

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 10-0454

In re: Americe, Inc.,  
d/b/a The Perimeter Group

Respondent

Appearances: Jonathan D. Gordy, Esquire, Office of the General Counsel, United States  
Department of Agriculture, Washington, DC, for the Complainant  
Robert Golub, for the Respondent

**Decision and Order**

**Preliminary Statement**

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151). Robert C. Keeney, the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding by filing a Complaint on September 29, 2010, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 11 sellers of the agreed purchase prices, or the balance of those prices in the total amount of \$751,682.54 for 53 lots of perishable agricultural commodities which it purchased, received and accepted, and seeking that the facts and circumstance of the violation be published.

Respondent filed a timely Answer to the Complaint and the parties were directed by

Order entered on December 16, 2011 to file witness and exhibit lists with the Hearing Clerk and to exchange exhibits. Only the Complainant complied with that Order and the matter was set for hearing to commence on April 24, 2012 in the United States Department of Agriculture Courtroom, Washington, DC. The Complainant was represented by Jonathan D. Gordy, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. Pursuant to its request, the Respondent's representative, Robert Golub participated by telephone. The Complainant called two witnesses and introduced 16 exhibits. The Respondent's representative was the only witness for the Respondent and no exhibits were proffered on the Respondent's behalf.

Following the hearing, the parties were afforded the right to submit post hearing briefs. The Complainant submitted a brief; however, none was received from the Respondent. On the basis of all of the evidence presented, the following Findings of Fact, Conclusions of Law and Order will be entered.

### **Discussion**

In its Answer, Respondent indicated unforeseen and uncontrollable circumstances precluded timely payment and that at no time was its failure to pay intentional and accordingly was not willful is without merit.

The evidence reflects that in September of 2008 after receiving several written reparation complaint and receiving information that Respondent was ending its operations, Senior Marketing Specialist Ivelisse Valentin conducted an on-site investigation of Respondent's operation.<sup>1</sup> T-15-16. Although Respondent's operations and computer systems were no longer operational, and much of the information previously requested by facsimile request in advance of

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<sup>1</sup> Valentin had conducted a prior investigation of Respondent in 2007.

her arrival in Georgia was no longer available, Valentin was able to collect a list of unpaid creditors from Respondent. Using the list, she contacted the sellers on the list and collected invoices reflected in Exhibits CX-4 through 15 and verified that the amounts listed in paragraph III of the Complaint were accurate. T-26. Valentin also discussed the list with the Respondent's former Comptroller, John Free. T-20. At the hearing, Robert Golub stipulated to the admissibility of the invoices and that the amounts listed in the Complaint were consistent with the list that he had provided Ms. Valentin. T-27-28. Following the filing of the Complaint in this action, Valentin called the unpaid vendors again to reconfirm that the amounts listed were still accurate. T-30-31.

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 a careless disregard of statutory requirements. *In re: Ocean View Produce, Inc.*, 68 Agric. Dec. 594 (2009). Accordingly, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629-630 (1996). Willfulness is established in this action as Respondent despite having a clear statutory requirement to make full and prompt payment withheld full and prompt payment from 11 sellers from whom it purchased, received and accepted perishable agricultural commodities in the course of or in contemplation of interstate and foreign commerce.

Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered.

### **Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of Delaware. CX-1. Respondent ceased all business operations sometime in the fall of 2008. T-19, 41. Respondent's

business address and mailing address was in Roswell, Georgia.

2. Until its license was terminated for failure to pay the required annual fee, Respondent was licensed under the provisions of the PACA. License No. 19900753 was issued to Respondent on March 2, 1990. The license terminated on March 2, 2008 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee. CX-1, T-13.

3. Respondent, during the period of December 1, 2006 through December 14, 2007, on or about the dates and in the transactions set forth in paragraph III of the Complaint, incorporated herein by reference, failed to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$751,682.54 for 53 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. T-27 &-28.

4. Respondent further sold this produce in interstate commerce to customers including Wal-Mart, Quality Food Stores, and Save-A-Lot stores. T-38.

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

### **Order**

1. A finding is made that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances set forth above, shall be published.

2. This decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to these proceedings within 30 days after

service as provided in sections 1.139 and 1.145 of the Rules of Practice, 7 C.F.R. § 1.139, 1.145.

Copies of this Decision and Order shall be served upon the parties.

August 1, 2012

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**Peter M. Davenport**  
Chief Administrative Law Judge

Copies to: Jonathan D. Gordy, Esquire  
Robert Golub