

AGRICULTURE DECISIONS

Volume 75

Book Two

Part Three (PACA)

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

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JULY – DECEMBER 2016

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DEPARTMENTAL DECISIONS

In re: PARADISE CORNER, LLC.

Docket No. 14-0098.

Remand Order.

Filed October 21, 2016.

**PACA-D – Administrative procedure – Appeal to Judicial Officer – Appeal petition,
requirements of – Petition to reopen hearing – Remand.**

Christopher P. Young, Esq. for Complainant.

Tony Liu for Paradise Corner, LLC.

Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

Order entered by William G. Jenson, Judicial Officer.

REMAND ORDER

Procedural History

Administrative Law Judge Jill S. Clifton [ALJ] issued *Paradise Corner, LLC*, PACA-D Docket No. 14-0098, 2016 WL 5718453 (U.S.D.A. Aug. 19, 2016) (Decision and Order on the Written Record). On September 19, 2016, Paradise Corner, LLC [Paradise Corner], filed a letter addressed to the ALJ captioned “An Appeal to Docket 14-0098.” Attached to the letter are copies of twenty bills of lading and a copy of a letter dated April 19, 2016, from Andrew Y. C. Lee to Cheung Chau Trading, Inc. The Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [Deputy Administrator], failed to respond to Paradise Corner’s September 19, 2016, filing, and on October 17, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration of Paradise Corner’s September 19, 2016, filing.

Discussion

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The rules of practice applicable to this proceeding¹ set forth requirements for an appeal petition, as follows:

§ 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.

7 C.F.R. § 1.145(a). Paradise Corner's September 19, 2016, filing does not identify any error by the ALJ; does not identify any portion of the ALJ's August 19, 2016, Decision and Order on the Written Record or any ruling by the ALJ with which Paradise Corner disagrees; and does not allege any deprivation of rights. In short, Paradise Corner's September 19, 2016, filing does not remotely conform to the requirements for an appeal petition set forth in 7 C.F.R. § 1.145(a). Therefore, despite the caption of Paradise Corner's September 19, 2016, filing ("An Appeal to Docket 14-0098"), I find the filing is not an appeal petition.

¹ The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

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Instead, while not without doubt, I find Paradise Corner's September 19, 2016, filing is a petition for reopening the hearing to take further evidence. In particular, I find the September 19, 2016, filing is a petition for reopening the hearing to admit as evidence the documents attached to Paradise Corner's September 19, 2016, letter to the ALJ.

The Rules of Practice provide that any petition for reopening the hearing filed prior to the filing of an appeal of the administrative law judge's decision shall be ruled on by the administrative law judge.¹ Neither Paradise Corner nor the Deputy Administrator has appealed *Paradise Corner, LLC*, PACA-D Docket No. 14-0098, 2016 WL 5718453 (U.S.D.A. Aug. 19, 2016) (Decision and Order on the Written Record), to the Judicial Officer. Therefore, I remand this proceeding to the ALJ to rule on Paradise Corner's September 19, 2016, filing, which I find to be a petition for reopening the hearing.

For the foregoing reasons, the following Order is issued.

ORDER

This proceeding is remanded to the ALJ for a ruling on Paradise Corner's September 19, 2016, petition for reopening the hearing and for any further proceedings the ALJ finds necessary for the proper disposition of this proceeding.

In re: THE SQUARE GROUP, LLC.
Docket No. 15-0102.
Decision and Order.
Filed November 10, 2016.

PACA-D – Bankruptcy documents, admissions in – Hearing, entitlement to – License, revocation of – Prompt payment, failure to make – Willful violation.

Shelton S. Smallwood, Esq. for Complainant.
Steven E. Nurenberg, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

¹ See 7 C.F.R. § 1.146(a)(1).

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DECISION AND ORDER

Procedural History

Melissa Bailey, Acting Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 28, 2015. The Deputy Administrator instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Deputy Administrator alleges that: (1) during the period October 2013 through August 2014, The Square Group, LLC [Square Group], failed to make full payment promptly to thirty-two sellers of the agreed purchase prices in the amount of \$1,190,177.70 for 658 lots of perishable agricultural commodities that Square Group purchased, received, and accepted in the course of interstate and foreign commerce;² (2) on July 21, 2014, Square Group filed a voluntary petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1532) in the United States Bankruptcy Court, Central District of California;³ (3) Square Group admitted in its Schedule F – Creditors Holding Unsecured Nonpriority Claims, filed in the United States Bankruptcy Court, Central District of California, that twenty-three of the thirty-two sellers listed in Appendix A of the Complaint hold unsecured claims for unpaid produce debt totaling

² Appendix A of the Complaint identifies each of the thirty-two produce sellers that Square Group allegedly failed to pay in accordance with the PACA, the number of lots of perishable agricultural commodities each produce seller allegedly sold to Square Group, the types of perishable agricultural commodities each produce seller allegedly sold to Square Group, the dates Square Group allegedly accepted the perishable agricultural commodities from each produce seller, the dates that Square Group's payment was allegedly due to each produce seller, and the amount allegedly past due and unpaid to each produce seller.

³ Square Group's bankruptcy petition is designated "Case No. 2:14-bk-23806-DS."

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\$800,213.55;⁴ and (4) Square Group's failure to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that Square Group purchased, received, and accepted in the course of interstate and foreign commerce constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) (Compl. ¶¶ III-V at 2-3).

On June 30, 2015, Square Group filed a timely⁵ Answer denying it willfully violated the PACA as alleged in the Complaint and asserting five affirmative defenses.⁶ On July 24, 2015, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing by Reason of Admissions [Motion for Default Decision] and a proposed Decision Without Hearing Based on Admissions [Proposed Default Decision]. On September 10, 2015, Square Group filed an opposition to the Deputy Administrator's Motion for Default Decision. On March 22, 2016, the Deputy Administrator filed a request for a ruling on the Deputy Administrator's Motion for Default Decision.

On April 28, 2016, the ALJ issued a Decision and Order on the Written Record [Decision and Order] in which the ALJ: (1) found that, during the period February 22, 2014 through August 19, 2014, Square Group failed

⁴ Schedule F – Creditors Holding Unsecured Nonpriority Claims which Square Group filed in the United States Bankruptcy Court, Central District of California, is attached to the Complaint and identified as “Attachment A.”

⁵ On May 13, 2015, Square Group filed a “Request For Extension Of Time To File Answer To Complaint Pursuant to 7 C.F.R. §§ 1.143 and 1.147(f).” On May 18, 2015, Square Group filed a second “Request For Extension Of Time To File Answer To Complaint Pursuant to 7 C.F.R. §§ 1.143 and 1.147(f).” On May 19, 2015, Administrative Law Judge Jill S. Clifton [ALJ] issued an order extending Square Group's time to file an answer through June 30, 2015. Square Group filed its “Answer and Affirmative Defenses” [Answer] on June 30, 2015.

⁶ Square Group asserts the following five affirmative defenses: (1) the \$358,927.15 claim of Moo Gung International, Inc., is not a violation of the PACA because the claim “is disputed, invalid, and subject to a valid counterclaim for the full amount stated in Appendix A to the Complaint”; (2) the claims listed in Appendix A of the Complaint either have been resolved or are being disputed; (3) payment for each undisputed claim listed in Appendix A of the Complaint is being administered as part of Square Group's Chapter 11 reorganization in the United States Bankruptcy Court; (4) the Deputy Administrator failed to allege any facts in support of the Deputy Administrator's contention that Square Group's alleged violations of the PACA were intentional and/or willful; and (5) the Complaint “fails to allege any facts that [Square Group] is a financially irresponsible entity in the produce industry justifying action by the United States Department of Agriculture.” (Answer ¶¶ 1-5, at 3-4).

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to make full payment promptly to twenty-three sellers of the agreed purchase prices in the total amount of more than \$767,000.00 for perishable agricultural commodities that Square Group purchased, received, and accepted in the course of interstate or foreign commerce; (2) concluded that Square Group willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4); and (3) revoked Square Group's PACA license.⁷

On June 8, 2016, Square Group appealed to the Judicial Officer by filing an Appeal Petition and a Brief in Support of Appeal Petition. The Deputy Administrator failed to file a response to Square Group's Appeal Petition, and, on June 29, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon careful consideration of the record, pursuant to 7 C.F.R. § 1.145(i), I adopt the ALJ's April 28, 2016 Decision and Order as the final order in this proceeding.

Decision

Square Group's Appeal Petition

Square Group raises three issues on appeal. First, Square Group asserts the ALJ erred by relying upon Square Group's bankruptcy Schedule F as "*confirmation* and admissions" that Square Group failed to make full payment promptly to certain produce sellers (Appeal Pet. at 2-5; Br. in Support of Appeal Pet. ¶ IV.A. at 3-4). Specifically, Square Group contends the ALJ erroneously found that Square Group's listing of the following "Potential PACA Claimants" in Square Group's bankruptcy Schedule F constituted "confirmation" of failure to make payment promptly:

ABC Produce, Inc., in the amount of \$72,474.92;

Advantage Produce, Inc., in the amount of \$12,484.75;

Benito Turrubiartes, in the amount of \$16,300.00;

⁷ ALJ's Decision and Order ¶¶ 1, 48, 50 at 1, 15, 17.

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E&DA Farm, in the amount of \$42,623.00;
ETR Merchandises Co., in the amount of \$22,837.20;
Green West Farm, Inc., in the amount of \$645.00;
Harmoni International Spice, Inc., in the amount of \$15,115.00;
House of Produce, in the amount of \$12,800.50;
JML Produce, Inc., in the amount of \$15,879.58;
L&C Distributing, Inc., in the amount of \$10,263.00;
Lucky Hong Farm, Inc., in the amount of \$48,979.00;
Lucky Taro, in the amount of \$18,124.35;
Maui Fresh, in the amount of \$82,886.40;
QSI, in the amount of \$43,788.00;
Quality 1st Produce, Inc., in the amount of \$95,179.40;
T Fresh Company, in the amount of \$81,161.30;
T&C Company, in the amount of \$7,204.00;
TAC Produce, Inc., in the amount of \$53,262.50;
The Choice Produce, in the amount of \$17,893.50;
Times Produce, Inc., in the amount of \$23,906.50;
Two HK, Inc., in the amount of \$17,251.00;
Valley Fruit & Produce, Inc., in the amount of \$47,857.75; and

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WF Produce Trading, in the amount of \$8,892.00.

(Appeal Pet. at 2-4).

I conclude the ALJ was correct in treating the list of creditors in Square Group's Schedule F as Square Group's admissions that it failed to make full payment promptly to the listed produce sellers. By identifying the above-referenced produce sellers on its Schedule F as having undisputed claims, Square Group admits that it failed to make prompt payment in the total dollar amounts provided.⁸ It is well established that a PACA respondent's admissions in documents filed in a bankruptcy case may be treated as admissions in a related PACA proceeding.⁹ Here, Square Group listed on its Schedule F twenty-three produce sellers, or creditors, to whom Square Group owed money in the aggregate amount of \$767,000.00 for perishable agricultural commodities that Square Group purchased, received, and accepted in interstate and foreign commerce (Compl. Attach. A). Therefore, I reject Square Group's contention that the ALJ erroneously treated the list of creditors in Square Group's Schedule F as "admissions of unpaid produce debt."

Second, Square Group asserts the ALJ erred in concluding that Square Group's violations of 7 U.S.C. § 499b(4) were willful (Appeal Pet. at 5). "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."¹⁰ The record supports the ALJ's conclusion that Square Group's PACA violations are "willful," as that term is used in the Administrative Procedure Act. Based upon the large number of transactions, significant amount of debt, and the continuation of violations over almost a six-month

⁸ See *RDM Int'l, Inc.*, 73 Agric. Dec. 285, 289 (U.S.D.A. 2014); *A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1604 (U.S.D.A. 1985) (treating undisputed claims listed in bankruptcy pleadings as admissions); *Fava & Company, Inc.*, 46 Agric. Dec. 79, 80 (U.S.D.A. 1984) (Ruling on Certified Question).

⁹ *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (U.S.D.A. 1993); see *United Fruit & Vegetable Co. v. U.S. Dep't of Agric.*, 668 F.2d 983, 983-84 (8th Cir. 1982); see also *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 606-07 (D.C. Cir. 1987); *Five Star Food Dist., Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997); *Fava & Co.*, 46 Agric. Dec. 79, 80 (U.S.D.A. 1984) (Ruling on Certified Question).

¹⁰ *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (U.S.D.A. 1996); see also *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989).

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period, I conclude that Square Group's violations were willful in that Square Group knew or should have known that it did not have sufficient funds with which to comply with the prompt-payment provisions of the PACA.¹¹ Therefore, I reject Square Group's contention that the ALJ's conclusion that Square Group willfully violated 7 U.S.C. § 499b(4), is error.

Third, Square Group asserts the ALJ erroneously concluded that Square Group was not entitled to an oral hearing on material issues of fact (Appeal Pet. at 5). I reject Square Group's contention and find, to the contrary, that Square Group is not entitled to a hearing because Square Group has failed to cite any genuine issues of material fact. As stated above, the Schedule F that Square Group filed in its bankruptcy proceeding constitutes an admission of the material allegations set forth in the Complaint.¹² If a respondent in a PACA disciplinary proceeding admits the failure to pay for agricultural commodities in a related bankruptcy proceeding, no hearing is required in the PACA disciplinary proceeding.¹³ Moreover, even if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total amount owed more than *de minimis*.¹⁴

A respondent in an administrative proceeding does not have the right to an oral hearing under all circumstances, and an agency may dispose of

¹¹ See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998) (stating willfulness is determined by looking at a respondent's violations of express requirements of the PACA and the Regulations, the length of the time period during which the violations occurred, and the number and total dollar amount of transactions at issue.)

¹² See *Potato Sales Co.*, 54 Agric. Dec. 1409, 1411 (U.S.D.A. 1995); *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (U.S.D.A. 1993) ("Respondent's failure to pay for perishable agricultural commodities is admitted by Respondent in its Bankruptcy proceeding. . . . Therefore, no material issue of fact exists and a hearing is not required."); *B.G. Sale's Co.*, 44 Agric. Dec. 2021, 2024 (U.S.D.A. 1985).

¹³ *Id.*

¹⁴ See *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) ("Moreover, there is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, so long as the violations are not *de minimis*."); see also *Veg-Mix, Inc.*, 44 Agric. Dec. 2060, 2060 (U.S.D.A. 1985) (Order Den. Recons.), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *Fava & Company, Inc.*, 46 Agric. Dec. 79, 80-81 (U.S.D.A. 1984) (Ruling on Certified Question) (stating that in order to warrant a hearing "enough of the sellers would have had to enter into such express agreements for such delayed payment so that the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000").

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a hearing where there is no material issue of fact regarding which a meaningful hearing may be held.¹⁵ In its Brief in Support of Appeal Petition, Square Group asserts that “a material issue of fact exists as to the evidentiary relevance of Square Group’s bankruptcy Schedule F. Since Square Group is in the process of Chapter 11 reorganization, there has been no adjudication by the bankruptcy court that [Square Group] has insufficient assets to pay its produce creditors in full.” (Br. in Support of Appeal Pet. ¶ IV.C. at 5). This argument is without merit. It has long been held that admissions in documents filed in a bankruptcy proceeding may be treated as admissions in the related PACA proceeding;¹⁶ thus, there is no question as to a Schedule F’s “evidentiary relevance.” Further, it is of no consequence whether a bankruptcy court has adjudicated that Square Group has insufficient assets to pay its creditors in full, as inability pay will not suffice to prevent license revocation.¹⁷ Whereas Square Group has admitted the material allegations of fact contained in the Complaint, there are no issues on which a meaningful hearing could be held in this proceeding; therefore, the ALJ properly issued the April 28, 2016 Decision and Order without hearing.

Based upon careful consideration of the record, I find that no change or modification of the ALJ’s April 28, 2016 Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge’s decision as the final order in a proceeding as follows:

§ 1.145 Appeal to Judicial Officer.

....

Decision of the judicial officer on appeal. If the
Judicial Officer decides that no change or modification of

¹⁵ H. Schnell & Company, Inc., 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see also* Five Star Distribs., Inc., 56 Agric. Dec. 880, 894 (U.S.D.A. 1997).

¹⁶ *See supra* note 8.

¹⁷ *See* Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1224 (U.S.D.A. 1996) (stating that “excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time”); R.H. Produce, Inc., 43 Agric. Dec. 511, 523 (U.S.D.A. 1984) (“In disciplinary cases under the Perishable Agricultural Commodities Act, all excuses that have been offered as to why payment was not made promptly have been routinely ignored since the Act calls for payment not excuses.”) (internal quotations omitted).

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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.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 28, 2016 Decision and Order is adopted as the final order in this proceeding.

RIGHT TO SEEK JUDICIAL REVIEW

Square Group 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. Square Group must seek judicial review within sixty days after entry of the Order in this Decision and Order.¹ The date of entry of the Order in this Decision and Order is November 10, 2016.

In re: PARADISE CORNER, LLC.
Docket No. 14-0098.
Decision and Order.
Filed August 19, 2016.

PACA-D.

Christopher P. Young, Esq. for Complainant.
Tony S. Liu for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Decision Summary

¹ 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT

1. The Respondent Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2011 of the purchase prices or balances thereof to Pamela Lee of, for purposes of this Decision only, approximately \$36,158.75, for fruits and vegetables, all being perishable agricultural commodities that Paradise Corner purchased, received, and accepted in the course of interstate or foreign commerce.

Parties and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Program [now known as Specialty Crops Program], Agricultural Marketing Service, United States Department of Agriculture [AMS or Complainant].

3. The Respondent Paradise Corner, LLC, is a limited liability company, organized and existing under the laws of the state of Hawaii [Paradise Corner or Respondent].

4. On June 26, 2015, I issued a “Notice that a Decision Will Be Issued on the Written Record.” This “Decision and Order on the Written Record” decides the allegations regarding Paradise Corner, LLC, Honolulu, Hawaii,² brought under the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

5. AMS alleged in the Complaint filed on April 30, 2014, that the Respondent Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce, as more particularly

² This “Decision and Order on the Written Record” does *not* address allegations which I decided July 30, 2015 regarding the four Respondents Cheung Chau Trading, Inc., PACA-D Docket No. 14-0099; Super Aloha, Ltd., PACA-D Docket No. 14-0100; Super Save Market, LLC, PACA-D Docket No. 14-0101; and Tony S. Liu, PACA-D Docket No. 14-0102 (available at http://www.oaljdecisions.dm.usda.gov/sites/default/files/14-0102%20DO_Redacted_0.pdf) (last visited Feb. 22, 2017).

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described in the Complaint and in Appendix A. Appendix A specified that the alleged amount past due and unpaid was \$164,958.75 to Pamela Lee for 124 lots of mixed fruits and vegetables; and that the alleged payment due dates were February 28, 2011 through July 23, 2011. AMS asked the judge so to find, and to order the facts and circumstances of the violations published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

6. Paradise Corner, LLC was directed, controlled, and managed by Tony S. Liu at all times material herein, and particularly in 2011. Paradise Corner, LLC through Tony S. Liu denied the allegations regarding Paradise Corner contained in the Complaint and Appendix A and filed documents, in the answer and thereafter, in opposition to the allegations.

7. Paradise Corner, LLC through Tony S. Liu has maintained throughout this proceeding that, although the exact dollar amount owed from the transactions between Paradise Corner and Pamela Lee in 2011 is not known precisely, that if Paradise Corner owed to Pamela Lee from their transactions in 2011, the net amount would be \$5,000.00 or less; and that Pamela Lee may instead have owed money to Paradise Corner. Paradise Corner's calculations with supporting documentation are discussed below in the Findings of Fact.

8. Telephone conferences I held with counsel for AMS, Christopher Young, and Paradise Corner manager Tony S. Liu on February 18, 2015, on June 26, 2015, on July 27, 2016, and on August 9, 2016, helped me understand Tony S. Liu's and Paradise Corner's opposition to a judgment, which included \$164,958.75 principal, entered against Tony S. Liu and Paradise Corner, LLC on October 30, 2012 (U.S. District Court, District of Hawaii, CV 12-00281 SOM-KSC). I take official notice of that judgment, and in issuing this Decision, I am not permitted to allow Tony S. Liu and Paradise Corner, LLC to "re-litigate" that judgment.

9. During each of our telephone conferences, Paradise Corner manager Tony S. Liu lamented the judgment which included \$164,958.75 principal, stating that the judgment is unjust and based on false and fraudulent information. Tony S. Liu stated that the judgment happened because he and Paradise Corner could not afford to be represented by an attorney, that he was not permitted to represent the limited liability company, that he

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was in danger of being found in contempt of court, and that his limited English and his inability to communicate in court kept him from presenting the evidence that would have prevented the judgment. The evidence, which Tony S. Liu has described and documented in this case, is evidence of numerous large cash payments for fruits and vegetables made to Pamela Lee by Paradise Corner that had not been credited by Pamela Lee; Paradise Corner's sales of fruits and vegetables to Pamela Lee that Pamela Lee did not pay for (twenty (20) shipments); and credits due from Pamela Lee for inferior quality fruits and vegetables that Pamela Lee delivered to Paradise Corner. Tony S. Liu's assertions during the telephone conferences and in the documents he filed in this case are discussed below in the Findings of Fact.

Discussion

10. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) 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 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

11. The policy of the U.S. Department of Agriculture 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.

Scamcorp, Inc., 57 Agric. Dec. 527, 549 (U.S.D.A. 1998).

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12. The appropriate sanction in a “no-pay” case where the violations are flagrant and repeated is license revocation. 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 purposes of the PACA to require a PACA violator to pay a civil penalty rather than pay produce sellers to whom the PACA violator owes money. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (U.S.D.A. 1998).

13. Here, the Respondent Paradise Corner, LLC “shifted the risk of nonpayment to sellers of the perishable agricultural commodities”, intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)). *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998). Here, buying perishable agricultural commodities without sufficient funds to comply with the prompt payment provision of the PACA is regarded as an intentional violation of the PACA or, at the least, careless disregard of the statutory requirements.

14. Where there is no license to revoke (the Respondent Paradise Corner, LLC never had a PACA license), the appropriate sanction is a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. *Furr’s Supermarkets Inc.*, 62 Agric. Dec. 385, 386-87 (U.S.D.A. 2003).

15. 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. *H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see also Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997).

16. Even if Paradise Corner, LLC were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

17. I measure at two times the past due amounts that determine the outcome of this “Decision and Order on the Written Record”: (a) when the amounts

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were first past due and unpaid; that is, during 2011; and, when AMS employee Scott McKenna, Senior Marketing Specialist, determined the remaining balances in January 2015, because more than 120 days had passed since the Complaint was served.

Findings of Fact regarding Paradise Corner, LLC, Honolulu, Hawaii

18. Paradise Corner, LLC, Respondent, was a limited liability company organized and existing under the laws of the state of Hawaii, with a business and mailing address that was 1290 C Maunakea Street, Honolulu, Hawaii 96817.

19. At all times material herein, and specifically in 2011, Paradise Corner, LLC was not licensed under the PACA but was operating subject to the provisions of the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499f), and the regulations issued thereunder, 7 C.F.R. Part 46.

20. At all times material herein, and, specifically, in 2011, Tony S. Liu, an individual, directed, controlled and managed Paradise Corner, LLC. Tony S. Liu's business and mailing address in 2011 was 1290 C Maunakea Street, Honolulu, Hawaii 96817, the same as that of Paradise Corner, LLC.

21. Paradise Corner, LLC still owed, past due and unpaid, \$164,958.75 to Pamela Lee, Keaau, Hawaii, according to Ralph Smith, representing Pamela Lee, more than three years later. Ralph Smith made this statement on January 8, 2015 to AMS employee Scott McKenna, Senior Marketing Specialist. *See* Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.

22. The Complaint was served on May 3, 2014. More than 120 days later, Paradise Corner, LLC still had failed to pay past due amounts. Paradise Corner, LLC's inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than thirty (30) days. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (U.S.D.A. 1998); *Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06

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(U.S.D.A. 1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988).

23. Paradise Corner representative Tony S. Liu described in his answer and other filings and during the telephone conferences with opposing counsel and me, \$128,800.00 in cash payments that Paradise Corner made to Pamela Lee in 2011, for which Pamela Lee gave Paradise Corner no receipt and no credit. All but \$13,000.00 of these cash payments are documented with bank deposit receipts that Tony S. Liu maintains represent cash paid into Pamela Lee's personal checking account that Pamela Lee did not give Paradise Corner credit for. The \$13,000.00 for which there are not bank deposit receipts was, according to Tony S. Liu, cash paid directly into Pamela Lee's hands in Honolulu.

24. Thus, Tony S. Liu maintains that there were two types of cash payments, totaling \$128,800.00, which Paradise Corner paid to Pamela Lee in 2011 and did not receive credit for:

(a) \$115,800.00 cash deposited into Pamela Lee's personal checking account, documented by the bank deposit receipts for Hawaii National Bank, Honolulu, Hawaii. These deposits were made from March 1, 2011 to June 28, 2011. The account number is not included in this Decision. The bank deposit slip copies were filed twice, on July 7, 2014; and on July 21, 2014. The second filing, which is in color, is more legible.

(b) \$13,000.00 cash given in person to Pamela Lee, in Honolulu, documented in Paradise Corner's records with notations on/with the bank deposit receipts. Tony S. Liu said that cash was given directly into Pamela Lee's hands on two occasions, and on each occasion Pamela Lee said she did not have her receipt book with her, so Paradise Corner consequently has no receipt for the cash. Tony S. Liu on behalf of Paradise Corner shows these details for the two occasions: \$10,000.00 cash paid to Pamela Lee in Honolulu on May 15, 2011; and \$3,000.00 cash paid to Pamela Lee in Honolulu on June 24, 2011.

25. I take official notice of a judgment, which included \$164,958.75

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principal, entered against Tony S. Liu and Paradise Corner, LLC on October 30, 2012 (U.S. District Court, District of Hawaii, CV 12-00281 SOM-KSC). I do not know the particulars of how the \$164,958.75 principal was calculated [if Pamela Lee's sales to Paradise Corner totaled \$238,000.00, more than \$73,000.00 was credited]. For purposes of this Decision only, I credit Paradise Corner, LLC with the \$128,800.00 described in paragraphs 23 and 24 as an offset to the \$164,958.75. For purposes of this Decision only, that leaves an unpaid balance of approximately \$36,158.75.

26. My finding that the unpaid balance is approximately \$36,158.75 for purposes of this Decision only, despite the tension my finding produces with a judgment which included \$164,958.75 principal, is based on the persuasiveness of Paradise Corner's \$128,800.00 cash payments claim and because of the prohibitive expense that would be required to conduct an in-person, face-to-face hearing in Hawaii using subpoena power to make an exact finding. An exact finding is not required here. Only if there is no material issue of fact, can I follow through on my "Notice that a Decision Will Be Issued on the Written Record." Only by accepting Paradise Corner's \$128,800.00 cash payments claim, or by accepting as conclusive the judgment which included \$164,958.75 principal, can I issue this Decision. I choose to accept Paradise Corner's \$128,800.00 cash payments claim, for purposes of this Decision only.

27. Paradise Corner representative Tony S. Liu described in his answer and other filings and during the telephone conferences, Paradise Corner's sales of fruits and vegetables to Pamela Lee that Pamela Lee did not pay for, twenty (20) shipments from May to July 2011. *See, especially*, July 21, 2014 and August 9, 2016 filings. These Paradise Corner sales to Pamela Lee are described as Young Brothers' shipments from Honolulu to Hilo. Young Brothers Bills of Lading, filed July 21, 2014, document the shipments, but not the values of the sales to Pamela Lee. By my order issued July 28, 2016, paragraph 5, I suggested "The Declaration may include the **values**, relevant to this case, . . ." With no values, I cannot consider any credit for any offset for Paradise Corner's sales of fruits and vegetables to Pamela Lee.

28. Paradise Corner representative Tony S. Liu has described in his answer and other filings and during the telephone conferences, credits due from

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Pamela Lee for inferior quality fruits and vegetables that Pamela Lee delivered to Paradise Corner. No specifics were provided. With no values, I cannot consider any credit for any offset for inferior quality deliveries from Pamela Lee.

29.Paradise Corner, LLC failed, during February 28, 2011 through July 23, 2011, to make full payment promptly of the purchase prices, or balances thereof, of, for purposes of this Decision only, approximately \$36,158.75 [$\$164,958.75 - \$128,800.00 = \$36,158.75$] for fruits and vegetables, in 124 lots, all being perishable agricultural commodities, that Paradise Corner, LLC purchased, received, and accepted in the course of interstate or foreign commerce, from Pamela Lee, Keaau, Hawaii. See Appendix A to Complaint, and paragraphs 23 and 24.

30.Paradise Corner, LLC's violations of the PACA are willful within the meaning of the Administrative Procedure Act (*see* 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." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

31.Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

32.Paradise Corner, LLC 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." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

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33.Paradise Corner, LLC's violations are "repeated" (repeated means more than one); and Paradise Corner, LLC's violations are "flagrant". Whether violations are "flagrant" under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

Conclusions

34.The Secretary of Agriculture has jurisdiction over Paradise Corner, LLC, the Respondent, and the subject matter involved herein.

35.Tony S. Liu, day-to-day during 2011, directed, controlled, and managed Paradise Corner, LLC, including the timing and amount of payments to Pamela Lee, a supplier of perishable agricultural commodities.

36.The Respondent Paradise Corner, LLC, failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

37.More than 120 days after the Complaint was served, the amount still owed and unpaid on January 8, 2015, by Respondent Paradise Corner, LLC for its purchases from Pamela Lee, Keaau, Hawaii, was still the entire \$164,958.75, according to Ralph Smith, representing Pamela Lee, who made his statement to AMS employee Scott McKenna, Senior Marketing Specialist.

38.Even if Respondent Paradise Corner, LLC were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) (regarding making full payment promptly), *especially* 7 C.F.R. § 46.2(aa)(5) and (11).

39.Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the violations detailed above in the Findings of Fact are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)).

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40. Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2011 of the purchase prices or balances thereof to Pamela Lee of, for purposes of this Decision only, approximately \$36,158.75 for fruits and vegetables, all being perishable agricultural commodities that Paradise Corner, LLC purchased, received, and accepted in the course of interstate or foreign commerce.

ORDER

41. The Respondent, Paradise Corner, LLC, is found to have committed willful, flagrant, and repeated 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).

42. This Order shall take effect on the eleventh (11th) day after this Decision and Order becomes final.

43. Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect **as of the effective date for purposes of employment sanctions pursuant to the Decision and Order regarding the four Respondents** Cheung Chau Trading, Inc., PACA-D Docket No. 14-0099; Super Aloha, Ltd., PACA-D Docket No. 14-0100; Super Save Market, LLC, PACA-D Docket No. 14-0101; and Tony S. Liu, PACA-D Docket No. 14-0102, which may have been **October 21, 2015** (http://www.oaljdecisions.dm.usda.gov/sites/default/files/14-0102%20DO_Redacted_0.pdf).

When I issued that Decision and Order regarding those four Respondents, I was not yet prepared to issue this Decision and Order regarding Paradise Corner, LLC. It would be unfair to prolong the employment sanctions beyond what would have been imposed if I had decided all five Respondents' cases together. The employment sanctions here will run concurrently with those employment sanctions already in effect.

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Finality

44. 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* App. A).

Copies of this Decision and Order shall be sent by the Hearing Clerk to each of the parties.

**In re: ANDREWS FARMING, INC.
Docket No. 16-0032.
Decision and Order.
Filed September 12, 2016.**

PACA-D.

Shelton S. Smallwood, Esq. for Complainant.¹

Craig A. Stokes, Esq. for Respondent.²

Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Decision Summary

1. Andrews Farming, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, or balances thereof, during December 2014 through June 2015, totaling \$494,715.09 for fruits and vegetables from seven (7) of the eleven (11) produce sellers listed in Appendix A to the Complaint, all being perishable agricultural commodities that Andrews Farming, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

¹ The Complainant is the Administrator, Specialty Crops Program [formerly Fruit and Vegetable Program], Agricultural Marketing Service, United States Department of Agriculture [AMS or Complainant].

² The Respondent is Andrews Farming, Inc., a corporation organized and existing under the laws of the Commonwealth of Virginia [Andrews Farming or Respondent].

Background

2. AMS's "Motion for Decision on the Record," filed August 9, 2016, asks me to issue a decision based on the requirements of the PACA in light of Andrews Farming, Inc.'s admissions. AMS's Motion asserts that since there are no material issues of fact in dispute, there is no need to have a hearing. AMS's Motion includes two attachments: Appendix A to the Complaint; and Schedule F (Creditors Who Have Unsecured Claims) from Andrews Farming, Inc.'s Chapter 7 bankruptcy filing, Case No.: 7:16-bk-70627, filed on May 5, 2016 in the U.S. Bankruptcy Court, Western District of Virginia (Roanoke).

3. Andrews Farming, Inc. filed no opposition to the "Motion for Decision on the Record." Andrews Farming, Inc. was served with the Motion on August 15, 2016. Andrews Farming, Inc. also filed nothing in response to my order "File by August 10 (Wed) 2016". After filing its Answer on February 1, 2016, Andrews Farming, Inc. filed nothing in this case. The Answer denies that Andrews Farming, Inc. failed to pay promptly or that sums remain due; the Answer denies that Andrews Farming, Inc. willfully violated the PACA.

4. Following careful review of all documents filed, I agree with AMS that there is no need for an oral hearing. *See Scamcorp, Inc.*, 57 Agric. Dec. 527 (U.S.D.A. 1998). I issue this Decision and Order based on the written record, finding that Andrews Farming, Inc. has committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

Findings of Fact

5. Andrews Farming, Inc., the Respondent, is a corporation organized and existing under the laws of the Commonwealth of Virginia, with a business address in Hillsville, Virginia.

6. Andrews Farming, Inc. was licensed under the provisions of the Perishable Agricultural Commodities Act [the PACA] on July 2, 2014, license number 20140892. The license terminated on July 2, 2016.

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7. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires produce licensees such as Andrews Farming, Inc. to make “full payment promptly” for fruit and vegetable purchases, usually within ten (10) days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 C.F.R. § 46.2(aa)(5) and (11) (defining “full payment promptly”).

8. Andrews Farming, Inc. failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

9. Andrews Farming, Inc. made admissions that certain produce sellers had not been paid. These admissions are contained in its Schedule F listing of creditors filed in its Chapter 7 bankruptcy case, Case No.: 7:16-bk-70627, filed on May 5, 2016 in the U.S. Bankruptcy Court, Western District of Virginia (Roanoke). I take official notice (7 C.F.R. § 1.141(h)(6)) of the bankruptcy filing, particularly Schedule F.

10. Andrews Farming, Inc. failed to achieve full compliance with the PACA within 120 days after the Complaint was served; the Complaint was served in January 2016.

11. Andrews Farming, Inc. failed, during December 2014 through June 2015, to make full payment promptly of the purchase prices or balances thereof totaling \$494,715.09 to seven (7) of the eleven (11) produce sellers listed in Appendix A to the Complaint for fruits and vegetables, all being perishable agricultural commodities that Andrews Farming, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

Conclusions

12. The Secretary of Agriculture has jurisdiction over Andrews Farming, Inc. and the subject matter involved herein.

13. Even if Andrews Farming, Inc. were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

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14. The grounds for revocation of a PACA license are found in 7 U.S.C. § 499h and include flagrant or repeated failures to comply with 7 U.S.C. § 499b(4), which requires full payment promptly.

15. Where there is no license to revoke, the appropriate sanction is a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. *Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-87 (U.S.D.A. 2003).

16. Andrews Farming, Inc.'s violations are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)). [Though willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4).]

17. Andrews Farming, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing during December 2014 through June 2015 to make full payment promptly to seven (7) of the eleven (11) produce sellers listed in Appendix A to the Complaint, of the purchase prices or balances thereof totaling \$494,715.09 for fruits and vegetables, all being perishable agricultural commodities that Andrews Farming, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

ORDER

18. The Respondent Andrews Farming, Inc. is found to have committed willful, flagrant, and repeated 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).

19. Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect on the eleventh (11th) day after this Decision and Order becomes final.

20. This Order shall take effect on the eleventh (11th) day after this Decision and Order becomes final. See next paragraph for when this Decision and Order becomes final.

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Finality

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

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

In re: PARADISE CORNER, LLC.
Docket No. 14-0098.
Decision and Order on Remand.
Filed October 26, 2016.

PACA-D.

Christopher P. Young, Esq. for Complainant.¹

Tony S. Liu for Respondent.²

Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON REMAND

Decision Summary

1. The Respondent Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2011 of the purchase prices or balances thereof to Pamela Lee of, for purposes of this Decision only, approximately \$4,158.75, for fruits and vegetables, all being perishable agricultural commodities that Paradise Corner purchased, received, and accepted in the course of interstate or foreign commerce.

Parties and Allegations

¹ See ¶ 2.

² See ¶ 3.

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2. The Complainant is the Deputy Administrator, Fruit and Vegetable Program [now known as Specialty Crops Program], Agricultural Marketing Service, United States Department of Agriculture [herein frequently “AMS” or “Complainant”].

3. The Respondent Paradise Corner, LLC, is a limited liability company, organized and existing under the laws of the state of Hawaii [herein frequently “Paradise Corner” or “Respondent”].

4. On June 26, 2015, I issued a “Notice that a Decision Will Be Issued on the Written Record.” The “Decision and Order on the Written Record” was issued on August 19, 2016. Paradise Corner, LLC filed a Petition for Reopening the Hearing on September 19, 2016, which was granted. This “Decision and Order on Remand” replaces the Decision that was issued on August 19, 2016, and decides the allegations regarding Paradise Corner, LLC, Honolulu, Hawaii,³brought under the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

5. AMS alleged in the Complaint filed on April 30, 2014, that the Respondent Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce, as more particularly described in the Complaint and in Appendix A. Appendix A specified that the alleged amount past due and unpaid was \$164,958.75 to Pamela Lee for 124 lots of mixed fruits and vegetables; and that the alleged payment due dates were February 28, 2011 through July 23, 2011. AMS asked the judge so to find, and to order the facts and circumstances of the violations published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

³ This “Decision and Order on Remand” does not address allegations which I decided July 30, 2015 regarding the four Respondents Cheung Chau Trading, Inc., PACA-D Docket No. 14-0099; Super Aloha, Ltd., PACA-D Docket No. 14-0100; Super Save Market, LLC, PACA-D Docket No. 14-0101; and Tony S. Liu, PACA-D Docket No. 14-0102. See *Cheung Chau Trading, Inc.*, 74 Agric. Dec. 473 (U.S.D.A. 2015), available at https://www.oaljdecisions.dm.usda.gov/sites/default/files/140102%20DO_Redacted_0.pdf (last visited Mar. 30, 2017).

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6. Paradise Corner, LLC was directed, controlled, and managed by Tony S. Liu at all times material herein, and particularly in 2011. Paradise Corner, LLC through Tony S. Liu denied the allegations regarding Paradise Corner contained in the Complaint and Appendix A and filed documents, in the answer and thereafter, in opposition to the allegations.

7. Paradise Corner, LLC through Tony S. Liu has maintained throughout this proceeding that, although the exact dollar amount owed from the transactions between Paradise Corner and Pamela Lee in 2011 is not known precisely, that if Paradise Corner owed to Pamela Lee from their transactions in 2011, the net amount would be \$5,000.00 or less; and that Pamela Lee may instead have owed money to Paradise Corner. Paradise Corner's calculations with supporting documentation are discussed below in the Findings of Fact.

8. Telephone conferences I held with counsel for AMS Christopher Young and Paradise Corner manager Tony S. Liu, on February 18, 2015, on June 26, 2015, on July 27, 2016, and on August 9, 2016, helped me understand Tony S. Liu's and Paradise Corner's opposition to a judgment, which included \$164,958.75 principal, entered against Tony S. Liu and Paradise Corner, LLC on October 30, 2012 (U.S. District Court, District of Hawaii, CV 12-00281 SOM-KSC). I take official notice of that judgment, and in issuing this Decision, I am not permitted to allow Tony S. Liu and Paradise Corner, LLC to "re-litigate" that judgment.

9. During each of our telephone conferences, Paradise Corner manager Tony S. Liu lamented the judgment which included \$164,958.75 principal, stating that the judgment is unjust and based on false and fraudulent information. Tony S. Liu stated that the judgment happened because he and Paradise Corner could not afford to be represented by an attorney, that he was not permitted to represent the limited liability company, that he was in danger of being found in contempt of court, and that his limited English and his inability to communicate in court kept him from presenting the evidence that would have prevented the judgment. The evidence, which Tony S. Liu has described and documented in this case, is evidence of numerous large cash payments for fruits and vegetables made to Pamela Lee by Paradise Corner that had not been credited by Pamela Lee; Paradise Corner's sales of fruits and vegetables to Pamela Lee that Pamela Lee did not pay for (twenty shipments); and credits due from Pamela Lee for

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inferior quality fruits and vegetables that Pamela Lee delivered to Paradise Corner. Tony S. Liu's assertions during the telephone conferences and in the documents he filed in this case are discussed below in the Findings of Fact.

Discussion

10. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) 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 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

11. The policy of the U.S. Department of Agriculture 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.

Scamcorp, Inc., 57 Agric. Dec. 527, 549 (U.S.D.A. 1998).

12. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. 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 purposes of the PACA to require a PACA violator to pay a civil penalty

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rather than pay produce sellers to whom the PACA violator owes money. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (U.S.D.A. 1998).

13. Here, the Respondent Paradise Corner, LLC “shifted the risk of nonpayment to sellers of the perishable agricultural commodities”, intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)). *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998). Here, buying perishable agricultural commodities without sufficient funds to comply with the prompt payment provision of the PACA is regarded as an intentional violation of the PACA or, at the least, careless disregard of the statutory requirements.

14. Where there is no license to revoke (the Respondent Paradise Corner, LLC never had a PACA license), the appropriate sanction is a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. *Furr’s Supermarkets Inc.*, 62 Agric. Dec. 385, 386-387 (U.S.D.A. 2003).

15. 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. *H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998). *See also Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997).

16. Even if Paradise Corner, LLC were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

17. I measure at two times the past due amounts that determine the outcome of this “Decision and Order on the Written Record”: (a) when the amounts were first past due and unpaid; that is, during 2011; and, when AMS employee Scott McKenna, Senior Marketing Specialist, determined the remaining balances in January 2015, because more than 120 days had passed since the Complaint was served.

Findings of Fact Regarding Paradise Corner, LLC, **Honolulu, Hawaii**

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18. Paradise Corner, LLC, Respondent, was a limited liability company organized and existing under the laws of the state of Hawaii, with a business and mailing address that was 1290 C Maunakea Street, Honolulu, Hawaii 96817.

19. At all times material herein, and specifically in 2011, Paradise Corner, LLC was not licensed under the PACA but was operating subject to the provisions of the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

20. At all times material herein, and, specifically, in 2011, Tony S. Liu, an individual, directed, controlled and managed Paradise Corner, LLC. Tony S. Liu's business and mailing address in 2011 was 1290 C Maunakea Street, Honolulu, Hawaii 96817, the same as that of Paradise Corner, LLC.

21. Paradise Corner, LLC still owed, past due and unpaid, \$164,958.75 to Pamela Lee, Keaau, Hawaii, according to Ralph Smith, representing Pamela Lee, more than three years later. Ralph Smith made this statement on January 8, 2015 to AMS employee Scott McKenna, Senior Marketing Specialist. *See* Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.

22. The Complaint was served on May 3, 2014. More than 120 days later, Paradise Corner, LLC still had failed to pay past due amounts. Paradise Corner, LLC's inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than 30 days. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (U.S.D.A. 1998); *Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (U.S.D.A. 1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988).

23. Paradise Corner representative Tony S. Liu described in his answer and other filings and during the telephone conferences with opposing counsel and me, \$128,800.00 in cash payments that Paradise Corner made to

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Pamela Lee in 2011, for which Pamela Lee gave Paradise Corner no receipt and no credit. All but \$13,000.00 of these cash payments are documented with bank deposit receipts that Tony S. Liu maintains represent cash paid into Pamela Lee's personal checking account that Pamela Lee did not give Paradise Corner credit for. The \$13,000.00 for which there are not bank deposit receipts was, according to Tony S. Liu, cash paid directly into Pamela Lee's hands in Honolulu.

24. Thus, Tony S. Liu maintains that there were two types of cash payments, totaling \$128,800.00, which Paradise Corner paid to Pamela Lee in 2011 and did not receive credit for:

\$115,800.00 cash deposited into Pamela Lee's personal checking account, documented by the bank deposit receipts for Hawaii National Bank, Honolulu, Hawaii. These deposits were made from March 1, 2011 to June 28, 2011. The account number is not included in this Decision. The bank deposit slip copies were filed twice, on July 7, 2014; and on July 21, 2014. The second filing, which is in color, is more legible.

\$13,000.00 cash given in person to Pamela Lee, in Honolulu, documented in Paradise Corner's records with notations on/with the bank deposit receipts. Tony S. Liu said that cash was given directly into Pamela Lee's hands on two occasions, and on each occasion Pamela Lee said she did not have her receipt book with her, so Paradise Corner consequently has no receipt for the cash. Tony S. Liu on behalf of Paradise Corner shows these details for the two occasions: \$10,000.00 cash paid to Pamela Lee in Honolulu on May 15, 2011; and \$3,000.00 cash paid to Pamela Lee in Honolulu on June 24, 2011.

25. I take official notice of a judgment, which included \$164,958.75 principal, entered against Tony S. Liu and Paradise Corner, LLC on October 30, 2012 (U.S. District Court, District of Hawaii, CV 12-00281 SOM-KSC). I do not know the particulars of how the \$164,958.75 principal was calculated [if Pamela Lee's sales to Paradise Corner totaled \$238,000.00, more than \$73,000.00 was credited]. For purposes of this Decision only, I credit Paradise Corner, LLC with the \$128,800.00 described in paragraphs 23 and 24 as an offset to the \$164,958.75. For purposes of this Decision only, subtracting the \$128,800.00 described in

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paragraphs 23 and 24 would leave an unpaid balance of approximately \$36,158.75.

26. Paradise Corner representative Tony S. Liu described in his answer and other filings and during the telephone conferences, Paradise Corner's sales of fruits and vegetables to Pamela Lee that Pamela Lee did not pay for, 20 shipments from May to July 2011. *See, especially*, filings received by the Hearing Clerk on July 21, 2014, August 9, 2016, August 19, 2016, and September 19, 2016. Paradise Corner describes these sales to Pamela Lee as Young Brothers' shipments from Honolulu to Hilo. Young Brothers' Bills of Lading document the shipments, but not the values of the sales to Pamela Lee. By my order issued July 28, 2016, paragraph 5, I suggested "The Declaration may include the **values**, relevant to this case," . . . With no values, I could not consider any credit for any offset for Paradise Corner's sales of fruits and vegetables to Pamela Lee. In Paradise Corner's September 19, 2016 filing, Paradise Corner included **values**: \$32,000.00, comprised of (a) the market value of approximately \$24,500.00 for 25,000 pounds of "Chill Produce" (including watermelon, pineapple, jalapeno peppers, snap beans, cherries, honeydew melon, green onion, cantaloupe, mango, apples, okra, corn, tomato); plus (b) the market value of approximately \$7,500.00 for "Dried Merchandise" (including 107 cases of China Dried Garlic, twenty bags of Thai Jasmine Rice, and forty bags of Fresh Maui Onion). Pamela Lee likely would have owed Paradise Corner the wholesale value for these twenty shipments, and I accept "the market value" provided by Paradise Corner for these twenty shipments to mean the wholesale market value. No other supporting paperwork (invoices or FAXes or emails or accounting entries) has been filed. As stated in paragraph 25, I do not know the particulars of how the \$164,958.75 principal was calculated [if Pamela Lee's sales to Paradise Corner totaled \$238,000.00, more than \$73,000.00 was credited]. For purposes of this Decision only, I accept Paradise Corner's representation that Pamela Lee did not pay for these twenty shipments from May to July 2011; and I will proceed as if the value of these twenty shipments was not already credited in calculating the \$164,958.75 principal; and I credit Paradise Corner, LLC with the \$32,000.00 described in Paradise Corner's September 19, 2016 filing as an additional offset to the \$164,958.75 principal entered in the judgment against Tony S. Liu and Paradise Corner, LLC on October 30, 2012. For purposes of this Decision only, that leaves

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an unpaid balance of approximately \$4,158.75 [$\$164,958.75 - \$128,800.00 = \$36,158.75$] and [$\$36,158.75 - \$32,000.00 = \$4,158.75$].

27. My finding that the unpaid balance is approximately \$4,158.75 for purposes of this Decision only, despite the tension my finding produces with a judgment which included \$164,958.75 principal, is based on the persuasiveness of Paradise Corner's \$128,800.00 cash payments claim, plus the persuasiveness of Paradise Corner's \$32,000.00 unpaid twenty shipments from May to July 2011 claim, and because of the prohibitive expense that would be required to conduct an in-person, face-to-face hearing in Hawaii using subpoena power to make an exact finding. An exact finding is not required here. Only if there is no material issue of fact, can I follow through on my "Notice that a Decision Will Be Issued on the Written Record". Only by accepting Paradise Corner's \$128,800.00 cash payments claim plus Paradise Corner's \$32,000.00 unpaid twenty shipments from May to July 2011 claim, or by accepting as conclusive the judgment which included \$164,958.75 principal, can I issue this Decision. I choose to accept Paradise Corner's \$128,800.00 cash payments claim plus Paradise Corner's \$32,000.00 unpaid 20 shipments from May to July 2011 claim, for purposes of this Decision only.

28. Paradise Corner representative Tony S. Liu has described in his answer and other filings and during the telephone conferences, credits due from Pamela Lee for inferior quality fruits and vegetables that Pamela Lee delivered to Paradise Corner. No specifics were provided. With no values, I cannot consider any credit for any offset for inferior quality deliveries from Pamela Lee.

29. Paradise Corner, LLC failed, during February 28, 2011 through July 23, 2011, to make full payment promptly of the purchase prices, or balances thereof, for purposes of this Decision only, of approximately \$4,158.75 [$\$164,958.75 - \$128,800.00 = \$36,158.75$] and [$\$36,158.75 - \$32,000.00 = \$4,158.75$] for fruits and vegetables, in 124 lots, all being perishable agricultural commodities, that Paradise Corner, LLC purchased, received, and accepted in the course of interstate or foreign commerce, from Pamela Lee, Keaau, Hawaii. *See* Appendix A to Complaint, and paragraphs 23, 24, 25 and 26.

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30.Paradise Corner, LLC's violations of the PACA are willful within the meaning of the Administrative Procedure Act (*see* 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." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

31. Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

32.Paradise Corner, LLC 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." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

33.Paradise Corner, LLC's violations are "repeated" (repeated means more than one); and Paradise Corner, LLC's violations are "flagrant." Whether violations are "flagrant" under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

Conclusions

34.The Secretary of Agriculture has jurisdiction over Paradise Corner, LLC, the Respondent, and the subject matter involved herein.

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35. Tony S. Liu, day-to-day during 2011, directed, controlled, and managed Paradise Corner, LLC, including the timing and amount of payments to Pamela Lee, a supplier of perishable agricultural commodities.

36. The Respondent Paradise Corner, LLC, failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

37. More than 120 days after the Complaint was served, the amount still owed and unpaid on January 8, 2015, by Respondent Paradise Corner, LLC for its purchases from Pamela Lee, Keaau, Hawaii, was still the entire \$164,958.75, according to Ralph Smith, representing Pamela Lee, who made his statement to AMS employee Scott McKenna, Senior Marketing Specialist.

38. Even if Respondent Paradise Corner, LLC were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

39. Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the violations detailed above in the Findings of Fact are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)).

40. Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2011 of the purchase prices or balances thereof to Pamela Lee of, for purposes of this Decision only, approximately \$4,158.75 for fruits and vegetables, all being perishable agricultural commodities that Paradise Corner, LLC purchased, received, and accepted in the course of interstate or foreign commerce.

ORDER

41. The Respondent, Paradise Corner, LLC, is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA,

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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).

42. This Order shall take effect on the eleventh (11th) day after this Decision and Order becomes final.

43. Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect **as of the effective date for purposes of employment sanctions pursuant to the Decision and Order regarding the four Respondents** Cheung Chau Trading, Inc., PACA-D Docket No. 14-0099; Super Aloha, Ltd., PACA-D Docket No. 14-0100; Super Save Market, LLC, PACA-D Docket No. 14-0101; and Tony S. Liu, PACA-D Docket No. 14-0102, which may have been **October 21, 2015**. See *Cheung Chau Trading, Inc.*, 74 Agric. Dec. 473 (U.S.D.A. 2015), available at https://www.oaljdecisions.dm.usda.gov/sites/default/files/140102%20DO_Redacted_0.pdf (last visited Mar. 30, 2017).

When I issued that Decision and Order regarding those four Respondents, I was not yet prepared to issue a Decision and Order regarding Paradise Corner, LLC. It would be unfair to prolong the employment sanctions beyond what would have been imposed if I had decided all five Respondents' cases together. The employment sanctions here will run concurrently with those employment sanctions already in effect.

Finality

44. 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 Appendix A).

Copies of this Decision and Order shall be sent by the Hearing Clerk to each of the parties.

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REPARATION DECISIONS

R.S. HANLINE & CO. v. GOLDEN WEST PRODUCE, LLC.

PROSOURCE, INC. v. R.S. HANLINE & CO.

Docket Nos. W-R-2013-259, E-R-2014-4.

Decision and Order.

Filed September 29, 2016.

PACA-R.

Impossibility of Performance

In the case of agricultural commodities, destruction of part of a seller's crop does not excuse performance where the commodity is identified in the contract only by kind and amount, without reference to the specific acreage where the commodity would be produced. *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975).

Katy Koetsner Esquivel, Esq. for R.S. Hanline & Co.

Bart M. Botta, Esq., for Golden West Produce, LLC & ProSource, Inc.

Shelton S. Smallwood, Presiding Officer.

Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) [Rules of Practice]. In PACA Docket No. W-R-2013-259, R.S. Hanline & Co., Inc. (Hanline) filed a timely formal Complaint on September 20, 2013, seeking an award of reparation in the amount of \$632,231.50 from Golden West Produce LLC [Golden West] in connection with multiple loads of jumbo red onions shipped in the course of interstate commerce. A copy of the Complaint was served on Golden West.

On October 25, 2013, the Department received correspondence from Ms. Katy Koestner-Esquivel, Esq., attorney for Hanline, advising that the parties were in the process of scheduling a mediation of PACA Docket No. W-R-2013-259, which would encompass the issues raised in PACA

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Docket No. E-R-2014-4, an informal complaint filed by ProSource, Inc. (ProSource) against Hanline, and requesting that the two cases be consolidated for handling by the Department. Mr. Bart M. Botta, Esq., attorney for both Golden West and ProSource, submitted correspondence to the Department on November 15, 2013, confirming that Golden West and ProSource also wished to consolidate the cases and requesting that both actions be stayed to allow the parties the opportunity to mediate the interrelated disputes.

On May 9, 2014, the Department received correspondence from Mr. Botta advising that the parties' negotiations had reached an impasse and requesting that the stay be lifted. On May 14, 2014, Mr. Botta submitted a formal motion to consolidate the subject cases. By letter dated June 23, 2014, the Department advised Mr. Botta and Ms. Koestner-Esquivel that the motion to consolidate was premature because ProSource had not submitted a formal complaint.

On July 14, 2014, ProSource filed a timely formal Complaint seeking an award of reparation in the amount of \$188,499.25, plus interest at the rate of 1.5% per month, from Hanline in connection with multiple loads of jumbo red onions shipped in the course of interstate commerce. The Complaint included a request to consolidate with PACA Docket No. W-R-2013-259 and a request for oral hearing. A copy of the Complaint was served on Hanline.

Also on July 14, 2014, Golden West submitted an Answer and demand for oral hearing in PACA Docket No. W-R-2013-259. On August 28, 2014, Respondent Hanline submitted an Answer and Counterclaim, request to consolidate, and request for oral hearing in PACA Docket No. E-R-2014-4.

Based on the requests of the parties, and because the amounts involved in each claim exceed \$30,000.00, PACA Docket Nos. W-R-2013-259 and E-R-2014-4 were consolidated for oral hearing. The hearing was held Monday, October 19, 2015, through Wednesday, October 21, 2015, by personal attendance at the USDA Rural Development office in Boise, Idaho. At the hearing, Golden West and ProSource were represented by Mr. Bart M. Botta, Esq., of Rynn & Janowsky LLC, Newport Beach,

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California, and Hanline was represented by Ms. Katy Koestner-Esquivel, Esq., of Esquivel Law, Naples, Florida. Shelton Smallwood, attorney with the Office of the General Counsel, U.S. Department of Agriculture, served as the Presiding Officer.

At the hearing, Robert Hanline testified for Hanline, and Troy Seward, Robert Harris, Lyndon Johnson, Jim Klauzer, and Corey Griswold testified for Golden West and ProSource. Hanline offered 45 exhibits to be admitted into evidence (HX-1 through 45). All were admitted. Golden West and ProSource offered 47 exhibits to be admitted into evidence (GWPX-A through UU). All were admitted. In accordance with section 47.7 of the Rules of Practice, the ROI is part of the evidence of this proceeding. (7 C.F.R. § 47.7.) A transcript of the hearing was prepared. Hanline filed a post-hearing brief and application for fees and expenses in connection with the oral hearing. Golden West and ProSource filed a joint post hearing brief and request for reimbursement of fees and costs.

Findings of Fact

Complainant in PACA Docket No. W-R-2013-259 and Respondent in PACA Docket No. E-R-2014-4, R.S. Hanline & Co., Inc., is a corporation whose post office address is P.O. Box 494, Shelby, OH 44875. At the time of the transactions involved herein, Hanline was licensed under the PACA.

Respondent in PACA Docket No. W-R-2013-259, Golden West Produce LLC, is a limited liability company whose post office address is P.O. Box 456, Parma, ID 83660. At the time of the transactions involved herein, Respondent was licensed under the PACA.

Complainant in PACA Docket No. E-R-2014-4, ProSource, Inc., is a corporation whose post office address is 101 E. Bullion Street, Suite 3H, Hailey, ID 83333. At the time of the transactions involved herein, ProSource was licensed under the PACA.

On February 24, 2012, Robert Harris of Rocky Mountain Brokerage Co. sent an email message to Hanline's Robert Hanline and Kraig Sullivan and Golden West's Troy Seward stating:

Bob, I got with Troy from Golden West Produce again this morning and he has secured more reds for the contract. He can do

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1550 50lb sacks of Jumbo Red Onions per week @ \$7.75 fob Nyssa, OR. And the 640 25lb sacks of Medium Red Onions @ \$5.40 fob Nyssa. Same time frame as before, approximately Sept 1, 2012 until March 20th, 2013. We understand that this contract is separate from the Jumbo Yellow onion, however we do want you [sic] yellow onion business also. Please let us know as soon as possible if this is accepted as planting preparations are underway. Thanks for your consideration.

(HX-24.)

5. On March 7, 2012, at 7:56 a.m. EST, Hanline's Kraig Sullivan emailed to Robert Harris of Rocky Mountain Brokerage Co. a written contract that reads as follows:

SHIPPER:	Buyer:	Broker:
Golden West Produce LLC	R.S. Hanline & Co., Inc.	Rocky Mountain Co.
418 Commercial Ave	P.O. Box 494	3000 S. Jamaica Ct #135
Nyssa, Oregon 97913	Shelby, Ohio 44875	Aurora, Colorado 80014

**CONTRACTED
ONIONS:**

1550 50 # sacks Jumbo Red Onions per week @ \$7.75 fob

640 25 # bags Large Medium Red Onions per @ \$5.40 fob
week

Loading date from September 1st 2012 through
March 20th 2013

One additional (in addition to the normal 1550 per week) rail car (2500 50 lb bags) of 50 lb Jumbo Red Onions @ 7.75 fob to load on or around March 20th 2013 (whenever the last week of this storage crop is shipping)

Delivery service in its entirety is the responsibility of the shipper. The onions will be shipped either by truck or rail at the discretion of the buyer. However, the shipper will determine when the onions are cured well enough for shipment by rail. When product is to be loaded on rail, pallets must be used on the floor,

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and slipsheets on each pallet. When product is to be loaded by truck it must be on pallets with slip sheets on each pallet.

PRODUCT SPECIFICATIONS:

- Jumbo Red Onions

Variety: Fifty (50) pound sack U.S. No. 1 Jumbo Red Onions of the Single Center Variety Only.

Sizing: 60% must be no smaller than 3.5" and no larger than 4.25"

- Large Medium Red Onions

Variety: Twenty Five (25) pound sack U.S. No. 1 Large Medium Red Onions of the Single Center Variety Only.

Sizing: 60% must be no smaller than 2.25" and no larger than 3.25"

This contract is subject to the following conditions for both the Shipper and the Buyer.

In the event that circumstances beyond Buyers control occur and the Shippers products are no longer required, the Buyer reserves the opportunity to terminate the contract.

Golden West will invoice R.S. Hanline Co., Inc. on a delivered basis.

Terms: 30 days from delivery

Act of God Clause for price proposal:

In the event that market circumstances develop that are related to "Acts of God" (i.e.: drought, flooding, hail, disease, infestation, freeze, etc) or "market disruptions" (i.e.: labor strife, border issues, fuel prices, governmental regulations, etc.), that are beyond our control and prevalent within the industry, Golden West Produce LLC, Inc retains the right to either prorate supplies or pass through landed product cost increases, after discussion and approval with R.S. Hanline & Co., Inc. Any price increase would be dictated solely by the increased raw product cost to Golden West Produce LLC, as reflected by the market conditions that are beyond our control.

NOTICE: This contract is bound by the terms and conditions as stated. By signing below both "Buyer" and "Seller" acknowledge and accept these terms and conditions.

(HX-25 at 1-3.)

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6. On March 7, 2012, at 3:12 p.m. MST, Mr. Harris emailed Golden West's Troy Seward a copy of the contract with a message stating, "This looks okay except the language about the extra load. I'll call you later and we can go over that." (HX-25 at 1.)

7. On March 17, 2012, Robert Harris of Rocky Mountain Brokerage Co. sent to Hanline's Kraig Sullivan and copied Golden West's Troy Seward a message stating, "Kraig, just got off the phone with Bob. Will do the 2400 Jumbo reds @ 7.85 and 600 Jumbo yellows @ 5.90 plus the medium reds as they were on the first contract. I'll get with you Monday and we can go over this. Have a good weekend." (HX-26.)

8. On March 19, 2012, Troy Seward, President of Golden West, Robert D. Harris, Owner of Rocky Mountain Brokerage Co., and Thomas Rowlands, President of Hanline, signed the written contract mentioned in Finding of Fact 5, which was revised to show the weekly quantity of 50-pound sacks of jumbo red onions increased to 2,400 sacks, and the price increased to \$7.85 per sack, f.o.b. In the revised contract, Golden West also agreed to supply Hanline with 600 50-pound sacks of U.S. No. 1 jumbo yellow onions (single center, 60% no smaller than 3.5 inches and no larger than 4.25 inches) per week at \$5.90 per sack, f.o.b. (HX-1 at 1-2; GWPX-A at 1-2.)

9. On April 24, 2012, KTVB.com, in an article entitled "Storm causes power outages across Treasure Valley," reported that a band of strong thunderstorms brought damaging winds and hail to parts of eastern Oregon and southwest Idaho Tuesday afternoon (April 23, 2012). (GWPX-B.)

10. On July 11, 2012, at 9:22 a.m. MST, Robert Harris of Rocky Mountain Brokerage Co. sent an email message to Golden West's Troy Seward stating:

Troy, Bob Hanline will be up in your area next week and would like to see the packing shed and maybe a couple of fields and have lunch with you. He will be giving you a call to set something up. I gave him your cell #. Hope that it will work for you.

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At 2:12 p.m. MST on the same date, Mr. Seward responded, "I will be in the valley Monday thru Wednesday, and leaving for the PMA on Thursday AM...so, I hope he is here early in the week! I would love to show him around... Let me know if you know his schedule please." (GWPX-E.) Robert Hanline visited Golden West twice during the summer of 2012. (Tr. 59:22, 60:1-6.)

11. On August 1, 2012, at 2:43 p.m. MST, Golden West's Troy Seward sent an email message to Robert Harris of Rocky Mountain Brokerage Co. advising:

This picture shows how the red onions are stressed at the end runs of the drip tape due to the algae issue we talked about, which is plugging the water emitters across the valley. We have extensively researched all avenues in which to clear the emitters with little success. We expect to see a reduction in overall yield and size as a result in these zones, although it is hard to estimate how much at this time. We just cannot get water to the onion bulbs. You can see farther down the field, the color change, where the onions are getting more water.

(HX-29.) On August 7, 2012, at 4:26 p.m. MST, Mr. Harris forwarded Mr. Seward's email to Hanline's Kraig Sullivan and Robert Hanline, along with a message stating, "Just wanted to pass along an e-mail I got from Troy. They have some concerns on some of the drip acreage do [sic] to the drip tape plugging from an unusual situation. He's afraid some of their production could suffer. Won't really know until everything is harvested. I'll keep you posted." (HX-29.)

12. On or about August 15, 2012, ProSource entered a written contract with Brothers Produce whereby ProSource agreed to supply Brothers Produce with 1,700 25-pound sacks of jumbo red onions every 12 to 14 days between September 3, 2012, and April 1, 2013, for a total of 25,500 pounds. (HX-45 at 9; GWPX-QQ.)

13. On or about August 27, 2012, ProSource entered a written contract with Sysco Merchandising and Supply Chain Services, Inc. (SMS) whereby ProSource agreed to supply SMS with 2,385 25-pound cartons of jumbo

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red onions and 3,907 25-pound sacks of jumbo red onions per week between September 10, 2012, and April 29, 2013. (HX-45 at 2-7, 11-13; Tr. 468:11-12, 469:14-16, 474:6-22, 475:1-12.) During the same period, Golden West entered a written contract with ProSource wherein it agreed to supply ProSource with the onions required under ProSource's contract with SMS. (HX-45 at 10-13; Tr. 472:3-22, 473:1-5.)

14. On or about August 30, 2012, Golden West and Kingston & Associates Marketing LLC (Kingston) entered a written contract whereby Golden West agreed to supply, and Kingston agreed to purchase, 80 (+/-) 25# sacks, or 2,000 pounds, of Jumbo Red onions per week from the beginning of the season in 2012, through the end of the season in 2013. (HX-30; Tr. 476:5-22, 477:1-19.)

15. On or about November 26, 2012, Golden West's Troy Seward sent an e-mail message to Dave Block of Uptown Produce Connection, Inc., a company with whom Golden West contracted to supply 120 to 180 25-pound sacks of jumbo red onions from October 31, 2001, through October 31, 2013. (HX-23; Tr. 478:8-19.) The message states, in pertinent part, as follows:

...

Due to the fact that we are in a very tight supply situation this season due to reduced crop yields, I must propose the following moving forward:

We will supply Vermilion moving forward from today's date through the balance of our season, based on their usage on the 2011-2012 season, which is a load every 19-20 days. This will help keep our supplies in check for the remainder of the shipping season, while giving them a reasonable quantity to work with based off historical usage and shipments. I know this may cause some discontent, but at this time, we feel that we need to work together on this to continue to fill the agreement based on history, not on market conditions.

...

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(HX-31; Tr. 566:10-16, 567:9-16.)

16. On December 4, 2012, Golden West purchased 100 bags of field run onions from Rodriguez Farms. (HX-33 at 1.) On December 22, 2012, Golden West purchased 100 bags of field run jumbo red onions and 100 bags of field run medium red onions from Rodriguez Farms. (HX-33 at 2.)

17. Between September 1, 2012, and February 7, 2013, Golden West shipped 54,362 50-pound bags of jumbo red onions to Hanline pursuant to the written contract described in Finding of Fact 4. (HX-13.)

18. On January 5, 2013, ProSource issued invoice number 16219 billing Hanline for 300 50-pound bags of U.S. No. 1 jumbo yellow onions at \$17.55 per bag, or \$5,265.00, 50 50-pound bags of U.S. No. 1 medium yellow onions at \$13.55 per bag, or \$677.50, 50 50-pound bags of colossal yellow onions at \$18.05 per bag, or \$902.50, 400 50-pound bags of jumbo yellow onions at \$9.45 per bag, or \$3,780.00, 400 25-pound bags of medium red onions at \$7.20 per bag, or \$2,880.00, and 1,600 50-pound bags of jumbo red onions at \$11.40 per bag, or \$18,240.00, plus \$23.50 for a temperature recorder, for a total invoice price of \$31,768.50. (GWPX-O at 2.)

19. A USDA inspection was performed on the 1,600 50-pound bags of jumbo red onions billed on invoice number 16219 on January 17, 2013, at 12:56 p.m., at Hanline, in Shelby, Ohio, following their shipment from Golden West, in Parma, Idaho, via railcar on January 5, 2013. (HX-14 at 203, 208.) The inspection disclosed 21 percent average decay in generally early, few moderate, few advanced stages, and pulp temperatures ranging from 54 to 57 degrees Fahrenheit.

20. On January 9, 2013, ProSource issued invoice number 16257 billing Hanline for 300 50-pound bags of U.S. No. 1 jumbo yellow onions at \$21.55 per bag, or \$6,465.00, 50 50-pound bags of U.S. No. 1 colossal yellow onions at \$22.05 per bag, or \$1,102.50, 50 50-pound bags of medium yellow onions at \$15.55 per bag, or \$777.50, 400 25-pound bags of medium red onions at \$7.20 per bag, or \$2,880.00, 400 50-pound bags of jumbo yellow onions at \$9.45 per bag, or \$3,780.00, and 1,600 50-pound bags of jumbo red onions at \$11.40 per bag, or \$18,240.00, plus

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\$23.50 for a temperature recorder, for a total invoice price of \$33,268.50. (GWPX-O at 3.)

21.A USDA inspection was performed on the 1,600 50-pound bags of jumbo red onions billed on invoice number 16257 on January 23, 2013, at 10:39 a.m., at Hanline, in Shelby, Ohio, following their shipment from Golden West, in Parma, Idaho, via railcar on January 9, 2013. (HX-14 at 211, 217.) The inspection disclosed 14 percent average defects, including 4 percent damage by sprouts and 10 percent decay in mostly early, some advanced stages, and pulp temperatures ranging from 43 to 45 degrees Fahrenheit.

22. On January 15, 2013, ProSource issued invoice number 16319 billing Hanline for 310 50-pound bags of U.S. No. 1 jumbo yellow onions at \$26.55 per bag, or \$8,230.50, 50 50-pound bags of U.S. No. 1 medium yellow onions at \$19.55 per bag, or \$977.50, 400 50-pound bags of jumbo yellow onions at \$9.45 per bag, or \$3,780.00, 480 25-pound bags of medium red onions at \$7.20 per bag, or \$3,456.00, and 1,600 50-pound bags of jumbo red onions at \$11.40 per bag, or \$18,240.00, plus \$23.50 for a temperature recorder, for a total invoice price of \$34,707.50. (GWPX-O at 4.)

23.A USDA inspection was performed on the 1,600 50-pound bags of jumbo red onions billed on invoice number 16319 on January 30, 2013, at 8:19 a.m., at Hanline, in Shelby, Ohio, following their shipment from Golden West, in Parma, Idaho, via railcar on January 15, 2013. (HX-14 at 219, 220.) The inspection disclosed 14 percent average decay in mostly early, some advanced, some moderate stages, and pulp temperatures ranging from 60 to 61 degrees Fahrenheit. (HX-14 at 219, 220.)

24. On January 22, 2013, at 6:05 p.m. MST, Golden West's Troy Seward prepared and sent via email to Hanline's Robert Hanline and Kraig Sullivan, and Rocky Mountain Brokerage Co.'s Robert Harris, a letter stating as follows:

Re: Onion Contract

Gentlemen,

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As we are 2/3 through the term of our contract, I have initiated a review of our obligation to R.S. Hanline, and the disposition of our *Jumbo Red Onion* supply as it pertains to this contract. Through the growing season of 2012, we brought to the attention of all parties, several concerns that had arisen that were to impact the overall yield and the ultimate ability to provide the complete volume of contracted Red Onions. These concerns included 2 hailstorms, wind damage to seedlings, and water deprivation due to uncontrollable algae blockage in our drip lines. Each of these issues has prevented GW Farms, LLC and Golden West Produce, LLC from achieving the crop stand and yield per acre, that was estimated as “normal” when calculating the required planted acreage to fulfill this contract.

As a guideline, we used the prior year’s yield average of 800 cwt/acre on red onions, to calculate how much acreage to plant for R.S. Hanline. Initially, Bob had asked us to contract 1,550 50# Jumbo Reds / week, and I had determined by calculation in my sales notebook, the required acreage to satisfy the proposal (See Attachment):

30 weeks x 1,550 JR 50# / week = 46,500 sacks
-At 800 cwt/ac. X 70% JR x 20% shrink loss = 900 50# sacks / acre (packed)
****Would take 50 Acres Reds****

Through mutual discussion and agreement, Bob asked for 2,400 50# JR / week rather than the above mentioned 1,550 sacks, over the course of 29 shipping weeks. Using the same criteria for acreage calculation, we determined:

29 weeks x 2,400 JR 50# / week = 69,600 sacks
-At 800 cwt/ac. X 70% JR x 20% shrink loss = 900 50# sacks / acre (packed)
69,600 / 900 50# per acre = ****77 acres of Reds** to be planted for Hanline.**

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GW Farms, LLC harvested 6 fields, comprising 155 acres of Red Onions during the 2012 growing season. To provide a fair and transparent view of the overall yield as it pertains to this contract, and to avoid stipulating from where we were to source the contracted product, we are providing the following data from each field:

<u>Field</u>	<u>Acres</u>	<u>Yield/ac</u>	<u>Weight</u>
1051-212	25	634	15,580 cwt
1051-1712	32	549	17,568 cwt
1051-1912	18	786	14,148 cwt
1051-2212	53	658	34,874 cwt
1051-1112	14	559	7,826 cwt
1051-612	13	570	7,410 cwt
Totals: 155 acres			97,676 cwt

Total Farm Average Yield = 97,676 cwt / 155 acres = 630.2 cwt per acre

Knowing that our yields were down from the estimated 800 cwt / acre “normal” yield, we communicated post-harvest that it would be an obvious struggle to deliver the complete volume of the contract. The 630 cwt farm average equates to 78.8% of the 800 cwt estimated yield at time of planting, and 800 cwt was the basis for the calculations tabulated for this contract proposal. Using these true figures in our formula reveals:

-At 630 cwt/ac. X 70% JR x 20% shrink loss = 706 50# sacks / planted acre

77 acres planted x 706 50# JR per acre = 54,362 50# Jumbo Reds to CONTRACT

As you can see, **due to the yield loss** during the growing season, that we can only supply 54,362 50# Jumbo Reds from the 77 acres grown for this contract. We cannot supply the contracted amount of 69,600 50# Jumbo Red sacks, without passing through landed product cost

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increases on 15,238 50# Jumbo Reds per the contract, assuming a replacement supply can be acquired at market value. Golden West Produce has scaled back other existing contracts to 60% of contracted volume from the beginning of the shipping season, due to this yield loss.

*By these numbers presented, Golden West Produce, LLC shall retain its contractual right, by virtue of events related to "Acts of God" beyond our control and prevalent within the industry, and shall prorate to R.S. Hanline the remaining volume of 50# **JUMBO REDS** as presented and documented in the above calculations. To date through week 19, representing 66% of the shipping period, we have delivered 72.5% of the contract or 50,450 50# Jumbo Reds, leaving a balance of 3,912 50# JR to be prorated through the balance or term of this contract. Any other contracted volumes of onions other than 50# Jumbo Reds are not subject to this contractual right at this time, and shall be delivered in accordance with the contract.*

Please review these figures and do not hesitate ask [sic] if there are any questions. We have made every effort to fulfill as much contracted volume as possible through this difficult growing and marketing season, and are open to discuss any solutions.

(GWPX-P; HX-2.)

25. On January 23, 2013, ProSource issued invoice number 16439 billing Hanline for 150 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$907.50, 200 25-pound bags of medium red onions at \$5.50 per bag, or \$1,100.00, and 600 50-pound bags of jumbo red onions at \$8.00 per bag, or \$4,800.00, for a total invoice price of \$6,807.50. (GWPX-O at 5.)

26. A USDA inspection was performed on the 600 50-pound bags of jumbo red onions billed on invoice number 16439 on January 28, 2013, at 12:42 p.m., at Hanline, in Shelby, Ohio, following their shipment from Golden

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West, in Parma, Idaho, via truck on January 23, 2013. (HX-14 at 227, 229.) The inspection disclosed 5 percent average decay in mostly advanced, many early stages, and pulp temperatures ranging from 52 to 53 degrees Fahrenheit.

27. On January 24, 2013, ProSource issued invoice number 16440 billing Hanline for 150 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$907.50, 200 25-pound bags of medium red onions at \$5.50 per bag, or \$1,100.00, and 600 50-pound bags of jumbo red onions at \$8.00 per bag, or \$4,800.00, for a total invoice price of \$6,807.50. (GWPX-O at 6.)

28. On January 24, 2013, ProSource issued invoice number 16441 billing Hanline for 150 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$907.50, 200 25-pound bags of medium red onions at \$5.50 per bag, or \$1,100.00, and 600 50-pound bags of jumbo red onions at \$8.00 per bag, or \$4,800.00, for a total invoice price of \$6,807.50. (GWPX-O at 7.)

29. On January 31, 2013, ProSource issued invoice number 16553 billing Hanline for 50 50-pound bags of U.S. No. 1 jumbo yellow onions at \$23.15 per bag, or \$1,157.50, 100 50-pound bags of U.S. No. 1 medium yellow onions at \$16.15 per bag, or \$1,615.00, 100 50-pound bags of jumbo yellow onions at \$6.05 per bag, or \$605.00, and 600 50-pound bags of jumbo red onions at \$8.00 per bag, or \$4,800.00, for a total invoice price of \$8,177.50. (GWPX-O at 8.)

30. On February 4, 2013, ProSource issued invoice number 16577 billing Hanline for 50 50-pound bags of U.S. No. 1 jumbo yellow onions at \$23.15 per bag, or \$1,157.50, 150 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$907.50, 100 25-pound bags of medium red onions at \$5.50 per bag, or \$550.00, and 600 50-pound bags of jumbo red onions at \$8.00 per bag, or \$4,800.00, for a total invoice price of \$7,415.00. (GWPX-O at 9.)

31. A USDA inspection was performed on the 600 50-pound bags of jumbo red onions billed on invoice number 16577 on February 7, 2013, at 12:54 p.m., at Hanline, in Shelby, Ohio, following their shipment from Golden

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West, in Parma, Idaho, via truck on February 4, 2013. (HX-14 at 245, 249.) The inspection disclosed 10 percent average defects, including 1 percent damage and serious damage by dry sunken areas and 9 percent decay in mostly early, many advanced stages, and pulp temperatures ranging from 43 to 44 degrees Fahrenheit.

32. A second inspection was performed on the 600 50-pound bags of jumbo red onions billed on invoice number 16577 on February 8, 2013, at 4:30 p.m. That inspection disclosed 12 percent average defects, including 1 percent quality (dry sunken areas) and 11 percent decay in mostly early, some moderate and some advanced stages, and pulp temperatures ranging from 54 to 56 degrees Fahrenheit. (HX-14 at 251.)

33. On February 4, 2013, at 11:59 p.m. MST, Golden West's Troy Seward prepared and sent via email to Hanline's Robert Hanline and Kraig Sullivan, and Rocky Mountain Brokerage Co.'s Robert Harris, a letter stating, in pertinent part, as follows:

Re: Onion Contract – Prorated Supply

...

Per the earlier email, we will prorate the Jumbo Red supply to a total of 54,362 50# bags on contract. This leaves a total of 912 50# Jumbo Reds to allocate on contract after PO #109668. If an alternative supply can be procured, and R.S. Hanline wishes Golden West Produce to ship more 50# Jumbo Reds than so prorated, Golden West Produce shall pass through any and all landed product cost increases subject to the market conditions beyond our control. This cost increase would be subject to any 50# Jumbo Red shipped after the 912 50# Jumbo Red allocation. Any such onions shall be USDA inspected on-site and be shipped as FOB Inspection Final.

Please note and adjust your orders and PO numbers on 50# Jumbo Reds accordingly. If we can be of service to locate an alternative supply of Jumbo Reds from other

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area growers at market price, please advise, and we will attempt to do so.

(GWPX-Q; HX-3.)

34. On February 5, 2013, ProSource issued invoice number 16578 billing Hanline for 150 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$907.50, 200 25-pound bags of medium red onions at \$5.50 per bag, or \$1,100.00, and 600 50-pound bags of jumbo red onions at \$8.00 per bag, or \$4,800.00, for a total invoice price of \$6,807.50. (GWPX-O at 10.)

35. A USDA inspection was performed on the 600 50-pound bags of jumbo red onions billed on invoice number 16578 on February 8, 2013, at 12:36 p.m., at Hanline, in Shelby, Ohio, following their shipment from Golden West, in Parma, Idaho, via truck on February 5, 2013. (HX-14 at 253, 258.) The inspection disclosed 9 percent average defects, including 2 percent damage by dry sunken areas and 7 percent decay in generally early, few advanced stages, and pulp temperatures ranging from 46 to 49 degrees Fahrenheit.

36. On February 6, 2013, at 2:23 p.m. EST, Hanline's Robert Hanline sent an email message to Golden West's Troy Seward and Rocky Mountain Brokerage Co.'s Robert Harris stating:

Golden West's reliance on the Act of God clause in order to pro-rate the shipments to Hanline is misplaced. The right to prorate supply is expressly conditioned upon "discussion and approval" from Hanline. Hanline has not approved Golden West's decision to pro-rate, and disputes that the circumstances outlined in your January 22 email fall within the Act of God provision in the March 19, 2012 onion contract. Again, Hanline maintains that Golden West's failure to supply the contracted amounts contract [sic] is a breach of that contract. Hanline will cover any shortfall in Golden West's shipments and intends to recover all damages incurred as a result of Golden West's breach, which will include, but are not

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limited to, the cost of purchasing onions in substitution for those due from Golden West, along with incidental and consequential damages, costs, interest and attorney's fees.

(GWPX-S at 2; HX-4.)

37. On February 6, 2013, at 2:39 p.m. MST, Rocky Mountain Brokerage Co.'s Robert Harris sent an email message to Hanline's Robert Hanline and Kraig Sullivan stating:

First, let me say that I am sad that we have not been able to come to any other solution on this issue other than turning it over to the attorneys. I know it is not what either party intended when we first entered into this agreement. Also for business partners over the past twelve to thirteen years I would hope we would want to do everything possible to avoid harming each other or the end buyer and user, Wendys. I don't think anyone can say there is not a shortage of red onions at this point. Shipping point prices indicate this, they are an all-time high of \$1.00 per pound. I have searched the storage crop areas for replacements of red onions and supplies are very low and in few hands. Every shipper I talked to would only quote them in mixer quantities, couple pallets on a load. Troy also has searched and as I told Kraig this morning there may be one independent grower with a supply anywhere close to the volume needed and those may already be tied up. I'm just wondering if there isn't another solution. Possibly the use of yellow onions for the period that remains until new supplies become available. I remember not long ago a tomato shortage that caused many restaurants to pull tomatoes off certain products. Has this question been asked? This may be one of several shortages that could happen as we enter into the fresh onion deal and mother nature becomes an even greater factor that time of year. I think some flexibility would be in the best interests of all to avoid this situation in the future. Please let me know your thoughts..

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(GWPX-R.)

38. On February 7, 2013, at 5:50 p.m. MST, Golden West's Troy Seward sent an email message to Hanline's Robert Hanline and Kraig Sullivan, and Rocky Mountain Brokerage Co.'s Robert Harris, stating, in pertinent part, as follows:

...

To date, you have indicated that our right to prorate supply is conditioned upon "discussion and approval" from Hanline, but you have not provided any reasonable basis to refuse the approval of the proration. Would you please share some clarification of what circumstances that you are disputing regarding the information I have provided, which outlines the issues we have experienced? All issues discussed in my January 22 email, simply document all problems experienced and discussed with you from the time of calculating the required acreage for the contract, through harvest and packing of the product. I felt that the email was a proactive attempt to reinform all parties of events that we all knew were a real possibility, and to provide us all time to prepare a plan to create a real solution to the problem.

In an effort to find a solution that would satisfy the contract, and to ensure that Hanline can be serviced with the adequate supply of Jumbo Red Onions, we have located ONE grower in the Treasure Valley growing region that owns a volume of red onions that could satisfy the shortfall. We feel that we could possibly negotiate a deal with this grower at market prices, and forward on this product to Hanline, at a negotiated market price. Time is sensitive in this matter, as this grower has other interested parties in his product. This fact has has [sic] been presented to Rob Harris, who I believe has passed the information on to either you or Kraig for consideration,

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and we have yet to hear from you whether you are accepting the offer to procure this alternative supply, or if you have made any attempt to address this issue. If you elect to ignore or bypass our efforts to prorate and secure additional product under this contract and/or by law, and instead secure alternative product from outside sources, Golden West Produce will not assume any responsibility for any costs of any kind, associated with those purchases.

...

(GWPX-S; HX-6.)

39. On February 7, 2013, ProSource issued invoice number 16596 billing Hanline for 300 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$1,815.00, 476 25-pound bags of medium red onions at \$5.50 per bag, or \$2,618.00, and 312 50-pound bags of jumbo red onions at \$8.00 per bag, or \$2,496.00, for a total invoice price of \$6,929.00. (GWPX-O at 11.)

40. On February 12, 2013, ProSource issued invoice number 16649 billing Hanline for 500 25-pound bags of medium red onions at \$5.50 per bag, or \$2,750.00, and 600 50-pound bags of jumbo yellow onions at \$6.05 per bag, or \$3,630.00, for a total invoice price of \$6,380.00. (GWPX-O at 12.)

41. On February 13, 2013, at 10:08 a.m. MST, Rocky Mountain Brokerage Co.'s Robert Harris sent an email message to Hanline's Kraig Sullivan stating:

Kraig, I'm not sure how Bob is doing securing the Jumbo Reds for replacing the shortage from Golden West but I can do 2400 50lb bags per week from a shipper in Umatilla, OR. They have enough supply to go to the last week of March. The price this week would be \$30.00 fob. They do have rail service through U.P if you wanted to try the rail again. I would have to check with the shipper to see if he has enough cars and if he would ship the reds on rail. Let me know please.

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(GWPX-V.)

42. On February 19, 2013, ProSource issued invoice number 16718 billing Hanline for 600 50-pound bags of U.S. No. 1 jumbo yellow onions at \$6.05 per bag, or \$3,630.00, and 500 25-pound bags of medium red onions at \$5.50 per bag, or \$2,750.00, for a total invoice price of \$6,380.00. (GWPX-O at 13.)

43. On February 21, 2013, at 4:45 p.m. MST, Rocky Mountain Brokerage Co.'s Robert Harris sent an email message to Robert Hanline stating:

To keep this as simple as possible and so Troy knows exactly what he has to purchase to fulfill Hanline's needs could you go through your numbers and give me a total number of 50lb sacks of Jumbo Reds, 25lb Medium Reds and 50lb Jumbo Yellows he needs to ship through the week of March 20th. I think that would simplify this whole situation.

(HX-37.) At 2:56 p.m. PST on the same date, Mr. Hanline responded, "I will look at info Friday or over the weekend. I will reply Monday." (HX-37.)

44. On February 22, 2013, at 1:11 p.m. MST, Rocky Mountain Brokerage Co.'s Robert Harris sent an email message to Golden West's Troy Seward stating, "Troy, I have a shipper in Umatilla that has a good supply of reds yet. I can get you all you need @\$30 fob. They have been very nice." (GWPX-LL at 4.)

45. On February 25, 2013, ProSource issued invoice number 16834 billing Hanline for 500 25-pound bags of medium red onions at \$5.50 per bag, or \$2,750.00, and 600 50-pound bags of jumbo yellow onions at \$6.05 per bag, or \$3,630.00, for a total invoice price of \$6,380.00. (GWPX-O at 14.)

46. On February 28, 2013, at 3:19 p.m. MST, Rocky Mountain Brokerage Co.'s Robert Harris sent an email message to Golden West's Troy Seward stating, "Troy, I still have 50lb Jumbo reds available from Strebin Farms

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@ \$30.00 fob Umatilla, OR. Let me know if these would work. Thanks.”
(GWPX-LL at 5.)

47. On March 4, 2013, ProSource issued invoice number 16921 billing Hanline for 500 25-pound bags of medium red onions at \$5.50 per bag, or \$2,750.00, and 600 50-pound bags of jumbo yellow onions at \$6.05 per bag, or \$3,630.00, for a total invoice price of \$6,380.00. (GWPX-O at 15.)

48. On March 7, 2013, at 12:08 p.m. MST, Rocky Mountain Brokerage Co.’s Robert Harris sent an email message to Golden West’s Troy Seward stating:

Troy, Pricing for this week on the 50lb Jumbo reds from Strebin Farms is \$32.00. They went up \$2 due to demand recently and their supplies are being depleted more quickly than anticipated. Also if you need any the 50lb medium reds are based off of \$27.00. These prices are fob Umatilla, OR. Let me know if these will work for you.

(GWPX-LL at 6.)

49. On March 11, 2013, ProSource issued invoice number 16999 billing Hanline for 640 25-pound bags of medium red onions at \$5.50 per bag, or \$3,520.00, and 535 50-pound bags of jumbo yellow onions at \$6.05 per bag, or \$3,236.75, for a total invoice price of \$6,756.75. (GWPX-O at 16.)

50. On March 13, 2013, at 9:19 a.m. MST, Rocky Mountain Brokerage Co.’s Robert Harris sent an email message to Golden West’s Troy Seward stating, “Still have a fair supply of good quality Reds in Umatilla, OR. Price is \$30 fob. Also a few Mediums, \$12 on 25lb and \$22 on 50lb sacks.” (GWPX-LL at 7.)

51. On March 18, 2013, ProSource issued invoice number 17130 billing Hanline for 640 25-pound bags of medium red onions at \$5.50 per bag, or \$3,520.00, and 530 50-pound bags of jumbo yellow onions at \$6.05 per bag, or \$3,206.50, for a total invoice price of \$6,726.50. (GWPX-O at 17.)

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52. On March 18, 2013, at 10:41 p.m. MST, Rocky Mountain Brokerage Co.'s Robert Harris sent an email message to Golden West's Troy Seward stating, "Troy, South Basin packing in Umatilla went up \$2.00 on the reds but I can get Red Bull variety from 4 Star Ag in Oakes, ND for \$30.00 per 50lb sack. These look good and are still dormant, no sprouting. Let me know if you are interested." (GW PX-LL at 8.)

53. On March 22, 2013, at 9:31 a.m. MST, Golden West's Troy Seward sent an email message to Rocky Mountain Brokerage Co.'s Robert Harris stating:

As per the contract, we have fulfilled our obligation of shipping our weekly commitment through the date of March 20, 2013. As you know, the contract specifies shipping up to the indicated quantities through this date. Please advise Hanline that we have met this commitment, and that we will not be accepting any further orders at the contracted prices. The order you emailed for shipping Monday 3/25, is beyond the contract date and will not be shipped.

(GW PX-Z.)

54. The informal complaint in PACA Docket No. W-R-2013-259 was filed on May 6, 2013 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

CONCLUSIONS

In PACA Docket No. W-R-2013-259, Complainant Hanline alleges that pursuant to a written agreement entered with Respondent Golden West on March 19, 2012, Golden West was required to supply Hanline with 72,100 50-bags of jumbo red onions between September 1, 2012 and March 20, 2013. (Compl. ¶ 5.) Hanline alleges further that Golden West wrongfully invoked the Act of God clause in the contract and supplied Hanline with only 54,362 50-pound bags of jumbo red onions, 1,862 of which were rejected, resulting in a net quantity of jumbo red onions received of 52,500 50-pound bags. (Compl. ¶ 6; HX-12, HX-13 at 2.) As

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a result, Hanline states it was forced to make cover purchases, resulting in lost profits for the onions purchased and other damages totaling \$632,231.50, which amount Hanline seeks to recover from Golden West. (Compl. ¶ 7.)

In response to Hanline's allegations, Golden West submitted an Answer and Affirmative Defenses wherein it admits entering a written contract to supply Hanline with onions, but denies that the contract provided for the purchase and sale of 72,100 50-pound bags of jumbo red onions. (Answer ¶ 5.) Among the affirmative defenses asserted by Golden West is the contention that it should be deemed to have fully performed under the contract according to the doctrine of impossibility of performance. (Answer at 4.) Golden West also asserts that Hanline owes to Golden West, through its related marketing agent ProSource, the principal amount of at least \$188,499.25 for onions sold to and accepted by Hanline, plus attorney fees and finance charges, subject to proof as to the exact amount. (Answer at 3.)

Turning first to Golden West's objection to Hanline's contention that the contract provided for the purchase and sale of 72,100 50-pound bags of jumbo red onions, the written contract signed by the parties on March 19, 2012 specified that Golden West would sell, and Hanline would purchase, 2,400 50-pound sacks of jumbo red onions per week between September 1, 2012, and March 20, 2013, a period of approximately 29 weeks. (GWPX-A at 1-2; HX-1 at 1-2.) The contract also stated that one additional railcar comprised of 2,500 50-pound bags of jumbo red onions would be shipped on or around March 20, 2013. The shipment of 2,400 50-pound bags of red onions per week for 29 weeks would equal a total of 69,600 bags. Adding an additional railcar with 2,500 50-pound bags of jumbo red onions increases this total to 72,100 bags.

When asked at hearing about his understanding of the provision in the contract concerning the extra railcar, Golden West's Troy Seward responded:

The understanding of this provision is simply, in talking with Rob Harris during negotiation of this, even in the emails, this was always up in the air. One of Rob's emails said something along the line of, and we will have to find

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it, but everything looks okay on the contract, except that extra car. Those were discussions we were having at the time of forming this contract because I didn't understand what it meant to me as a grower, shipper. Rob's response to me was, well you know, just like normally if we have additional onions to ship at the end of term, then we will ship an extra car.

That made sense to me, if I have a good yield and I've got red onions available, Hanline is a good customer, we will ship another car if I have the onions, but I didn't have the onions.

So to me that negated that clause.

(Tr. 278:22, 279:1-17.) While the record shows that on March 7, 2012, Robert Harris emailed Mr. Seward a copy of the contract with a message stating "this looks okay except the language about the extra load" (HX-25 at 1), the record also shows that this provision remained in the version of the contract that Mr. Seward signed on March 19, 2012. (GW PX-A at 1-2; HX-1 at 1-2.) Moreover, Mr. Seward, in a January 22, 2013 email message to Mr. Harris and Hanline's Robert Hanline and Kraig Sullivan, acknowledges that when he was determining how many acres to plant to satisfy the Hanline contract, he used a period of 30 weeks, thereby accounting for the additional railcar shipped on or about March 20, 2013. (HX-2 at 1, 4.) We therefore find that the preponderance of the evidence supports Hanline's contention that the contract specified that Golden West would sell, and Hanline would purchase, a total of 72,100 50-pound bags of jumbo red onions.

Next we will consider Golden West's claim that it was excused from shipping the required number of 50-pound sacks of jumbo red onions under the contract based on "the doctrine of impossibility of performance." To properly address this claim, we must first consider whether the contract required for its performance goods identified when the contract was made, as per Uniform Commercial Code (U.C.C.) section 2-613; or alternatively stated, whether the goods were contemplated by the parties as coming

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exclusively from a sole source of supply, as addressed by U.C.C. section 2-615. U.C.C. section 2-613 provides the following:

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2-324) then if the loss is total the contract is avoided; and

if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Two factors determine whether U.C.C. § 2-613 applies; first, does the contract require for its performance goods identified when the contract is made; and second, did the goods suffer casualty without fault of either party before the risk of loss passed to the buyer? In the case of agricultural commodities, courts have held that destruction of part of a seller’s crop does not excuse performance where the commodity is identified in the contract only by kind and amount, without reference to the specific acreage where the commodity would be produced, *i.e.*, such commodity is not considered a good “identified when the contract is made.” *Bunge Corporation v. Recker*, 519 F.2d 449 (8th Cir.), 1975; *St. Joseph Hay & Feed Co. v. Brewster*, 195 S.W. 71 (Mo. App. 1917).

In a similar vein, Official Comment 9 to U.C.C. section 2-615 makes clear that for a seller of agricultural commodities to claim excused performance under this section, the agreement must specify the land on which the crops identified in the contract are to be grown. U.C.C. section 2-615 states:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

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Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Official Comment 9 to U.C.C. 2-615 explains:

The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods [U.C.C. section 2-613] or this section, and he may be excused, where there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

In dealing with this section of the U.C.C., P.A.C.A. reparation cases have affirmed the requirement that a specific acreage be referenced in the contract as the source for produce in order for the section to have

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effect. See *G. & H. Sales Corp. v. C. J. Vitner Co., Inc.*, 50 Agric. Dec. 1892 (1991); *Al Campisano Fruit Co., Inc. v. Richard C. Shelton*, 50 Agric. Dec. 1875 (1991); *Bliss Produce Co. v. A. E. Albert & Sons*, 35 Agric. Dec. 742, 20 U.C.C. Reporting Service 917 (1976); *Harrell v. Olin Price*, 31 A.D. 331 (1972), and *Holt v. Shipley*, 25 A.D. 436 (1966). This is rather pointedly addressed in *DiMare Fresh, Inc. v. Castro Produce LLC*,¹ wherein we stated,

PACA reparation cases and cases arising outside the PACA have both dealt with the application of these U.C.C. provisions by first resolving the threshold question: Does the contract call for the agricultural products to be supplied to be crops grown on designated land? If so, either of these U.C.C. provisions may apply. If not, they do not.

Additionally, we have also held that an impossibility, or Act of God, clause should have its widest application to farmers, with the berth narrowing as one moves in degrees towards the ultimate consumer. So if designation of the land upon which crops will be grown is contractually mandatory before a farmer will fall within the U.C.C. section 2-615 exemption, it is even more necessary that land designation apply to dealers before exemption be legally allowed. *Bliss Produce Co. v. A. E. Albert & Sons*, 35 Agric. Dec. 742, 20 U.C.C. Reporting Service 917 (1976).

Golden West's Troy Seward testified at hearing that Golden West was established to pack onions grown by GW Farms, the latter being the farming wing of Golden West. (Tr. 255:8-10, 256:9-11.) Mr. Seward also testified that Golden West purchased and packed onions from another grower, Rodriguez Farms. (Tr. 497:6-22, 498:1-22, 499:1-21; HX-33.) The contract between Golden West and Hanline makes no mention of the specific acreage on which the jumbo red onions used to satisfy the contract would be grown. In fact, the contract lacks any reference to any particular state or region where the jumbo red onions identified in the contract would be produced. The contract specifies only that the onions be "U.S. No. 1 Jumbo Red Onions of the Single Center Variety," and the Act of God Clause merely excuses performance for market circumstances that develop

¹ PACA Docket No. W-R-2011-372, Decided May 8, 2013.

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related to “Acts of God” or other market disruptions that are beyond Golden West’s control and “prevalent within the industry.” (HX-1 at 1-2.)

In *R & R Produce, Inc., v. Fresh Unlimited, Inc.*,² we stated:

The rationale of the requirement that the contract call for the crop to be grown on designated land in order for the impossibility excuse to be applicable, is that the absence of such a provision leaves the whole of the remaining world (excepting only reasonable transportation strictures) as a possible source of supply, and, that absent such a clause in the contract, it must be concluded that there were no contemplated restrictions on the seller accessing these other sources of supply.

Notably, Golden West has not shown that there was no supply to be had of jumbo red onions at any price. On the contrary, the record shows that the broker for the contract between Hanline and Golden West, Robert Harris of Rocky Mountain Brokerage Co., repeatedly advised Robert Hanline and Golden West’s Troy Seward that sufficient supplies were available to fulfill Golden West’s obligation to Hanline, albeit at a price that substantially exceeded the contract price. (GWPX-LL at 4-6.) Official Comment 4 to U.C.C. section 2-615 states:

Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.

(U.C.C. § 2-615, Official Comment 4.) The availability of jumbo red onions from other suppliers throughout the period of the contract shows

² 56 Agric. Dec. 997, 1006 (U.S.D.A. 1997).

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that there was no general failure of the red onion crop throughout all possible supply regions.

In addition to the foregoing, Hanline subpoenaed evidence from Golden West prior to hearing which shows that on or about August 27, 2012, ProSource entered a written contract with Sysco Merchandising and Supply Chain Services, Inc. (SMS) whereby ProSource agreed to supply SMS with 2,385 25-pound cartons of jumbo red onions and 3,907 25-pound sacks of jumbo red onions per week between September 10, 2012, and April 29, 2013. (HX-45 at 2-7, 11-13; Tr. 468:11-12, 469:14-16, 474:6-22, 475:1-12.) This evidence also shows that on or after August 27, 2012, Golden West entered a written contract with ProSource wherein it agreed to supply ProSource with the onions required under ProSource's contract with SMS.³ (HX-45 at 10-13; Tr. 472:3-22, 473:1-5.)

The ProSource/Golden West contract committed Golden West to supplying jumbo red onions in addition to those already committed to Hanline. Notably, the ProSource/Golden West contract was negotiated months after Golden West's Troy Seward admittedly had concerns that Golden West's jumbo red onion yield would be reduced as a result of two major hail storms that occurred in April and May of 2012. Also of note, the ProSource/Golden West contract was negotiated weeks after Mr. Seward sent an email message to Robert Harris of Rocky Mountain Brokerage Co. on August 1, 2012, advising that "the red onions are stressed at the end runs of the drip tape due to the algae issue we talked about," and that "we expect to see a reduction in overall yield and size as a result in these zones." (HX-29.)

The 157,300 pounds per week (2,385 25-pound cartons and 3,907 25-pound sacks), or a total of approximately 5.2 million pounds over 33 weeks, of jumbo red onions that Golden West committed to sell pursuant to its contract with ProSource and ProSource's related contract with SMS far exceeds the 980,000-pound shortfall (19,600 50-pound bags) that

³ The evidence submitted at hearing and the oral testimony also shows that on or about August 30, 2012, Golden West and Kingston & Associates Marketing LLC (Kingston) entered a written contract whereby Golden West agreed to supply, and Kingston agreed to purchase, 80 (+/-) 25# sacks, or 2,000 pounds, of Jumbo Red onions per week from the beginning of the season in 2012, through the end of the season in 2013. (HX-30; Tr. 476:5-22, 477:1-19.)

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Hanline is claiming in this proceeding. As Golden West made this commitment after it became aware that its yield of jumbo red onions would likely be less than anticipated, its performance was not made impossible by the occurrence of a contingency that was not anticipated by the parties at the time of contracting. Rather, Golden West's inability to satisfy the contract using onions produced by Mr. Seward's farming operation, GW Farms, which we have already determined was not a requirement of the contract, resulted from commitments made after unanticipated contingencies (i.e., hailstorms and algae blockage) occurred.

Golden West could have fulfilled its contractual obligation by acquiring jumbo red onions from any place or source and delivering them to Hanline. Golden West's failure to fulfill its contractual obligation is not excused by U.C.C. § 2-613 or U.C.C. § 2-615. Since U.C.C. § 2-613 does not apply to excuse Golden West's failure to deliver in accordance with the terms of the supply contract, Hanline is not limited to the option to "either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." U.C.C. § 2-613(b). Similarly, since U.C.C. § 2-615 does not apply to excuse Golden West's failure, there is no need to assess whether Golden West complied with its duty to allocate in a manner which is fair and reasonable, and to notify Hanline seasonably that there would be delay or non-delivery and of the estimated quota made available for the Hanline.

Hanline has available to it the remedies provided in U.C.C. §§ 2-711 and 2-712. U.C.C. § 2-712 provides that after a breach within U.C.C. § 2-711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. Having made such purchases, the buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as defined in U.C.C. § 2-715, but less expenses saved in consequence of the seller's breach.

Hanline seeks to recover damages for its cover purchases, and has offered a summary spreadsheet purchases of jumbo red onions that it made from January 28, 2013, through April 12, 2013, and the invoices from

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those purchases. (HX-17, 18.) Hanline's spreadsheet depicts the total costs of cover purchases above the contract price, with an overall total of \$674,603.00. (HX-18.) The spreadsheet shows purchases of 19,600 50-pound bags of jumbo red onions or their equivalent. This represents the difference between the contract quantity of 72,100 50-pound bags of jumbo red onions, and the 52,500 50-pound bags of jumbo red onions that were delivered to Hanline after adjusting for 1,862 50-pound bags of jumbo red onions that were reportedly rejected. (Compl. ¶ 6; HX-12, HX-13 at 2.) There is, however, no evidence in the record showing that any of onions delivered by Golden West were rejected by Hanline. Hanline is therefore entitled to cover damages for the purchase of 17,738 (72,100 – 54,362) 50-pound sacks of jumbo red onions.

Starting with Hanline's first purchase on January 28, 2013, six days after Troy Seward informed Hanline of Golden West's intention to prorate its remaining supply of jumbo red onions (HX-2), and adding the quantities purchased thereafter, Hanline's allowable cover purchases were completed on April 3, 2013. (HX-17.) During that period, Hanline purchased jumbo red onions, in both 25-pound and 50-pound bags, from River Point, Basin Gold, NW Onion, RPE, Four Seasons, J.F. Palmer, and Potandon. (HX-17.) Hanline generally calculated its damages by subtracting the contract price from the cover price; however, in the case of River Point, Hanline measured its damages as the difference between the market price and the contract price because, as Hanline states, it "utilized onions from a fixed price contract with River Point as cover" and "the price for those onions was well below the prevailing market price." (HX-17.)

U.C.C. § 2-712 provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. (U.C.C. § 2-712, Official Comment 1.) If Hanline had pre-existing commitments for the onions that it contracted to purchase from River Point, it presumably would have used the onions for that purpose. That Hanline used these onions in substitution of those due from Golden West suggests that Hanline had no other commitment for the onions and that it properly utilized those onions to mitigate the damages suffered as a result of Golden West's breach. Hanline's damages should, therefore, be measured as the difference between the contract price and the cover price, not the market price.

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Hanline purchased 15,250 25-pound bags of jumbo red onions from River Point at \$5.25 per bag. (HX-18 at 1-2, 5-6, 10, 12, 18, 21, 24, 26-27.) This equates to the purchase of 7,625 50-pound bags at \$10.50 per bag.⁴ Hanline is entitled to recover from Golden West the difference between the \$10.50 cover price and the \$7.85 contract price, or \$2.65, for the 7,625 50-pound equivalent jumbo red onions it purchased. This results in damages of \$20,206.25 (7,625 * 2.65).

For its remaining cover purchases, Hanline purchased 50-pound bags of jumbo red onions at \$40.00 per bag from Basin Gold, 50-pound bags of jumbo red onions from NW Onion at \$35.00 per bag, 25-pound bags of jumbo red onions from RPE at \$20.90 and \$22.00 per bag (\$41.80 and \$44.00 per 50-pound bag equivalent), 50-pound bags of jumbo red onions from Four Seasons at \$39.65 per bag, 25-pound bags of jumbo red onions from J.F. Palmer at \$22.10 per bag (\$44.20 per 50-pound bag equivalent), and 50-pound bags of jumbo red onions from Potandon at \$38.50 per bag. All of these prices exceed the \$30.00 per bag price that Rocky Mountain Brokerage Co.'s Robert Harris quoted for 50-pound bags of jumbo red onions from other shippers. (GWPX-V, LL at 7-8.)

While Hanline asserts that it had concerns about doing any further business with Golden West after it breached the contract, the purchase of substitute onions from other shippers through Rocky Mountain Brokerage Co. would not involve Golden West. Consequently, we find that Hanline failed to mitigate its damages by refusing to purchase substitute onions from other shippers through Rocky Mountain Brokerage Co. and instead purchasing the onions from other shippers at higher prices. We therefore find that Hanline's damages for these onions should be limited to the difference between the \$30.00 per bag cover price that it could have

⁴ Golden West argues that the price for 50-pound sacks cannot be determined simply by doubling the price for 25-pound sacks, due to differences in supply costs and labor. (Golden West and ProSource Post-Hearing Brief at 51.) Golden West does not, however, offer an alternative methodology for converting one price to the other; and, the \$10.50 per bag price that results from doubling the price for 25-pound bags of jumbo red onions is still significantly below the price that Rocky Mountain Brokerage Co.'s Robert Harris was quoting for substitute supplies of 50-pound bags of jumbo red onions. (GWPX-V.)

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secured through Rocky Mountain Brokerage and the \$7.85 per bag contract price.

For the remaining 10,113 50-pound bags of jumbo red onions that Hanline was entitled to purchase as cover, the difference in cost of \$22.15 per bag (\$30.00 less \$7.85) results in damages of \$224,002.95. Adding this to the damages of \$20,206.25 associated with the purchase of onions from River Point, we arrive at total damages for Hanline's cover purchases of \$244,209.20.

In defense of its failure to pay Hanline this sum, Golden West raises a number of affirmative defenses. Specifically, Golden West asserts that, a) the Complaint fails to state facts sufficient to constitute a cause of action against Golden West; b) Hanline has waived or partially waived any and all claims it may have had against Golden West; c) Hanline does not have standing and is therefore not entitled to the relief requested; d) Hanline failed to mitigate its damages; e) Golden West fully performed all terms and conditions of the agreement with Hanline; and f) Golden West's performance was excused by Hanline's breach of the agreement and failure to perform. These defenses either lack sufficient detail to be considered or are deemed without merit based on the conclusions reached above.

Golden West's failure to pay Hanline \$244,209.20 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Hanline. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. See *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); see also *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (1963). The interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the

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Federal Reserve System, for the calendar week preceding the date of the Order.

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Hanline in this action paid \$500.00 to file its Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

Next we will consider PACA Docket No. E-R-2014-4, wherein ProSource seeks to recover a total of \$188,499.25 billed to Hanline for sixteen loads of onions shipped between January 5, 2013, and March 18, 2013. (Compl. ¶ 6.) The onions in question were supplied to Hanline pursuant to the written contract with Golden West that is the subject of PACA Docket No. W-R-2013-259. While the contract specified that Golden West would invoice Hanline for the onions, Hanline's Robert Hanline testified at hearing that he understood that ProSource was a sales agency for Golden West (75:14-15), and the evidence shows that Hanline paid 33 invoices issued by ProSource for the contract onions between September 5, 2012 and January 3, 2013 without objection.⁵ The evidence shows further that Hanline prepared corresponding purchase orders for these transactions listing ProSource as the vendor.⁶ Accordingly, we find that Hanline consented to receiving billing from and paying ProSource for the contract onions.

There is no dispute that Hanline received and accepted the sixteen loads of onions at issue in the PACA Docket No. E-R-2014-4. Hanline is, therefore, liable to ProSource for the onions it accepted at the contract prices totaling \$188,499.25, less any damages resulting from any breach of contract by ProSource. Hanline alleges that ProSource's claim is barred by the doctrine of setoff, and asserts that Hanline's damages stemming

⁵ HX-14 at 2, 7, 14, 20, 25, 31, 37, 44, 50, 56, 62, 69, 75, 81, 92, 99, 104, 110, 115, 120, 125, 130, 135, 140, 145, 150, 159, 164, 175, 180, 185, 190, and 195.

⁶ HX-14 at 4, 10, 16, 22, 27, 33, 40, 46, 52, 58, 63, 71, 77, 83, 88, 97, 101, 107, 112, 117, 122, 127, 132, 137, 142, 147, 152, 161, 177, 183, 188, 191, and 196.

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from ProSource's breach of contract, as alleged in the Counterclaim, exceed any damages claimed and allegedly sustained by ProSource. (Answer at 4.)

The allegations that comprise Hanline's Counterclaim in PACA Docket No. E-R-2014-4 mirror the allegations asserted against Golden West in PACA Docket No. W-R-2013-259. Hanline's claim against ProSource is founded upon its contention that Golden West and ProSource are so intertwined and non-distinct from each other that each operates as an alter ego or instrument of the other, and that Golden West assigned all or part of its duties and obligations under the contract to ProSource. (Answer ¶¶ 9, 11.)

That Golden West assigned its duty to invoice Hanline for the onions to ProSource does not establish that Golden West assigned *all* of its duties and obligations under the contract to ProSource. Moreover, as we already mentioned, Hanline's Robert Hanline has testified that to his understanding ProSource performed marketing functions for Golden West that are separate and distinct from the packing operation of Golden West. Furthermore, PACA license records show Golden West and ProSource share only one principal in common, Troy Seward. They are otherwise separately owned. Accordingly, we find no merit in Hanline's contention that the firms are non-distinct or that Golden West assigned anything other than its invoicing duty under the contract to ProSource.

As we have already determined that Golden West is liable to Hanline for damages in connection with the same allegations asserted by Hanline against ProSource in its Counterclaim, the Counterclaim should be dismissed. In addition to the setoff, Hanline raises a number of other affirmative defenses, including a) ProSource fails to state a claim upon which relief can be granted; b) ProSource has not been damaged in any sum; and c) ProSource's claim is barred by the doctrines of unclean hands, estoppel, and laches. It is plain from foregoing discussion that ProSource states a claim upon which relief can be granted and that it was damaged, and Hanline fails to explain how the doctrines of unclean hands, estoppel and laches should be applied to bar ProSource's claim. Absent more detail, we are unable to consider these defenses.

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Hanline's failure to pay ProSource \$188,499.25 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to ProSource. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. See *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); see also *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (1963). ProSource seeks pre-judgment interest on the unpaid produce shipments listed in the Complaint at the rate of 1.5 percent per month (18 percent per annum). ProSource's claim is based on its invoices issued to Hanline, which expressly state: "Past due invoices shall accrue interest at 1.5% per month." (See, e.g., Compl. Ex. B.) There is nothing in the record to indicate that Hanline objected to the interest provision stated on ProSource's invoices. While Hanline asserts that Pro-Source should not be awarded pre-judgment interest because the interest provision was not included in the written contract with Golden West covering said onions, we have already established that Hanline was aware and acquiesced to the invoicing function of the contract being assigned to ProSource. Since the payment of interest on past due invoices was not addressed in the contract, there was no bar to ProSource including a provision addressing this issue on its invoices. Therefore, in the absence of a timely objection by Hanline, we find that the interest provision stated on ProSource's invoice was incorporated into the sales contract. See *Coliman Pac. Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 646-47 (2014). Accordingly, pre-judgment interest will be awarded to ProSource at the rate of 1.5 percent per month (18 percent per annum). Post-judgment interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

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PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Pro-Source in this action paid \$500.00 to file its Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party. Section 7(a) of the PACA (7 U.S.C. § 499g(a)) states that, after an oral reparation hearing under the PACA, the “Secretary shall order any commission merchant, dealer, or broker, who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing.” In PACA Docket No. W-R-2013-259, we determined that Hanline is entitled to recover from Golden West \$244,209.20, or approximately 40 percent of the amount claimed in its Complaint.

The term “prevailing party” has been defined to be the party in whose favor judgment is entered whether or not the party has recovered its entire claim. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). In determining the identity of the prevailing party, “the amount of effort put forth at the hearing in support of certain allegations is a significant factor.” *Anthony Vineyards v. Sun World International, Inc.*, 62 Agric. Dec. 342, 356 (2001).

The majority of the testimony at hearing was devoted to the issue of whether Golden West was excused from performance under the contract by circumstances outside of its control. On this issue, Hanline prevailed. Hanline also prevailed on the issue of contract quantity. Although Golden West was successful in proving that Hanline failed to mitigate damages, the overriding issue remained Golden West’s failure to fulfill its contractual obligation to supply red onions to Hanline, and Hanline prevailed on this issue and was awarded cover damages as a result. Accordingly, we find that Hanline is the prevailing party in PACA Docket No. W-R-2013-259.

In accordance with 7 C.F.R. § 47.19(d), Hanline timely filed a request for reimbursement of fees and costs in connection with the oral hearing.

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Golden West did not file an objection to the fees and costs included in Hanline's request. The fees and costs will therefore be allowed to the extent that they are considered reasonable.

Hanline claims \$31,470.00 in attorney's fees (104.9 hours at \$300.00 per hour) for time spent by its attorney, Ms. Katy Koestner-Esquivel, preparing for the oral hearing. Absent any objection from Golden West, we find that Hanline is entitled to recover the attorney's fees claimed. Hanline also claims \$3,600.00 (24 hours at \$150.00 per hour) for Ms. Koestner-Esquivel's time spent travelling to and from the hearing. Attorney's fees for time spent in travel are, however, not recoverable. See *Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (1979).

Expenses that would have been incurred in connection with a case if that case was handled under the documentary procedure also may not be awarded under section 7(a) of the PACA. *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 865 (2000). Hanline claims \$894.10 for printing trial exhibits and subpoena responses. As the same exhibits presumably would have been printed for submission under the documentary procedure, and the expenses for subpoena responses are not separated from those for trial exhibits, we are unable to award Hanline the printing expenses claimed. Hanline is, however, entitled to recover the \$900.00 expense it incurred to obtain a copy of the hearing transcript.

Finally, Hanline claims \$64.41 for fuel/mileage, \$25.95 for internet, \$785.38 for lodging, \$134.81 for meals, \$117.00 for parking, and \$1,322.11 for transportation expenses incurred by Ms. Koestner-Esquivel in connection with her attendance at the oral hearing. Hanline submitted an itemized list and copies of receipts in support of these expenses. The \$64.41 claimed for mileage to and from the airport and fuel for the rental car used to travel to and from the hearing are recoverable. The relationship of the \$25.95 fee for in-flight internet to Ms. Koestner-Esquivel's participation or preparation for the hearing is not established and this expense is therefore disallowed. Hanline submitted a hotel receipt showing a lodging expense of \$785.35 (5 nights at \$157.07 per night) for Ms. Koestner-Esquivel's attendance at the hearing. We find that this expense is recoverable. However, only \$471.21 will be awarded since the

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hearing was completed in 3 days. The receipts submitted by Hanline also support recovery of \$53.62 for meals, \$117.00 for parking and \$1,275.10 for transportation.

Based on the foregoing, we find that as the prevailing party Hanline is entitled to recover fees and expenses totaling \$34,291.34 (\$31,410.00 attorney's fees, \$900.00 hearing transcript, \$64.41 fuel/mileage, \$471.21 lodging, \$53.62 meals, \$117.00 parking, and \$1,275.10 transportation) from Golden West.

While in PACA Docket No. E-R-2014-4 we are awarding ProSource \$188,499.25, or 100 percent of the amount claimed in its Complaint against Hanline, Hanline's only dispute with respect to its liability for this sum was the proper party for payment, and only a minimal amount of hearing testimony was devoted to this issue. ProSource's attorney, Mr. Bart M. Botta, also represented Golden West in its defense of the claim asserted by Hanline. As Mr. Botta's efforts were primarily concentrated on the defense of Golden West, and no attempt was made to separate the fees related to his defense of Golden West from those associated with the claim asserted by ProSource, we are unable to award fees and expenses to ProSource as the prevailing party in its claim against Hanline.

Finally, Hanline's Counterclaim against ProSource, which mirrored the assertions made in its Complaint against Golden West, was dismissed because Hanline offered no evidence showing that ProSource assumed anything other than the invoicing duties of Golden West. While it may be argued on this basis that ProSource is the prevailing party in the Counterclaim, the award of fees and expenses associated with this claim is again made impracticable by the overlap of the claims and the shared representation.

ORDER

Within 30 days from the date of this Order, Golden West shall pay Hanline as reparation \$244,209.20, with interest thereon at the rate of 0.60 of one percent per annum from the date of this Order, until paid, plus the amount of \$500.00.

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Within 30 days from the date of this Order, Golden West shall pay Hanline as reparation for fees and expenses, \$34,291.34, with interest thereon at the rate of 0.60 of one percent per annum from the date of this Order, until paid, plus the amount of \$500.00.

Within 30 days from the date of this Order, Hanline shall pay ProSource as reparation \$188,499.25, with interest thereon at the rate of 18 percent per annum from March 1, 2013, up to the date of this Order. Hanline shall also pay ProSource interest at the rate of 0.60 percent per annum on the sum of \$188,499.25 from the date of this Order, until paid, plus the amount of \$500.00.

The Counterclaim submitted by Hanline is dismissed.

Copies of this Order shall be served upon the parties.

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The PACA reparation decision found on pages 763 to 768 was not intended for publication and has been retracted.

Miscellaneous Decisions & Orders
75 Agric. Dec. 769

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://www.oaljdecisions.dm.usda.gov/misc-current>.

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**In re: MIMI USA, INC.
Docket No. 16-0149.
Miscellaneous Order.
Filed August 26, 2016.**

**In re: RODERICK L. ALLEN.
Docket No. 15-0083.
Miscellaneous Order.
Filed December 20, 2016.**

**In re: JOSHUA C. ALLEN.
Docket No. 15-0084.
Miscellaneous Order.
Filed December 20, 2016.**

**In re: MARK TOWERY.
Docket No. 15-0095.
Miscellaneous Order.
Filed December 21, 2016.**

DEFAULT DECISIONS

DEFAULT DECISIONS & ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/.

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M & M PRODUCE, INC.

Docket No. 16-0035.

Default Decision and Order.

Filed July 6, 2016.

FLORIDA FRESH TROPICALS, LLC.

Docket No. 15-0101.

Default Decision and Order.

Filed August 9, 2016.

SANDIA DISTRIBUTORS, INC.

Docket No. 16-0092.

Default Decision and Order.

Filed November 21, 2016.

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Consent Decisions
75 Agric. Dec. 771

CONSENT DECISIONS

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Mi Pueblo Latin Market, Inc.

Docket No. 16-0069.

Filed August 17, 2016.

Gregory Melton, d/b/a GM Brokerage.

Docket No. 16-0033.

Filed November 10, 2016.
