

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) **[PACA-D]**
) **Docket No. 10-0232**
Lenny Perry's Produce, Inc.)
) **Decision and Order**
Respondent) **on the Written Record**

Appearances:

Charles L. Kendall, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant (AMS); and

Robert R. Radel, Esq., Buffalo, NY, for the Respondent (Lenny Perry's Produce).

1. The Complaint, filed on April 15, 2010, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a -§499t) (herein frequently the "PACA").

Parties and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant").

3. The Respondent is Lenny Perry's Produce, Inc., a corporation registered in the State of New York.

4. The Complaint alleges that the Respondent, Lenny Perry's Produce, Inc. (herein frequently "Lenny Perry's Produce" or "Respondent"), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay 30 produce sellers for \$534,645.19 in produce purchases during 2007-2008, as more particularly described in Appendix A to the Complaint. The Complaint alleges that Lenny Perry's Produce willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA. 7 U.S.C. § 499b(4).

5. On behalf of Respondent Lenny Perry's Produce, Inc., which ceased business operations in October 2008, its counsel, Robert R. Radel, Esq., filed a response to the Complaint on May 13, 2010, asserting among other things that all proceedings against Lenny Perry's Produce are stayed by bankruptcy proceedings and the order entered in September 2009 by a United States District Judge for the Western District of New York.

Discussion

6. AMS filed, on October 14, 2011, a Motion entitled "Complainant's Motion for a Decision Without Hearing by Reason of Default or for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued." *See* 7 C.F.R. § 1.139. Lenny Perry's Produce responded to AMS's Motion on November 1, 2011. Complainant's Reply was filed on December 9, 2011.

7. Counsel for Lenny Perry's Produce, Robert R. Radel, Esq., has fought valiantly for the status quo in this case. Mr. Radel insists that any determination I would now make should not be made, because the number of PACA creditors and the amount of PACA claims will be determined elsewhere, in the U.S. District Court. Mr. Radel states, "The purpose of the Respondent's corporate chapter 7 bankruptcy filing was to provide a process

and procedure for the submission of claims, the liquidation of assets, and the payment of claims, specifically including any PACA claims.” *See* Response, filed November 1, 2011 by Lenny Perry’s Produce. [Mr. Radel represents Lenny Perry’s Produce not only here, but also in the bankruptcy. Mr. Radel makes clear that at the time of filing bankruptcy, Lenny Perry’s Produce had assets and accounts receivable worth \$435,532.96.] Among the defenses raised in the response to the Complaint filed on May 13, 2010, Mr. Radel included:

“Some or all of the sellers listed in Appendix A to the Complaint never provided the commodities listed therein” and

“The allegations in the Complaint are barred, in part or in whole, by release, payment, modification, and/ or award as to some or all of the sellers listed in Appendix A of the Complaint”.

8. I see Mr. Radel’s point. What I have determined to do here, is to distinguish, among the claims from the Schedule F submitted by Lenny Perry’s Produce in bankruptcy, those that match Appendix A attached to the Complaint, that show **no** Setoff to the claim, and that do **not** show “Disputed” in the appropriate column. These are the claims that are admitted, in Lenny Perry’s Produce’s Schedule F; *see* paragraph 18 for the bolded, underlined dollar amounts. What I decide here has no impact on the work being done in the U.S. District Court and in bankruptcy. Whether any of the produce sellers in Appendix A attached to the Complaint is eventually paid-in-full; or any is eventually paid nothing, my decision here would not change; consequently there is no reason for me to wait to decide. Upon careful consideration, AMS’s Motion is granted in part, and I issue this Decision and Order on the Written Record without further hearing or procedure.

9. Section 2(4) of the PACA requires licensed produce dealers to make “full payment promptly” for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).¹ 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.” *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998).²

10. The Department’s policy in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

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).

11. Lenny Perry’s Produce’s inability to assert that it has achieved full compliance with the PACA within 120 days³ of having been served with the Complaint makes this a “no-

¹ *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining “full payment promptly”).

² *See also, In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (decision without hearing by reason of admissions).

³ The Complaint was served April 19, 2010; to this day (in December 2011), undisputed claims remain undecided and unpaid, of fruit and vegetable sellers listed as creditors in Lenny Perry’s Produce’s bankruptcy. *See* Schedule F, attached to Complainant’s Reply filed December 9, 2011.

pay” case. *See Scamcorp*, 57 Agric. Dec. at 549. The appropriate sanction in a “no-pay” case where the violations are flagrant and repeated is license revocation. *See id.* A civil penalty is not appropriate because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA”, and it would not be consistent with the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id.*, at 570-71.

12. Lenny Perry’s Produce intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *See id.*, at 553.

13. Where there is no longer a valid license to revoke, the appropriate sanction in lieu of revocation is a finding of willful, flagrant and repeated violations of the PACA and publication of the facts and circumstances of the violations. *See In re: Furr’s Supermarkets Inc.*, 62 Agric. Dec. 385, 386-387 (2003).

Findings of Fact

14. Lenny Perry’s Produce, Inc. (Respondent) is a corporation registered in the State of New York, which ceased business operations in October 2008.

15. The mailing address of Lenny Perry’s Produce, Inc. is in care of its counsel, Robert R. Radel, Esq., Buffalo, NY.

16. Pursuant to the licensing provisions of the PACA, Lenny Perry’s Produce, Inc. was issued license number 20040735 on April 29, 2004; the license terminated on April 29, 2009.

17. Official notice is taken of docket entry 16 in bankruptcy case 1-09-10297, in the United States Bankruptcy Court for the Western District of New York, a true and correct copy of which is attached to Complainant's Reply filed December 9, 2011.

18. In its bankruptcy filing on May 4, 2009, Lenny Perry's Produce, Inc. admitted⁴ that it had not paid:

(1) \$3,000.00 that it had owed to "J&J Produce", Loxahatchee, FL, since 2007. This, more probably than not, is item 1 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller "J & J Produce, Inc.", Loxahatchee, FL.

(2) \$37,466.00 that it had owed to "Red Isle Produce Co. Ltd., Charlottetown, PEI C1E 2A1, Canada", since 2008. This, more probably than not, is item 2 of Appendix A attached to the Complaint, concerning potatoes, bought from the produce seller "Red Isle Produce Co. LTD, Charlottetown, PE, CN".

(3) \$23,713.37 that it had owed to "Shipping Point Marketing", Phoenix, AZ, since 2008. This, more probably than not, is item 3 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from "Shipping Point Marketing, Inc.", Phoenix, AZ.

(4) \$3,766.75 that it had owed to "Thruway Produce of Florida", Deerfield Beach, Florida, since 2008. This, more probably than not, is item 4 of

⁴ See Schedule F, attached to Complainant's Reply filed December 9, 2011.

Appendix A attached to the Complaint, concerning mixed vegetables, bought from “Thruway Produce of Florida, Inc.”, Deerfield Beach, FL.

(5) **\$29,298.36** that it had owed to Eagle Fruit Traders LLC, Wilmington, MA, since 2008. This is item 5 of Appendix A attached to the Complaint, concerning mixed fruit.

(6) \$7,246.00 claimed by I Love Produce LLC, Kelton, PA, incurred 2008. This is item 6 of Appendix A attached to the Complaint, concerning mixed vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(7) **\$2,200.00** that it had owed to Nash Produce Company, Inc., Nashville, NC, since 2008. This is item 7 of Appendix A attached to the Complaint, concerning sweet potatoes.

(8) \$5,261.45 claimed by Crown Harvest Produce Sales LLC, Plant City, FL, incurred 2008. This is item 8 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(9) **\$3,951.00** that it had owed to Wendell Roberson Farms, Tifton, GA, since 2008. This, more probably than not, is item 9 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from “Wendell Roberson Farms, Inc.”, Tifton, GA.

(10) **\$13,652.50** that it had owed to “Exeter Produce, Exeter, Ontario N0M 1S3 Canada”, since 2008. This, more probably than not, is item 10 of

Appendix A attached to the Complaint, concerning mixed vegetables, bought from “Exeter Produce & Storage Co. LTD, Ontario, CN”.

(11) \$5,999.30 that it had owed to Syracuse Banana, Syracuse, NY, since 2008. This, more probably than not, includes the \$4,428.50 in item 11 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables.

(12) \$2,800.00 that it had owed to “Brooks Tropicals Inc.”, Homestead FL, since 2008. This, more probably than not, is item 12 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller “Brooks Tropical LLC”, Homestead, FL.

(13) \$56,000.00 claimed by Weis-Buy Farms, Inc., Fort Myers, FL, incurred 2008. This is item 13 of Appendix A attached to the Complaint, concerning mixed vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(14) \$4,843.70 claimed by “Pismo Oceano Vegetable Exchange”, Oceano, CA, incurred 2008. This, more probably than not, is item 14 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller “Prismo-Oceano (sic) Vegetable Exchange”, Oceano, CA. THIS CLAIM IS DISPUTED (Schedule F).

(15) \$34,474.38 claimed by Dean Tucker Farms Produce Inc., Sumner, GA, incurred 2008. This is item 15 of Appendix A attached to the Complaint, concerning mixed fruit. THIS CLAIM IS DISPUTED (Schedule F).

- (16) **\$21,871.50** that it had owed to Burch Farms, Faison, NC, since 2008. This is item 16 of Appendix A attached to the Complaint, concerning mixed vegetables.
- (17) \$6,652.60 claimed by Pioneer Growers Cooperative, Belle Glade, FL, incurred 2008. This is item 17 of Appendix A attached to the Complaint, concerning mixed vegetables. THIS CLAIM IS DISPUTED (Schedule F).
- (18) \$117,021.25 claimed by John B. Ordille, Inc., Hammonton, NJ, since 2008. This is item 18 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables. THIS CLAIM IS DISPUTED (Schedule F).
- (19) **\$2,120.00** that it had owed to Wilson Family Farm, LTD, Saint Augustine, FL, since 2007 (or 2008). This is item 19 of Appendix A attached to the Complaint, concerning potatoes.
- (20) \$640.00 claimed by McDaniel Fruit Co., Fallbrook, CA, incurred 2008. This is item 20 of Appendix A attached to the Complaint, concerning avocados. THIS CLAIM IS DISPUTED (Schedule F).
- (21) **\$14,602.50** that it had owed to Kenneth Alexander Produce Sales, LLC, Vardaman, MS, since 2008. This is item 21 of Appendix A attached to the Complaint, concerning potatoes.
- (22) \$45,557.42 claimed by “Jackson’s Farming Company”, Autryville, NC, incurred 2008. This, more probably than not, is item 22 of Appendix A attached to the Complaint, concerning mixed fruit, bought from the produce

seller “Jackson Farming Co.”, Autryville, NC. THIS CLAIM IS DISPUTED (Schedule F).

(23) \$33,931.75 that it had owed to “Pier 27, Holland Landing, Ontario L9N 1P6, Canada”, since 2008. This, more probably than not, is item 23 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller “Pier 27 Produce, Ontario, CN”.

(24) \$2,407.00 that it had owed to “Fortune Growers”, Hoffman Estates, IL, since 2008. This, more probably than not, is item 24 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller “Fortune Growers, LLC”, Hoffman Estates, IL.

(25) \$875.00 that it had owed to “Turlock Fruit”, Turlock, CA, since 2008. This, more probably than not, is item 25 of Appendix A attached to the Complaint, concerning honeydews, bought from the produce seller “Turlock Fruit Co.”, Turlock, CA.

(26) \$17,767.25 that it had owed to Centre Maraicher, Sainte Clotilde Quebec J0L 1N0 Canada, since 2008. This is item 26 of Appendix A attached to the Complaint, concerning mixed fruit & vegetables.

(27) \$26,636.00 that it had owed to “Wings Landing Farms, Preston, MD, since 2008. This, more probably than not, is item 27 of Appendix A attached to the Complaint, concerning mixed fruit, bought from the produce seller “Wings Landings Farms”, Preston, MD.

(28) \$7,878.91 that it had owed to Frank Minardo Inc., Mesa AZ, since 2008. This is item 28 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables.

(29) \$3,985.00 claimed by “Top Trellis”, North East, PA, incurred 2008. This, more probably than not, is item 29 of Appendix A attached to the Complaint, concerning grapes, bought from the produce seller “Top Trellis, Inc.”, North East, PA. THIS CLAIM IS DISPUTED (Schedule F).

(30) \$997.00 claimed by James Desiderio Inc., Buffalo, NY, incurred 2008. This, more probably than not, includes the \$597.00 in item 30 of Appendix A attached to the Complaint, concerning mixed fruit & vegetables. THIS CLAIM IS DISPUTED (Schedule F).

19. Of the 30 entries in paragraph 18, the 11 DISPUTED claims are, with respect to this proceeding only, dismissed with prejudice. The 19 remaining entries, for which Respondent Lenny Perry’s Produce, Inc. has admitted liability in its bankruptcy filings, prove that Lenny Perry’s Produce, Inc. failed to make full payment promptly to 19 of the 30 produce sellers listed in paragraph III of the Complaint (referencing Appendix A), for \$252,366.39 of perishable agricultural commodities that Lenny Perry’s Produce purchased, received, and accepted in the course of interstate and foreign commerce in 2007 and 2008.

Conclusions

20. The Secretary of Agriculture has jurisdiction over Lenny Perry’s Produce, Inc. and the subject matter involved herein.

21. Lenny Perry's Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during 2007 and 2008, by failing to make full payment promptly of the purchase prices, or balances thereof, for \$252,366.39 in fruits and vegetables, all being perishable agricultural commodities, that Lenny Perry's Produce, Inc. purchased, received, and accepted in the course of interstate and foreign commerce.

Order

22. Lenny Perry's Produce, Inc. is found to have committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

23. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

24. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order on the Written Record shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 16th day of December 2011

s/ Jill S. Clifton

Jill S. Clifton
Administrative Law Judge

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APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the 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. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]