

In re: SCARPACI BROTHERS, INC.
PACA Docket No. D-00-0014.
Decision and Order.
Filed August 6, 2001.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*), hereinafter "PACA", was initiated on April 18, 2000, by a complaint filed by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, alleging that Respondent willfully violated the PACA by failing to make full payment promptly to eighteen sellers of the agreed purchase prices in the total amount of \$599,504.49 for 134 lots perishable agricultural commodities that it purchased, received and accepted in interstate commerce during the period March 1998 through July 1999. The complaint also alleges that PACA license number 930672, which was issued to Respondent on February 17, 1993, terminated on February 17, 2000, when it was not renewed. The complaint requests that the Administrative Law Judge find that Respondent has committed willful, 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.

The complaint was served on Respondent by certified mail delivered to: (1) Stanley G. Makoroff, its Trustee in a Chapter 7 bankruptcy proceeding, and (2) Todd Scarpaci, its President. No answer to the allegations of the complaint has been filed on behalf of Respondent by Mr. Makoroff. On June 5, 2000, Todd Scarpaci filed an answer admitting that Respondent had failed to pay \$599,504.49 to its wholesalers as alleged in the complaint, but denying that Respondent's failures to pay were willful.¹ This answer neither disputes the unpaid purchase amounts and other details of the 134 transactions that were alleged in paragraph III of the complaint, or the further allegation set forth in paragraph IV of the complaint that Respondent has admitted in a bankruptcy Schedule F- Creditors Holding Unsecured

¹ Mr. Scarpaci's letter answer contains the following three statements respecting the alleged failures to make full payment promptly in the total amount of \$599,504.49:

- (1) "It is true that Scarpaci Bros was unable to make payments to wholesalers thus forcing bankruptcy and liquidation."
- (2) "Scarpaci Bros, unwillfully violated section 2(4) PACA (7 USC 499b(4)) We simply were not able to pay due to uncollectable receivables which we had no control over."
- (3) "Rich Armstrong the investigator on the case told me that what he found was what you have announced, \$599,504.49."

Non-Priority Claims, filed in *In re Scarpaci Brothers, Inc.*, Case No. 99-26153 MBM (United States Bankruptcy Court for the Western District of Pennsylvania), “that it owes 17 of the 18 sellers named in paragraph III of the complaint herein (Consolidated Services, Inc. is not listed as a creditor in Schedule F) amounts equal or greater than those alleged unpaid in paragraph III for inventory purchases made in 1998 and 1999.” Respondent admits in its answer that the chapter 11 bankruptcy it filed on August 18, 1999 was “filed involuntarily (sic) due to pressure applied on the same day thru temporary restraining order.”

A copy of the Rules of Practice which govern the conduct of these proceedings (7 C.F.R. § 1.130 - 1.151) accompanied the complaint. Respondent was required under section 1.136(b)(1) of these Rules of Practice (7 C.F.R. § 1.136(b)(1)) to clearly admit, deny, or explain each of the allegations of the complaint. Under section 1.136(c) of these Rules of Practice (7 C.F.R. § 1.136(c)) Respondent’s failure to deny the above specific allegations in its answer constitutes an admission of said allegations unless the parties have agreed to a consent decision.

Complainant filed a request that official notice be taken of documents filed by Respondent in its bankruptcy proceeding, and the bankruptcy proceeding docket sheet, and a motion with supporting memorandum seeking a decision without hearing by reason of admissions made by Respondent in its answer and in its bankruptcy petition and schedules. Based upon a careful consideration of the pleadings and precedent decisions cited by Complainant², official notice is taken of the requested bankruptcy documents and docket sheet and this decision is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

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

² See, *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) *In re Granoff’s Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), remanded on other grounds, *Veg-Mix, Inc. v. U.S. Dept. Of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987); *In re Fava & Company, Inc.*, 44 Agric Dec. 870 (1985)(decision), 46 Agric. Dec. 79 (1987)(ruling on certified question issued December 4, 1984).

received in interstate or foreign commerce by such commission merchant, or brought 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)(7 U.S.C. § 499e(c)) of this title. 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 chapter. (emphasis added).

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

(a) Whenever (a) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this act (7 U.S.C. § 499b), or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the fact 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.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

(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 agreement for time
of payment shall have the burden of proving it.

Findings of Fact

1. Scarpaci Brothers, Inc. (hereinafter, “Respondent”), is a corporation incorporated in the state of Pennsylvania. Its business address while operating was 2100 Smallman Street, Pittsburgh, Pennsylvania, 15222. Its current addresses are c/o Stanley G. Markoroff, Trustee, 1200 Koppers Building, Pittsburgh, Pennsylvania, 15219 and c/o Todd Michael Scarpaci, 122 Judith Drive, Venetia, Pennsylvania, 15317.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. License number 930672 was issued to Respondent on February 17, 1993. This license terminated February 17, 2000, when it was not renewed.

3. Respondent, during the period March 1998 through July 1999, on or about the dates and in the transactions set forth in paragraph III of the complaint, failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$599,504.49 for 134 lots of perishable agricultural commodities that were purchased, received, and accepted in interstate commerce.

4. On August 18, 1999, Respondent filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101) in the United States Bankruptcy Court for the Western District of Pennsylvania. The Chapter 11 proceeding, *In re Scarpaci Brothers, Inc.*, Case No. 99-26153 MBM, was converted to a Chapter 7 proceeding on October 25, 1999.

5. Respondent filed a bankruptcy schedule, Schedule F- Creditors Holding Unsecured Non-Priority Claims, in which Respondent admitted that it owes 17 of the 18 sellers named in paragraph III of the complaint herein (Consolidation Services, Inc. is not listed as a creditor in Schedule F) amounts equal or greater than those alleged unpaid in paragraph III for inventory purchases made in 1998 and 1999.

6. By signing the Declaration that accompanied Respondent’s bankruptcy schedules, Respondent’s president Todd M. Scarpaci declared under penalty of perjury that Respondent owed fixed and undisputed amounts totaling \$573,089.73 to these 17 produce sellers as of September 1, 1999. The amounts alleged unpaid by Complainant in paragraph III of the complaint and admitted unpaid by Respondent’s Schedule F listing to these 17 produce firms are as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Schedule F</u>
Stanley Orchard Sales, Inc.	\$26,290.08	\$26,290.00
Ron Funkhouser Sales, LTD	5,040.00	5,040.00

Wilkinson-Cooper Produce, Inc.	14,705.65	15,032.00
Walden-Sparkman, Inc.	10,650.00	10,650.00
Earl Roy Produce	8,634.32	12,594.00
Mieze Jet Air Sales, Inc.	238,764.30	253,776.00
Lane Packing Company	8,414.25	10,433.00
Main Street Produce, Inc.	10,030.83	10,030.00
C H Robinson	9,386.70	12,586.00
Williams Farm, PT.	77,822.05	78,535.00
Gallop Farms	2,360.00	2,360.00
Ohio Valley Mushroom Farm	386.75	386.00
Hearty Fresh	28,475.00	32,356.00
Thomas Produce Co.	34,802.50	38,348.00
Action Produce Company	62,171.25	84,325.00
Thomas B. Smith Farms	21,188.00	21,188.00
Lewis Taylor Farms, Inc.	<u>14,399.00</u>	<u>14,399.00</u>
	\$573,089.73	\$628,328.00

7. Respondent has admitted by Exhibit A to the Voluntary Petition filed in its bankruptcy proceeding that it had total assets of \$254,000,00 and total liabilities of \$1,004,398.00 as of August 30, 1999. Included in Respondent's total assets were accounts receivable with a current market value of \$180,000.00.

8. Respondent has admitted by its answer that the chapter 11 bankruptcy it filed on August 18, 1999 was "filed involuntarily (sic) due to the pressure applied on the same day thru temporary restraining order."

Conclusions

Respondent's admitted failures to make full payment promptly to 18 sellers for purchases of 134 lots of perishable agricultural commodities in the amount of \$599,504.49 in interstate commerce during the period March 1998 through July 1999 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Under the controlling decisions of the Secretary of Agriculture, Respondent's admission that \$599,504.49, as specified by the complaint, remains unpaid to eighteen sellers of perishable agricultural commodities warrants a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and an order that the facts and circumstances of its violation be published. Although the issuance and publication of a finding that Respondent has committed flagrant and repeated violations of section 2(4) of the PACA does not require a determination of willfulness, Respondent's violations were clearly willful. Respondent's denial that its violations of section 2(4) of the PACA were willful is entirely without merit as a matter of law since the violations occurred over a sixteen

month period during which Respondent must have known that it had inadequate working capital to make full payment promptly. Therefore, the full finding sought by the complaint, that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) should be made and published without hearing.

The complaint alleges, and we conclude based upon Respondent's admissions, that during the period March 1998, through July 1999, Respondent failed to make full payment promptly to 18 sellers of agreed purchase prices in the total amount of \$599,504.49 for 134 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. The transaction details were set forth in a two page table in paragraph III of the complaint. The specific commodities listed were all perishable agricultural commodities under the PACA.³ The eighteen sellers named were either shown to be located in another state or, if located in Pennsylvania, to have sold commodities whose out of state origins were expressly set forth. The date(s) on which the 134 lots were accepted, and the date(s) on which payments were due under the PACA were also set forth over a sixteen month plus period by specific seller. Finally, the total amount past due and unpaid was set forth for each seller. Respondent has not denied the truth and accuracy of the specific facts alleged in this paragraph III table. Respondent has expressly acknowledged in its answer: (1) that it was unable to make payment to its wholesalers; and (2) that the total amount alleged as past due and unpaid, \$599,504.49, was the same amount that the agency investigator, Rich Armstrong, identified as being unpaid during the investigation that he conducted. Respondent has not disputed that the 134 payment violations occurred as alleged, but only that these violations were willful. Respondent has further failed to deny, and, therefore, has admitted that it filed a schedule of unsecured nonpriority claims in its bankruptcy proceeding that identifies 17 of the 18 sellers listed in paragraph III of the complaint as being owed amounts equal or greater than the unpaid and past due amounts set forth in paragraph III. This admission, and the admissions made in Respondent's bankruptcy documents of which official notice has been taken pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143), establish that the \$573,089.73 produce debt that Respondent owes to these seventeen unpaid sellers for 124 transactions⁴ is part of the acknowledged unsecured debt for which Respondent has sought relief from the Bankruptcy Court as a non-operating Chapter 7 debtor. By so scheduling this produce debt, Respondent has implicitly asserted that there is no prospect of full payment of this debt at any future date.

³ Mixed fruits & vegetables, onions, watermelons, peaches, sweet potatoes, and mushrooms were listed.

⁴ The \$26,414.76 that Consolidation Services, Inc. is owed for 10 lots of watermelons was not scheduled as an acknowledged unsecured debt on Respondent's bankruptcy Schedule F.

Respondent has further admitted in the bankruptcy documents that it incurred unsecured debts totaling \$813,229, most of which is shown on its Schedule F as being owed to 17 of the 18 unpaid sellers named in the complaint. This produce debt was incurred while Respondent was in a seriously impaired financial condition.

Respondent filed a voluntary petition under chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 1101) that was converted to a Chapter 7 case on October 25, 1999. Respondent listed its produce debts in its Schedule F - Creditors Holding Unsecured Nonpriority Claims as debts incurred “for the purchase of inventory in 1998” or “for the purchase of inventory in 1999” and indicated that these debts were fixed and undisputed by failing to mark each scheduled debt as “c” (contingent), “u” (unliquidated) or “d” (disputed) as is required for contested claims when completing this Official Bankruptcy Form. See West’s Bankruptcy Code, Rules and Forms, 887 (1996 Edition). Respondent’s president, Todd M. Scarpaci, declared under penalty of perjury that the information provided in Respondent’s Voluntary Petition was true and correct. He declared under penalty of perjury that the Debtor’s Schedules were true and correct to the best of his knowledge, information, and belief, in his Declaration Concerning Debtor’s Schedules, on September 1, 1999.⁵

Respondent has admitted in bankruptcy pleadings of which the Secretary may take official notice that as of September 1, 1999, it owed fixed amounts that total \$573,089.73 to 17 of the 18 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$599,504.49 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 43 creditors named are 31 firms whose undisputed claims are noted as having been incurred for the purchase of inventory in 1998 or 1999. Seventeen of these 31 produce firms are listed as unpaid sellers in the complaint. A comparison with the table set forth in paragraph III of the complaint reveals that the amounts acknowledged as owed by Respondent are identical (except for rounding down to the last full dollar) for eight of the produce sellers, and slightly or considerably higher for nine of the produce sellers. One firm alleged to be unpaid for \$26,414.72 in the complaint, Consolidation Service, Inc., is not identified as a creditor on Schedule F. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent with respect to the other seventeen produce firms are set forth in Finding of Fact No. 6, *supra*. Respondent has admitted by this Schedule F listing, that it has failed to pay these seventeen sellers at least \$573,089.73. A decision and order that relies upon such admissions

⁵ Official notice was not requested and taken of the original petition that Respondent’s answer and the bankruptcy docket report acknowledge was filed on August 18, 1999, but of the replacement petition that was executed on September 1, 1999.

may be issued in disciplinary proceedings brought under the PACA.⁶

We conclude that Respondent is not entitled to a hearing on its denial that its admitted failures to pay were willful. Respondent has admitted in its answer failing to pay for 134 purchases of perishable agricultural commodities totaling \$599,504.49 made in interstate commerce from 18 sellers over a 16 month period. Respondent has confirmed this produce debt by admitting in its bankruptcy Schedule F that undisputed amounts totaling \$573,089.73 are owed to 17 of these 18 produce sellers. The dollar amount, the number, and the lengthy time period make these payment violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) willful, repeated, and flagrant, as a matter of law. The violations are “repeated” because repeated means more than one. The violations are “flagrant” because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.⁷ The fact that they occurred over an extended period during which Respondent must have known that it did not possess sufficient funds to comply with the payment requirements of the PACA establishes that the violations were willful. It is not necessary to find that Respondent made any of the purchases alleged with a deliberate intent not to pay for such purchases in order to conclude that its actions were willful. Respondent recklessly and negligently continued to make new purchases while being many months past due in making payment for prior purchases subject to the Act. Respondent’s answer acknowledges that Respondent continued to make produce purchases until forced

⁶See, *In re Kirby Produce Company*, 58 Agric. Dec. 1011(1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) ; *In re Granoff’s Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *remanded on other grounds, Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987). [This footnote was cited as FN 4 - Editor]

⁷See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 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); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972)(finding 26 violations involving \$19,059.08 occurring over 2 1/2 months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110,115 (2d Cir. 1967)(concluding that because the 295 violations did not occur simultaneously, they must be considered “repeated” violations within the context of the PACA and finding 295 violations to be “flagrant” violations of the PACA in that they occurred over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), *aff’d*, 1997 WL 829211 (2d Cir. December 19, 1997), court decision printed at 56 Agric. Dec. 1790 (1997), (Havana’s failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo’s failure to pay 6 sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least \$238,374.08 over a 11 month period were “willful, repeated, and flagrant, as a matter of law”).

to seek relief in bankruptcy after one of its creditors obtained a temporary restraining order on August 18, 1999. Such conduct is willful.

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.⁸ A more stringent definition of the word “willfulness,” as that word is used in 5 U.S.C. § 558(c), has been followed in the Fourth and Tenth Circuits. A willful violation has been defined in these Circuits as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed.⁹ Even under this more stringent definition, the Department’s Judicial Officer has determined that payment violations similar to the violations established by Respondent’s admissions would still be willful because of a gross neglect of the express provisions of the PACA known by Respondent to require prompt payment. *See, In re Five Star Food Distributors, Inc., supra*, at 897, where the Judicial Officer explained:

Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 11 month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent’s violations are, therefore, willful. *In re Hogan Distrib., Inc., supra*, 55 Agric. Dec. at 630; *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff’d*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic*

⁸ *See, Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 560 (1991); *Finer Foods Sales Co. v. Block, supra*, 708 F.2d at 777-78; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1991); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Five Star Food Distributors, Inc., supra*, at 896; *In re Havana Potatoes of New York Corp., and Havpo, Inc., supra*, at 1244.

⁹ *See, Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); and *Capital Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965).

Produce Co., 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.)(Table), *cert. denied*, 439 U.S. 819 (1978).

The situation in the present proceeding is virtually identical to that in *Five Star*. Respondent reported in Exhibit A to its Voluntary Petition having total assets of \$254,000.00 and total liabilities of \$1,004,398.00 as of August 30, 1999. Respondent has reported in bankruptcy Schedule B-Personal Property that the “accounts receivable of the business” have a current market value of \$180,000.00. Respondent must have known at the time that it made most of the purchases of perishable agricultural commodities for which it has failed to pay that its financial condition was so impaired as to preclude compliance with the “make full payment promptly” requirement of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Under this section of the PACA and the substantive regulations that define prompt payment, payment for produce must be made within 10 days after the day on which the produce is accepted, unless there are written payment terms, entered into prior to the transaction, extending the time for payment. Respondent has not disputed in its answer, and, therefore, has admitted that payment was due in the transactions involved in this proceeding on the payment due dates asserted in the complaint, which dates were either 10 days after the relevant delivery dates or such other number of days as was set forth in writing on the unpaid sales invoices. By scheduling some \$573,089.73 of this interstate produce debt as unsecured debt in its Chapter 7 bankruptcy proceeding, Respondent has acknowledged that funds do not exist for the full payment of these debts. Accordingly, Respondent willfully violated section 46.2(aa) of the regulations which provides:

‘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. Insofar as pertinent here, ‘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 agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5),(11)

The Department's Judicial Officer has held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and has placed the burden on the Respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985). The United States Court of Appeals for the District of Columbia Circuit in upholding the Department's reliance upon admissions made in a bankruptcy proceeding has expressly noted that the Department's view in *Fava* accorded with its rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. See *Veg-Mix, Inc., et al. v. USDA*, 83 F.2d 601 (1987), *reprinted* at 55 Agric. Dec. 537, 542 (1996). Respondent's assertion that it "unwilfully violated section 2(4) of the PACA" because of "uncollectable receivables which we had no control over" does not establish the existence of a genuine dispute requiring the holding of a hearing in this proceeding. A similar denial of willfulness was rejected without hearing in *Peter DeVito Company, Inc.*, 57 Agric. Dec. 830 (1997). The Administrative Law Judge concluded that:

Respondent's failures to pay for numerous and substantial produce obligations, which respondent has acknowledged as liquidated, undisputed and non contingent debts, within the time limits established by a substantive regulation duly promulgated under the PACA are wilful as a matter of law, and respondent's denials in its answer that "it willfully failed to promptly pay the prices therefor" and "it wilfully and flagrantly violated Sec. 2(4) of the P.A.C.A. (7 U.S.C. sec. 499b(4))" do not establish the existence of a *bona fide* dispute as to material facts that would require the holding of a hearing pursuant to the Rules of Practice in the proceeding.

57 Agric. Dec. at 835 (1997)

Respondent has sought to place the blame for its "unwilful," repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) on the existence of uncollectible receivables. The financial difficulties excuse that Respondent has asserted, even if established to be factually accurate, would also have no material effect on the determination of proper sanction in this proceeding. It has been the Department's sanction policy since 1991 to examine the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, as set forth in *In re S.S. Linn County, Inc.*, 50 Agric. Dec. 476 (1991). Yet, the adoption of this sanction policy has not altered the doctrine in *In re Caito Produce Co.*, 48 Agric. Dec. 602 (1989) that because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a

particular case are not sufficient to prevent a license revocation, or a substitute finding of willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and publication of the facts and circumstances of the violation in cases where the license has terminated, where there have been repeated failures to pay a substantial amount of money over an extended period of time. *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622 (1996); and see *Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. 701 (1995), at 712, where the Judicial Officer has noted that “even though a respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a respondent’s failure to pay from being flagrant or willful.”

The Judicial Officer recently reaffirmed the Department’s policy of dispensing with a hearing and relying upon clear admissions made by a Respondent in other court proceedings, noting that the undisputed facts so admitted need not prove all the allegations in the complaint. In this case, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999), the same finding that Respondent’s failures to make full payment promptly constituted willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) would have been issued unless the proven violations had been determined to be *de minimis*. *Id.* at 1025-27.

Respondent does not currently have a valid PACA license. As a result, the proper sanction for its admitted violations is a finding that it committed willful, flagrant and repeated violations of section 2(4) of the PACA and an order that the facts and circumstances of its violations be published. See, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999); *In re H. Schnell & Company, Inc.*, 58 Agric. Dec. 1002 (1999); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re National Produce Co., Inc.*, 53 Agric. Dec. 1622, 1626 (1964). A civil penalty is not appropriate in lieu of a finding of the commission of willful, flagrant and repeated violations when, as herein, a Respondent has not made full payment of its produce obligations. *In re H. Schnell & Company, Inc.*, *supra* at 1010-11. A civil penalty is never appropriate in “no pay” cases. *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 570-71 (1998). Accordingly, the following Order is issued.

Order

Respondent Scarpaci Brothers, Inc. has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances set forth herein shall be published.

This order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became effective October 6, 2001 – Editor]

