

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
)	
VIRGINIO MORENO,)	PACA Docket No. D-17-0005
d/b/a FRESHPACK DISTRIBUTION,)	
)	
Respondent)	

DECISION WITHOUT HEARING BY REASON OF DEFAULT

Appearances:

Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Specialty Crops Program, Agricultural Marketing Service [AMS]; and

Virginio Moreno, pro se.

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) [PACA], the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45) [Regulations], and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) [Rules of Practice].

This proceeding initiated with a complaint filed by Melissa Bailey, Associate Deputy Administrator, Specialty Crops Program, Agricultural Marketing Service [AMS or Complainant] on October 11, 2016, alleging that Virginio Moreno, d/b/a Freshpak Distribution [Respondent], willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to two (2) sellers of the agreed purchase prices, or balances thereof, in the total amount of \$219,574.00, for fourteen (14) lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce. The Complaint

alleges that the violations occurred in commerce between November 2013 and December 2014, on or about the dates and in the transactions set forth in Appendix A to the Complaint and incorporated herein by reference. Moreover, Complainant requests that I: *(1)* find that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and *(2)* order that the facts and circumstances of the violations be published.

Although duly served with the Complaint, Respondent did not file an answer to the Complaint within the twenty-day time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).¹ On March 2, 2017, Complainant filed a “Motion for Decision Without Hearing by Reason of Default” [Motion for Default] and “Proposed Decision Without Hearing by Reason of Default” [Proposed Decision]. As of this date, Respondent has not filed any objections thereto.²

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision. 7 C.F.R. § 1.136(c). As Respondent failed to file an answer within the time period prescribed in section 1.136 of the Rules of Practice

¹ The Hearing Clerk’s records reflect that the Complaint was sent to Respondent via certified mail and regular mail on October 12, 2016, but that the certified mailing was returned “unclaimed” by the U.S. Postal Service on December 8, 2016. In accordance with section 1.147 of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk’s Office re-mailed the Complaint by ordinary mail on December 13, 2016. Respondent had twenty (20) days from the date of service to file a response. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent’s answer was due by January 3, 2017. Respondent did not file an answer on or before that date.

² The Hearing Clerk’s records reflect that the Motion for Default and Proposed Decision were sent to Respondent on May 31, 2017. Respondent had twenty (20) days from the date of service to file objections to Complainant’s Motion. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent’s objections were due by June 20, 2017. Respondent did not file any objections on or before that date.

(7 C.F.R. § 1.136), the following Decision and Order is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual. Respondent's mailing address is a home address. Respondent's home address is withheld from this Decision to protect personal privacy but will be provided to the Hearing Clerk's Office separately for service purposes.
2. At all times material herein, Respondent was licensed or operating subject to the provisions of the PACA. License No. 20140108 was issued to Respondent on October 25, 2013. The license was suspended on June 27, 2014, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)). This license terminated on October 25, 2014, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), after Respondent failed to pay the annual renewal fee.
3. Respondent, during the period November 12, 2013, and December 29, 2014, on or about the dates and in the transactions set forth in Appendix A to the Complaint and incorporated herein by reference, failed to make full payment promptly to two (2) sellers of the agreed purchase prices, or balances thereof, in the total amount of \$219,574.00 for fourteen (14) lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

Conclusions of Law

Respondent's failure to make full payment promptly with respect to the fourteen (14) transactions referenced in Finding of Fact No. 3 above, and set forth in Appendix A to the Complaint, constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.


ORDER

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

This Decision and Order shall be final and effective 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).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 21st day of June, 2017


Bobbie J. McCartney
Chief Administrative Law Judge

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