

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT
OCT - 7 2002
DROP BOX
United States Bankr. Ct. District
Albuquerque, New Mexico

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779 SA
Chapter 7

Debtor.

**MOTION FOR A DETERMINATION THAT THE STAY APPLIES
TO AN ADMINISTRATIVE PROCEEDING COMMENCED
BY THE UNITED STATES DEPARTMENT OF AGRICULTURE**

Yvette J. Gonzales (the "Trustee"), the duly appointed chapter 7 Trustee in this chapter 7 bankruptcy case, asks the Court to determine that the Administrative Proceeding (defined below) was commenced in violation of the automatic stay, and that prosecution of the Administrative Proceeding will violate the stay further. In addition, if the Court determines that the stay applies, and if the Administrative Proceeding is not stayed, with the consent of the Associate Deputy Administrator, Fruit and Vegetables Programs, Agricultural Marketing Service, United States Department of Agriculture (the "Associate Deputy Administrator"), pending resolution of this motion, the Trustee asks that appropriate sanctions be issued for violation of the stay.

In support of this motion, the Trustee states:

1. On September 12, 2002, the Associate Deputy Administrator filed a complaint commencing a disciplinary administrative proceeding entitled *In re Furr's Supermarkets, Inc.*, Respondent, United States Department of Agriculture, Before the Secretary of Agriculture, No. D-02-W28 (the "Administrative Proceeding"). A copy of such complaint is attached hereto as Exhibit A.

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2. Commencement and prosecution of the Administrative Proceeding violates the stay imposed under Bankruptcy Code §362(a)(1) and (a)(3).

3. Commencement and prosecution of the Administrative Proceeding is not excepted from the stay as an exercise, under Bankruptcy Code §362(b)(4), of the United States Department of Agriculture's ("USDA's") police and regulatory power. The complaint has been brought to further the USDA's pecuniary interest in collecting from Fleming Companies, Inc. ("Fleming"), and not to further a legitimate public policy to discipline Furr's or the Trustee for willfully violating the Perishable Agricultural Commodities Act, 7 U.S.C. §499a *et. seq* ("PACA").

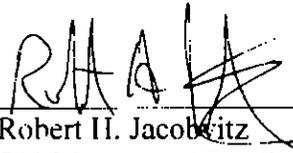
4. The only relief sought in the complaint is the publication of Furr's alleged violations of PACA in relation to a pre-petition claim against Furr's of Quality Fruit & Vegetable Company (the "Quality Fruit Claim"). No legitimate public policy is served by publishing such a notice. The Trustee is liquidating the assets of the Furr's bankruptcy estate for the benefit of creditors. Furr's has not sold any products since August 31, 2001, is not operating a business, and has no employees. The sales upon which the Quality Fruit Claim is based all took place before Furr's filed its chapter 11 bankruptcy case. Furr's sought and obtained an order on the first day of its chapter 11 case protecting PACA claimants who perfected their claims as PACA trust fund claims. To the best of the Trustee's knowledge, after Furr's filed its chapter 11 case, Furr's paid all PACA claims against it that were perfected as trust fund claims, but Quality Fruit failed to perfect its PACA claim. After Furr's commenced its chapter 11 case, Furr's was precluded under the United States Bankruptcy Code from paying the Quality Fruit Claim.

because it was a pre-petition unsecured non-priority claim, and Quality Fruit failed to perfect its claim under PACA.

5. It appears that the Associate Deputy Administrator filed the disciplinary Administrative Proceeding against Furr's not to obtain the relief sought in the complaint, but in furtherance of its seeking to hold Fleming liable for the Quality Fruit Claim as person responsibly connected with Furr's when the claim arose. See Exhibit B hereto.

WHEREFORE, the Trustee seeks a determination that the stay applies to the Administrative Proceeding, and also seeks sanctions if and to the extent appropriate if the Associate Deputy Administrator does not agree to stay the Administrative Proceeding pending resolution of this motion.

JACOBVITZ, THUMA & WALKER
a Professional Corporation

By 
Robert H. Jacobvitz
500 Marquette NW, Suite 650
Albuquerque, NM 87102
(505) 766-9272/(505) 766-9287 (fax)
Attorneys for Yvette J. Gonzales, Trustee

This certifies that foregoing was transmitted by overnight federal express, and by U.S. mail, to:

Andrew Y. Stanton
Office of the General Counsel
United States Department of Agriculture
Room 2309, Stop 1413
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1413

this 7th day of October 2002.



UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-02-028
)	
Furr's Supermarkets, Inc.,)	
)	
Respondent)	Complainant

There is reason to believe that the Respondent named herein has wilfully violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a et seq.; hereinafter "PACA"), and the Regulations issued thereunder (7 C.F.R. Part 46; hereinafter "Regulations"). Therefore, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 et seq., hereinafter "Rules of Practice"), initiates this disciplinary proceeding against Furr's Supermarkets, Inc.

I.

Section 2(4) of the PACA (7 U.S.C. §499b(4)) provides:

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; or to fail to maintain the trust as required under section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

EXHIBIT

A

II.

(a) Furr's Supermarkets, Inc. (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Delaware. Respondent's business address is 4411 The 25 Way N.E., Albuquerque, New Mexico 87109. Respondent's mailing address is P. O. Box 10267, Albuquerque, New Mexico 87184.

(b) At all times material herein, Respondent was licensed under the provisions of the PACA. License number 920759 was issued to Respondent on March 2, 1992. This license terminated on March 2, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

III.

Respondent, during the period September 29, 1998, through February 23, 2001, failed to make full payment promptly to one seller, Quality Fruit & Veg. Co., El Paso, Texas, of the agreed purchase prices, or balances thereof, in the total amount of \$174,105.05 for 910 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce. The details of these transactions are set forth below:

SELLER'S NAME & ADDRESS	NO. OF LOTS	COMMODITY	DATES ACCEPTED	DUE DATES	AMOUNT PAST DUE
Quality Fruit & Veg. Co. El Paso, TX	910	Mxd Fts & Vgs	09/14/98 to 02/08/01	09/29/98 to 02/23/01	\$174,105.05

IV.

On February 8, 2001, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §1101 et seq.) in the United States Bankruptcy Court for the District of New Mexico. This petition was designated Case No. 11-01-10779-SA. This case was converted to Chapter 7 of the Bankruptcy Code (11 U.S.C. §701 et seq.) on December 19, 2001.

V.

By reason of the facts alleged in paragraph III herein, Respondent wilfully violated Section 2(4) of the PACA (7 U.S.C. §499b(4)). The failure of Respondent to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce constitutes wilful, flagrant, and repeated violations of Section 2(4) of the PACA.

WHEREFORE, this complaint shall be served upon Respondent for the purpose of determining whether Respondent has wilfully violated the PACA. Respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Stop 9203, 1400 Independence Avenue, SW, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the PACA (7 C.F.R. §1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

The Complainant requests:

1. That unless Respondent fails to file an answer within the time allowed, or admits all the material allegations of this complaint, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the PACA; and

2. That pursuant to Section 8(a) of the PACA (7 U.S.C. §499h(a)), the Administrative Law Judge find that Respondent has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. §499b(4)), and order that the facts and circumstances of such violations be published.

Issued at Washington, D.C.

this 11th day of September 2002



Eric M. Forman
Associate Deputy Administrator
Fruit and Vegetable Programs
Agricultural Marketing Service



Andrew Y. Stanton
Attorney for Complainant
Office of the General Counsel
United States Department of Agriculture
Room 2309, Stop 1413
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1413
Telephone: (202) 720-5779

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United States
Department of
Agriculture

Marketing and
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Programs

Agriculture
Marketing
Service

P.O. Box 95456
Washington, DC
20090 5456

RECEIVED

September 29, 2002

In reply refer to
File PACA D 2292

Fleming Companies Inc.
1945 Lakewood Drive
Lewisville, Texas 75057

Gentlemen:

On September 12, 2002, a complaint was filed under the Perishable Agricultural Commodities Act (PACA), against Furr's Supermarket's Inc., Albuquerque, New Mexico, alleging that the company committed violations of Section 2(4) of the PACA from September 29, 1998 through February 23, 2001 by failing to pay \$174,105.05 to one seller for perishable agricultural commodities purchased, received and accepted in interstate commerce. A copy of the complaint, which has been served on the company, is enclosed for your reference.

We have made an initial determination that you were responsibly connected to Furr's Supermarket's Inc., at the time the company is alleged to have committed violations of the PACA, from September 1998 through February 2001. Section 1(9) of the PACA states:

The term "responsibly connected" means affiliated or connected with a commission merchant, dealer or broker as an officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person either was only nominally a partner, officer, director or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The Department's records show that you were a 35.4 stockholder of Furr's Supermarkets, Inc., from March 1991 through February 2001. Therefore, it is our initial determination that you were responsibly connected to Furr's Supermarket's Inc., during the period of the alleged violations. Under Sections 4(b) and 8(b) of the PACA, licensing and employment restrictions are placed upon individuals who were responsibly connected to a firm at the time the firm violated the PACA.

You may contest this initial determination by responding in writing to this letter and explaining in detail why the initial determination is incorrect. If you choose to file a written response to this initial determination, it will be reviewed by the Chief of the PACA Branch, who will decide whether your response warrants a change in the initial determination, and will notify you of his determination. You may appeal the Chief's determination and request a formal hearing before an administrative law judge of the United States Department of Agriculture.

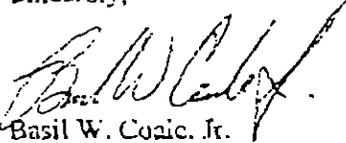


EXHIBIT
B

If you do not respond to this letter within 30 days from receipt, this initial determination will become the Department's final determination that you were responsibly connected with Furr's Supermarket's Inc., at the time of the alleged violations, and you will waive any further procedure or hearing regarding your responsibly connected status. If it is then determined that Furr's Supermarket's Inc., did violate the PACA and its license is suspended or revoked, you will be notified of the exact date when your PACA license and employment restrictions will begin.

The Rules of Practice involving responsibly connected proceedings, the PACA and the regulations are available on our website at www.ams.usda.gov/fv/paca.htm. If you do not have access to the Internet, contact us at (202) 720-6873 and we will make sure you receive paper copies of this information.

Sincerely,



Basil W. Coak, Jr.
Senior Marketing Specialist
Trade Practice Section
PACA Branch
Fruit and Vegetable Programs

Enclosure