc., in the amount of \$53,262.50;
- s. The Choice Produce, in the amount of \$17,893.50;
- t. Times Produce, Inc., in the amount of \$23,906.50;
- u. Two HK, Inc., in the amount of \$17,251.00;
- v. Valley Fruit & Produce, Inc., in the amount of \$47,857.75; and
- w. WF Produce Trading, in the amount of \$8,892.00.

(Appeal Pet. at 2-4).

I conclude the ALJ was correct in treating the list of creditors in Square Group's Schedule F as Square Group's admissions that it failed to make full payment promptly to the listed produce sellers. By identifying the above-referenced produce sellers on its Schedule F as having undisputed claims, Square Group admits that it failed to make prompt payment in the total dollar amounts provided.⁷ It is well established that a PACA respondent's admissions in documents filed in a bankruptcy case may be treated as admissions in a related PACA proceeding.⁸ Here, Square Group

⁷ See RDM Int'l, Inc., 73 Agric. Dec. 285, 289 (U.S.D.A. 2014); A. Pellegrino & Sons, Inc., 44 Agric. Dec. 1602, 1604 (U.S.D.A. 1985) (treating undisputed claims listed in bankruptcy pleadings as admissions); Fava & Company, Inc., 46 Agric. Dec. 79, 80 (U.S.D.A. 1984) (Ruling on Certified Question).

⁸ Samuel S. Napolitano Produce, Inc., 52 Agric. Dec. 1607, 1610 (U.S.D.A. 1993); see United

listed on its Schedule F twenty-three produce sellers, or creditors, to whom Square Group owed money in the aggregate amount of \$767,000.00 for perishable agricultural commodities that Square Group purchased, received, and accepted in interstate and foreign commerce (Compl. Attach. A). Therefore, I reject Square Group's contention that the ALJ erroneously treated the list of creditors in Square Group's Schedule F as "admissions of unpaid produce debt."

Second, Square Group asserts the ALJ erred in concluding that Square Group's violations of 7 U.S.C. § 499b(4) were willful (Appeal Pet. at 5). "A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements."⁹ The record supports the ALJ's conclusion that Square Group's PACA violations are "willful," as that term is used in the Administrative Procedure Act. Based upon the large number of transactions, significant amount of debt, and the continuation of violations over almost a six-month period, I conclude that Square Group's violations were willful in that Square Group knew or should have known that it did not have sufficient funds with which to comply with the prompt-payment provisions of the PACA.¹⁰ Therefore, I reject Square Group's contention that the ALJ's conclusion

Fruit & Vegetable Co. v. U.S. Dep't of Agric., 668 F.2d 983, 983-84 (8th Cir. 1982); *see also Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 606-07 (D.C. Cir. 1987); *Five Star Food Dist., Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997); *Fava & Co.*, 46 Agric. Dec. 79, 80 (U.S.D.A. 1984) (Ruling on Certified Question).

⁹ *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (U.S.D.A. 1996); *see also H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989).

¹⁰ *See Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998) (stating willfulness is determined by looking at a respondent's violations of express requirements of the PACA and the Regulations, the length of the time period during which the violations occurred, and the number and total dollar amount of transactions at issue.)

that Square Group willfully violated 7 U.S.C. § 499b(4), is error.

Third, Square Group asserts the ALJ erroneously concluded that Square Group was not entitled to an oral hearing on material issues of fact (Appeal Pet. at 5). I reject Square Group's contention and find, to the contrary, that Square Group is not entitled to a hearing because Square Group has failed to cite any genuine issues of material fact. As stated above, the Schedule F that Square Group filed in its bankruptcy proceeding constitutes an admission of the material allegations set forth in the Complaint.¹¹ If a respondent in a PACA disciplinary proceeding admits the failure to pay for agricultural commodities in a related bankruptcy proceeding, no hearing is required in the PACA disciplinary proceeding.¹² Moreover, even if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total amount owed more than *de minimis*.¹³

A respondent in an administrative proceeding does not have the right to an oral hearing under all circumstances, and an agency may dispose of a hearing where there is no material issue

¹¹ See *Potato Sales Co.*, 54 Agric. Dec. 1409, 1411 (U.S.D.A. 1995); *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (U.S.D.A. 1993) ("Respondent's failure to pay for perishable agricultural commodities is admitted by Respondent in its Bankruptcy proceeding. . . . Therefore, no material issue of fact exists and a hearing is not required."); *B.G. Sale's Co.*, 44 Agric. Dec. 2021, 2024 (U.S.D.A. 1985).

¹² *Id.*

¹³ See *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) ("Moreover, there is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, so long as the violations are not *de minimis*."); see also *Veg-Mix, Inc.*, 44 Agric. Dec. 2060, 2060 (U.S.D.A. 1985) (Order Den. Recons.), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *Fava & Company, Inc.*, 46 Agric. Dec. 79, 80-81 (U.S.D.A. 1984) (Ruling on Certified Question) (stating that in order to warrant a hearing "enough of the sellers would have had to enter into such express agreements for such delayed payment so that the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000").

of fact regarding which a meaningful hearing may be held.¹⁴ In its Brief in Support of Appeal Petition, Square Group asserts that “a material issue of fact exists as to the evidentiary relevance of Square Group’s bankruptcy Schedule F. Since Square Group is in the process of Chapter 11 reorganization, there has been no adjudication by the bankruptcy court that [Square Group] has insufficient assets to pay its produce creditors in full.” (Br. in Support of Appeal Pet. ¶ IV.C. at 5). This argument is without merit. It has long been held that admissions in documents filed in a bankruptcy proceeding may be treated as admissions in the related PACA proceeding;¹⁵ thus, there is no question as to a Schedule F’s “evidentiary relevance.” Further, it is of no consequence whether a bankruptcy court has adjudicated that Square Group has insufficient assets to pay its creditors in full, as inability pay will not suffice to prevent license revocation.¹⁶ Whereas Square Group has admitted the material allegations of fact contained in the Complaint, there are no issues on which a meaningful hearing could be held in this proceeding; therefore, the ALJ properly issued the April 28, 2016 Decision and Order without hearing.

Based upon careful consideration of the record, I find that no change or modification of the ALJ’s April 28, 2016 Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge’s decision as the final order in a

¹⁴ H. Schnell & Company, Inc., 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see also* Five Star Distribs., Inc., 56 Agric. Dec. 880, 894 (U.S.D.A. 1997).

¹⁵ *See supra* note 8.

¹⁶ *See* Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1224 (U.S.D.A. 1996) (stating that “excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time”); R.H. Produce, Inc., 43 Agric. Dec. 511, 523 (U.S.D.A. 1984) (“In disciplinary cases under the Perishable Agricultural Commodities Act, all excuses that have been offered as to why payment was not made promptly have been routinely ignored since the Act calls for payment not excuses.”) (internal quotations omitted).

proceeding as follows:

§ 1.145 Appeal to Judicial Officer.

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- (i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 28, 2016 Decision and Order is adopted as the final order in this proceeding.

RIGHT TO SEEK JUDICIAL REVIEW

Square Group has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Square Group must seek judicial review within sixty days after entry of the Order in this Decision and Order.¹⁷ The date of entry of the Order in this Decision and Order is November 10, 2016.

Done at Washington, DC

November 10, 2016

William G. Jenson
Judicial Officer

¹⁷ 28 U.S.C. § 2344.