

UNITED STATES DEPARTMENT OF AGRICULTURE, *19 FEB 13 PM 3:54*  
BEFORE THE SECRETARY OF AGRICULTURE

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PACA Docket No. 18-0009

**ORDER DENYING RESPONDENT'S MOTION TO VACATE DECISION AND ORDER  
ON THE WRITTEN RECORD AND AFFIRMING DECISION AND ORDER**

#### Summary of Background

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (“PACA”), wherein Administrative Law Judge (“ALJ”) Jill Clifton issued an August 28, 2018 Decision and Order on the Written Record (“Decision and Order”) finding, *inter alia*, that Respondent, during the period December 2016 through May 2017, on or about the dates and in the transactions set forth in Appendix A to the Complaint filed in this case, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to four (4) sellers for 108 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$898,725.70. ALJ Clifton further denied Respondent’s request for an oral hearing and ordered that the facts and circumstances of Respondent’s PACA violations be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

On September 28, 2018, Respondent filed a Motion to Vacate Decision and Order on the Written Record, or in the Alternative, to Appeal to the Judicial Officer Pursuant to 7 C.F.R. § 1.145 (“Motion to Vacate”),<sup>1</sup> apparently on the sole basis that on May 15, 2018, one of the unpaid

<sup>1</sup> Complainant asserts that Respondent's filing does not meet the requirements of a petition for appeal (7 C.F.R. § 1.145); however, Respondent's filing will be deemed sufficient for purposes of this Order.

produce sellers listed on Appendix A to the Complaint in the instant case filed a Voluntary Dismissal and Withdrawal of its Trust Claim in District Court (in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 17-cv-08381). Respondent asserts in its motion that because the produce seller New Era Produce, LLC (“New Era”) withdrew its claim in District Court, New Era should be removed from the list of produce sellers that ALJ Clifton in the August 28, 2018 Decision and Order found were owed unpaid and past due produce debt by Respondent (New Era is owed \$762,253.05 by Respondent). Respondent seeks to have the amount owed to New Era removed from consideration in an effort to argue that the remaining balance of \$136,472.65 (\$898,725.70 - \$762,253.05 = \$136,472.65), an amount which Respondent apparently does not dispute is a past due unpaid produce debt, is a *de minimis* amount and that therefore does not warrant a finding or sanctions against Respondent. Complainant’s Response to Respondent’s Motion to Vacate was filed on October 23, 2018.

For the reasons discussed more fully herein below, Respondent’s Motion to Vacate is denied and the Decision and Order issued by ALJ Clifton on August 28, 2018 is affirmed.

#### Discussion

##### **1. New Era’s withdrawal of trust claim is not dispositive to Respondent’s failure to pay.**

Respondent provides, as an exhibit to its Motion to Vacate, the May 15, 2018 Voluntary Dismissal and Withdrawal of its Trust Claim filed by New Era in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 17-cv-08381. The Voluntary Dismissal consists of two lines stating only that New Era voluntarily withdrew its PACA trust claim and offers no substantive explanation for the dismissal of the trust claim. The fact that the claim was withdrawn and dismissed in District Court is not dispositive of whether Respondent failed to pay New Era in accordance with the provisions of the PACA.

The fact that a PACA produce seller has perfected its rights under the trust provisions of the PACA, or that a PACA trust claimant has withdrawn or waived its PACA trust rights under the PACA, in no way precludes the Secretary from enforcing the full and prompt payment provisions of the PACA under section 2(4) (7 U.S.C. § 499b(4)). *Baiardi Food Chain v. United States*, 482 F.3d 238, 242-44 (3rd Cir. 2007). Nor do these facts preclude disciplinary sanctions for a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *Id.* Complainant's position on this issue, set forth in its October 23, 2018 Response to Respondent's Motion, accurately summarizes the applicable law and is hereby adopted. Full payment promptly in accordance with the PACA means payment by a buyer within ten days after the day(s) on which produce is accepted, provided that parties may elect to use different payment terms, so long as those terms are reduced to writing prior to entering into the transaction. The burden of proof of such written agreement is on the party claiming existence of the agreement. 7 C.F.R. §§ 46.2 (aa)(5) and 46.2 (aa)(11); *see Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). A PACA licensee always has a duty under section 2(4) of the PACA to make full payment promptly (*Scamcorp, Inc.*, 57 Agric. Dec. at 547-49); the PACA trust is an additional remedy under a separate section of the Act (7 U.S.C. § 499e(c)) against a buyer failing to make prompt payment. *Idahoan Fresh*, 157 F.3d 197, 199 (3d Cir. 1998); H.R. REP. NO. 98-543, at 2 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406. Prior to this amendment to the PACA, unpaid produce suppliers were unsecured creditors vulnerable to the buyers' practice of granting other creditors a security interest in their inventory and accounts receivable. *In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 808-09 (8th Cir. 1994).

Respondent, in its Motion to Vacate, in no way substantively addresses the debt owed to New Era or states that the debt has been (or will be) paid. Moreover, Respondent does not address

the declaration of PACA Senior Marketing Specialist (b) (7)(C) who on July 10, 2018 (two months after New Era's Voluntary Dismissal and waiver of trust claims in District Court) communicated with (b) (7)(C), Managing Member of New Era and was told by Mr. (b) (7)(C) that as of that date, the entire New Era debt of \$762,253.05 as stated in the Complaint was still owed by Respondent. Nor does Respondent in any way address (b) (7)(C)'s finding that as of July 10, 2018, Respondent had accumulated \$123,567.00 in additional roll-over PACA produce debt to produce sellers. See Declaration of (b) (7)(C); Decision and Order on the Written Record at 8-9.

The amount owed to New Era, as stated in Appendix A to the Complaint, the Declaration of (b) (7)(C) and as found by ALJ Clifton in her August 28, 2018 Decision and Order, is supported by the record; therefore, it will not be subtracted from the total debt of \$898,725.70 that ALJ Clifton found Respondent owed to produce sellers. That New Era withdrew and waived its PACA trust rights in the District Court forum does not eliminate Respondent's PACA prompt-payment violation as to New Era, nor does it bar a finding by the Secretary that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA when it failed to promptly pay New Era. *Baiardi Food Chain*, 482 F.3d at 241-44.

**2. Respondent is incorrect as to what constitutes a *de minimis* amount.**

Assuming *arguendo* that the New Era debt should be subtracted from the \$898,725.70 total debt that ALJ Clifton found Respondent owed to produce sellers, the \$136,472.65, which Respondent apparently does not dispute is a past-due unpaid produce debt owing to three produce sellers, is not a *de minimis* amount. See, for example, *D.W Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994) (a finding of PACA violation and sanction is appropriate whenever the total amount due and owing exceeds \$5,000); *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984)

(Ruling on Certified Question) (no hearing required unless “the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000”), *final decision*, 44 Agric. Dec. 870 (U.S.D.A. 1985).

*See also Scamcorp, Inc.*, 57 Agric. Dec. at 551 n.7.

Respondent has made no assertion in the Answer, or in any subsequent filing, that full payment of the past due and unpaid New Era debt or *any* of the past due and unpaid produce debt owed to the other sellers listed in the Appendix to the Complaint in this case will be made or full compliance will be achieved pursuant to the parameters set by the *Scamcorp* case. *See id.* at 548-49. Under the policy enunciated in the *Scamcorp* case (*see* ALJ Clifton’s Decision and Order at 5-6), this is a no-pay case for which revocation of Respondent’s license is warranted, or publication in lieu of revocation. *Id.* No genuine issue of fact exists in this case that would require a hearing.<sup>2</sup> Under these circumstances, a Decision and Order on the record and finding of PACA violation and sanction was appropriate. *Id.*; *see also H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 7 C.F.R. § 1.139.

### **3. Respondent’s PACA Violations Were Repeated, Flagrant, and Willful.**

The Secretary of Agriculture may revoke the license of a dealer who is found to have committed repeated, flagrant, and willful PACA violations.<sup>3</sup> As the Judicial Officer has explained:

[O]ne of the primary remedial purposes of the PACA [is] the financial protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even customers of perishable

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<sup>2</sup> *See Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (“Common sense suggests the futility of hearings when there is no factual dispute of substance.”).

<sup>3</sup> *See* 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); *Norinsberg v. U.S. Dep’t of Agric.*, 47 F.3d 1224, 1225 (D.C. Cir. 1995).

agricultural commodities who ultimately bear increased industry costs resulting from failures to pay. *These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.*<sup>4</sup>

ALJ Clifton's finding that Respondent's violations in this case were repeated is fully supported by the record and is affirmed. Violations are "repeated" under PACA when they are committed multiple times, non-simultaneously.<sup>5</sup> As Respondent failed to pay four sellers promptly and in full for 108 lots of perishable agricultural commodities over a nearly six-month period, its violations were clearly repeated.

ALJ Clifton's finding that Respondent's PACA violations were flagrant is also supported by the record and is hereby affirmed. Flagrancy is determined by evaluating the number of violations, total money involved, and length of time during which the violations occurred.<sup>6</sup> The signed declaration by PACA employee (b) (7)(C) provides that, as of July 10, 2018, Respondent owes a total of at least \$889,233.70 to the four sellers named in Appendix A to the Complaint.<sup>7</sup> The declaration further states: "Since the completion of my compliance investigation there have been three additional informal complaints filed against Olympic Wholesale Produce, Inc., in the amount of \$123,567.00. Olympic Wholesale Produce, Inc., has not responded to two complaints, and is not disputing the other."<sup>8</sup> By failing to pay that money – far more than a *de minimis* amount – to multiple sellers over a near six-month period and proceeding to accumulate an additional

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<sup>4</sup> *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1273-74 (U.S.D.A. 1996) (emphasis added).

<sup>5</sup> See *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 592 (6th Cir. 2003); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *Five Star Food Distrib., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

<sup>6</sup> *Five Star Food Distrib., Inc.*, 56 Agric. Dec. at 895; *Havana Potatoes*, 55 Agric. Dec. at 1270; see *Reese Sales Co. v. Hardin*, 458 F.2d 183, 185 (9th Cir. 1972).

<sup>7</sup> See Mot. for Decision Without Hrg Attach. at 1 ¶¶ 3-6.

<sup>8</sup> *Id.* at 1 ¶ 7.

\$123,567.00 in produce debt thereafter, Respondent has committed flagrant PACA violations.<sup>9</sup>

Respondent submits no evidence to the contrary.

Lastly, ALJ Clifton's finding that Respondent's violations were willful is fully supported by the record and is hereby affirmed.

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. Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.<sup>10</sup>

Given the many transactions, substantial amount of debt, and continuation of violations over a six-month period in this case, ALJ Clifton correctly found that Respondent's violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of PACA.<sup>11</sup>

## **ORDER**

For the foregoing reasons, Respondent's Motion to Vacate is DENIED. The Decision and Order issued by Administrative Law Judge Jill Clifton on August 28, 2018 is AFFIRMED.

1. Olympic Wholesale Produce, Inc.'s Motion to Vacate Decision and Order on the Written Record is DENIED.

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<sup>9</sup> AMS is not required to prove – and ALJ Clifton was not required to find – the exact number of unpaid produce sellers or the exact amount Respondent owes each seller. See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1835-36 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2007); see also *Humts Point Tomato Co.*, 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

<sup>10</sup> *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998).

<sup>11</sup> *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016).

2. The finding that Olympic Wholesale Produce, Inc. committed willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)) is fully supported by the record and is AFFIRMED.
3. Olympic Wholesale Produce, Inc.'s PACA license, No. 19740290, is revoked. In the alternative, in the event that Olympic Wholesale Produce, Inc. failed to renew its license, the facts and circumstances of Olympic Wholesale Produce Inc.'s PACA violations shall be published.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all the dockets identified herein above.

Done at Washington, D.C.

this 13<sup>th</sup> day of February 2019

  
[REDACTED]  
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Bobbie J. McCartney  
Judicial Officer

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