

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-01-0023
)
Baiardi Chain Food Corp.,)
) **Order Denying Petition**
Respondent) **to Reconsider**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 2, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Baiardi Chain Food Corp. [hereinafter Respondent], during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of \$830,728.39

for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On October 23, 2001, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On February 2, 2004, and May 25, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Complainant.¹ Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 30, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on September 10, 2004, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law. On October 4, 2004, Complainant filed Complainant's Reply Brief.

On April 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which

¹On October 4, 2004, Jeffrey J. Armistead entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed October 4, 2004).

Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.

On July 27, 2005, Respondent appealed to the Judicial Officer. On August 16, 2005, Complainant filed Complainant's Response to Respondent's Appeal. On August 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On September 2, 2005, I issued a Decision and Order: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.²

On October 12, 2005, Respondent filed a Petition to Reconsider *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005). On November 4, 2005, Complainant filed Complainant's Response to Respondent's Petition. On November 10, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

²*In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____, slip op. at 13, 17, 22 (Sept. 2, 2005).

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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 any 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[.] . . .

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, 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.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF
AGRICULTURE**

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE AGRICULTURAL
COMMODITIES ACT, 1930**

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

(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.

7 C.F.R. § 46.2(aa)(5), (11).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises two issues in Respondent’s Petition to Reconsider. First, Respondent asserts an approximation of the amount Respondent failed to pay produce sellers violates due process (Respondent’s Pet. to Reconsider at 2).

Complainant proved by a preponderance of the evidence³ and I found that, during

³Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ___, slip op. at 22 n.5 (Nov. 2, 2005); *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506

(continued...)

the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of \$830,728.39 for 343 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate and foreign commerce (CX 5-CX 72; Tr. 38-43). *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____, slip op. at 10-11 (Sept. 2, 2005). Thus, I reject Respondent's assertion that the amount Complainant proved and I found Respondent failed to pay its produce sellers in accordance with the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)), was approximated.

Further, I disagree with Respondent's assertion that Complainant was required to prove and I was required to find the exact amount that remained unpaid to Respondent's produce sellers. The United States Department of Agriculture's "slow-pay-no-pay" policy merely requires that I determine whether a respondent is in full compliance with the PACA within 120 days after the Hearing Clerk serves the respondent with the complaint or the date of the hearing, if that occurs first. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the

³(...continued)

U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

PACA and is not in 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 PACA case will be treated as a “no-pay” case. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in 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 PACA case will be treated as a “slow-pay” case. Full compliance requires that a respondent have paid all produce sellers in full.

The Hearing Clerk served Respondent with the Complaint on August 8, 2001.⁴ Complainant proved by a preponderance of the evidence⁵ and I found that, in March 2002, Respondent owed at least nine produce sellers listed in the Complaint \$342,906.75 for produce and, in November 2003, Complainant owed at least seven produce sellers listed in the Complaint \$166,426.18 for produce (CX 74, CX 77; Tr. 57, 64-65). *In re Baiardi Chain Food Corp.*, 64 Agric. ____, slip op. at 8, 11 (Sept. 2, 2005). Thus, Respondent was not in full compliance with the PACA within 120 days after the Hearing Clerk served Respondent with the Complaint. In accordance with the United States Department of Agriculture’s “slow-pay-no-pay” policy, this case is a “no-pay” case. Complainant was not required to prove and I was not required to find the exact number of

⁴United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 1546.

⁵See note 3.

unpaid produce sellers and the exact amount Respondent owed each produce seller in March 2002 and in November 2003 in order to determine that this case is a “no-pay” case, as Respondent contends.

Second, Respondent contends I misapprehended *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004). Respondent contends *American Banana* holds that a produce seller may opt out of the prompt payment provisions of the PACA by agreeing to extend payment terms beyond 30 days and the agreement may be oral or written and may occur before or after the produce transaction. (Respondent’s Pet. to Reconsider at 3.)

I reject Respondent’s contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) defines the term *full payment promptly* for purposes of determining violations of the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the Regulations (7 C.F.R. § 46.2(aa)(5)) provides payment for produce must be made within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records. Further, the party claiming the

existence of the agreement to use a different time for payment has the burden of proving the existence of the agreement. Respondent did not introduce any evidence to show that Respondent entered into a written agreement with the produce sellers listed in the Complaint before the transactions, which are the subject of this proceeding.

I have re-read *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004). I find *American Banana* inapposite. The Court in *American Banana* held, if a produce seller enters into a pre-transaction or post-default oral or written agreement extending the time for payment beyond the 30-day maximum allowed to qualify for coverage under the PACA trust, the produce seller loses PACA trust protection. *American Banana* offers no support for Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

For the foregoing reasons and the reasons set forth in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition to Reconsider was timely-filed and automatically stayed *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Baiardi Chain Food Corp.*,

64 Agric. Dec. ____ (Sept. 2, 2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.⁶ The date of entry of the Order in this Order Denying Petition to Reconsider is November 15, 2005.

Done at Washington, DC

November 15, 2005

William G. Jenson
Judicial Officer

⁶See 28 U.S.C. § 2344.