

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-09-0045
)
Pets Calvert Company,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 23, 2008. The Deputy Administrator 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); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company failed to make full payment promptly to 10 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of \$363,815.50 for 63 lots of perishable agricultural commodities which Pets

Calvert Company purchased, received, and accepted in interstate and foreign commerce.¹

On March 2, 2009, Pets Calvert Company filed a response to the Complaint [hereinafter Answer] in which Pets Calvert Company admitted the material allegations of the Complaint.

On October 27, 2009, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Based on Admissions and a Proposed Decision and Order. Pets Calvert Company failed to respond to the Deputy Administrator's Motion for Decision Based on Admissions and Proposed Decision and Order.

On December 22, 2009, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Admissions: (1) finding, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company failed to make full payment promptly to 10 produce sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of \$363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate commerce; (2) concluding Pets Calvert Company willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); and (3) revoking Pets Calvert Company's PACA license (ALJ's Decision and Order by Reason of Admissions at 7-8).

On March 1, 2010, Pets Calvert Company filed "Appeal Petition to the Judicial Officer" [hereinafter Appeal Petition]. On March 22, 2010, the Deputy Administrator

¹Compl. ¶ III.

filed “Response to Respondent’s Appeal to the Judicial Officer.” On June 30, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ’s Decision and Order by Reason of Admissions.

DECISION

Discussion

The PACA requires produce dealers to make full payment promptly for perishable agricultural commodity purchases, usually within 10 days after the day on which the produce is accepted, unless the parties agree to different terms prior to the purchase. (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11).) The Deputy Administrator alleges, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company violated the payment provisions of the PACA by failing to make full payment promptly to 10 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of \$363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate and foreign commerce.² Pets Calvert Company admitted the material allegations of the Complaint. Pets Calvert Company’s owner, Michael O’Neill, states: “I also take full responsibility for the 10 vendors and amount owed in your report” (Answer). The Deputy Administrator also alleges that Pets Calvert Company is an Illinois corporation that was operating under

²See note 1.

PACA license number 1975-0925 when Pets Calvert Company failed to make full payment promptly to produce sellers in violation of 7 U.S.C. § 499b(4). Pets Calvert Company admits it was operating subject to a valid PACA license. Pets Calvert Company's failure to deny or otherwise respond to the specific allegations concerning Pets Calvert Company's incorporation and PACA license number constitutes an admission of those allegations.³

A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.⁴ Based upon Pets Calvert Company's admissions and failure to deny or otherwise respond to allegations of the Complaint, I conclude there is no material issue of fact on which a meaningful hearing can be held in the instant proceeding.

The United States Department of Agriculture's sanction policy in cases in which PACA licensees have failed to make full payment promptly for produce is, as follows:

³See 7 C.F.R. § 1.136(c) ("failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation").

⁴*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating an agency may ordinarily dispense with a hearing when no genuine dispute exists).

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 the 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.

In re Scamcorp, Inc., 57 Agric. Dec. 527, 549 (1998). Pets Calvert Company states it received the Complaint on February 9, 2009.⁵ The 120-day period for compliance with the PACA expired on June 9, 2009. Pets Calvert Company makes no assertion that the produce sellers identified in the Complaint were paid in accordance with the PACA or that Pets Calvert Company achieved full compliance with the PACA within 120 days after having been served with the Complaint. Instead, Pets Calvert Company only asserts it is “in the process of getting the necessary financing and paying the old debts over time” (Answer).

Pets Calvert Company’s failure to assert it achieved full compliance with the PACA within 120 days after having been served with the Complaint makes this case a “no-pay” case. The appropriate sanction in a “no-pay” case, if the violations are flagrant or repeated, is license revocation.⁶ A civil penalty is not appropriate because limiting participation in the perishable agricultural commodities industry to financially responsible

⁵Letter from Pets Calvert Company to the Hearing Clerk dated February 28, 2009.

⁶*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

persons is one of the primary goals of the PACA and requiring a PACA violator to pay a civil penalty to the United States Treasury while produce sellers are left unpaid would thwart one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment for produce promptly.⁷

Pets Calvert Company's violations of the PACA are repeated because there was more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the time period over which the violations occurred.⁸ Pets Calvert Company's violations of the PACA are also willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved.⁹ Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by the respondent or actions undertaken with

⁷*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

⁸*See, e.g., Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.) (holding 86 transactions occurring over nearly 3 years involving over \$300,000 to be repeated and flagrant violations of the payment provisions of the PACA), *cert. denied*, 528 U.S. 1021 (1999); *Farley & Calfee v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of "repeated"); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 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).

⁹*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (1998).

careless disregard of the statutory requirements.¹⁰ Despite knowing that it did not have sufficient working capital to make full or prompt payment to produce sellers, Pets Calvert Company continued to purchase more than \$350,000 worth of produce over a time period that spanned almost 4 years. Pets Calvert Company intentionally, or with careless disregard for the payment requirements in 7 U.S.C. § 499b(4), shifted the risk of nonpayment to sellers of the perishable agricultural commodities.

Findings of Fact

1. Pets Calvert Company is a corporation incorporated and existing under the laws of the State of Illinois.
2. Pets Calvert Company's business and mailing address is 2455 S. Damen Avenue, Chicago, Illinois 60608-5231.
3. Pets Calvert Company was issued PACA license number 1975-0925 on January 10, 1974.
4. At all times material to the instant proceeding, Pets Calvert Company was a PACA licensee.

¹⁰ See, e.g., *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), cert. denied, 528 U.S. 1021 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974).

5. Pets Calvert Company failed to make full payment promptly to the 10 produce sellers identified in the Complaint in the amount of \$363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert Company purchased, received, and accepted in interstate commerce during the period August 13, 2004, through June 17, 2008.

6. Pets Calvert Company makes no assertion that the produce sellers identified in the Complaint have been paid in full or that Pets Calvert Company achieved full compliance with the PACA within 120 days after having been served with the Complaint.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over Pets Calvert Company and the subject matter involved in the instant proceeding.

2. Pets Calvert Company willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period August 13, 2004, through June 17, 2008, by failing to make full payment promptly of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of \$363,815.50 for perishable agricultural commodities that Pets Calvert Company purchased, received, and accepted in interstate commerce.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Pets Calvert Company's Request for Oral Argument

Pets Calvert Company's request for oral argument (Appeal Pet. at 7), which the Judicial Officer may grant, refuse, or limit,¹¹ is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Pets Calvert Company's Appeal Petition

Pets Calvert Company raises one issue in its Appeal Petition. Pets Calvert Company contends the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), applied by the ALJ, is improper and inappropriate, especially under current economic conditions. Pets Calvert Company asserts, if its PACA license is revoked, it will be unable to pay its creditors who are also suffering from the effects of economic recession. Pets Calvert Company urges that, instead of applying the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), I remand the instant proceeding to the ALJ for hearing to determine if Pets Calvert Company has paid its produce sellers by the date of the hearing and allow Pets Calvert Company to avoid PACA license revocation if it has paid all of its produce sellers by the date of the hearing.

PACA was designed primarily for the protection of producers of perishable agricultural commodities, most of whom must entrust their products to a buyer who may be thousands of miles away and depend for their payment upon the buyers' business

¹¹7 C.F.R. § 1.145(d).

acumen and fair dealing.¹² One of the goals of the PACA is to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution.¹³ The United States Department of Agriculture's sanction policy, set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), is to revoke the PACA license of any PACA licensee that repeatedly or flagrantly fails to make full payment promptly if the licensee cannot achieve full compliance with the PACA within 120 days after having been served with a complaint or by the date of the administrative hearing, whichever occurs first. I conclude the sanction policy articulated in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), is consistent with the goal of the PACA to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution. To allow a financially troubled PACA licensee, such as Pets Calvert Company, that cannot make full payment promptly to its produce sellers, to continue to purchase produce for an extended period of time, would shift the risk of nonpayment to these produce sellers and would not be consistent with the goal of the

¹²S. Rep. No. 84-2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; *Tom Lang Co. v. A. Gagliano Co.*, 61 F.3d 1305, 1308 (7th Cir. 1995).

¹³*Hunts Point Tomato Co. v. U.S. Dep't of Agric.*, 204 F. App'x 981, 983 (2d Cir. 2006); *Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987); *Tri-County Wholesale Produce Co. v. U.S. Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (*per curiam*); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *Marvin Tragash Co. v. U.S. Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). *See Anthony Marano Co. v. Glass*, 2007 WL 257630 (N.D. Ill. 2007) (stating the purposes of the PACA include ensuring financial stability of the entire produce industry).

PACA to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution.

I reject Pets Calvert Company's argument that economic conditions should be considered when determining whether to apply the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer has long held that business recessions are not relevant to the sanction to be imposed for failure to make full payment promptly in accordance with the PACA.¹⁴ A PACA licensee should be adequately capitalized to meet its obligations in economically depressed times as well as in good financial times.¹⁵ The economic conditions in which Pets Calvert Company finds itself provide no basis for remanding the instant proceeding to the ALJ, as Pets Calvert Company urges.

Moreover, the record indicates that Pets Calvert Company's failures to pay its produce sellers in accordance with the PACA were not caused by current economic conditions. Pets Calvert Company asserts in its Answer that its financial problems resulted from a "bad" business deal with [a] past landlord[.]"

I also reject Pets Calvert Company's argument that the detrimental effect on its creditors of a discontinuation of Pets Calvert Company's business should be considered

¹⁴*In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1483 (1988); *In re B.G. Sale's Co.*, 44 Agric. Dec. 2021, 2029-30 (1985); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 130-31 (1984); *In re Produce Brokers, Inc.* (Ruling on Certified Questions), 41 Agric. Dec. 2247, 2250-51 (1982).

¹⁵*In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 523 (1984).

when determining whether to apply the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer has long held that the effect on creditors of a forced discontinuation of a PACA licensee's business is not relevant to the sanction to be imposed for failure to make full payment promptly in accordance with the PACA:

Even where a respondent argues correctly that it would be detrimental to its creditors if it were forced to discontinue business, as a result of a license-revocation order, such arguments (frequently made) are routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by the creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country. If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of a particular respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

In re The Caito Produce Co., 48 Agric. Dec. 602, 628 (1989) (footnote omitted).¹⁶ The detrimental effect that PACA license revocation may have on Pets Calvert Company's creditors provides no basis for remanding the instant proceeding to the ALJ, as Pets Calvert Company urges.

For the foregoing reasons, the following Order is issued.

¹⁶ See also *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 142 (1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1160 (1983); *In re Bananas* (Order Denying Intervention), 42 Agric. Dec. 426, 426-27 (1983), *final decision*, 42 Agric. Dec. 588 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347, 351 (6th Cir. 1984); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

ORDER

Pets Calvert Company's PACA license is revoked. This Order shall become effective 60 days after service of this Order on Pets Calvert Company.

RIGHT TO JUDICIAL REVIEW

Pets Calvert Company 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. Pets Calvert Company must seek judicial review within 60 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 July 9, 2010.

Done at Washington, DC

July 9, 2010

William G. Jenson
Judicial Officer

¹⁷28 U.S.C. § 2344.