

AGRICULTURE DECISIONS

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Book One

Part Three (PACA)

Pages 285 – 368



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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JANUARY – JUNE 2014

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DEPARTMENTAL DECISIONS

In re: RDM INTERNATIONAL, INC.

Docket Nos. 12-0458, 12-0601.

Decision and Order.

Filed February 12, 2014.

PACA – Administrative procedure – Complaint, timely filing of – Failure to make full payment promptly.

Charles L. Kendall, Esq. for Complainant.

Robert Moore for Respondent.

Initial Decision by Janice K. Bullard, Administrative Law Judge.

Final Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On May 7, 2012, RDM International, Inc. [hereinafter RDM], submitted an application for a license under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], to Charles W. Parrott, Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator]. On June 4, 2012, in response to RDM's PACA license application, the Deputy Administrator filed a Notice to Show Cause and Request for Expedited Hearing [hereinafter Notice to Show Cause] initiating a proceeding in accordance with 7 U.S.C. § 499d(d) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] to give RDM the opportunity to show cause why the Deputy Administrator should not refuse to issue a PACA license to RDM.¹

¹ The Hearing Clerk assigned the show cause proceeding docket number "PACA Docket No. 12-0458."

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The Deputy Administrator: (1) alleged RDM's application states Robert D. Moore is the sole principal and 100 percent shareholder of RDM;² (2) alleged RDM's application states Mr. Moore filed Chapter 7 bankruptcy on March 29, 2011, and was granted a discharge by the United States Bankruptcy Court for the Central District of California on November 30, 2011;³ (3) alleged Schedule F, the list of Mr. Moore's creditors holding unsecured nonpriority claims, filed by Mr. Moore in *Moore*, Case No. 11-13864 (Bankr. C.D. Cal.), includes undisputed claims totaling \$607,563 from eight produce sellers of which seven are PACA licensees and one is a Canadian produce exporter;⁴ (4) alleged, on March 27, 2012, a judgment was entered by the United States District Court for the Central District of California in favor of the plaintiff, Newland North America Foods, Inc., against defendant, RDM, for a valid PACA Trust debt in the amount of \$400,013.37;⁵ and (5) alleged RDM is unfit to engage in the business of a commission merchant, dealer, or broker under the PACA because of RDM's failure to make full payment promptly of the agreed purchase prices of perishable agricultural commodities that RDM purchased, received, and accepted in interstate and foreign commerce.⁶

On July 23, 2012, RDM filed an Answer to the Notice to Show Cause and Request for Expedited Hearing [hereinafter Answer] in which RDM did not deny that it failed to make full payment promptly to eight produce sellers, as alleged in the Notice to Show Cause and listed on Schedule F filed by Mr. Moore in *Moore*, Case No. 11-13864 (Bankr. C.D. Cal.). Instead, RDM addressed its failure to make full payment promptly to the eight produce sellers in question, as follows: (1) RDM asserted it disputes Chiquita Brand, LLC's \$31,913 claim; (2) RDM asserted it disputes Columbia Fruit's \$116,737 claim; (3) RDM asserted it was unable to spend the time to defend against Mariscos Bahia's \$25,000 claim and will file a counterclaim against Mariscos Bahia in the future; (4) RDM asserted it is arranging a payment plan with Merrill Blueberry Farms in connection with Merrill Blueberry Farms' \$118,514 claim; (5) RDM asserted it has filed a counterclaim against Naturipe

² Notice to Show Cause ¶ III(a) at 2, App. A.

³ Notice to Show Cause ¶ III(b) at 2, App. A.

⁴ Notice to Show Cause ¶ III(c) at 3, Apps. B-C.

⁵ Notice to Show Cause ¶ III(d) at 3, App. D.

⁶ Notice to Show Cause ¶ IV at 3.

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Foods, LLC, in connection with Naturipe Foods, LLC's \$52,252 claim; (6) RDM asserted it has settled Rainsweet, Inc.'s \$122,043 claim and has made scheduled monthly payments to Rainsweet, Inc.; (7) RDM asserted it has made arrangements with South Alder Farms Canada with respect to South Alder Farms Canada's \$78,000 claim; and (8) RDM asserted it is investigating Sill Farms Market, Inc.'s \$61,104 claim and RDM will settle with Sill Farms Market, Inc., when RDM's investigation is complete.⁷

The Agricultural Marketing Service conducted an investigation to verify the assertions in RDM's Answer. As a result of this investigation, the Deputy Administrator instituted a disciplinary proceeding in accordance with the PACA and the Rules of Practice against RDM by filing a Complaint, on August 27, 2012.⁸ The Deputy Administrator: (1) alleged that, during the period November 13, 2008, through June 17, 2011, RDM willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to eight produce sellers of the agreed purchase prices, or the balances of the agreed purchase prices, for 74 lots of perishable agricultural commodities which RDM purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of \$832,934.95;⁹ and (2) requested that the administrative law judge assigned to the proceeding find RDM willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and order publication of the facts and circumstances of RDM's violations pursuant to 7 U.S.C. § 499h(a).¹⁰ RDM failed to file a response to the Complaint.

On August 27, 2012, the Deputy Administrator filed a Motion to Consolidate Complaint and Notice to Show Cause, and, on January 23, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] consolidated the show cause proceeding, *RDM International, Inc.*, PACA Docket No. 12-0458, and the disciplinary proceeding, *RDM International, Inc.*, PACA Docket No. 12-0601.¹¹ The ALJ also ordered

⁷ Answer.

⁸ The Hearing Clerk assigned the disciplinary proceeding docket number "PACA Docket No. 12-0601."

⁹ Compl. ¶¶ III-IV at 2-3, App. A.

¹⁰ Compl. at 4.

¹¹ Order Granting Reconsideration and Consolidating Cases.

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RDM to show cause why a decision without hearing should not be issued against RDM and allowed RDM 30 days within which to demonstrate that it made full payment by February 15, 2013, of the \$832,934.95, which the Deputy Administrator alleged RDM owed to eight produce sellers. RDM failed to comply with the ALJ's order.¹²

On May 13, 2013, the Deputy Administrator filed Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued. On June 14, 2013, RDM requested an extension of time within which to file a response to the Deputy Administrator's May 13, 2013, motion,¹³ and, on June 24, 2013, the ALJ extended the time for filing RDM's response to July 1, 2013.¹⁴ On July 8, 2013, the ALJ extended the time for RDM's response to July 18, 2013.¹⁵ RDM failed to file a timely response to Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.

On July 23, 2013, the ALJ issued a Decision and Order on the Record [hereinafter Decision and Order] in which the ALJ: (1) found, during the period November 13, 2008, through June 17, 2011, RDM failed to make full payment promptly to eight produce sellers of the agreed purchase prices, or balances of the agreed purchase prices, for 74 lots of perishable agricultural commodities which RDM purchased in the course of interstate and foreign commerce, in the amount of \$832,934.95, of which \$804,257.04 remained unpaid as of May 19, 2013; (2) concluded RDM's failure to make full payment promptly to eight produce sellers in the total amount of \$832,934.95 for 74 lots of perishable agricultural commodities constitutes willful, repeated, and flagrant violations of 7 U.S.C. § 499b(4); (3) ordered publication of the facts and circumstances of RDM's willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (4) affirmed the Deputy Administrator's refusal to issue a PACA license to RDM.¹⁶

¹² ALJ's Decision and Order Denying Reconsideration at 2.

¹³ Req. for Extension.

¹⁴ Order Extending Deadlines for Submissions.

¹⁵ E-mail, dated July 8, 2013, from the ALJ to RDM and counsel for the Deputy Administrator stating RDM must respond to the Deputy Administrator's May 13, 2013, motion within 20 days after June 28, 2013; namely, no later than July 18, 2013.

¹⁶ ALJ's Decision and Order at 5-6.

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On August 23, 2013, RDM requested additional time to respond to the Notice to Show Cause and the Complaint, and, on September 3, 2013, RDM filed Answer for Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued. The ALJ construed RDM's September 3, 2013, filing as a motion for reconsideration of the ALJ's July 23, 2013, Decision and Order. On September 25, 2013, the ALJ issued a Decision and Order Denying Reconsideration in which the ALJ stated, after careful review of RDM's September 3, 2013, filing, she found no good cause to reconsider the July 23, 2013, Decision and Order.

On October 28, 2013, RDM filed Response and Appeal to Decision and Order Denying Reconsideration [hereinafter Appeal Petition], and on November 21, 2013, the Deputy Administrator filed a response to RDM's Appeal Petition. On November 25, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The PACA makes it unlawful for any commission merchant, dealer, or broker to fail or refuse to make full payment promptly in respect of any transaction in any perishable agricultural commodity to the person with whom such transaction is had.¹⁷ "Full payment promptly" in accordance with the PACA means payment for produce by a buyer within 10 days after the day on which the produce is accepted.¹⁸

RDM admitted that it failed to make full payment promptly to RDM's produce sellers which Mr. Moore identified on Schedule F, filed in *Moore*, Case No. 11-13864 (Bankr. C.D. Cal.), as having undisputed claims.¹⁹ Moreover, RDM's Answer, filed in *RDM International, Inc.*,

¹⁷ 7 U.S.C. § 499b(4).

¹⁸ 7 C.F.R. § 46.2(aa)(5).

¹⁹ See *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997) (stating documents filed in a bankruptcy proceeding that have a direct relation to matters at issue in a PACA disciplinary proceeding have long been officially noticed in PACA disciplinary proceedings); *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (U.S.D.A. 1993) (stating, if the failure to pay for agricultural commodities is admitted by a respondent in a bankruptcy proceeding, no hearing is required in the related PACA disciplinary proceeding).

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PACA Docket No. 12-0458, does not deny RDM's failure to make full payment promptly to eight produce sellers, as alleged in the Notice to Show Cause and identified on Schedule F.²⁰

Further still, RDM failed to file a timely answer to the Complaint, filed in *RDM International, Inc.*, PACA Docket No. 12-0601. Pursuant to 7 C.F.R. § 1.136(c), a failure to file a timely answer to a complaint is deemed, for the purposes of the proceeding, an admission of the allegations in the complaint. Thus, for the purposes of this proceeding, RDM is deemed to have admitted that it failed to make full payment promptly: (1) the amount of \$51,100.97 to Rainsweet, Inc., Salem, Oregon, for 28 lots of berries; (2) the amount of \$87,816 to South Alder Farms, Aldergrove, British Columbia, Canada, for 1 lot of raspberries; (3) the amount of \$52,251.60 to Naturipe Foods, LLC, Grand Junction, Michigan, for 4 lots of berries; (4) the amount of \$32,370.23 to Chiquita Brand, LLC, Philadelphia, Pennsylvania, for 3 lots of mixed fruit; (5) the amount of \$116,045 to Merrill Blueberry Farms, Ellsworth, Maine, for 14 lots of blueberries; (6) the amount of \$61,104 to Sill Farms Market, Inc., Lawrence, Michigan, for 2 lots of cherries; (7) the amount of \$396,321.05 to Newland North America Foods, Inc., Vaudreull, Quebec, Canada, for 5 lots of berries; and (8) the amount of \$35,926.10 to Columbia Fruit, Woodland, Washington, for 17 lots of berries. Finally, RDM failed to comply with the ALJ's order that RDM demonstrate that it made full payment by February 15, 2013, of the \$832,934.95 which the Deputy Administrator alleged RDM owed to eight produce sellers and show cause why a decision without hearing should not be issued against RDM,²¹ and, despite two extensions of time, RDM failed to respond to the Deputy Administrator's May 13, 2013, Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.

RDM's Appeal Petition provides no basis for overturning the ALJ's July 23, 2013, Decision and Order. Instead, RDM: (1) offers excuses for failing to make full payment promptly to Chiquita Brand, LLC, Columbia Fruit, Naturipe Foods, LLC, and Newland North America Foods, Inc; (2) states RDM is investigating Sill Farms Market, Inc.'s claim; (3) states Merrill Blueberry Farms and South Alder Farms have

²⁰ Answer at 1-2.

²¹ ALJ's Decision and Order Den. Recons. at 2.

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not filed claims against RDM; (4) states Rainsweet, Inc., and RDM have reached an agreement regarding Rainsweet, Inc.'s claim against RDM; and (5) states Mariscos Bahia never did business with RDM.²²

Based upon my review of the record, I affirm the ALJ's July 23, 2013, Decision and Order, and I find no change or modification of the ALJ's July 23, 2013, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision and order as the final order in a proceeding, as follows:

§ 1.145 Appeal to Judicial Officer.

....
(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's July 23, 2013, Decision and Order is adopted as the final order in this proceeding.

—

²² Appeal Pet. at 4-8.

PERISHABLE AGRICULTURAL COMMODITIES ACT

**In re: AMERSINO MARKETING GROUP, LLC AND
SOUTHEAST PRODUCE LIMITED, USA.**

Docket Nos. D-12-0221, D-12-0222.

Decision and Order.

Filed April 18, 2014.

PACA – Administrative procedure – Answer, failure to file timely – Hearing, waiver of – Request for oral argument – Willful violation.

Christopher Young, Esq. for Complainant.

Henry Wang, Esq. for Respondents.

Initial Decision by Janice K. Bullard, Administrative Law Judge.

Final Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Charles W. Parrott, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this proceeding by filing a Complaint on February 1, 2012. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On March 6, 2012, the Deputy Administrator filed an Amended Complaint, which is the operative pleading in this proceeding.

The Deputy Administrator alleges, during the period December 22, 2008, through August 5, 2010, Amersino Marketing Group, LLC, and Southeast Produce Limited, USA [hereinafter Respondents], failed to make full payment promptly of the agreed purchase prices to 10 produce sellers in the total amount of \$497,960.90 for 43 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce.¹

¹ Am. Compl. ¶ III at 3, App. A.

On March 20, 2012, Respondents filed an Answer to the Amended Complaint [hereinafter Answer]. Respondents admit they failed to make full payment promptly to four of the ten produce sellers identified in Appendix A of the Amended Complaint. Specifically, Respondents admit: (1) three produce sellers, Yi Poa International, Inc., Morris Okun, Inc., and Centre Maraicher, provided Respondents additional time to pay the amounts due for produce purchases; (2) they still owed Morris Okun, Inc., \$28,000 for produce purchases; (3) they still owed Centre Maraicher \$19,000 for a produce purchase; and (4) they settled and paid one produce seller, Cimino Brothers Produce, less than the agreed purchase prices for produce purchases.²

On June 5, 2012, pursuant to 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing. Respondents failed to file a response to the Deputy Administrator's Motion for Decision Without Hearing. On July 17, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order on the Record [hereinafter the ALJ's Decision], pursuant to 7 C.F.R. § 1.139, in which the ALJ: (1) found, during the period December 22, 2008, through August 5, 2010, Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce; (2) concluded Respondents' failures to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce, constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (3) ordered publication of the facts and circumstances of Respondents' violations of 7 U.S.C. § 499b(4).³

On August 17, 2012, Respondents appealed to the Judicial Officer. On November 16, 2012, the Deputy Administrator filed a response to Respondents' Appeal Petition. On January 24, 2014, the Hearing Clerk

² Answer at 1, Attachs. 1-3.

³ ALJ's Decision at 6-7.

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transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Respondents' Request for Oral Argument

Respondents' request for oral argument,⁴ which the Judicial Officer may grant, refuse, or limit,⁵ is refused because the issues raised in Respondents' Appeal Petition are not complex and oral argument would serve no useful purpose.

Respondents' Appeal Petition

Respondents raise six issues in their Appeal Petition. First, Respondents contend the business records and business activities of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were not commingled. Respondents assert Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were separate entities and there is no evidence that they disregarded corporate formalities. (Appeal Pet. at 1, 3, 5).

The Deputy Administrator alleges the following regarding the relationship between Amersino Marketing Group, LLC, and Southeast Produce Limited, USA:

II

....

(e) Respondent Amersino and Respondent Southeast operated from the same building, shared the same office space, and shared the same two principal officers and owners. The business records and business activities of Respondents Amersino and Southeast, particularly as they related to buying and selling of produce, were commingled.

Am. Compl. ¶ II(e) at 3. Respondents failed to deny or otherwise respond

⁴ Appeal Pet. at 6.

⁵ 7 C.F.R. § 1.145(d).

to the allegations in paragraph II(e) of the Amended Complaint.

The Rules of Practice provide that a failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegation.⁶ Therefore, I find the business records and business activities of Amersino Marketing Group, LLC and Southeast Produce Limited, USA, were commingled and Respondents' assertion in their Appeal Petition that their business records and business activities were not commingled comes far too late to be considered.

Second, Respondents contend the ALJ's finding that Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, is error (Appeal Pet. at 2).

The PACA requires produce buyers to make full payment promptly for produce purchases (7 U.S.C. § 499b(4)). Full payment promptly in accordance with 7 U.S.C. § 499b(4) means payment by a produce buyer within 10 days after the day on which the produce is accepted; provided that, the parties to the transaction may elect to use different payment terms, so long as those terms are reduced to writing before the parties enter into the transaction. The burden of proof of a written agreement is on the party claiming existence of the agreement. (7 C.F.R. § 46.2(aa)(5), (11)).

The Deputy Administrator alleges Respondents failed to pay promptly the full purchase prices in the total amount of \$176,883.50 for 11 lots of broccoli purchased from Cimino Brothers Produce, Salinas, California, and accepted by Respondents during the period December 1, 2008, through December 12, 2008.⁷ Respondents admit they settled with Cimino Brothers Produce and the record establishes that Cimino Brothers Produce accepted a partial payment of \$25,000 in full satisfaction of the total past due amount of \$176,883.50.⁸ Acceptance of

⁶ 7 C.F.R. § 1.136(c).

⁷ Am. Compl. ¶ III at 3, App. A ¶ 1.

⁸ Answer ¶ 2a at 1, Attach. 1; Deputy Administrator's Mot. for Decision Without Hearing, Attach. 1.

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partial payment of the purchase price of produce in full satisfaction of a debt does not constitute full payment and does not negate a violation of the PACA.⁹ Moreover, Southeast Produce Limited, USA, and Cimino Brothers Produce did not execute the settlement agreement until December 29, 2011, approximately 3 years after payment for the produce Respondents purchased from Cimino Brothers Produce became due.¹⁰

The Deputy Administrator also alleges Respondents failed to pay promptly the full purchase prices in the total amount of \$191,039 for 18 lots of garlic purchased from Yi Pao International, Inc., Commerce, California, and accepted by Respondents during the period August 30, 2009, through February 22, 2010.¹¹ Respondents admit Yi Pao International, Inc., provided Respondents additional time to pay for the garlic without the existence of a written agreement made prior to Respondents' entering into the transactions.¹²

The Deputy Administrator further alleges Respondents failed to pay promptly the full purchase prices in the total amount of \$40,088 for two lots of mixed vegetables purchased from Morris Okun, Inc., Bronx, New York, and accepted by Respondents during the period October 13, 2009, through October 22, 2009.¹³ Respondents admit Morris Okun, Inc., provided Respondents additional time to pay for the mixed vegetables without the existence of a written agreement made prior to Respondents' entering into the transactions, and, as of the date Respondents filed the Answer, Respondents still owed Morris Okun, Inc., a balance of \$28,000 for the mixed vegetables.¹⁴

Further still, the Deputy Administrator alleges Respondents failed to pay promptly the full purchase price of \$21,021 for one lot of green onions purchased from Centre Maraicher, Sainte-Clotilde, Quebec,

⁹ Frank Tambone, Inc., 53 Agric. Dec. 703, 723 (U.S.D.A. 1994), *aff'd*, 50 F.3d 52 (D.C. Cir. 1995); Charles Crook Wholesale Produce & Grocery Co., 48 Agric. Dec. 557, 559 (U.S.D.A. 1989); Magic City Produce Co., 44 Agric. Dec. 1241, 1250 (U.S.D.A. 1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981).

¹⁰ Deputy Administrator's Motion for Decision Without Hearing Attach. 1.

¹¹ Am. Compl. ¶ III at 3, App. A ¶ 4.

¹² Answer ¶ 2d at 1.

¹³ Am. Compl. ¶ III at 3, App. A ¶ 5.

¹⁴ Answer ¶ 2e at 1, Attach. 2.

Canada, and accepted by Respondents on July 16, 2010.¹⁵ Respondents admit Centre Maraicher provided Respondents additional time to pay for the green onions without the existence of a written agreement made prior to Respondents' entering into the transaction, and, as of the date Respondents filed the Answer, Respondents still owed Centre Maraicher a balance of \$19,000 for the green onions.¹⁶

Therefore, I conclude the ALJ's finding that Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce, is fully supported by the record and, in particular, by Respondents' admissions, and I reject Respondents' contention that the ALJ's finding, is error.

Third, Respondents contend the ALJ's conclusion that Respondents willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) is error (Appeal Pet. at 2, 5).

Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the record supports a finding that Respondents' violations of the PACA were "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)).¹⁷ Willfulness is reflected by Respondents' violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and the number and dollar amount of Respondents' violative transactions. Respondents' violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations

¹⁵ Am. Compl. ¶ III at 3, App. A ¶ 10.

¹⁶ Answer ¶ 2j at 1, Attach. 3.

¹⁷ A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See, e.g., Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *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); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

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occurred.¹⁸ Respondents' violations are "repeated" because repeated means more than one.¹⁹ Therefore, I reject Respondents' contention that the ALJ's conclusion that Respondents willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), is error.

Fourth, Respondents contend the ALJ's failure to consider, and deem as credible, Respondents' Answer, is error (Appeal Pet. at 2).

A review of the ALJ's Decision reveals that the ALJ not only considered Respondents' Answer, but relied extensively on Respondents' admissions in the Answer.²⁰ Respondents do not cite, and I cannot locate, any portion of the ALJ's Decision indicating the ALJ did not find Respondents' Answer credible. Therefore, I reject Respondents' assertion that the ALJ failed to consider, and deem as credible, Respondents' Answer.

Fifth, Respondents contend the ALJ's failure to provide Respondents and Henry Wang an opportunity for hearing, is error (Appeal Pet. at 2, 4-5).

The Rules of Practice provide that the admission of material allegations of fact contained in the complaint shall constitute a waiver of hearing.²¹ Respondents admit, during the period December 22, 2008, through August 5, 2010, Respondents failed to make full payment promptly to at least four sellers of the agreed purchase prices in the total amount of \$429,031.50 for 32 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce.²² As Respondents admit material allegations of fact contained in the Amended Complaint, there are no issues of fact on which a meaningful hearing could be held in connection with those allegations which Respondents have admitted, and the ALJ properly issued the July 17, 2012, Decision pursuant to 7 C.F.R. § 1.139, without providing Respondents an opportunity for hearing. The

¹⁸ Five Star Food Distributors, Inc., 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

¹⁹ KDLO Enterprises, Inc., 70 Agric. Dec. 1098, 1101 (U.S.D.A. 2011); B.T. Produce Co., 66 Agric. Dec. 774, 812 (U.S.D.A. 2007), *aff'd*, 296 F. App'x 78 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2075 (2009).

²⁰ ALJ's Decision at 3-4, 6.

²¹ 7 C.F.R. § 1.139.

²² Answer ¶¶ 2a, 2d, 2e, 2j at 1.

application of the default provisions in the Rules of Practice do not deprive Respondents of their rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.²³

As for Respondents' contention that the ALJ erroneously failed to provide Henry Wang an opportunity for hearing, Mr. Wang is not a party to this proceeding;²⁴ therefore, Mr. Wang has no right to a hearing in this proceeding.

Sixth, Respondents assert publication of the facts and circumstances of Respondents' violations of 7 U.S.C. § 499b(4) will have the effect of depriving Mr. Wang of his means of livelihood. Respondents contend such an effect constitutes cruel and unusual punishment. (Appeal Pet. at 5).

Mr. Wang is not a party to the instant proceeding,²⁵ and no

²³ See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

²⁴ Mr. Wang avers he was the owner of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA (Answer at 1). Respondents assert Mr. Wang was the owner of Amersino Marketing Group, LLC, formed in or about 2002 and the partial owner of Southeast Produce Limited, USA, formed in 1995. Respondents further assert Mr. Wang had no association with Southeast Produce Limited, USA, during the period from 2002 until 2008, when Mr. Wang purchased Southeast Produce Limited, USA. (Appeal Pet. at 3). Mr. Wang's ownership of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, during the period of time when Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, violated 7 U.S.C. § 499b(4) does not make Mr. Wang a party to this proceeding. The only parties in this proceeding are the Deputy Administrator, the party who instituted this proceeding, and Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, the parties against whom the Deputy Administrator instituted this proceeding. (See the definitions of the terms "Complainant" and "Respondent" in 7 C.F.R. § 1.132).

²⁵ See note 24.

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employment restriction is imposed on Mr. Wang in the instant proceeding. Moreover, any employment restriction on Mr. Wang, which may result from the disposition of the instant proceeding, is irrelevant to the disposition of this proceeding. Therefore, I decline to address Respondents' contention that an employment restriction imposed on Mr. Wang would constitute cruel and unusual punishment.

Based upon a careful consideration of the record, I affirm the ALJ's July 17, 2012, Decision, and I find no change or modification of the ALJ's July 17, 2012, Decision 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.

....

(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's July 17, 2012, Decision is adopted as the final order in this proceeding.

Right to Judicial Review

Respondents have 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. Judicial review must be sought within sixty (60) days after entry of the Order in this Decision and

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Order.²⁶

The date of entry of the Order in this Decision and Order is April 18, 2014.

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²⁶ 28 U.S.C. § 2344.

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In re: GEORGE FINCH AND JOHN DENNIS HONEYCUTT.
Docket Nos. 13-0068, 13-0069.
Decision and Order.
Filed June 6, 2014.

PACA-APP – Constitutionality – Due process – Responsibly connected – Responsibly connected, standard for – Restrictions, licensing and employment.

Michael A. Hirsch, Esq. for Petitioners.
Christopher Young, Esq. and Shelton S. Smallwood, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On October 3, 2012, Karla D. Whalen, Director, PACA Division, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Director], determined George Finch and John Dennis Honeycutt were responsibly connected with Third Coast Produce Company, Ltd. [hereinafter Third Coast] during the period of time when Third Coast violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ Pursuant to the rules of practice applicable to this proceeding,² Mr. Finch and Mr. Honeycutt each filed a petition for review of the Director's "responsibly connected" determination.

On February 12, 2013, Chief Administrative Law Judge Peter M.

¹ Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities, which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010. *Third Coast Produce Co., Ltd.*, No. 12-0234, 71 Agric. Dec. ____ (U.S.D.A. Apr. 27, 2012), available at http://www.oaljdecisions.dm.usda.gov/sites/default/files/120427_12-0234_DO_ThirdCoastProduceCompanyLtd.pdf (last visited Jan. 29, 2016).

² 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) [hereinafter the Rules of Practice].

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Davenport [hereinafter the Chief ALJ] consolidated the two “responsibly connected” proceedings, *Finch*, PACA-APP Docket No. 13-0068, and *Honeycutt*, PACA-APP Docket No. 13-0069.³ On August 13, 2013, the Chief ALJ conducted an oral hearing in Washington, DC. Michael A. Hirsch, Schlanger, Silver, Barg & Paine, L.L.P., Houston, Texas, represented Mr. Finch and Mr. Honeycutt. Shelton S. Smallwood and Christopher Young, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Director. At the hearing, both Mr. Finch and Mr. Honeycutt testified and one witness, William W. Hammond, testified on behalf of the Director.⁴ Mr. Finch and Mr. Honeycutt introduced 12 exhibits.⁵ The Director introduced a certified agency record applicable to Mr. Finch containing 16 exhibits⁶ and a certified agency record applicable to Mr. Honeycutt containing 11 exhibits.⁷

On November 20, 2013, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding Mr. Finch was responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), by virtue of his active participation in Third Coast’s operations and his status as an officer and a director of Third Coast; (2) concluding Mr. Honeycutt was responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), by virtue of his active participation in Third Coast’s operations and his status as an officer and a director of Third Coast; (3) affirming the Director’s October 3, 2012, determinations that Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (4) stating Mr. Finch and Mr. Honeycutt are subject to the licensing restrictions in 7 U.S.C.

³ Order of Dismissal as to Third Coast Produce Company, Ltd. and Order Setting Hr’g Date at 2.

⁴ References to the transcript of the August 13, 2013 hearing are indicated as “Tr.” and the page number.

⁵ Mr. Finch and Mr. Honeycutt’s exhibits are indicated as PX 1-PX 12.

⁶ References to the exhibits in the Director’s certified agency record applicable to Mr. Finch are indicated as GFRX 1-GFRX 16.

⁷ References to the exhibits in the Director’s certified agency record applicable to Mr. Honeycutt are indicated as JHRX 1-JHRX 11.

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§ 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).⁸

On December 17, 2013, Mr. Finch and Mr. Honeycutt filed a Petition for Appeal and Brief in Support Thereof [hereinafter Appeal Petition]. On January 8, 2014, the Director filed a Response to Petitioners' Appeal. On January 13, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and a decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the Chief ALJ's Decision and Order as the final agency decision and order.

DECISION

Statutory Background

The PACA was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce⁹ and to provide a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.¹⁰

Under the PACA, a person who buys or sells specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce is required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a). Regulated commission merchants, dealers, and brokers are required to "truly and correctly . . . account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had[.]" 7 U.S.C. § 499b(4). An order suspending or revoking a PACA license or a finding that an entity has committed a flagrant violation, or repeated violations, of 7 U.S.C. § 499b(4) has significant collateral consequences in the form of licensing and

⁸ Chief ALJ's Decision and Order at 17-18.

⁹ H.R. Rep. No. 71-1041, at 1 (1930).

¹⁰ S. Rep. No. 84-2507, at 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. Rep. No. 84-1196, at 2 (1955).

employment restrictions for persons found to be responsibly connected with the violator.¹¹ The term “responsibly connected” is defined as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

The second sentence of the definition of the term “responsibly connected” provides a two-prong test whereby those who would otherwise fall within the statutory definition of “responsibly connected” may rebut the statutory presumption of the first sentence:

the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of

¹¹ 7 U.S.C. §§ 499d(b), 499h(b).

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the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners[.]

Salins, 57 Agric. Dec. 1474, 1488 (U.S.D.A. 1998). A standard for the first prong of the test has been adopted as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 610-11 (U.S.D.A. 1999) (Decision on Remand).

The parameters of the second prong of the test were revisited in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). In that case, the Court found Ms. Taylor and Mr. Finberg were merely nominal officers of the violating entity. Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975), and *Bell v. Dep't of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994), the Court stated, under 7 U.S.C. § 499a(b)(9), an officer of the offending company is not considered to be responsibly connected with a violating licensee if that person was not actively involved in the PACA violation and was powerless to curb the wrongdoing. The Court

emphasized that, under the “actual, significant nexus” test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company’s operations:

Under the “actual, significant nexus” test, “the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority.” *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Although we have consistently applied the ‘actual, significant nexus’ test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.

* * *

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 615, 617 (D.C. Cir. 2011).

In *Taylor*, 68 Agric. Dec. 1210, 1220-21 (U.S.D.A. 2009), I had found that Fresh America’s board of directors ran Fresh America and made decisions usually reserved for individuals at lower levels of authority, including decisions governing Fresh America’s payment of bills, capital expenditures, and personnel. A preponderance of the evidence established that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations. Applying the “actual, significant nexus” test, as explained in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), on remand, I concluded Ms. Taylor and Mr. Finberg were merely nominal officers of Fresh America, who were powerless to curb the PACA violations and who lacked the power and authority to direct and affect Fresh America’s operations as they related to payment of produce sellers. *Taylor*, No. 06-0008, 73 Agric. Dec. ___, slip op. at 7-8 (U.S.D.A. May 22, 2012) (Decision on Remand), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/taylor3.pdf> (last visited Feb. 1, 2016).

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The “actual, significant nexus” test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9) wherein Congress amended the definition of the term “responsibly connected” specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of “responsibly connected” a two-prong test allowing them to rebut the statutory presumption of responsible connection. While Congress could have explicitly adopted the “actual, significant nexus” test, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to “actual, significant nexus,” power to curb PACA violations, or power to direct and affect operations. Instead, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was “only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license” (7 U.S.C. § 499a(b)(9)).

I concluded that continued application of the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term “responsibly connected” avoiding that status. As examples, I noted that a minority shareholder, who is not merely a shareholder in name only, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a real director, who is a member of a three-person board of directors, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally would not have the power to prevent the partnership’s PACA violations or the power to direct and affect the partnership’s operations. Should the minority shareholder, the director on the three-person board of directors, and the partner with a 40 percent interest in the partnership demonstrate the requisite lack of power, application of the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), would result in each of these persons being designated “nominal.”

I announced that, in future cases, I would not apply the “actual,

significant nexus” test and would instead substitute a “nominal inquiry” limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder in name only. Thus, while the power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a factor to be considered under the “nominal inquiry,” it would no longer be the *sine qua non* of responsible connection to a PACA-violating entity. *Taylor*, No. 06-0008, 73 Agric. Dec. ___, slip op. at 12-13 (U.S.D.A. May 22, 2012) (Decision on Remand), *available at* <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/taylor3.pdf> (last visited Feb. 1, 2016).¹²

Discussion

Mr. Finch and Mr. Honeycutt have significant experience in the produce industry. Mr. Finch testified that he has “been in the food business all [his] life” with more than 25 years in the produce business (Tr. 40). Mr. Finch acknowledged being thoroughly aware of the PACA and the responsibilities imposed by it, stating “we understand our obligations to PACA” and “PACA was the number one payment we need to make.” (Tr. 55, 76). Mr. Honeycutt also had extensive experience as an officer, owner, and PACA licensee in the produce industry (Tr. 79-82, 90-91).

Mr. Finch testified that he, Mr. Honeycutt, and Artemio Bueno started Third Coast in May 1992 (Tr. 40). Third Coast started with just one van and sublet space (Tr. 40). With the passage of time and the investment of substantial time and energy on the part of the three founders, Third Coast grew to one of the major produce distributors in the Houston metropolitan area with about 170 employees, 40 trucks, a 60,000 square foot warehouse, and \$1,000,000 in weekly sales (Tr. 40-42, 55, 66).

¹² *Taylor*, 73 Agric. Dec. __ (U.S.D.A. May 22, 2012) (Decision on Remand), was remanded upon a joint motion in the United States Court of Appeals for the District of Columbia Circuit and vacated. However, the “nominal inquiry” test remains the current United States Department of Agriculture policy. *Taylor*, 73 Agric. Dec. __, slip op. at 10-11 (U.S.D.A. Dec. 18, 2012) (Modified Decision on Remand); *Petro*, 73 Agric. Dec. __, slip op. at 5-8 (U.S.D.A. Nov. 13, 2012) (Order Den. Pet. to Reconsider as to Bryan Herr), *available at* <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/petro.pdf> (last visited Feb. 1, 2016).

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Prior to discovering serious financial problems within the company, both Mr. Finch and Mr. Honeycutt indicated that their responsibilities “mainly revolved around sales, and the administration around sales, to generate business for the company.” (Tr. 38, 82, 84-85). Artemio Bueno functioned as Third Coast’s buyer and was responsible for company operations (Tr. 65, 84-85). As the company grew from its small family-run origins, the financial responsibilities of the company became entrusted to Artemio Bueno’s oldest son, Javier Bueno, who had graduated from the University of Houston with a degree in accounting and business management and who was working toward a master’s degree at Rice University (Tr. 38-39). Mr. Finch and Mr. Honeycutt possessed an unfortunately misplaced but high degree of trust in the Bueno family as they started Third Coast with Artemio Bueno and Mr. Finch and Mr. Honeycutt had watched the Bueno children graduate, get married, and have children (Tr. 40-41).¹³ Consistent with that trust, Javier Bueno was in time named the Chief Financial Officer of Third Coast and given oversight of all of the financial aspects of the business (Tr. 41, 53).

Mr. Finch and Mr. Honeycutt first noticed cash flow problems in 2009 and in early 2010 and directed that Third Coast’s financial information be sent to the CPA firm in Houston that monitored Third Coast’s books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Mr. Finch and Mr. Honeycutt returned their focus to the sales operation (Tr. 41). Upon being informed that certain Third Coast suppliers had ceased selling to Third Coast and that Third Coast’s bank raised its own concerns, Mr. Finch and Mr. Honeycutt retained Tatum & Tatum, LLC, an outside accounting firm, near the end of January 2010 (Tr. 70). The resulting audit and monitoring of the receivables revealed a systematic diversion of Third Coast’s receivables to previously unknown and unauthorized bank accounts established by Javier Bueno (Tr. 46-47). To conceal the diversions, Javier Bueno had been making fraudulent general ledger entries making it appear that suppliers were being paid when in fact

¹³ Mr. Honeycutt testified that he had known Javier Bueno since about the time Javier Bueno was 10 years old and was employed sweeping the floors at Southern Produce, prior to the time that Third Coast was formed (Tr. 83).

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Third Coast's suppliers were not being paid (Tr. 47-49).¹⁴ After discovering that receivables were being diverted and that produce sellers were not being paid, Mr. Finch and Mr. Honeycutt confronted Javier Bueno, removed him from his position with Third Coast, and assumed control of the company in February 2010 (Tr. 54-59, 73-75, 89). Mr. Finch and Mr. Honeycutt retained control of Third Coast until it ceased operation in July 2010 (Tr. 6, 37).

Both Mr. Finch and Mr. Honeycutt stipulated they were officers and directors of Third Coast and acted as officers and directors of the company during the violation period (Tr. 5-6, 15, 37). Despite their knowledge of Third Coast's inability to pay all produce suppliers promptly, as required by the PACA, Mr. Finch and Mr. Honeycutt continued to purchase produce from sellers until Third Coast ceased operation (Tr. 75-78). Thus, although the defalcation that was the proximate cause of Third Coast's serious cash shortage predated their assumption of control of the company, Mr. Finch and Mr. Honeycutt's period of control of Third Coast occurred during the greatest portion of the violation period, specifically from sometime in February 2010 through July 16, 2010. During that period of time, Third Coast struggled to stay open so as to pay as many people as it possibly could and to maintain payments to the bank (Tr. 54-59, 61-63, 75-78). Even after significant infusions [REDACTED]

[REDACTED],^{*15} Mr. Finch and Mr. Honeycutt's efforts to save Third Coast proved unsuccessful. With the bank's "blessing," first the processing portion of the business was sold¹⁶ and later the assets of the

¹⁴ Third Coast's Wells Fargo account reflected that about \$360,000 was diverted between September 2009 and January 2010; however, a more in depth investigation revealed that over a period of three years the amount embezzled was well over \$1,000,000 (Tr. 49-53).

* Redacted by the Editor pursuant to "Exemption 4" of the Freedom of Information Act (FOIA). See 5 U.S.C. § 552(b)(4).

¹⁵ Mr. Finch testified that the funds he contributed [REDACTED]

[REDACTED] (Tr. 99). [Redacted by the Editor pursuant to "Exemption 4" of the Freedom of Information Act (FOIA). See 5 U.S.C. § 552(b)(4).]

¹⁶ The processing operation consisted of processing fresh fruits and vegetables for the end user. "It's a value-added product, mixed salads and varied commodities that go to our customers." (Tr. 56).

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distribution portion of the business¹⁷ were sold to another entity (Tr. 57-58). The sale proceeds went to the bank (Tr. 57).

I have a great deal of empathy for Mr. Finch and Mr. Honeycutt, both of whom demonstrated themselves to be honest and well-intentioned men who were victims themselves and who did not personally gain from the situation in which they found themselves. Nonetheless, I must conclude that, by virtue of having been actively involved in the activities that resulted in Third Coast's violations of the PACA and officers and directors of Third Coast from sometime in February 2010 until Third Coast's assets were liquidated in July 2010, both Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast during the period when Third Coast violated the PACA.

Mr. Finch and Mr. Honeycutt's Request for Oral Argument

Mr. Finch and Mr. Honeycutt's request for oral argument,¹⁸ which the Judicial Officer may grant, refuse, or limit,¹⁹ is refused because the issues raised by Mr. Finch and Mr. Honeycutt in their Appeal Petition are not complex and oral argument would serve no useful purpose.

Mr. Finch and Mr. Honeycutt's Appeal Petition

Mr. Finch and Mr. Honeycutt raise six issues in their Appeal Petition. First, Mr. Finch and Mr. Honeycutt contend the PACA is unconstitutionally overbroad because it penalizes virtuous, non-culpable, and lawful conduct as if the conduct were contrary (Appeal Pet. ¶ 1A at 1).

Challenges to the imposition of licensing restrictions in 7 U.S.C. § 499d(b) and employment restrictions in 7 U.S.C. § 499h(b) on individuals responsibly connected with violators of the PACA have been consistently rejected.²⁰ The United States Court of Appeals for the

¹⁷ The assets of the distribution portion of the business consisted of the real estate and the trucks and other equipment used to handle the produce delivered to Third Coast's customers (Tr. 57-58).

¹⁸ Appeal Pet. at 3.

¹⁹ 7 C.F.R. § 1.145(d).

²⁰ *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (stating the employment bar imposed on individuals responsibly connected with violators

Second Circuit addressed the constitutionality of the application of the employment bar in 7 U.S.C. § 499h(b) to responsibly connected persons, as follows:

.... Undoubtedly the perishable commodities industry is an industry subject to reasonable congressional regulation. *See Eastern Produce Co. v. Benson*, 278 F.2d 606 (3 Cir. 1960). Conceding Congress's undoubted right to regulate the industry petitioners question whether the right to regulate gives Congress the right to provide that the Secretary of Agriculture may exclude persons in petitioners' position from all employment in the industry.

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in the business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry. While admittedly the result Congress desired could be harsh in some cases, we cannot say that Section 499h(b) is not reasonably designed to achieve the desired Congressional purpose. *See Nebbia v. People of State of New York*, 291 U.S. 502, 525, 54 S. Ct. 505 (1934).

of the PACA has been challenged repeatedly with little success; the courts that have considered this issue have been unwilling to invalidate the PACA or to interfere with the Secretary of Agriculture's enforcement of the PACA); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (stating, while the employment bar in 7 U.S.C. § 499h(b) can be harsh in some instances, we cannot say that 7 U.S.C. § 499h(b) is not reasonably designed to achieve the desired congressional purpose), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (stating we do not agree with the appellant's characterization of the PACA as unconstitutional; the exclusion from the PACA industry of "responsibly connected" persons is not irrational or arbitrary).

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An analogous situation to this was presented to the New York Court of Appeals in *Bradley v. Waterfront Comm'n of N.Y. Harbor*, 12 N.Y.2d 276, 239 N.Y.S.2d 97, 189 N.E.2d 601 (1963). Section 8 of the New York Waterfront Commission Act, McKinney's Unconsol. Laws, § 9933, which forbids unions from collecting dues from waterfront employees if any of the union's officers had been convicted of a felony was upheld by the United States Supreme Court in *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed.2d 1109 (1960). Discovering that the former officers continued to dominate the unions as "employees," the New York Legislature amended Section 8 so as to extend the section's application to employees of the union as well as to union officers. The court in *Bradley* had no difficulty in holding that this amendment to the statute did not violate due process because the amendment was no more than was necessary in order to carry out the original objectives of the statute. *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967) (footnote omitted).

Mr. Finch and Mr. Honeycutt offer no support for their contention that the PACA is unconstitutionally overbroad because it penalizes virtuous, non-culpable, and lawful conduct as if the conduct were contrary, and I reject Mr. Finch and Mr. Honeycutt's contention that the PACA is unconstitutionally overbroad.

Second, Mr. Finch and Mr. Honeycutt contend PACA "responsibly connected" proceedings violate principles of due process (Appeal Pet. ¶ 1B at 1).

The fundamental elements of procedural due process are notice and opportunity to be heard.²¹ Each person who has been initially determined to be responsibly connected is provided with notice of the

²¹ See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

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initial determination and an opportunity to be heard, and all PACA “responsibly connected” proceedings are conducted in accordance with the Administrative Procedure Act and the Rules of Practice.

On February 23, 2012, in accordance with 7 C.F.R. § 47.49(a)-(b), Phyllis Hall, Chief, Investigative Enforcement Branch, PACA Division, informed Mr. Finch and Mr. Honeycutt that she had made initial determinations that they were responsibly connected with Third Coast and that they could contest these initial determinations by submitting written responses, which would be reviewed by the Director in accordance with 7 C.F.R. § 47.49(c) (GFRX 2; JHRX 2). On March 12, 2012, Mr. Finch and Mr. Honeycutt submitted a joint response contesting Ms. Hall’s initial determinations (GFRX 3; JHRX 3). After review of Mr. Finch and Mr. Honeycutt’s joint response, the Director determined Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast, and on October 3, 2012, the Director notified Mr. Finch and Mr. Honeycutt of her “responsibly connected” determinations and their right under 7 C.F.R. § 47.49(d) to request review of her determinations by an administrative law judge in a proceeding which would be conducted in accordance with the Rules of Practice.

Mr. Finch and Mr. Honeycutt each filed a petition for review of the Director’s “responsibly connected” determination and participated in an administrative adjudicatory proceeding conducted by the Chief ALJ in accordance with the Administrative Procedure Act and the Rules of Practice. This proceeding included an oral hearing during which Mr. Finch and Mr. Honeycutt had an opportunity to, and did, present oral and documentary evidence and cross-examine the sole witness who testified on behalf of the Director. After the Chief ALJ issued a Decision and Order affirming the Director’s “responsibly connected” determinations, Mr. Finch and Mr. Honeycutt had the opportunity to, and did, appeal the Chief ALJ’s Decision and Order to the Judicial Officer. Moreover, Mr. Finch and Mr. Honeycutt have the right to seek judicial review of this Decision and Order.²² Therefore, I reject Mr. Finch and Mr. Honeycutt’s contention that PACA “responsibly connected” proceedings violate principles of due process, and I reject Mr. Finch and Mr. Honeycutt’s suggestion that they have been denied due process in

²² 28 U.S.C. § 2342(2).

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the instant proceeding.

Third, Mr. Finch and Mr. Honeycutt contend the PACA provides for the forfeiture of property to the United States in violation of “the spirit” of 18 U.S.C. §§ 981-987 (Appeal Pet. ¶ 1B at 1).

The imposition of licensing restrictions in accordance with 7 U.S.C. § 499d(b) and employment restrictions in accordance with 7 U.S.C. § 499h(b) does not constitute a forfeiture of property to the United States. Further, 18 U.S.C. §§ 981-987 are not applicable to the licensing restrictions in 7 U.S.C. § 499d(b) or the employment restrictions in 7 U.S.C. § 499h(b). Therefore, I reject Mr. Finch and Mr. Honeycutt’s contention that the PACA provides for the forfeiture of property to the United States in violation of “the spirit” of 18 U.S.C. §§ 981-987.

Fourth, Mr. Finch and Mr. Honeycutt contend the PACA violates the Bill of Attainder Clause in Article I, Section 9, of the Constitution of the United States (Appeal Pet. ¶ 1B at 1).

Article I, Section 9, Clause 3, of the Constitution of the United States provides that no bill of attainder shall be passed. A bill of attainder is defined as a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.²³ To constitute a bill of attainder, a statute must: (1) apply with specificity to affected persons; (2) impose punishment; and (3) assign guilt without a judicial trial.

The specificity requirement may be satisfied if a statute singles out a person or class by name or applies to easily ascertainable members of a group.²⁴ The “easily ascertainable” requirement is satisfied if the challenged statute describes the targeted members of the group in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.²⁵ The PACA does not identify Mr. Finch or Mr. Honeycutt by name. Moreover, the “responsibly

²³ Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846-47 (1984); Nixon v. Adm’r of General Services, 433 U.S. 425, 468 (1977); United States v. Lovett, 328 U.S. 303, 321-22 (1946).

²⁴ Foretich v. United States, 351 F.3d 1198, 1217 (D.C. Cir. 2003).

²⁵ Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961); Cummings v. Missouri, 71 U.S. 277, 323-24 (1866).

connected” provision of the PACA is open-ended in that it applies to any person who falls within the definition of “responsibly connected.”²⁶ A statute with open-ended applicability, namely, a statute that attaches not to specific persons or groups, but to anyone who commits certain acts or possesses certain characteristics, does not apply with specificity to specific persons or groups and does not constitute a bill of attainder.

The PACA does not impose punishment. The PACA provides for the imposition of licensing restrictions and employment restrictions on persons responsibly connected with a person who has been found to have committed violations of 7 U.S.C. § 499b.²⁷ However, the licensing and employment restrictions in the PACA are not “punishment,” but rather statutory civil sanctions to assist regulatory enforcement of the PACA.²⁸ The PACA does not assign guilt without a judicial trial. PACA’s license and employment restrictions may be imposed only after the person alleged to be responsibly connected has been afforded an opportunity for an administrative adjudicatory proceeding conducted in accordance with the Administrative Procedure Act and the Rules of Practice. Further, any final agency determination that a person is responsibly connected, is subject to judicial review.²⁹

Therefore, I reject Mr. Finch and Mr. Honeycutt’s contention that the PACA violates the Bill of Attainder Clause in Article I, Section 9, of the Constitution of the United States.

Fifth, Mr. Finch and Mr. Honeycutt contend they have proven the circumstances and events resulting in Third Coast’s violations of 7 U.S.C. § 499b(4) were due to independent acts of a third party (Appeal Pet. ¶ 1C at 2).

Mr. Finch and Mr. Honeycutt introduced evidence that, prior to the period when Third Coast violated the PACA, Javier Bueno, without Mr. Finch or Mr. Honeycutt’s participation, authorization, or knowledge, embezzled funds from Third Coast. This embezzlement was the

²⁶ *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (stating 7 U.S.C. § 499h(b) is not an invalid bill of attainder as it does not name or describe any persons or groups), *cert. denied*, 389 U.S. 835 (1967).

²⁷ 7 U.S.C. §§ 499d(b), 499h(b).

²⁸ *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating the employment restriction provided for in 7 U.S.C. § 499h(b) is not punitive in nature).

²⁹ 28 U.S.C. § 2342(2).

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proximate cause of Third Coast's serious cash shortage. However, proof of Javier Bueno's embezzlement of Third Coast's funds, by itself, is not proof by a preponderance of the evidence that Mr. Finch and Mr. Honeycutt were not actively involved in the activities that resulted in Third Coast's violations of the PACA. The record establishes, despite their knowledge of Third Coast's inability to pay all produce suppliers promptly, Mr. Finch and Mr. Honeycutt continued to purchase produce from sellers until Third Coast ceased operation (Tr. 37, 75-77). I find, under these circumstances, Mr. Finch and Mr. Honeycutt were actively involved in activities that resulted in Third Coast's violations of the PACA.

Sixth, Mr. Finch and Mr. Honeycutt stipulate they were officers and directors of Third Coast (Appeal Pet. Ex. A at 17); however, Mr. Finch and Mr. Honeycutt contend they were only nominal officers and directors of Third Coast *vis-a-vis* Javier Bueno's embezzlement of Third Coast's funds (Appeal Pet. ¶ 1C at 2, Ex. A at 17-18).

Mr. Finch and Mr. Honeycutt introduced evidence that, prior to the period when Third Coast violated the PACA, Javier Bueno, without Mr. Finch or Mr. Honeycutt's participation, authorization, or knowledge, embezzled funds from Third Coast. However, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test in 7 U.S.C. § 499a(b)(9), could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license[.]" (7 U.S.C. § 499a(b)(9)). Thus, Mr. Finch and Mr. Honeycutt's relationship to Javier Bueno's embezzlement, which occurred prior to Third Coast's violations of the PACA, is not at issue. Instead, the issue is Mr. Finch and Mr. Honeycutt's relationship to Third Coast during the period when Third Coast violated the PACA.

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³⁰ Cf. Margiotta, 65 Agric. Dec. 622, 644-46 (U.S.D.A. 2006) (concluding the petitioner failed to prove he was only a nominal officer of the violating PACA licensee, even though the petitioner proved that another employee of the PACA licensee committed the PACA violations and the petitioner did not authorize, or even know of, the violations).

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Based upon all of the evidence before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Finch is an individual residing in Friendswood, Texas. Mr. Finch has been in the food business all of his life, with more than 25 years of experience in the produce industry (Tr. 40). Mr. Finch acknowledged being aware of the PACA and the responsibilities it imposes (Tr. 55, 76-77).
2. Mr. Honeycutt is an individual residing in Katy, Texas. Mr. Honeycutt began his involvement in the produce industry at college age and for the six years prior to forming Third Coast worked for a produce company that he termed “the best in town.” (Tr. 79-82).
3. Mr. Finch, Mr. Honeycutt, and Artemio Bueno started Third Coast in May 1992 and built the enterprise from one with a single van and leased space into an operation in 2010 with 40 trucks, about 170 employees, a 60,000 square foot warehouse, and \$1,000,000 in weekly sales (Tr. 40-42, 55, 65-66, 82-84).
4. Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or the balances of the agreed purchase prices, in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010 (Tr. 6; *Third Coast Produce Co., Ltd.*, No. 12-0234, 71 Agric. Dec. __ (U.S.D.A. Apr. 27, 2012), *available* at http://www.oaljdecisions.dm.usda.gov/sites/default/files/120427_12-0234_DO_ThirdCoastProduceCompanyLtd.pdf (last visited Jan. 29, 2016)).
5. Mr. Finch and Mr. Honeycutt were officers and directors of Third Coast during the period when Third Coast violated the PACA (Tr. 6).

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6. Mr. Finch and Mr. Honeycutt first noticed cash flow problems in 2009 and in early 2010 and directed that Third Coast's financial information be sent to the CPA firm in Houston that monitored Third Coast's books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Mr. Finch and Mr. Honeycutt returned their focus to the sales operation until they learned that Third Coast's suppliers were not being paid. (Tr. 41).

7. After being informed that certain Third Coast suppliers had ceased selling to Third Coast and that Third Coast's bank raised its own concerns, Mr. Finch and Mr. Honeycutt retained an outside accounting firm near the end of January 2010. The resulting audit and monitoring of the receivables revealed a systematic diversion of Third Coast's receivables to previously unknown and unauthorized bank accounts established by Javier Bueno, Third Coast's Chief Financial Officer (Tr. 46-47). To conceal the diversions, Javier Bueno had been making fraudulent general ledger entries making it appear that suppliers were being paid when in fact Third Coast's suppliers were not being paid (Tr. 47-49).

8. Although the preliminary computation of the defalcation amounted to \$360,000 between September 2009 and January 2010, a more thorough and comprehensive investigation revealed shortages well in excess of \$1,000,000 (Tr. 49-53).

9. In February 2010, Mr. Finch and Mr. Honeycutt removed Javier Bueno from his position with Third Coast and assumed control of Third Coast (Tr. 37, 54-59, 72-75, 89).

10. Despite Mr. Finch and Mr. Honeycutt's best efforts to honor contractual obligations to provide produce, to keep Third Coast open so as to pay as many people possible, to maintain payments to the bank, and to pro-rate the amounts paid to suppliers and despite infusing Third Coast with personal funds and obtaining concessions from Third Coast's bank, it was necessary first to sell the processing portion of the business and finally to liquidate the assets of the distribution portion of the business and cease Third Coast's operation (Tr. 55-58, 75-76).

11. While under the control of Mr. Finch and Mr. Honeycutt, despite

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knowledge that Third Coast had failed to pay suppliers promptly, as required by the PACA, Mr. Finch and Mr. Honeycutt continued to purchase produce from produce sellers during the period when Third Coast violated the PACA (Tr. 69, 75-77, 89, 95-96).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities, which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010. *Third Coast Produce Co., Ltd.*, No. 12-0234, 71 Agric. Dec. __ (U.S.D.A. Apr. 27, 2012), *available at* http://www.oaljdecisions.dm.usda.gov/sites/default/files/120427_12-0234_DO_ThirdCoastProduceCompanyLtd.pdf (last visited Jan. 29, 2016).
3. Mr. Finch was responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), by virtue of his active involvement in the activities resulting in Third Coast's violations of the PACA and his status as an officer and a director of Third Coast.
4. By virtue of being responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), Mr. Finch is subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).
5. Mr. Honeycutt was responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), by virtue of his active involvement in the activities resulting in Third Coast's violations of the PACA and his status as an officer and a director of Third Coast.
6. By virtue of being responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), Mr. Honeycutt is

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subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).

For the foregoing reasons, the following Order is issued.

ORDER

1. The Director's October 3, 2012, determination that Mr. Finch was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed.
2. Mr. Finch is accordingly subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Finch.
3. The Director's October 3, 2012, determination that Mr. Honeycutt was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed.
4. Mr. Honeycutt is accordingly subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Honeycutt.

Right to Judicial Review

Mr. Finch and Mr. Honeycutt have 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. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.

³¹

The date of entry of the Order in this Decision and Order is June 6, 2014.

³¹ 28 U.S.C. § 2344.

Osteen Marketing, LLC
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In re: OSTEEN MARKETING, LLC.
Docket No. 13-0339.
Decision and Order.
Filed January 7, 2014.

PACA.

Charles L. Kendall, Esq. for Complainant.
Respondent, pro se.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA) and the regulations issued thereunder (7 C.F.R. Part 46) (Regulations), instituted by a Complaint filed on September 6, 2013 by the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture.

Complainant alleged in its Complaint that Respondent Osteen Marketing LLC (Respondent) committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to six (6) sellers for 45 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce, in the total amount of \$447,519.10 and requested that findings be entered that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order the facts and circumstances of these violations published.

On October 21, 2013, Respondent filed a one-page Answer to the Complaint with the Department's Hearing Clerk. In the fourth full paragraph of the Answer, Respondent stated, "Several debtors [sic] including Four Rivers Produce, Central Produce, National Onion, and Pure Country Produce have already filed law suits against Osteen

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Marketing and been awarded their claims and have placed judgments' against Osteen and William Osteen personally." Respondent, in its Answer, does not address the allegations in the Complaint regarding the two remaining sellers.

On November 21, 2013, Complainant filed a motion seeking a Decision Without Hearing by Reason of Admissions, based on the admissions made by Respondent in its Answer. Having carefully considered the pleadings and the authority cited by Complainant, the following Findings of fact, Conclusions of Law, and Order are entered pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (Emphasis added.)

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Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

- (a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Findings of Fact

1. Osteen Marketing LLC (Respondent) is a limited liability company organized and existing under the laws of the state of Wisconsin. Respondent is not currently operating. Respondent's last known business address was the home address of its sole principal.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 2009 0620 was issued to Respondent on April 7, 2009. The license terminated on April 7, 2012 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period August 2, 2010, through November 14, 2011, failed to make full payment promptly to six (6) sellers of the agreed purchase prices, or balances thereof, for 45 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce, in the total amount of \$447,519.10.

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Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent admitted in its Answer that it failed to pay for perishable agricultural commodities it purchased, received, and accepted in interstate commerce from four (4) of the sellers named in the Complaint; the Complaint alleged that Respondent failed to pay these four sellers in the total amount of \$341,608.50.
3. Respondent failed to address the remaining two sellers named in the Complaint, which the Complaint alleged that Respondent failed to pay in a total amount of an additional \$105,910.60. Failure to specifically respond to the allegations in the Complaint regarding the remaining two sellers is deemed an admission of those allegations and Respondent will be deemed to have admitted to failing to pay the remaining two sellers as was alleged.
4. Respondent willfully, flagrantly and repeatedly violated Section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the above violations herein shall be published.
2. This Order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

Agri-Sales, Inc.
73 Agric. Dec. 327

In re: AGRI-SALES, INC.
Docket No. 13-0195.
Decision and Order.
Filed March 12, 2014.

PACA.

Christopher Young, Esq. for Complainant.
Mary E. Gardner, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the Act or PACA), instituted by a Complaint filed on March 21, 2013, by Bruce W. Summers, then the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA).

The Complaint filed by Complainant alleges that Respondent, during the period April of 2010 through February of 2012, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of \$403,741.90 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

A copy of the Complaint and the Rules of Practice were served upon Respondent by certified mail on or about March 29, 2013. Counsel for the Respondent entered her appearance on April 17, 2013¹ and filed a Motion to Enlarge Time to Answer.² There being no objection to the Motion, it was granted and Respondent was given until March 29, 2013 in which to file its Answer.

¹ Docket Entry #3.

² Docket Entry #4.

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The Answer filed on May 29, 2013 denied that it purchased Produce from Eddy Produce for which that vendor had not been paid, admitted that it owed some funds to the other six vendors, and denied any willful violation of the PACA.

The case was assigned to my docket on June 6, 2013.³ On June 11, 2013 I directed the parties to file their witness and exhibit lists with the Hearing Clerk and to exchange copies of the exhibits intended to be introduced at any hearing.⁴ On June 28, 2013, a joint request for extension of time was filed and the filing and exchange dates were extended by Order dated July 1, 2013.⁵ On September 5, 2013, Complainant filed its witness and exhibit lists.⁶ Although there is some indication that Respondent's counsel provided Complainant's counsel with the Respondent's exhibits, no witness or exhibit list was filed with the Hearing Clerk until January 6, 2014.⁷ On review of the status of the case, I directed the parties to file cross motions for summary judgment and this matter is before the Administrative Law Judge upon the Motion of the Complainant for Summary Judgment. Respondent failed to avail itself of the opportunity to file a cross motion for summary judgment on behalf of the Respondent, or otherwise rebut the allegations of the Complainant with factual evidence of any type.

The Summary Judgment Standard

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (the Rules or the Rules of Practice) set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance. *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*,⁸ 68

³ Docket Entry # 8.

⁴ Docket Entry # 9.

⁵ Docket Entries #10 and 11.

⁶ Docket Entry # 12.

⁷ Docket Entry # 13.

⁸ See *supra* notes 6 and 7, at 858-59, where the use of summary judgment is discussed in a variety of cases.

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Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).

While not an exact match, “no factual dispute of substance” may be equated with the “no genuine issue as to any material fact” language found in the Supreme Court’s decision construing Fed. R. Civ. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is “genuine” if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is “material” if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

If a moving party supports its motion,⁹ the burden shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial. *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Fed. R. Civ. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler*, 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts, on speculation or suspicions, and may not avoid summary judgment on a hope that something may show up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-

⁹ *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

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movant's favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Anderson*, 477 U.S. at 254. In absence of a response to Complainant's Motion for Summary Judgment or cross motion for summary judgment, the record is completely and totally devoid of the type of supporting documentation discussed above.

As discussed in *Anderson*, the judge's function is not himself to weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson, id.* at 250. The standard to be used mirrors that for a directed verdict under Fed. R. Civ. P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Formerly it was held that if there was what was called a scintilla of evidence, a judge was obligated to leave that determination to a jury, but recent decisions have established a more reasonable rule that in every case the question for the judge is not whether there is literally no evidence, but whether there is any upon which the jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed. *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872). While administrative proceedings typically do not have juries, the rule's application remains applicable for a judge sitting as a fact finder performing the same function.

Discussion

Applying the foregoing standard to the evidence before me, it is necessary to determine whether Respondent established the existence of genuine issues of material fact as to each of the allegations addressed in Complainant's Motion. An evaluation of the evidence supporting the allegations contained in the Complaint follows.

The first two paragraphs of the Complaint contain a reference to the PACA and deal with the Respondent's identity and contain no

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substantive allegations of violations. The third paragraph is a summary paragraph of the alleged violations and references and incorporated an Appendix setting forth the specifics of those transactions. The fourth paragraph alleges that the violations alleged in the third paragraph constitute willful, flagrant and repeated violations of the PACA.

As Respondent failed to submit any cross motion, any response to Complainant's Motion for Summary Judgment, or any rebutting factual evidence concerning the violations, only Respondent's Answer exists to address the allegations before me. Accordingly, consistent with *T. W. Electric* and *Much*, Complainant's Motion must be granted. Consistent with the burden shifting requirements set forth in *T. W. Electric*, *Muck*, *Anderson* and *Adler*, the admissions in the Answer and the evidence of record compel the only possible conclusion that as a result of a combination of the Respondent's 100% shareholder's health problems and the failure of its own produced buyers to pay for produce, produce purchases were not paid for in a time manner and the violations alleged in the Complaint will be deemed established.

Although Complainant suggests that the amount owed to Eddy Produce set forth on Appendix A should be increased by some \$19,565.00, any additional amount was not alleged in the Complaint and accordingly is not before me.¹⁰ As to the other six sellers, Natures Finest Produce was also out of business, and although the other five reported lesser amounts owed as of January 24, 2014, the amount owed was still more than *de minimus*. See *Moore Marketing, International, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988).

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

¹⁰ Complainant's Motion for Summary Judgment, p.5 (Docket Entry # 15). Eddy Produce is no longer in business and could not be contacted to determine any amount currently owed, Attachment 3 (Declaration of Mark Hudson) to Motion for Summary Judgment. *Id.*

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Findings of Fact

1. Respondent Agri-Sales, Inc. is a corporation organized and existing under the laws of the state of Illinois. Respondent's business address is the home address of its 100% shareholder.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 20000783 was issued to Respondent on March 7, 2000. That license was succeeded on April 22, 2011 by License No. 21000806 which was next subject to renewal on April 22, 2013.
3. Respondent, during the period April of 2010 through February of 2012, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of \$403,741.90¹¹ for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions of Law

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

ORDER

1. The facts and circumstances of Respondent's violations shall be published.
2. If not already terminated by reason of failing to pay the renewal fee, PACA License No. 20110806 issued to Respondent is revoked.
3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding

¹¹ It is recognized that as of January 24, 2014, a lesser amount was owed; however, given the absence of evidence on behalf of the Respondent, the record establishes that for the period in question, the amounts alleged are deemed correct.

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within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. §1.145.

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

In re: FLORIDA EUROPEAN EXPORT-IMPORT CO., INC.
Docket No. 13-0263.
Decision and Order.
Filed April 15, 2014.

PACA.

Christopher Young, Esq. for Complainant.

Lawrence H. Meuers, Esq. for Respondent.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the Act or PACA), instituted by a Complaint filed on June 12, 2013, by Bruce W. Summers, then the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA).

The Complaint filed by Complainant alleges that Respondent, during the period from December of 2010 through June of 2012, failed to make full payment promptly to nine (9) sellers of the agreed purchase prices in the total amount of \$383,991.14 for 139 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). A copy of the Complaint and the Rules of Practice were served upon Respondent by certified mail.

On June 25, 2013, the Hearing Clerk's Office received a facsimile request for an extension of time in which to file an Answer, and on June

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26, 2013, an Order was granted giving the Respondent until July 25, 2013 in which to answer.

On August 9, 2013, a Notice of Appearance was entered by Lawrence H. Meurers, Esquire of Naples, Florida, which was accompanied by a request for a further extension of time in which to file an answer and an Answer that was tendered in the event the Department was not inclined to grant the request for extension of time.
1

On January 28, 2014, after review of the record indicated that the matter might be resolved without the necessity of a hearing, I entered an Order directing the parties to file cross motions for summary judgment, together with supporting memoranda and documentary evidence. The Complainant complied; however, despite the time for filing its motion and supporting documents, nothing has been received from the Respondent.

Respondent failed to file an answer to the Complaint within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) as further extended by the Administrative Law Judge on two occasions until July 25, 2013 and having further failed to comply with my Order of January 28, 2014. Accordingly, the following Findings of Fact, Conclusions of Law, and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and consistent with Departmental policy as set forth in *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Florida with a business address formerly in Miami, Florida. Respondent is no longer operating, and the Complaint was served on its majority owners of record.

¹ It will be noted that the matter is pending before an Administrative Law Judge who makes decisions independently of the Department and that the Answer tendered was not timely.

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2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 19792062 was issued to Respondent on September 19, 1979. The license was terminated on September 19, 2012 when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period from December of 2010 through June of 2012, failed to make full payment promptly to nine (9) sellers of the agreed purchase prices in the total amount of \$383,991.14 for 139 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

4. On July 5, 2012, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101, *et seq.*) in the United States Bankruptcy Court for the Southern District of Florida, the same being designated as Docket No. 12-26338. The schedules filed with the Petition contain undisputed debts to two of the nine produce seller listed in the Appendix to the Complaint in the amount of \$179,063.12.

Conclusions of Law

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

ORDER

1. The facts and circumstances of Respondent's violations shall be published.
2. This order shall take effect on the day that this Decision becomes final.
3. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the

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proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

In re: SNOKIST GROWERS.¹

Docket No. 13-0020.

Decision and Order.

Filed June 20, 2014.

PACA.

Charles L. Kendall, Esq. for Complainant.

Roger W. Bailey, Esq. for Respondent.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture (“Complainant”; “USDA”) against Snokist Growers (“Respondent”) alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a *et seq.* (“PACA”; “the Act”). The Complaint alleged that Respondent failed to make full payment promptly in the aggregate amount of \$696,853.95 to eight (8) growers for 402 lots of perishable agricultural commodities during the period from July, 2011 through September, 2011.

I. Procedural History

On March 29, 2013, Complainant filed a Complaint against Respondent alleging violations of the PACA. Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for USDA (“Hearing Clerk”) on April 16, 2013. By Order issued May 13, 2013, I set deadlines for the exchange of evidence and filing of witness and exhibit lists. Upon the request of the parties, I

¹ The complaints against other parties related to this action were resolved by other means.

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subsequently suspended action in the proceeding. In a status report filed November 12, 2013, counsel for Complainant advised that the parties were discussing settlement of the matter. On May 14, 2014, Complainant moved for a Decision and Order on the Record by Reason of Admissions. Respondent did not file a response.

This Decision and Order is issued on unopposed motion of Complainant and incorporates all of the pleadings of the parties and all other evidence of record.

II. Findings of Fact & Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (“Rules of Practice”), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. § 1.139). In addition, the Secretary has recognized that “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 & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998).

Respondent’s admissions and documentary evidence establish that there is no material issue of fact requiring a hearing. Additionally, it is uncontested that the outstanding balance due to sellers is in excess of \$5,000.00, which represents more than a de minimis amount. *See Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (1985). “[U]nless the amount admittedly owed is de minimis, there is no basis for a hearing merely to determine the precise amount owed.” *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). I find that a hearing is not necessary in this matter, as there is no genuine issue of material fact, and because the amount remaining unpaid to growers exceeds \$5,000.00.

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are

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reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). PACA requires “full payment promptly” for produce purchases and where “respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case.” *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

In its Answer to the Complaint, Respondent specifically admitted that it had received pears from the eight growers identified in Appendix A to the Complaint. Respondent further admitted that on December 7, 2011, it had filed a voluntary petition under Chapter 11 of the Bankruptcy code (11 U.S.C. § 101 *et seq.*), Petition No. 11-05868-FLK11 in the Eastern District of Washington. Respondent admitted that it had filed schedules in support of the petition wherein Respondent admitted to owing amounts to the identified growers that were equal to or in excess of the payment balances identified in Appendix A.

Respondent asserted that it had entered into contracts to pay the growers in a manner different from that required by 7 C.F.R. § 46.2(aa)(5). Respondent filed the bankruptcy petition over a month before the date of the second installment payment was due under the contracts to growers, January 31, 2012.

Respondent admitted that not all of the growers were paid in full through the bankruptcy proceeding. Respondent reached settlement with growers Rivermaid Trading Co., Naumes, Inc., Scully Packing Co. LLC, and David Elliott & Son. Respondent advised that growers who did not file state lien claims were not paid, and identified Adobe Creek Packing Co., Pauli Ranch, and Miles Oswald as growers who did not receive payment. Respondent denied having willfully violated PACA and asserted that its “inability to pay growers in accordance with their contracts resulted from factors, including Bankruptcy court orders and rules, beyond Snokist’s control.” See ¶ 2.13 of Respondent’s Answer.

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I find that Respondent has admitted to owing growers for produce and further admitted to failing to meet contractual payment obligations.² I reject Respondent's contention that its inability to pay was beyond its control, noting that Respondent voluntarily filed a petition in bankruptcy, thereby staying payment obligations. Furthermore, Respondent filed its petition before the date that the contractual payments were due. Respondent admitted that some growers were not paid at all. There has been no contention that unpaid growers have been paid any additional amounts since the Complaint and Answer were filed.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *Id.* at 1678. In the instant matter, Respondent has admitted that produce growers remain unpaid for purchases it made. Respondent's failure to pay sellers promptly for the purchase of products covered by section 2(4) of the PACA is willful, and the violations are repeated and flagrant. See 7 U.S.C. § 499b(4). Therefore, publication of the facts and circumstances of Respondent's violations is an appropriate sanction.

B. Findings of Fact

1. Respondent Snokist Growers is a cooperative formed and existing under the law of the state of Washington, with a business address in Yakima, Washington.
2. Respondent is not currently operating.
3. At all times material hereto, Respondent was licensed and operated subject to the provisions of the PACA, under license number 1916 3299, issued on March 12, 1956.

² In its Motion for a Decision and Order by Reason of Admissions, Complainant relies upon Respondent's Bankruptcy proceeding and filings therein as an additional admission of culpability. However, Complainant failed to include any of Respondent's bankruptcy documents with the motion, despite alluding to them as attachments. My search of Complainant's submissions, including a DVD, failed to reveal bankruptcy documents.

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4. Respondent's license terminated on March 4, 2008, after Respondent reported to USDA that it was no longer operating subject to PACA.
5. During the period from July 27, 2011, through September 30, 2011, Respondent failed to make full payment promptly of the agreed purchase prices in the aggregate of \$696,853.95 for 402 lots of pears, a perishable agricultural commodity purchased, received, and accepted by Respondent in interstate and foreign commerce from eight (8) growers.
6. The transactions that demonstrate violations of the PACA are described and enumerated in Appendix A of the Complaint filed in this matter, which is incorporated herein by reference.
7. Respondent entered into contracts to pay the growers pursuant to 7 C.F.R. § 46.2(aa)(11).
8. On December 7, 2011, more than a month before payment was due under the contracts, Respondent filed a voluntary petition under Chapter 11 of the Bankruptcy Code, Petition No. 11-05868-FLK11, in the Eastern District of Washington.
9. Through the bankruptcy proceeding, Respondent reached settlement with some of the unpaid growers, but some growers remained unpaid.
10. The unpaid balances represent more than de minimis amounts, thereby obviating a need for a hearing.

C. Conclusions of Law

1. The Secretary has jurisdiction over this matter.
2. Respondent's failure to make full payment promptly of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate commerce

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constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA. (7 U.S.C. § 499b(4)).

ORDER

Respondent Snokist Growers willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances underlying Respondent's violations shall be published.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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REPARATIONS DECISIONS

GLOBAL RELIANCE, INC. v. PINNACLE FOOD GROUPS LLC.

Docket No. E-R-2012-183.

Decision and Order.

Filed April 10, 2014.

PACA – Reparations.

Rejection - Not effective if not prompt

Respondent buyer received frozen potatoes and did not reject them within 24 hours as specified by 7 C.F.R. 46.2(cc)(1), so there was no effective rejection.

Revocation of Acceptance – Justified when buyer’s evidence is uncontroverted

Respondent took samples of the frozen potatoes, performed microbiological testing in its own lab, and submitted samples to an independent lab for chemical testing. When buyer later attempted to revoke the acceptance based on the lab results, complainant seller refused to reclaim the potatoes without retesting. Respondent buyer made two of the four lots available for retesting, and withheld the other two lots. Complainant did not refute buyer’s evidence through evidence from retesting, so buyer’s revocation of acceptance was justified for the two lots it made available. Since buyer’s evidence was controverted, its revocation of acceptance was not justified for the two lots it withheld from retesting.

Negative Inference – Drawn when a party fails to provide obviously necessary evidence

Buyer attempted to revoke acceptance of frozen potatoes after microbiological testing by buyer’s lab. When seller requested retesting, buyer made two lots available for retesting and withheld two other lots. A negative inference was drawn against buyer for the lots it withheld, and its revocation of acceptance deemed unjustified. A negative inference was drawn against seller on the two available lots when it failed to show results of retesting, and buyer’s revocation of acceptance was deemed justified as to those two lots.

Complainant, pro se.

McCarron & Diess, Counsel for Complainant.

Charles L. Kendall, Presiding Officer.

Decision and 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 *et seq.*) (PACA). Complainant instituted this proceeding under the PACA, and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) (Rules of Practice), by filing a timely Complaint (Complaint) seeking reparation against Respondent, in the amount of \$145,152.00 plus interest of 18% per annum, in connection with five (5) shipments of individually quick frozen (IQF) baby potatoes with skins that Complainant delivered to Respondent in October 2011 pursuant to a supply agreement between the parties.

Copies of the Report of Investigation (ROI) prepared by the Department were served upon the parties. The Department also prepared, and served upon the parties, a Supplemental Report of Investigation, correcting certain omissions in one of the exhibits of the initial ROI. A copy of the Complaint was served upon the Respondent. Respondent filed a timely Answer, Counterclaim and Request for Oral Hearing (Answer), in which it denied liability to Complainant and entered a counterclaim seeking: 1) incidental damages resulting from Complainant's alleged breach and Respondent's rejection of four (4) of the loads in question, in the amount of \$15,660.73 for labor, storage, handling and disposal of the potatoes; and 2) repayment from Complainant of \$32,805.00 for frozen potatoes which Complainant delivered in June 2011, Respondent alleges that it validly rejected, and Respondent alleges it mistakenly paid. Complainant filed a timely Reply (Reply) to Respondent's counterclaim.

Upon review of the Supply Agreement between the parties, we noted that it required the parties to resolve their disputes through arbitration and specified the process that the parties should undertake. The Department will give effect to such agreements. Therefore, we issued an Order to Show Cause Why Complaint Should not be Dismissed. In reply, Complainant indicated that there had been oral agreement to proceed in this forum in lieu of arbitration. The Supply Agreement specified, however, that none of its provisions may be changed, waived, discharged

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or terminated orally. The parties then submitted writings waiving the arbitration provisions of the Supply Agreement, and this case continued.

The amounts claimed in both the Complaint and the Counterclaim exceed \$30,000.00, and Respondent, in its Answer and Counterclaim, requested an oral hearing. On April 26, 2013, a teleconference was held among the parties and the Presiding Officer. After additional e-mail exchanges with the parties, the Presiding Officer issued a Summary of Teleconference and Cancellation of Hearing on May 31, 2013. Thereafter, by agreement of the parties, the case proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice under the PACA (7 C.F.R. § 47.20).

Under the documentary procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI)¹. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement (Op. St.), Respondent filed an Answering Statement (Ans. St.), and Complainant filed a Statement in Reply (St. in R.). Complainant and Respondent also submitted briefs (CB and RB, respectively).

Findings of Fact

1. Complainant, Global Reliance, Inc., is a corporation whose address is 3705 Quaker Bridge Road, #215, Hamilton, New Jersey 08619 (ROI, Ex. A at 1).
2. Respondent, Pinnacle Foods Group LLC, is a limited liability company whose address is 1 Old Bloomfield Ave, Mt. Lakes, NJ 07046-1429 (ROI, Ex. E at 2).
3. At the time of the transactions involved herein, Respondent was licensed under the PACA (ROI, cover sheet).
4. Complainant began supplying Respondent with potatoes in 1998, and

¹ The exhibits in the Report of Investigation are designated as "ROI Ex. A" through "ROI Ex. P"; where "ROI Ex. O" is referenced, the document(s) are found in the Supplemental Report of Investigation.

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Respondent's Purchasing Manager stated in a letter dated April 23, 2004 that Respondent had always been very satisfied with Complainant's product and had never had any issues with regard to quality (St. in R. at 3).

5. A broker, Marshall Sales Company, Inc., issued a Sales Memorandum dated March 29, 2011 for a supply contract under which Complainant sold to Respondent 520,000 lbs. of individually quick frozen (IQF) whole baby potatoes, size 1 1/16" to 1 1/8", in 50 lb. cases at a price of \$0.81 per pound delivered to Darien, WI, for a total price of \$421,200.00. The goods were to be shipped to order during the delivery period from April 1, 2011 through March 31, 2012 (Complaint Ex. 1A).
6. The sales for this supply contract were made pursuant to a Supply Agreement between the parties, effective as of April 1, 2011 (ROI, Ex. P at 24-32).
7. The Report of Investigation contains a document titled, "Bulk Case Specification Whole Baby Potatoes" (ROI, Ex. O, at 7-7b). The requirements include specified color, quality, (absence of) enzymes, maximum acceptable bacterial levels, packaging and shipping requirements, and a list of General Requirements. Included in the list of General Requirements, at number 10, A., is a requirement that "... any pesticide residues present on the product delivered do not exceed the tolerance set by EPA, USDA, FDA, State Laws for any pesticide residue." (ROI, Ex. O at 7b). Respondent's Vice President of Quality Systems, Kurt Buckman, avers that Respondent sent the "Bulk Case Specification Whole Baby Potatoes" to Complainant in June 2009 (Ans. St. at 1). Complainant's President, Sanjiv Kakkar, states in contrast that the only specs Complainant ever received were in 1998, and that those specs do not mention anything about chemical levels (St. in R. at 1).
8. On April 8, April 15, and April 22, 2011, per Respondent's purchase orders, Complainant delivered to Respondent six (6) loads of potatoes, for which Respondent paid in full (Compl.; Ex. 2-2E).
9. In October 2011, Complainant delivered five shipments of potatoes to

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Respondent. One of the five shipments is not in dispute: on October 13, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4457 (ROI, Ex. F at 5). Complainant's invoice #3767 for that shipment totals \$34,020.00 (ROI, Ex. A at 1), and Respondent acknowledges that at least that sum is due to Complainant (RB at 13).

10. On October 11, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4454 (ROI, Ex. F at 3). Complainant's invoice #3769 for that shipment totals \$34,020.00 (ROI, Ex. A at 1). Hereinafter, this shipment will be referred to as "Lot A."
11. On October 11, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4456 (ROI, Ex. F. at 4). Complainant's invoice #3768 for that shipment totals \$34,020.00 (ROI, Ex. J at 3). Hereinafter, this shipment will be referred to as "Lot B."
12. On October 13, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4458 (ROI, Ex. F at 2). Complainant's invoice #3766 for that shipment totals \$34,020.00 (ROI, Ex. J at 4). Hereinafter, this shipment will be referred to as "Lot C."
13. On October 20, 2011, Complainant delivered 224 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 5654 (ROI, Ex. F at 6). Complainant's invoice #3771 for that shipment totals \$9,072.00 (ROI, Ex. J at 5). Hereinafter, this shipment will be referred to as "Lot D."
14. After receiving each of the lots, Respondent drew samples from each lot and subjected the samples to bacteriological examination in Respondent's laboratory (ROI, Ex. O at 41-44). Respondent's laboratory had in place a rigorous Quality Assurance Plan (ROI, Ex. O at 19-24), had undertaken a recent Internal Laboratory Audit (ROI, Ex. O at 27-32), and had undergone an evaluation by an independent third-party auditor, the American Proficiency Institute (ROI, Ex. O at

33-40).

15. Respondent's laboratory reported the results of its testing (ROI, Ex. E at 3), which indicated that all four of the lots (Lot A, Lot B, Lot C, and Lot D) exceeded the bacterial limits contained in the "Bulk Case Specification Whole Baby Potatoes" (ROI, Ex. O at 7A) that Respondent asserts is part of the supply agreement between the parties. Respondent's lab reported the following : excessive levels of E. Coli in the samples of potatoes from Lot A (ROI, Ex. O at 41); excessive Aerobic Plate Count (APC) in the samples of potatoes from Lot B (ROI, Ex. O at 42); excessive levels of E. Coli in the samples of potatoes from Lot C (ROI, Ex. O at 43); and excessive levels of E. Coli and excessive levels of Coliform bacteria in the potatoes under PO 5654 (ROI, Ex. O at 43).
16. For each of the lots, Respondent generated a Supplier Corrective Action Request (SCAR) indicating Respondent's intent to reject the lot, and the reason(s) for the rejection. Lot A is addressed in SCAR 2284 (ROI, Ex. E at 7-8); Lot B is addressed in SCAR 2285 (ROI, Ex. E at 12-13); Lot C is addressed in SCAR 2286 (ROI, Ex. E at 5-6); Lot D is addressed in SCAR 2287 (ROI, Ex. E at 10-11). All of the SCARs were dated October 30, 2011. Respondent asserts that it issued the SCARs to Complainant on that date (Ans. St. at 4), and Complainant has not refuted that assertion.
17. Respondent also sent samples of each of the lots for pesticide testing at National Food Lab (NFL) in Livermore, CA (ROI, Ex. K at 1, 4-7). NFL is an accredited food testing laboratory (ROI, Ex. O at 9-13). NFL issued reports to Respondent, dated November 4, 2011, indicating the presence of a pesticide, Chlorpyrifos, in samples from Lot B (ROI, Ex. E at 9), and Lot C (ROI, Ex. E at 4). The United States Environmental Protection Agency (EPA) has established tolerances for Chlorpyrifos residue for numerous food commodities, listed at 40 C.F.R. 180.342; no tolerances, however, have been established for potatoes (ROI, Ex. O at 45-48). An agricultural commodity or processed food is deemed to be adulterated and subject to action by the Food and Drug Administration if it contains pesticide residue for which no tolerance or exemption has been established (ROI, Ex. O at 49).

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18. At some time after November 4, 2011, Respondent updated its SCARs for Lot B and Lot C to include presence of Chlorpyrifos as a reason for rejection of those lots.
19. After sending the SCARs for the four lots to Complainant, Respondent then added a notation on the second page of each SCAR, stating that Complainant had replied, “we do not accept your results and shall ask an independent lab to test the product again.” Each SCAR listed a “Corrective Action Due Date” of November 11, 2011 (ROI, Ex. E at 6, 8, 11, 13).
20. Mark Hooper, Respondent’s Senior Director, QA Supply Chain, sent an email dated December 1, 2011, to Complainant’s President, Sanjiv Kakkar, addressing Respondent’s intent to reject the four lots, and Complainant’s objection to Respondent’s proffered rejection of the lots (ROI Ex. E, pp. 14-15). The email stated, in pertinent part:
 21.

According to Sandy, you would like to schedule the USDA – Fruits and Vegetable Division, to come in and sample the product in question, composite samples by container and submit to a designated third party for testing.

Two containers, PO 4456 [Lot B] and 4458 [Lot C] were found to be positive for chemical residue not allowed in potatoes. These two PO’s are not subject to further review. . . .

The other two containers [Lot A and Lot D] were found to be non-compliant per the attached excel file. As you are contesting our internal results, we will agree to a retest of these two containers to determine whether or not they truly meet our purchase specifications as you have argued.
22. Dennis Ramthun, Respondent’s Senior Director of Procurement, sent a letter dated January 17, 2012, to Complainant’s President, Sanjiv

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Kakkar (ROI, Ex. E at 2). The letter stated that it served as official notice that Respondent was rejecting the four lots, and that the letter reiterated Respondent's request that Complainant remove the lots from Respondent's Darien, WI facility. If Complainant did not remove the lots by 5:00 pm CST on January 25, 2012, Respondent would send them for disposal and bill Complainant for the resulting cost.

23. On January 26, 2012, Complainant filed its informal complaint, which was within nine months of when the cause of action accrued.

Conclusions

It is undisputed that Complainant delivered four (4) shipments of 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI, as follows: Lot A, on October 11, 2011, with 840 boxes at an invoice price of \$34,020.00; Lot B, on October 11, 2011, with 840 boxes at an invoice price of \$34,020.00; Lot C, on October 13, 2011, with 840 boxes at an invoice price of \$34,020.00; Lot D, on October 20, 2011, with 224 boxes at an invoice price of \$9,072.00. It is also undisputed that on October 13, 2011, Complainant delivered 840 50-lb. boxes at an invoice price of \$34,020.00 (hereinafter "Lot E"); Respondent has acknowledged that it owes Complainant the invoice price for Lot E.

Complainant asserts that Respondent accepted all five shipments in compliance with the contract, and has failed to make payment for them (Complaint, pg. 2). Complainant therefore seeks reparation in the amount of \$145,152.00, plus interest at a rate of 18% per annum.

Respondent contends that it rejected four (4) of the loads [Lot A, Lot B, Lot C, and Lot D] (RB at 11). Respondent also filed a counterclaim for: 1) damages of \$15,660.73 incidental to Complainant's breach on the four (4) rejected loads; and 2) repayment of \$32,805.00 for a lot of potatoes that Complainant delivered to Respondent in June 2011, and that Respondent alleges that it mistakenly paid for in July 2011 and properly rejected in August 2011 (Answer at 2). Respondent seeks reparation on its counterclaim in the total amount of \$48,465.73, minus an amount due Complainant for Lot E of \$36,450.00, for a net counterclaim amount of \$12,015.73 (RB at 14).

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An initial question here is whether Respondent accepted or rejected the four lots in question upon delivery. Respondent received Lot A and Lot B on October 11, 2011, Lot C on October 13, 2011, and Lot D on October 20, 2011. Respondent communicated its intent to reject the lots when it issued the SCARs, dated October 30, 2011, to Complainant. The notations on the SCARs (ROI Ex. E, pp. 6, 8, 11, 13) indicate that Complainant did not accept the [test] results upon which the SCARs were based, and so, in effect, refused to accept Respondent's intended rejection of the goods.

Respondent notes, "A rejection, or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance, reverts title to the goods in the seller." (RB at 13). We agree that an *effective* rejection reverts title to the goods in the seller. We have previously held that:

Once a buyer has made a procedurally effective rejection title to the goods automatically reverts to the seller. Thereupon a seller must take possession of the goods even if the rejection was substantively wrongful. It is therefore meaningless for a seller to state that it refuses to accept an effective rejection. In addition, following an effective rejection the seller has the burden of proving by a preponderance of the evidence that the rejection was substantively wrongful.

Crowley, 55 Agric. Dec. 674, 677-78 (U.S.D.A. 1996) (citations omitted).

We have, on the other hand, held that a seller can refuse to accept a rejection (that is, a seller may refuse to retake possession of purportedly rejected produce) when the rejection is ineffective (but not when it is effective but wrongful). An offer to conditionally accept an ineffective rejection does not impose a positive duty on the seller to retake possession of produce unless the terms of the conditional offer are accepted. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (U.S.D.A. 1994).

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Respondent states, “To justify a rejection, the buyer has the burden of proving its rejection was procedurally effective and substantively rightful.” (RB at 11). Was Respondent’s rejection of the four lots procedurally effective? We have stated, “An effective rejection must be in clear, unmistakable terms, and mere complaints regarding a shipment are insufficient.” *Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429, 431 (U.S.D.A. 1983).

The documents generated by Respondent on October 30, 2011 are titled “SCAR”, which stands for “Supplier Corrective Action Request.” In and of themselves, “SCAR” and “Supplier Corrective Action Request” are not unmistakable terms communicating that Respondent is rejecting the goods in question, and neither are the “Additional Details” on the SCARs describing microbial and/or Chlorpyrifos counts. On the first page of each SCAR (ROI Ex. E, pp. 5, 7, 10, 12), however, under Quality Disposition, are notations “Disposition of Materials: Rejection” and “Disposition Comments: return to seller.” These notations in Respondent’s records do not constitute clear and unmistakable *communication to the seller* (Complainant) that the product was rejected. Respondent did communicate its rejection of the goods in clear, unmistakable terms to Complainant through Respondent’s letter dated January 17, 2012 (ROI, Ex. E at 2).

A rejection is not effective unless the buyer seasonably notifies the seller, and the burden of proving seasonable notice rests upon the buyer. *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867 (U.S.D.A. 1979). Respondent asserts that it provided Complainant with timely notice of Complainant’s breach, stating, “Under the circumstances of this case, which involves frozen product and food safety laboratory testing, the notice of breach to [Complainant] was within a reasonable time.” (RB at 11). Notice to a seller of a seller’s breach, however, is not the same thing as seasonable notice of rejection. As Respondent notes, under U.C.C. § 2-602(1):

A rejection is procedurally effective when it is made within a reasonable time after delivery, and seasonably conveyed to the seller. However, the buyer has a reasonable time to inspect the goods in a reasonable manner before acceptance occurs. Acceptance occurs

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only when: the buyer signifies it will take the goods after a reasonable opportunity to inspect the goods; or, after a reasonable opportunity to inspect, fails to make an effective rejection.

(RB at 11-12) (citations omitted.) Respondent contends further that the issuance of its SCARs on October 30, 2011, in regard to frozen product requiring lab analysis, was rejection within a reasonable time from delivery (RB at 13).

Questions of acceptance or rejection of fresh or frozen fruits and vegetables in commerce are governed by the regulations promulgated under the PACA. The regulations, at 7 C.F.R. 46.2, provide:

(cc) *Reasonable time*, as used in paragraph (bb) of this section, means:

(1) For frozen fruits and vegetables with respect to rail shipments, 48 hours after notice of arrival and the produce is made accessible for inspection, and with respect to truck shipments, not to exceed 12 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection;

* * *

(dd) *Acceptance* means:

* * *

(3) Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section: Provided, That acceptance shall not affect any claim for damages because of failure of the produce to meet the terms of the contract.

These regulations govern our consideration of whether a buyer has given seasonable notice of rejection, and thus whether a buyer's rejection of goods is procedurally effective. The last of the four lots in question here

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was delivered to Respondent on October 20, 2011. The record indicates that Respondent first gave Complainant clear, unmistakable notice of Respondent's rejection by means of its January 17, 2012 letter (ROI, Ex. E at 2), some 89 days later. Even if Respondent's SCARs were considered to constitute adequately clear notice of rejection, such notice given to Complainant on October 30, 2011, ten (10) days after the last delivery, was not seasonable notice of rejection. Therefore, Respondent's rejection was not procedurally effective. An ineffective rejection has the same legal consequence as acceptance. *Dew-Grow, Inc. v. First National Supermarkets, Inc.*, 42 Agric. Dec. 2020, 2025 (U.S.D.A. 1983). It is concluded that Respondent accepted the potatoes.

In the alternative, Respondent argues that even if it were deemed to have accepted the lots, it validly revoked its acceptance. Respondent references UCC § 2-608 for the proposition that, even if a buyer accepts the goods, it may revoke its acceptance if the buyer was unable to discover the non-conformity before acceptance, and revokes its acceptance within a reasonable time after discovery before any substantial change in condition of the goods not caused by their own defects (RB at 12). Respondent further cites decisions in which we have recognized such a revocation of acceptance under UCC § 2-608 (*Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475 (U.S.D.A. 1978); *Highland Grape Juice Co. v. T. W. Garner Food Co.*, 38 Agric. Dec. 1001 (U.S.D.A. 1979)).

Respondent asserts that it could not have discovered the defects that constituted the non-conformity of the goods until the goods underwent microbiological and chemical analysis (RB at 13). Such testing would serve to determine whether the goods met the terms of the contract, because Respondent argues that Respondent's specifications for acceptable levels both of microbes and of pesticides were part of the bargain between the parties. As evidence that these specifications were included in the bargain, Respondent offers its Bulk Case Specification (ROI, Ex. O at 7-7b), which Respondent's Kurt Buckman attests was sent to Complainant in June of 2009 (Ans. St. at 1).

Complainant states that, "Only specs we ever recd. were in 1998 when we started business with Birdseye. Those specs do not mention about chemical levels." (St. in R. at 1). By implication, even if the 1998

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specs do not mention chemical levels, they do address levels of microbes. Further, Complainant has offered evidence that the potatoes at issue in this proceeding were subjected to testing for the same microbes before being imported from India (Compl., Ex. 4, 4A, 4B, 4C). We find that the requirements regarding microbial counts in the Bulk Case Specification (ROI, Ex. O at 7-7b) were a part of the bargain between the parties.

We also find that the bargain between the parties required that the goods be free of any pesticide residues which are not permit by law. The record includes the document “Bulk Case Specification Whole Baby Potatoes.” Included in that document’s list of General Requirements, at number 10. A., is a requirement that “. . . any pesticide residues present on the product delivered do not exceed the tolerance set by EPA, USDA, FDA, State Laws for any pesticide residue.” (ROI, Ex. O at 7b).²

In order to establish a revocation of acceptance, Respondent must prove by a preponderance of the evidence that the product failed to conform to the terms of the contract. *Highland Grape Juice Co. v. T. W. Garner Food Co.*, 38 Agric. Dec. 1001, 1008 (U.S.D.A. 1979). Respondent performed microbiological testing of the potatoes in its lab. Respondent’s lab had a program in place which set standards and procedures for its microbiological tests, and those procedures were internally audited (ROI, Ex. O. at 19-33). Respondent’s laboratory and its procedures were also subjected quality audits in 2010 and 2011(ROI, Ex. O at 33-40). Respondent’s microbiological tests showed that the product in each of the four (4) rejected loads contained microbes in excess of the levels permitted in the Bulk Case Specifications (ROI, Ex. O at 41-44).

Respondent also submitted samples from each of the loads to National Food Lab (NFL), and asserts that the samples were frozen and

² We note that where it is determined that produce was grown using pesticides which have not been approved for that crop, even if the fruits or vegetables themselves do not show residues, the goods are deemed to be devoid of commercial value. See *Froerer Farms, Inc.*, Docket No. W-R-2007-433, available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5100548> and at <https://advance.lexis.com/api/document/collection/administrative-materials/id/5BPH-KW50-00D0-R0CN-00000-00?context=1000516> (2011).

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in good condition upon receipt by NFL. NFL reported that the potatoes from Lot B and Lot C contained Chlorpyrifos, a pesticide for which EPA has not issued a specified tolerance and has not granted any tolerance exemption (ROI, Ex. E at 4 & 9; Ex. O at 13-14). Complainant notes that EPA does not specify any limit [tolerance] for Chlorpyrifos in fresh or frozen potatoes (Ans. St. at 3), but seems confused about the import of that fact. The absence of a tolerance or tolerance exception means that a pesticide may not be used. The presence of pesticide residue at any detectable level in a commodity means that the commodity is deemed by FDA to be adulterated (ROI, Ex. O at 49).

Complainant claims that all baby potatoes have some level of Chlorpyrifos, and suggests that Chlorpyrifos (an organophosphate pesticide) may be mistaken for naturally occurring compounds in potatoes, glycoalkaloids (St. in R. at 5-6). Given the accreditation of National Food Lab (NFL) (ROI, Ex. O at 9-13), we find it unlikely that NFL would have mistaken the two substances and erroneously reported the presence of Chlorpyrifos in the potatoes from Lot B and Lot C. We, therefore, accept the NFL lab results as accurate.

Respondent, then, has provided some evidence that all four lots failed to meet the contract specifications for microbial levels, and that Lot B and Lot C failed to meet the contract specifications due to the presence of a banned pesticide. Respondent's evidence consists of Respondent's own internal microbiological testing, and testing of samples drawn by Respondent and analyzed by NFL. Complainant has challenged that evidence and requested retesting (ROI Ex. E, pp 6, 8, 11, 13). Respondent offered to allow for retesting of Lot A and Lot D, but not for Lot B and Lot C (ROI, Ex. E at 14; RB at 10).

Normally, in the absence of an inspection by a neutral party at destination, the buyer fails to prove breach. *Tantum v. Weller*, 41 Agric. Dec. 2456, 2457 (U.S.D.A. 1982). The microbiological analysis by Respondent's own laboratory cannot be viewed as an inspection by a neutral third party. The chemical analysis by NFL could potentially be viewed as inspection by a neutral party. The difficulty with the NFL testing results offered here, however, is that they were derived from samples drawn by Respondent itself.

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Sampling is a critical component of testing. As noted by a white paper from the United Fresh Produce Association Food Safety & Technology Council, Microbiological Testing of Fresh Produce, at page 15:

The accuracy of a test is as dependent on proper sampling technique as on the test itself. . . . The sample collector must be trained in aseptic sampling procedures. This minimizes the potential for contamination from other sources, including the individual collecting the sample, and from causing a false positive reaction.

*Id.*³

Respondent has offered evidence that its laboratory had in place a rigorous Quality Assurance Plan (ROI, Ex. O at 19-24), had undertaken a recent Internal Laboratory Audit (ROI, Ex. O at 27-32), and had undergone an evaluation by an independent third-party auditor, the American Proficiency Institute (ROI, Ex. O at 33-40). The program in place in Respondent's laboratory called for rigorous sampling procedures. Respondent's laboratory appears competent and scrupulous. Nonetheless, Respondent, as a party to the proceeding, cannot be viewed as neutral.

In a series of cases, we have permitted revocation of acceptance based on testing which disclosed defects which would not otherwise have been discovered or discoverable, so long as there was no change in the condition of the product from the time of delivery to the time the acceptance was revoked. In none of these cases, however, did the buyer draw its own samples: *Silver Star Processors, Inc. v. Costa Fruit & Produce Co., Inc.*, 53 Agric. Dec. 897, 904 (U.S.D.A. 1994) (director of third-party laboratory was personally present when samples were randomly selected and collected from unopened pails of palletized product.); *Steve Dart, Inc. v. Mecca Farms, Inc.*, 49 Agric. Dec. 638, 639 (U.S.D.A. 1990) (inspectors of the Canada Health & Welfare

³ Available at http://www.unitedfresh.org/assets/food_safety/MicroWhite%20Paper-%20Final.pdf.

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Department arrived at the complainant's warehouse and took samples of peppers for analysis.); *Highland Grape Juice Co. v. T. W. Garner Food Co.*, 38 Agric. Dec. 1001, 1005-06 (U.S.D.A. 1979) (samples of frozen grape pulp were drawn by USDA).

The product specifications in this case call for a complete absence of a substance, Chlopyrifos. EPA has established nonzero tolerance levels for the pesticide in numerous food commodities (ROI, Ex. O at 45-48). As a large-scale processor of frozen foods, Respondent could be expected to process some of those dozens of commodities. It is especially important, then, that samples be drawn by a neutral party, or by the seller under the buyer's supervision, so as to minimize the likelihood, or the appearance thereof, that the product in question may have been cross-contaminated by products with nonzero tolerance levels in Respondent's facility.

Again, Respondent has offered some evidence, in the form of its own sworn statements, that all four lots failed to meet the contract specifications as to microbial levels, and that Lot B and Lot C also failed due to the presence of Chlorpyrifos. A sworn statement which has not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982).

Prior to December 1, 2011, there were various communications between the parties, but none of which rose to the level of an unambiguous rejection (in this case, actually, revocation of acceptance). On December 1, 2011, Respondent offered to allow for retesting of Lot A and Lot D, but not for Lot B and Lot C (ROI, Ex. E at 14; RB at 10). In so doing, it foreclosed the possibility of either verifying or rebutting the evidence that it had offered of Complainant's breach as to Lot B and Lot C. In regard to Lot A and Lot D, however, Respondent afforded Complainant the opportunity to rebut Respondent's evidence of breach. Complainant has provided no evidence that any results of retesting rebutted Respondent's evidence.

The simple resolution of the issues in this case might have been accomplished by sampling and retesting of the four lots of potatoes by a

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neutral party. In this regard, each party has contributed to the difficulty. Respondent failed to make Lot B and Lot C available for retesting. Complainant either failed to have Lot A and Lot D sampled and retested, or failed to provide the results of retesting in this proceeding. In the absence of clear and definitive evidence of the actual state of the potatoes, we will resolve this dispute by application of the negative inference rule.

The negative inference rule is one in which the tribunal will infer that when something was not done by a party, if it had done so the information would have been against its best interest. *Burnac Produce, Inc. v. Calavo Growers of California*, 47 Agric. Dec. 1624, 1627 (U.S.D.A. 1988). Here, we infer that had Respondent made Lot B and Lot C available for retesting, the results would have shown no breach of the contract specifications by Complainant as to Lot B and Lot C. Therefore, Respondent has failed to prove that its revocation of acceptance was justified as to those two lots, and Respondent is liable to Complainant for their invoice price. Similarly, we infer that had Complainant provided results of retesting on Lot A and Lot D, those results would have shown that the lots failed to meet the contract specifications. Therefore, Respondent's revocation of acceptance was justified as to those two lots, and Respondent has no liability on Lot A or Lot D.

Respondent has made a counterclaim seeking: 1) incidental damages resulting from Complainant's alleged breach and Respondent's rejection of the four loads in question, in the amount of \$15,660.73 for labor, storage, handling and disposal of the potatoes; and 2) repayment from Complainant of \$32,805.00 for frozen potatoes which Complainant delivered in June 2011, Respondent alleges that it validly rejected, and Respondent alleges it mistakenly paid. We deem Respondent's evidence as to the costs of storage and disposal (ROI Ex. O, pg. 50) to be reasonable in its particulars. For Lot A, Respondent incurred storage costs of \$1,270.00 and handling costs of \$870.00, for a total of \$2,140.00. For Lot D, Respondent incurred storage costs of \$357.00 and handling costs of \$261.00, for a total of \$618.00. Respondent incurred total incidental damages as a result of Complainant's breach in a total amount of \$2,758.00.

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Respondent also asserted a Counterclaim for payment of \$32,805.00 for frozen potatoes delivered by Complainant to Respondent under PO 279957 in June 2011 (Answer at 2). Respondent alleges that the June 2011 shipment underwent microbiological testing in June 2011, which showed the potatoes failed to conform to the microbiological specifications (Ans. St. at 4-5). Respondent paid Complainant \$32,805.00 for these potatoes in July 2011. *Id.* Respondent further alleges that they were retested in August 2011, at the request of Complainant, and again failed to conform to the microbiological specifications, and were rejected on August 26, 2011. *Id.*

We first must consider whether we have jurisdiction over Respondent's counterclaim for the June 2011 transaction. We have stated:

There are four basic jurisdictional requirements under the act; they are: (1) the transaction must involve perishable agricultural commodities (7 U.S.C. 499a(4)); (2) the transaction must involve interstate or foreign commerce (7 U.S.C. 99a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. 499f(a)); and (4) the respondent must be a licensee under the act or operating subject to the licensing requirements of the act (7 U.S.C. 499d(a)).

Jebavy-Sorenson Orchard Co. v. Lynn Foods Corp., 32 Agric. Dec. 529, 531 (U.S.D.A. 1973).

In this case, there is no dispute that the transaction involved perishable agricultural commodities and interstate or foreign commerce. At the time of the transactions at issue in this case, Complainant (the respondent to the counterclaim) was not licensed under the PACA. Complainant did, however, subsequently apply for a license; its license was issued on January 24, 2012. In a previous case, where the file contained a copy of a license application filed by respondent, we found that the respondent was operating subject to the PACA and was thus subject to our jurisdiction. *Garden State Farms, Inc. v. Pinapfel*, 36 Agric. Dec. 933, 936 (U.S.D.A. 1977). We find in this case that

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Complainant was operating subject to the PACA at all times material herein.

Did Respondent petition the Secretary within nine months after its cause of action accrued? As Respondent has noted, its counterclaim on this load was filed on May 23, 2012 (RB at 14). Respondent describes the handling of this lot as follows (RB at 13-14):

The frozen potatoes under PO 279957 were delivered in June 2011, and underwent microbiological testing in June 2011, which showed the potatoes failed to conform to the microbiological specifications. *See* ROI, Ex. O at 52. They were retested in August 2011, at the request of Global, and again failed to conform to the microbiological specifications. *Id.* The potatoes were rejected on August 26, 2011. *Id.* at 5354. However, Pinnacle had already paid Global \$32,805.00 for these potatoes, which were validly rejected in July 2011. *Id.* at 55.

The following events were more than nine months before Respondent filed its May 23, 2012, counterclaim on its PO 279957: 1) the potatoes were delivered in June 2011; 2) the potatoes underwent microbiological testing [in Respondent's lab], also in June 2011; 3) Respondent paid for the lot "by mistake" in July 2011; 4) the potatoes were retested in August 2011; and 5) Respondent's lab returned the results of its retesting on August 12, 2011 (ROI Ex. O, pg. 52). Respondent's cause of action accrued, at the latest, on August 12, 2011, when Respondent determined, upon retesting, that the potatoes failed to meet the contract specifications. The May 23, 2012 counterclaim was not within nine months of that event. Respondent argues that its cause of action accrued when it rejected the potatoes on August 26, 2011, and it filed its counterclaim within nine months of that date. Respondent's failure to press its cause of action promptly does not alter the fact of the cause of action having accrued, at the latest, on August 12, 2011. Therefore, we have no jurisdiction over Respondent's counterclaim on this transaction.

Even if we did have jurisdiction over Respondent's counterclaim as to its PO 279957, the circumstance described by Respondent could not be

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deemed an effective rejection, since Respondent provided no evidence of a clear statement of rejection in the Answer, its Answering Statement, or in the exhibits to which those pleadings refer (ROI, Ex. O at 51-55), nor any proof of seasonable notice of rejection to Complainant. Therefore, there was no procedurally effective rejection as to this lot.

Neither is there clear and dispositive evidence of breach by Complainant, nor proof that Respondent seasonably communicated an intention to revoke its acceptance of the goods. Respondent's sworn statements are not uncontroverted, as Complainant has denied that it was informed about any disposition of the goods (St. in R. at 2). Respondent's payment for the shipment the month after delivery is a strong indication of acceptance of the goods. Revocation of that acceptance would require very strong evidence of both breach and notice, and neither of these appears in the record.

The amounts due to Complainant for Lot A, Lot D, and Lot E are the invoice prices of \$34,020.00 apiece, for a total amount of \$102,060.00. Respondent is due \$2,758.00 from Complainant for incidental damages due to Complainant's breach regarding Lot B and Lot C. The net amount due to Complainant from Respondent is \$99,302.00. Complainant has also claimed, in its Complaint, that it is due interest of 18% per annum. Complainant has not, however, provided any evidence that such an interest term was a part of the agreement between the parties. Therefore, we decline to award it.

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

Respondent's failure to make prompt payment for its purchases is a violation of section 2 of the Act for which reparation should be awarded to Complainant in the net amount of \$99,302.00. 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*

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Valley Tie Co., 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n, Inc.*, 22 Agric. Dec. 66, 67 (U.S.D.A. 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 Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 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).

ORDER

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$99,302.00, plus the amount of \$500.00, with interest thereon at the rate of 0.12% per annum from November 1, 2011, until paid.

Copies of this Order shall be served upon the parties.

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Miscellaneous Orders & Dismissals
73 Agric. Dec. 363 – 365

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: www.dm.usda.gov/oaljdecisions].

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEBORAH D. DROBNICK.

Docket No. 12-0490.

Order of Dismissal.

Filed February 28, 2014.

ERIK F. JARQUIN.

Docket No. 13-0256.

Order of Dismissal.

Filed March 19, 2014.

In re: RDM International, Inc.

Docket Nos. 12-0458, 12-0601.

Miscellaneous Order.

Filed April 8, 2014.

PACA – Administrative procedure – Extension of time.

Charles L. Kendall, Esq. for Complainant.

Robert D. Moore for Respondent.

Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

Ruling entered by William G. Jenson, Judicial Officer.

RULING DENYING RDM INTERNATIONAL, INC.'S
REQUEST FOR AN EXTENSION OF TIME
TO FILE A PETITION TO RECONSIDER

On April 2, 2014, RDM International, Inc. [hereinafter RDM], filed a motion requesting that I extend to April 10, 2014, the time for filing a petition to reconsider *RDM International, Inc.*, 73 Agric. Dec. ____ (U.S.D.A. Feb. 12, 2014). The United States Postal Service Product &

MISCELLANEOUS ORDERS & DISMISSALS

Tracking Information indicates the Hearing Clerk served RDM with *RDM International, Inc.*, 73 Agric. Dec. __ (U.S.D.A. Feb. 12, 2014), on March 20, 2014.¹

The rules of practice applicable to this proceeding² provide that a petition to reconsider a decision of the Judicial Officer must be filed with the Hearing Clerk within 10 days after the date of service of the Judicial Officer's decision on the party filing the petition to reconsider.³ As RDM filed its request for an extension of time after the expiration of RDM's time for filing a petition to reconsider *RDM International, Inc.*, 73 Agric. Dec. __ (U.S.D.A. Feb. 12, 2014), I deny RDM's request to extend the time for filing a petition to reconsider.

In re: AGRI-SALES, INC.
Docket No. D-13-0195.
Miscellaneous Order.
Filed April 15, 2014.

PACA- D – Administrative procedure – Extension of time.

Christopher Young, Esq. for Complainant.
Mary E. Gardner, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling entered by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING AGRI-SALES, INC.'S APPEAL PETITION AND SUPPORTING BRIEF

On April 15, 2014, Agri-Sales, Inc., by telephone, requested that I extend to April 23, 2014 the time for filing an appeal petition and supporting brief.

For good reason stated, Agri-Sales, Inc.'s motion to extend the time

¹ See Attach. A.

² 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).

³ 7 C.F.R. § 1.146(a)(3).

Miscellaneous Orders & Dismissals

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for filing an appeal petition and supporting brief is granted. The time for filing Agri-Sales, Inc.'s appeal petition and supporting brief is extended to, _____ and _____ includes, _____ April 23, _____ 2014.
1

¹ The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Agri-Sales, Inc., must ensure its appeal petition and supporting brief are received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, April 23, 2014.

DEFAULT DECISIONS

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and 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/.

PERISHABLE AGRICULTURAL COMMODITIES ACT

KHALID A. MOHMAND.

Docket No. 13-0306.

Default Decision and Order.

Filed January 14, 2014.

AZTECA RANCH MARKET, INC. # 2.

Docket No. D-14-0038.

Default Decision and Order.

Filed January 27, 2014.

LIBORIO MARKETS #5, INC.

Docket No. 13-0215.

Default Decision and Order.

Filed March 11, 2014.

AZTECA RANCH MARKET, INC. #3.

Docket No. D-14-0039.

Default Decision and Order.

Filed March 13, 2014.

CHAPARRAL FRUIT SALES, INC.

Docket No. 14-0060.

Default Decision and Order.

Filed March 25, 2014.

LA MERCED PRODUCE, LLC.

Docket No. 13-0307.

Default Decision and Order.

Filed April 25, 2014.

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DANIEL S. McCLELLAN.
Docket No. 14-0070.
Default Decision and Order.
Filed April 25, 2014.

TRIPLE R DISTRIBUTING, LLC.
Docket No. D-13-0340.
Default Decision and Order.
Filed May 5, 2014.

AZTECA RANCH MARKET, INC.
Docket No. 14-0037.
Default Decision and Order.
Filed May 5, 2014.

CONSENT DECISIONS

CONSENT DECISIONS

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Big Bear Storage and Packing, Inc.

Docket No. D-14-0051.

Filed March 4, 2014.

Drobnick Distributing, Inc.

Docket No. D-12-0001.

Filed March 12, 2014.

Deborah D. Drobnick.

Docket No. D-12-0490.

Filed March 12, 2014.

Staunton Food and Produce Co., Inc.

Docket No. D-13-0054.

Filed March 12, 2014.

De Bruyn Produce Co.

Docket No. D-14-0072.

Filed April 23, 2014.

Fresh World One, Inc.

Docket No. D-13-0211.

Filed June 19, 2014.

El Matate Foods, Inc., D/B/A El Metate Market.

Docket No. D-14-0028.

Filed June 23, 2014.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

**In re: RDM INTERNATIONAL, INC.
Docket Nos. 12-0458, 12-0601.
Decision and Order.
Filed February 12, 2014.**

PACA – Administrative procedure – Complaint, timely filing of – Failure to make full payment promptly.

Charles L. Kendall, Esq. for Complainant.
Robert Moore for Respondent.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On May 7, 2012, RDM International, Inc. [hereinafter RDM], submitted an application for a license under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], to Charles W. Parrott, Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator]. On June 4, 2012, in response to RDM's PACA license application, the Deputy Administrator filed a Notice to Show Cause and Request for Expedited Hearing [hereinafter Notice to Show Cause] initiating a proceeding in accordance with 7 U.S.C. § 499d(d) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] to give RDM the opportunity to show cause why the Deputy Administrator should not refuse to issue a PACA license to RDM.¹

¹ The Hearing Clerk assigned the show cause proceeding docket number "PACA Docket No. 12-0458."

PERISHABLE AGRICULTURAL COMMODITIES ACT

The Deputy Administrator: (1) alleged RDM's application states Robert D. Moore is the sole principal and 100 percent shareholder of RDM;² (2) alleged RDM's application states Mr. Moore filed Chapter 7 bankruptcy on March 29, 2011, and was granted a discharge by the United States Bankruptcy Court for the Central District of California on November 30, 2011;³ (3) alleged Schedule F, the list of Mr. Moore's creditors holding unsecured nonpriority claims, filed by Mr. Moore in *Moore*, Case No. 11-13864 (Bankr. C.D. Cal.), includes undisputed claims totaling \$607,563 from eight produce sellers of which seven are PACA licensees and one is a Canadian produce exporter;⁴ (4) alleged, on March 27, 2012, a judgment was entered by the United States District Court for the Central District of California in favor of the plaintiff, Newland North America Foods, Inc., against defendant, RDM, for a valid PACA Trust debt in the amount of \$400,013.37;⁵ and (5) alleged RDM is unfit to engage in the business of a commission merchant, dealer, or broker under the PACA because of RDM's failure to make full payment promptly of the agreed purchase prices of perishable agricultural commodities that RDM purchased, received, and accepted in interstate and foreign commerce.⁶

On July 23, 2012, RDM filed an Answer to the Notice to Show Cause and Request for Expedited Hearing [hereinafter Answer] in which RDM did not deny that it failed to make full payment promptly to eight produce sellers, as alleged in the Notice to Show Cause and listed on Schedule F filed by Mr. Moore in *Moore*, Case No. 11-13864 (Bankr. C.D. Cal.). Instead, RDM addressed its failure to make full payment promptly to the eight produce sellers in question, as follows: (1) RDM asserted it disputes Chiquita Brand, LLC's \$31,913 claim; (2) RDM asserted it disputes Columbia Fruit's \$116,737 claim; (3) RDM asserted it was unable to spend the time to defend against Mariscos Bahia's \$25,000 claim and will file a counterclaim against Mariscos Bahia in the future; (4) RDM asserted it is arranging a payment plan with Merrill Blueberry Farms in connection with Merrill Blueberry Farms' \$118,514 claim; (5) RDM asserted it has filed a counterclaim against Naturipe

² Notice to Show Cause ¶ III(a) at 2, App. A.

³ Notice to Show Cause ¶ III(b) at 2, App. A.

⁴ Notice to Show Cause ¶ III(c) at 3, Apps. B-C.

⁵ Notice to Show Cause ¶ III(d) at 3, App. D.

⁶ Notice to Show Cause ¶ IV at 3.

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Foods, LLC, in connection with Naturipe Foods, LLC's \$52,252 claim; (6) RDM asserted it has settled Rainsweet, Inc.'s \$122,043 claim and has made scheduled monthly payments to Rainsweet, Inc.; (7) RDM asserted it has made arrangements with South Alder Farms Canada with respect to South Alder Farms Canada's \$78,000 claim; and (8) RDM asserted it is investigating Sill Farms Market, Inc.'s \$61,104 claim and RDM will settle with Sill Farms Market, Inc., when RDM's investigation is complete.⁷

The Agricultural Marketing Service conducted an investigation to verify the assertions in RDM's Answer. As a result of this investigation, the Deputy Administrator instituted a disciplinary proceeding in accordance with the PACA and the Rules of Practice against RDM by filing a Complaint, on August 27, 2012.⁸ The Deputy Administrator: (1) alleged that, during the period November 13, 2008, through June 17, 2011, RDM willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to eight produce sellers of the agreed purchase prices, or the balances of the agreed purchase prices, for 74 lots of perishable agricultural commodities which RDM purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of \$832,934.95;⁹ and (2) requested that the administrative law judge assigned to the proceeding find RDM willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and order publication of the facts and circumstances of RDM's violations pursuant to 7 U.S.C. § 499h(a).¹⁰ RDM failed to file a response to the Complaint.

On August 27, 2012, the Deputy Administrator filed a Motion to Consolidate Complaint and Notice to Show Cause, and, on January 23, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] consolidated the show cause proceeding, *RDM International, Inc.*, PACA Docket No. 12-0458, and the disciplinary proceeding, *RDM International, Inc.*, PACA Docket No. 12-0601.¹¹ The ALJ also ordered

⁷ Answer.

⁸ The Hearing Clerk assigned the disciplinary proceeding docket number "PACA Docket No. 12-0601."

⁹ Compl. ¶¶ III-IV at 2-3, App. A.

¹⁰ Compl. at 4.

¹¹ Order Granting Reconsideration and Consolidating Cases.

PERISHABLE AGRICULTURAL COMMODITIES ACT

RDM to show cause why a decision without hearing should not be issued against RDM and allowed RDM 30 days within which to demonstrate that it made full payment by February 15, 2013, of the \$832,934.95, which the Deputy Administrator alleged RDM owed to eight produce sellers. RDM failed to comply with the ALJ's order.¹²

On May 13, 2013, the Deputy Administrator filed Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued. On June 14, 2013, RDM requested an extension of time within which to file a response to the Deputy Administrator's May 13, 2013, motion,¹³ and, on June 24, 2013, the ALJ extended the time for filing RDM's response to July 1, 2013.¹⁴ On July 8, 2013, the ALJ extended the time for RDM's response to July 18, 2013.¹⁵ RDM failed to file a timely response to Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.

On July 23, 2013, the ALJ issued a Decision and Order on the Record [hereinafter Decision and Order] in which the ALJ: (1) found, during the period November 13, 2008, through June 17, 2011, RDM failed to make full payment promptly to eight produce sellers of the agreed purchase prices, or balances of the agreed purchase prices, for 74 lots of perishable agricultural commodities which RDM purchased in the course of interstate and foreign commerce, in the amount of \$832,934.95, of which \$804,257.04 remained unpaid as of May 19, 2013; (2) concluded RDM's failure to make full payment promptly to eight produce sellers in the total amount of \$832,934.95 for 74 lots of perishable agricultural commodities constitutes willful, repeated, and flagrant violations of 7 U.S.C. § 499b(4); (3) ordered publication of the facts and circumstances of RDM's willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (4) affirmed the Deputy Administrator's refusal to issue a PACA license to RDM.¹⁶

¹² ALJ's Decision and Order Denying Reconsideration at 2.

¹³ Req. for Extension.

¹⁴ Order Extending Deadlines for Submissions.

¹⁵ E-mail, dated July 8, 2013, from the ALJ to RDM and counsel for the Deputy Administrator stating RDM must respond to the Deputy Administrator's May 13, 2013, motion within 20 days after June 28, 2013; namely, no later than July 18, 2013.

¹⁶ ALJ's Decision and Order at 5-6.

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On August 23, 2013, RDM requested additional time to respond to the Notice to Show Cause and the Complaint, and, on September 3, 2013, RDM filed Answer for Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued. The ALJ construed RDM's September 3, 2013, filing as a motion for reconsideration of the ALJ's July 23, 2013, Decision and Order. On September 25, 2013, the ALJ issued a Decision and Order Denying Reconsideration in which the ALJ stated, after careful review of RDM's September 3, 2013, filing, she found no good cause to reconsider the July 23, 2013, Decision and Order.

On October 28, 2013, RDM filed Response and Appeal to Decision and Order Denying Reconsideration [hereinafter Appeal Petition], and on November 21, 2013, the Deputy Administrator filed a response to RDM's Appeal Petition. On November 25, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The PACA makes it unlawful for any commission merchant, dealer, or broker to fail or refuse to make full payment promptly in respect of any transaction in any perishable agricultural commodity to the person with whom such transaction is had.¹⁷ "Full payment promptly" in accordance with the PACA means payment for produce by a buyer within 10 days after the day on which the produce is accepted.¹⁸

RDM admitted that it failed to make full payment promptly to RDM's produce sellers which Mr. Moore identified on Schedule F, filed in *Moore*, Case No. 11-13864 (Bankr. C.D. Cal.), as having undisputed claims.¹⁹ Moreover, RDM's Answer, filed in *RDM International, Inc.*,

¹⁷ 7 U.S.C. § 499b(4).

¹⁸ 7 C.F.R. § 46.2(aa)(5).

¹⁹ See *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997) (stating documents filed in a bankruptcy proceeding that have a direct relation to matters at issue in a PACA disciplinary proceeding have long been officially noticed in PACA disciplinary proceedings); *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (U.S.D.A. 1993) (stating, if the failure to pay for agricultural commodities is admitted by a respondent in a bankruptcy proceeding, no hearing is required in the related PACA disciplinary proceeding).

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PACA Docket No. 12-0458, does not deny RDM's failure to make full payment promptly to eight produce sellers, as alleged in the Notice to Show Cause and identified on Schedule F.²⁰

Further still, RDM failed to file a timely answer to the Complaint, filed in *RDM International, Inc.*, PACA Docket No. 12-0601. Pursuant to 7 C.F.R. § 1.136(c), a failure to file a timely answer to a complaint is deemed, for the purposes of the proceeding, an admission of the allegations in the complaint. Thus, for the purposes of this proceeding, RDM is deemed to have admitted that it failed to make full payment promptly: (1) the amount of \$51,100.97 to Rainsweet, Inc., Salem, Oregon, for 28 lots of berries; (2) the amount of \$87,816 to South Alder Farms, Aldergrove, British Columbia, Canada, for 1 lot of raspberries; (3) the amount of \$52,251.60 to Naturipe Foods, LLC, Grand Junction, Michigan, for 4 lots of berries; (4) the amount of \$32,370.23 to Chiquita Brand, LLC, Philadelphia, Pennsylvania, for 3 lots of mixed fruit; (5) the amount of \$116,045 to Merrill Blueberry Farms, Ellsworth, Maine, for 14 lots of blueberries; (6) the amount of \$61,104 to Sill Farms Market, Inc., Lawrence, Michigan, for 2 lots of cherries; (7) the amount of \$396,321.05 to Newland North America Foods, Inc., Vaudreull, Quebec, Canada, for 5 lots of berries; and (8) the amount of \$35,926.10 to Columbia Fruit, Woodland, Washington, for 17 lots of berries. Finally, RDM failed to comply with the ALJ's order that RDM demonstrate that it made full payment by February 15, 2013, of the \$832,934.95 which the Deputy Administrator alleged RDM owed to eight produce sellers and show cause why a decision without hearing should not be issued against RDM,²¹ and, despite two extensions of time, RDM failed to respond to the Deputy Administrator's May 13, 2013, Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.

RDM's Appeal Petition provides no basis for overturning the ALJ's July 23, 2013, Decision and Order. Instead, RDM: (1) offers excuses for failing to make full payment promptly to Chiquita Brand, LLC, Columbia Fruit, Naturipe Foods, LLC, and Newland North America Foods, Inc; (2) states RDM is investigating Sill Farms Market, Inc.'s claim; (3) states Merrill Blueberry Farms and South Alder Farms have

²⁰ Answer at 1-2.

²¹ ALJ's Decision and Order Den. Recons. at 2.

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not filed claims against RDM; (4) states Rainsweet, Inc., and RDM have reached an agreement regarding Rainsweet, Inc.'s claim against RDM; and (5) states Mariscos Bahia never did business with RDM.²²

Based upon my review of the record, I affirm the ALJ's July 23, 2013, Decision and Order, and I find no change or modification of the ALJ's July 23, 2013, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision and order as the final order in a proceeding, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .
(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's July 23, 2013, Decision and Order is adopted as the final order in this proceeding.

—

²² Appeal Pet. at 4-8.

PERISHABLE AGRICULTURAL COMMODITIES ACT

**In re: AMERSINO MARKETING GROUP, LLC AND
SOUTHEAST PRODUCE LIMITED, USA.**

Docket Nos. D-12-0221, D-12-0222.

Decision and Order.

Filed April 18, 2014.

**PACA – Administrative procedure – Answer, failure to file timely – Hearing, waiver
of – Request for oral argument – Willful violation.**

Christopher Young, Esq. for Complainant.

Henry Wang, Esq. for Respondents.

Initial Decision by Janice K. Bullard, Administrative Law Judge.

Final Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Charles W. Parrott, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this proceeding by filing a Complaint on February 1, 2012. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On March 6, 2012, the Deputy Administrator filed an Amended Complaint, which is the operative pleading in this proceeding.

The Deputy Administrator alleges, during the period December 22, 2008, through August 5, 2010, Amersino Marketing Group, LLC, and Southeast Produce Limited, USA [hereinafter Respondents], failed to make full payment promptly of the agreed purchase prices to 10 produce sellers in the total amount of \$497,960.90 for 43 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce.¹

¹ Am. Compl. ¶ III at 3, App. A.

On March 20, 2012, Respondents filed an Answer to the Amended Complaint [hereinafter Answer]. Respondents admit they failed to make full payment promptly to four of the ten produce sellers identified in Appendix A of the Amended Complaint. Specifically, Respondents admit: (1) three produce sellers, Yi Poa International, Inc., Morris Okun, Inc., and Centre Maraicher, provided Respondents additional time to pay the amounts due for produce purchases; (2) they still owed Morris Okun, Inc., \$28,000 for produce purchases; (3) they still owed Centre Maraicher \$19,000 for a produce purchase; and (4) they settled and paid one produce seller, Cimino Brothers Produce, less than the agreed purchase prices for produce purchases.²

On June 5, 2012, pursuant to 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing. Respondents failed to file a response to the Deputy Administrator's Motion for Decision Without Hearing. On July 17, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order on the Record [hereinafter the ALJ's Decision], pursuant to 7 C.F.R. § 1.139, in which the ALJ: (1) found, during the period December 22, 2008, through August 5, 2010, Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce; (2) concluded Respondents' failures to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce, constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (3) ordered publication of the facts and circumstances of Respondents' violations of 7 U.S.C. § 499b(4).³

On August 17, 2012, Respondents appealed to the Judicial Officer. On November 16, 2012, the Deputy Administrator filed a response to Respondents' Appeal Petition. On January 24, 2014, the Hearing Clerk

² Answer at 1, Attachs. 1-3.

³ ALJ's Decision at 6-7.

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transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Respondents' Request for Oral Argument

Respondents' request for oral argument,⁴ which the Judicial Officer may grant, refuse, or limit,⁵ is refused because the issues raised in Respondents' Appeal Petition are not complex and oral argument would serve no useful purpose.

Respondents' Appeal Petition

Respondents raise six issues in their Appeal Petition. First, Respondents contend the business records and business activities of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were not commingled. Respondents assert Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were separate entities and there is no evidence that they disregarded corporate formalities. (Appeal Pet. at 1, 3, 5).

The Deputy Administrator alleges the following regarding the relationship between Amersino Marketing Group, LLC, and Southeast Produce Limited, USA:

II

....

(e) Respondent Amersino and Respondent Southeast operated from the same building, shared the same office space, and shared the same two principal officers and owners. The business records and business activities of Respondents Amersino and Southeast, particularly as they related to buying and selling of produce, were commingled.

Am. Compl. ¶ II(e) at 3. Respondents failed to deny or otherwise respond

⁴ Appeal Pet. at 6.

⁵ 7 C.F.R. § 1.145(d).

to the allegations in paragraph II(e) of the Amended Complaint.

The Rules of Practice provide that a failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegation.⁶ Therefore, I find the business records and business activities of Amersino Marketing Group, LLC and Southeast Produce Limited, USA, were commingled and Respondents' assertion in their Appeal Petition that their business records and business activities were not commingled comes far too late to be considered.

Second, Respondents contend the ALJ's finding that Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, is error (Appeal Pet. at 2).

The PACA requires produce buyers to make full payment promptly for produce purchases (7 U.S.C. § 499b(4)). Full payment promptly in accordance with 7 U.S.C. § 499b(4) means payment by a produce buyer within 10 days after the day on which the produce is accepted; provided that, the parties to the transaction may elect to use different payment terms, so long as those terms are reduced to writing before the parties enter into the transaction. The burden of proof of a written agreement is on the party claiming existence of the agreement. (7 C.F.R. § 46.2(aa)(5), (11)).

The Deputy Administrator alleges Respondents failed to pay promptly the full purchase prices in the total amount of \$176,883.50 for 11 lots of broccoli purchased from Cimino Brothers Produce, Salinas, California, and accepted by Respondents during the period December 1, 2008, through December 12, 2008.⁷ Respondents admit they settled with Cimino Brothers Produce and the record establishes that Cimino Brothers Produce accepted a partial payment of \$25,000 in full satisfaction of the total past due amount of \$176,883.50.⁸ Acceptance of

⁶ 7 C.F.R. § 1.136(c).

⁷ Am. Compl. ¶ III at 3, App. A ¶ 1.

⁸ Answer ¶ 2a at 1, Attach. 1; Deputy Administrator's Mot. for Decision Without Hearing, Attach. 1.

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partial payment of the purchase price of produce in full satisfaction of a debt does not constitute full payment and does not negate a violation of the PACA.⁹ Moreover, Southeast Produce Limited, USA, and Cimino Brothers Produce did not execute the settlement agreement until December 29, 2011, approximately 3 years after payment for the produce Respondents purchased from Cimino Brothers Produce became due.¹⁰

The Deputy Administrator also alleges Respondents failed to pay promptly the full purchase prices in the total amount of \$191,039 for 18 lots of garlic purchased from Yi Pao International, Inc., Commerce, California, and accepted by Respondents during the period August 30, 2009, through February 22, 2010.¹¹ Respondents admit Yi Pao International, Inc., provided Respondents additional time to pay for the garlic without the existence of a written agreement made prior to Respondents' entering into the transactions.¹²

The Deputy Administrator further alleges Respondents failed to pay promptly the full purchase prices in the total amount of \$40,088 for two lots of mixed vegetables purchased from Morris Okun, Inc., Bronx, New York, and accepted by Respondents during the period October 13, 2009, through October 22, 2009.¹³ Respondents admit Morris Okun, Inc., provided Respondents additional time to pay for the mixed vegetables without the existence of a written agreement made prior to Respondents' entering into the transactions, and, as of the date Respondents filed the Answer, Respondents still owed Morris Okun, Inc., a balance of \$28,000 for the mixed vegetables.¹⁴

Further still, the Deputy Administrator alleges Respondents failed to pay promptly the full purchase price of \$21,021 for one lot of green onions purchased from Centre Maraicher, Sainte-Clotilde, Quebec,

⁹ Frank Tambone, Inc., 53 Agric. Dec. 703, 723 (U.S.D.A. 1994), *aff'd*, 50 F.3d 52 (D.C. Cir. 1995); Charles Crook Wholesale Produce & Grocery Co., 48 Agric. Dec. 557, 559 (U.S.D.A. 1989); Magic City Produce Co., 44 Agric. Dec. 1241, 1250 (U.S.D.A. 1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981).

¹⁰ Deputy Administrator's Motion for Decision Without Hearing Attach. 1.

¹¹ Am. Compl. ¶ III at 3, App. A ¶ 4.

¹² Answer ¶ 2d at 1.

¹³ Am. Compl. ¶ III at 3, App. A ¶ 5.

¹⁴ Answer ¶ 2e at 1, Attach. 2.

Canada, and accepted by Respondents on July 16, 2010.¹⁵ Respondents admit Centre Maraicher provided Respondents additional time to pay for the green onions without the existence of a written agreement made prior to Respondents' entering into the transaction, and, as of the date Respondents filed the Answer, Respondents still owed Centre Maraicher a balance of \$19,000 for the green onions.¹⁶

Therefore, I conclude the ALJ's finding that Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of \$429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce, is fully supported by the record and, in particular, by Respondents' admissions, and I reject Respondents' contention that the ALJ's finding, is error.

Third, Respondents contend the ALJ's conclusion that Respondents willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) is error (Appeal Pet. at 2, 5).

Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the record supports a finding that Respondents' violations of the PACA were "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)).¹⁷ Willfulness is reflected by Respondents' violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and the number and dollar amount of Respondents' violative transactions. Respondents' violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations

¹⁵ Am. Compl. ¶ III at 3, App. A ¶ 10.

¹⁶ Answer ¶ 2j at 1, Attach. 3.

¹⁷ A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See, e.g., Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *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); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

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occurred.¹⁸ Respondents' violations are "repeated" because repeated means more than one.¹⁹ Therefore, I reject Respondents' contention that the ALJ's conclusion that Respondents willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), is error.

Fourth, Respondents contend the ALJ's failure to consider, and deem as credible, Respondents' Answer, is error (Appeal Pet. at 2).

A review of the ALJ's Decision reveals that the ALJ not only considered Respondents' Answer, but relied extensively on Respondents' admissions in the Answer.²⁰ Respondents do not cite, and I cannot locate, any portion of the ALJ's Decision indicating the ALJ did not find Respondents' Answer credible. Therefore, I reject Respondents' assertion that the ALJ failed to consider, and deem as credible, Respondents' Answer.

Fifth, Respondents contend the ALJ's failure to provide Respondents and Henry Wang an opportunity for hearing, is error (Appeal Pet. at 2, 4-5).

The Rules of Practice provide that the admission of material allegations of fact contained in the complaint shall constitute a waiver of hearing.²¹ Respondents admit, during the period December 22, 2008, through August 5, 2010, Respondents failed to make full payment promptly to at least four sellers of the agreed purchase prices in the total amount of \$429,031.50 for 32 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce.²² As Respondents admit material allegations of fact contained in the Amended Complaint, there are no issues of fact on which a meaningful hearing could be held in connection with those allegations which Respondents have admitted, and the ALJ properly issued the July 17, 2012, Decision pursuant to 7 C.F.R. § 1.139, without providing Respondents an opportunity for hearing. The

¹⁸ Five Star Food Distributors, Inc., 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

¹⁹ KDLO Enterprises, Inc., 70 Agric. Dec. 1098, 1101 (U.S.D.A. 2011); B.T. Produce Co., 66 Agric. Dec. 774, 812 (U.S.D.A. 2007), *aff'd*, 296 F. App'x 78 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2075 (2009).

²⁰ ALJ's Decision at 3-4, 6.

²¹ 7 C.F.R. § 1.139.

²² Answer ¶¶ 2a, 2d, 2e, 2j at 1.

application of the default provisions in the Rules of Practice do not deprive Respondents of their rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.²³

As for Respondents' contention that the ALJ erroneously failed to provide Henry Wang an opportunity for hearing, Mr. Wang is not a party to this proceeding;²⁴ therefore, Mr. Wang has no right to a hearing in this proceeding.

Sixth, Respondents assert publication of the facts and circumstances of Respondents' violations of 7 U.S.C. § 499b(4) will have the effect of depriving Mr. Wang of his means of livelihood. Respondents contend such an effect constitutes cruel and unusual punishment. (Appeal Pet. at 5).

Mr. Wang is not a party to the instant proceeding,²⁵ and no

²³ See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

²⁴ Mr. Wang avers he was the owner of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA (Answer at 1). Respondents assert Mr. Wang was the owner of Amersino Marketing Group, LLC, formed in or about 2002 and the partial owner of Southeast Produce Limited, USA, formed in 1995. Respondents further assert Mr. Wang had no association with Southeast Produce Limited, USA, during the period from 2002 until 2008, when Mr. Wang purchased Southeast Produce Limited, USA. (Appeal Pet. at 3). Mr. Wang's ownership of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, during the period of time when Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, violated 7 U.S.C. § 499b(4) does not make Mr. Wang a party to this proceeding. The only parties in this proceeding are the Deputy Administrator, the party who instituted this proceeding, and Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, the parties against whom the Deputy Administrator instituted this proceeding. (See the definitions of the terms "Complainant" and "Respondent" in 7 C.F.R. § 1.132).

²⁵ See note 24.

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employment restriction is imposed on Mr. Wang in the instant proceeding. Moreover, any employment restriction on Mr. Wang, which may result from the disposition of the instant proceeding, is irrelevant to the disposition of this proceeding. Therefore, I decline to address Respondents' contention that an employment restriction imposed on Mr. Wang would constitute cruel and unusual punishment.

Based upon a careful consideration of the record, I affirm the ALJ's July 17, 2012, Decision, and I find no change or modification of the ALJ's July 17, 2012, Decision 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.

....

(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's July 17, 2012, Decision is adopted as the final order in this proceeding.

Right to Judicial Review

Respondents have 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. Judicial review must be sought within sixty (60) days after entry of the Order in this Decision and

Amersino Marketing Group, LLC & Southeast Produce Limited, USA
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Order.²⁶

The date of entry of the Order in this Decision and Order is April 18, 2014.

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²⁶ 28 U.S.C. § 2344.

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In re: GEORGE FINCH AND JOHN DENNIS HONEYCUTT.
Docket Nos. 13-0068, 13-0069.
Decision and Order.
Filed June 6, 2014.

PACA-APP – Constitutionality – Due process – Responsibly connected – Responsibly connected, standard for – Restrictions, licensing and employment.

Michael A. Hirsch, Esq. for Petitioners.
Christopher Young, Esq. and Shelton S. Smallwood, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On October 3, 2012, Karla D. Whalen, Director, PACA Division, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Director], determined George Finch and John Dennis Honeycutt were responsibly connected with Third Coast Produce Company, Ltd. [hereinafter Third Coast] during the period of time when Third Coast violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ Pursuant to the rules of practice applicable to this proceeding,² Mr. Finch and Mr. Honeycutt each filed a petition for review of the Director's "responsibly connected" determination.

On February 12, 2013, Chief Administrative Law Judge Peter M.

¹ Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities, which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010. *Third Coast Produce Co., Ltd.*, No. 12-0234, 71 Agric. Dec. ____ (U.S.D.A. Apr. 27, 2012), available at http://www.oaljdecisions.dm.usda.gov/sites/default/files/120427_12-0234_DO_ThirdCoastProduceCompanyLtd.pdf (last visited Jan. 29, 2016).

² 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) [hereinafter the Rules of Practice].

George Finch & John Dennis Honeycutt
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Davenport [hereinafter the Chief ALJ] consolidated the two “responsibly connected” proceedings, *Finch*, PACA-APP Docket No. 13-0068, and *Honeycutt*, PACA-APP Docket No. 13-0069.³ On August 13, 2013, the Chief ALJ conducted an oral hearing in Washington, DC. Michael A. Hirsch, Schlanger, Silver, Barg & Paine, L.L.P., Houston, Texas, represented Mr. Finch and Mr. Honeycutt. Shelton S. Smallwood and Christopher Young, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Director. At the hearing, both Mr. Finch and Mr. Honeycutt testified and one witness, William W. Hammond, testified on behalf of the Director.⁴ Mr. Finch and Mr. Honeycutt introduced 12 exhibits.⁵ The Director introduced a certified agency record applicable to Mr. Finch containing 16 exhibits⁶ and a certified agency record applicable to Mr. Honeycutt containing 11 exhibits.⁷

On November 20, 2013, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding Mr. Finch was responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), by virtue of his active participation in Third Coast’s operations and his status as an officer and a director of Third Coast; (2) concluding Mr. Honeycutt was responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), by virtue of his active participation in Third Coast’s operations and his status as an officer and a director of Third Coast; (3) affirming the Director’s October 3, 2012, determinations that Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (4) stating Mr. Finch and Mr. Honeycutt are subject to the licensing restrictions in 7 U.S.C.

³ Order of Dismissal as to Third Coast Produce Company, Ltd. and Order Setting Hr’g Date at 2.

⁴ References to the transcript of the August 13, 2013 hearing are indicated as “Tr.” and the page number.

⁵ Mr. Finch and Mr. Honeycutt’s exhibits are indicated as PX 1-PX 12.

⁶ References to the exhibits in the Director’s certified agency record applicable to Mr. Finch are indicated as GFRX 1-GFRX 16.

⁷ References to the exhibits in the Director’s certified agency record applicable to Mr. Honeycutt are indicated as JHRX 1-JHRX 11.

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§ 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).⁸

On December 17, 2013, Mr. Finch and Mr. Honeycutt filed a Petition for Appeal and Brief in Support Thereof [hereinafter Appeal Petition]. On January 8, 2014, the Director filed a Response to Petitioners' Appeal. On January 13, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and a decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the Chief ALJ's Decision and Order as the final agency decision and order.

DECISION

Statutory Background

The PACA was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce⁹ and to provide a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.¹⁰

Under the PACA, a person who buys or sells specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce is required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a). Regulated commission merchants, dealers, and brokers are required to "truly and correctly . . . account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had[.]" 7 U.S.C. § 499b(4). An order suspending or revoking a PACA license or a finding that an entity has committed a flagrant violation, or repeated violations, of 7 U.S.C. § 499b(4) has significant collateral consequences in the form of licensing and

⁸ Chief ALJ's Decision and Order at 17-18.

⁹ H.R. Rep. No. 71-1041, at 1 (1930).

¹⁰ S. Rep. No. 84-2507, at 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. Rep. No. 84-1196, at 2 (1955).

employment restrictions for persons found to be responsibly connected with the violator.¹¹ The term “responsibly connected” is defined as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

The second sentence of the definition of the term “responsibly connected” provides a two-prong test whereby those who would otherwise fall within the statutory definition of “responsibly connected” may rebut the statutory presumption of the first sentence:

the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of

¹¹ 7 U.S.C. §§ 499d(b), 499h(b).

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the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners[.]

Salins, 57 Agric. Dec. 1474, 1488 (U.S.D.A. 1998). A standard for the first prong of the test has been adopted as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 610-11 (U.S.D.A. 1999) (Decision on Remand).

The parameters of the second prong of the test were revisited in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). In that case, the Court found Ms. Taylor and Mr. Finberg were merely nominal officers of the violating entity. Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975), and *Bell v. Dep't of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994), the Court stated, under 7 U.S.C. § 499a(b)(9), an officer of the offending company is not considered to be responsibly connected with a violating licensee if that person was not actively involved in the PACA violation and was powerless to curb the wrongdoing. The Court

emphasized that, under the “actual, significant nexus” test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company’s operations:

Under the “actual, significant nexus” test, “the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority.” *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Although we have consistently applied the ‘actual, significant nexus’ test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.

* * *

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 615, 617 (D.C. Cir. 2011).

In *Taylor*, 68 Agric. Dec. 1210, 1220-21 (U.S.D.A. 2009), I had found that Fresh America’s board of directors ran Fresh America and made decisions usually reserved for individuals at lower levels of authority, including decisions governing Fresh America’s payment of bills, capital expenditures, and personnel. A preponderance of the evidence established that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations. Applying the “actual, significant nexus” test, as explained in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), on remand, I concluded Ms. Taylor and Mr. Finberg were merely nominal officers of Fresh America, who were powerless to curb the PACA violations and who lacked the power and authority to direct and affect Fresh America’s operations as they related to payment of produce sellers. *Taylor*, No. 06-0008, 73 Agric. Dec. ___, slip op. at 7-8 (U.S.D.A. May 22, 2012) (Decision on Remand), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/taylor3.pdf> (last visited Feb. 1, 2016).

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The “actual, significant nexus” test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9) wherein Congress amended the definition of the term “responsibly connected” specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of “responsibly connected” a two-prong test allowing them to rebut the statutory presumption of responsible connection. While Congress could have explicitly adopted the “actual, significant nexus” test, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to “actual, significant nexus,” power to curb PACA violations, or power to direct and affect operations. Instead, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was “only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license” (7 U.S.C. § 499a(b)(9)).

I concluded that continued application of the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term “responsibly connected” avoiding that status. As examples, I noted that a minority shareholder, who is not merely a shareholder in name only, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a real director, who is a member of a three-person board of directors, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally would not have the power to prevent the partnership’s PACA violations or the power to direct and affect the partnership’s operations. Should the minority shareholder, the director on the three-person board of directors, and the partner with a 40 percent interest in the partnership demonstrate the requisite lack of power, application of the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), would result in each of these persons being designated “nominal.”

I announced that, in future cases, I would not apply the “actual,

significant nexus” test and would instead substitute a “nominal inquiry” limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder in name only. Thus, while the power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a factor to be considered under the “nominal inquiry,” it would no longer be the *sine qua non* of responsible connection to a PACA-violating entity. *Taylor*, No. 06-0008, 73 Agric. Dec. ___, slip op. at 12-13 (U.S.D.A. May 22, 2012) (Decision on Remand), *available at* <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/taylor3.pdf> (last visited Feb. 1, 2016).¹²

Discussion

Mr. Finch and Mr. Honeycutt have significant experience in the produce industry. Mr. Finch testified that he has “been in the food business all [his] life” with more than 25 years in the produce business (Tr. 40). Mr. Finch acknowledged being thoroughly aware of the PACA and the responsibilities imposed by it, stating “we understand our obligations to PACA” and “PACA was the number one payment we need to make.” (Tr. 55, 76). Mr. Honeycutt also had extensive experience as an officer, owner, and PACA licensee in the produce industry (Tr. 79-82, 90-91).

Mr. Finch testified that he, Mr. Honeycutt, and Artemio Bueno started Third Coast in May 1992 (Tr. 40). Third Coast started with just one van and sublet space (Tr. 40). With the passage of time and the investment of substantial time and energy on the part of the three founders, Third Coast grew to one of the major produce distributors in the Houston metropolitan area with about 170 employees, 40 trucks, a 60,000 square foot warehouse, and \$1,000,000 in weekly sales (Tr. 40-42, 55, 66).

¹² *Taylor*, 73 Agric. Dec. __ (U.S.D.A. May 22, 2012) (Decision on Remand), was remanded upon a joint motion in the United States Court of Appeals for the District of Columbia Circuit and vacated. However, the “nominal inquiry” test remains the current United States Department of Agriculture policy. *Taylor*, 73 Agric. Dec. __, slip op. at 10-11 (U.S.D.A. Dec. 18, 2012) (Modified Decision on Remand); *Petro*, 73 Agric. Dec. __, slip op. at 5-8 (U.S.D.A. Nov. 13, 2012) (Order Den. Pet. to Reconsider as to Bryan Herr), *available at* <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/petro.pdf> (last visited Feb. 1, 2016).

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Prior to discovering serious financial problems within the company, both Mr. Finch and Mr. Honeycutt indicated that their responsibilities “mainly revolved around sales, and the administration around sales, to generate business for the company.” (Tr. 38, 82, 84-85). Artemio Bueno functioned as Third Coast’s buyer and was responsible for company operations (Tr. 65, 84-85). As the company grew from its small family-run origins, the financial responsibilities of the company became entrusted to Artemio Bueno’s oldest son, Javier Bueno, who had graduated from the University of Houston with a degree in accounting and business management and who was working toward a master’s degree at Rice University (Tr. 38-39). Mr. Finch and Mr. Honeycutt possessed an unfortunately misplaced but high degree of trust in the Bueno family as they started Third Coast with Artemio Bueno and Mr. Finch and Mr. Honeycutt had watched the Bueno children graduate, get married, and have children (Tr. 40-41).¹³ Consistent with that trust, Javier Bueno was in time named the Chief Financial Officer of Third Coast and given oversight of all of the financial aspects of the business (Tr. 41, 53).

Mr. Finch and Mr. Honeycutt first noticed cash flow problems in 2009 and in early 2010 and directed that Third Coast’s financial information be sent to the CPA firm in Houston that monitored Third Coast’s books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Mr. Finch and Mr. Honeycutt returned their focus to the sales operation (Tr. 41). Upon being informed that certain Third Coast suppliers had ceased selling to Third Coast and that Third Coast’s bank raised its own concerns, Mr. Finch and Mr. Honeycutt retained Tatum & Tatum, LLC, an outside accounting firm, near the end of January 2010 (Tr. 70). The resulting audit and monitoring of the receivables revealed a systematic diversion of Third Coast’s receivables to previously unknown and unauthorized bank accounts established by Javier Bueno (Tr. 46-47). To conceal the diversions, Javier Bueno had been making fraudulent general ledger entries making it appear that suppliers were being paid when in fact

¹³ Mr. Honeycutt testified that he had known Javier Bueno since about the time Javier Bueno was 10 years old and was employed sweeping the floors at Southern Produce, prior to the time that Third Coast was formed (Tr. 83).

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Third Coast's suppliers were not being paid (Tr. 47-49).¹⁴ After discovering that receivables were being diverted and that produce sellers were not being paid, Mr. Finch and Mr. Honeycutt confronted Javier Bueno, removed him from his position with Third Coast, and assumed control of the company in February 2010 (Tr. 54-59, 73-75, 89). Mr. Finch and Mr. Honeycutt retained control of Third Coast until it ceased operation in July 2010 (Tr. 6, 37).

Both Mr. Finch and Mr. Honeycutt stipulated they were officers and directors of Third Coast and acted as officers and directors of the company during the violation period (Tr. 5-6, 15, 37). Despite their knowledge of Third Coast's inability to pay all produce suppliers promptly, as required by the PACA, Mr. Finch and Mr. Honeycutt continued to purchase produce from sellers until Third Coast ceased operation (Tr. 75-78). Thus, although the defalcation that was the proximate cause of Third Coast's serious cash shortage predated their assumption of control of the company, Mr. Finch and Mr. Honeycutt's period of control of Third Coast occurred during the greatest portion of the violation period, specifically from sometime in February 2010 through July 16, 2010. During that period of time, Third Coast struggled to stay open so as to pay as many people as it possibly could and to maintain payments to the bank (Tr. 54-59, 61-63, 75-78). Even after significant infusions [REDACTED]

[REDACTED],^{*15} Mr. Finch and Mr. Honeycutt's efforts to save Third Coast proved unsuccessful. With the bank's "blessing," first the processing portion of the business was sold¹⁶ and later the assets of the

¹⁴ Third Coast's Wells Fargo account reflected that about \$360,000 was diverted between September 2009 and January 2010; however, a more in depth investigation revealed that over a period of three years the amount embezzled was well over \$1,000,000 (Tr. 49-53).

* Redacted by the Editor pursuant to "Exemption 4" of the Freedom of Information Act (FOIA). See 5 U.S.C. § 552(b)(4).

¹⁵ Mr. Finch testified that the funds he contributed [REDACTED]

[REDACTED] (Tr. 99). [Redacted by the Editor pursuant to "Exemption 4" of the Freedom of Information Act (FOIA). See 5 U.S.C. § 552(b)(4).]

¹⁶ The processing operation consisted of processing fresh fruits and vegetables for the end user. "It's a value-added product, mixed salads and varied commodities that go to our customers." (Tr. 56).

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distribution portion of the business¹⁷ were sold to another entity (Tr. 57-58). The sale proceeds went to the bank (Tr. 57).

I have a great deal of empathy for Mr. Finch and Mr. Honeycutt, both of whom demonstrated themselves to be honest and well-intentioned men who were victims themselves and who did not personally gain from the situation in which they found themselves. Nonetheless, I must conclude that, by virtue of having been actively involved in the activities that resulted in Third Coast's violations of the PACA and officers and directors of Third Coast from sometime in February 2010 until Third Coast's assets were liquidated in July 2010, both Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast during the period when Third Coast violated the PACA.

Mr. Finch and Mr. Honeycutt's Request for Oral Argument

Mr. Finch and Mr. Honeycutt's request for oral argument,¹⁸ which the Judicial Officer may grant, refuse, or limit,¹⁹ is refused because the issues raised by Mr. Finch and Mr. Honeycutt in their Appeal Petition are not complex and oral argument would serve no useful purpose.

Mr. Finch and Mr. Honeycutt's Appeal Petition

Mr. Finch and Mr. Honeycutt raise six issues in their Appeal Petition. First, Mr. Finch and Mr. Honeycutt contend the PACA is unconstitutionally overbroad because it penalizes virtuous, non-culpable, and lawful conduct as if the conduct were contrary (Appeal Pet. ¶ 1A at 1).

Challenges to the imposition of licensing restrictions in 7 U.S.C. § 499d(b) and employment restrictions in 7 U.S.C. § 499h(b) on individuals responsibly connected with violators of the PACA have been consistently rejected.²⁰ The United States Court of Appeals for the

¹⁷ The assets of the distribution portion of the business consisted of the real estate and the trucks and other equipment used to handle the produce delivered to Third Coast's customers (Tr. 57-58).

¹⁸ Appeal Pet. at 3.

¹⁹ 7 C.F.R. § 1.145(d).

²⁰ *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (stating the employment bar imposed on individuals responsibly connected with violators

Second Circuit addressed the constitutionality of the application of the employment bar in 7 U.S.C. § 499h(b) to responsibly connected persons, as follows:

.... Undoubtedly the perishable commodities industry is an industry subject to reasonable congressional regulation. *See Eastern Produce Co. v. Benson*, 278 F.2d 606 (3 Cir. 1960). Conceding Congress's undoubted right to regulate the industry petitioners question whether the right to regulate gives Congress the right to provide that the Secretary of Agriculture may exclude persons in petitioners' position from all employment in the industry.

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in the business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry. While admittedly the result Congress desired could be harsh in some cases, we cannot say that Section 499h(b) is not reasonably designed to achieve the desired Congressional purpose. *See Nebbia v. People of State of New York*, 291 U.S. 502, 525, 54 S. Ct. 505 (1934).

of the PACA has been challenged repeatedly with little success; the courts that have considered this issue have been unwilling to invalidate the PACA or to interfere with the Secretary of Agriculture's enforcement of the PACA); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (stating, while the employment bar in 7 U.S.C. § 499h(b) can be harsh in some instances, we cannot say that 7 U.S.C. § 499h(b) is not reasonably designed to achieve the desired congressional purpose), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (stating we do not agree with the appellant's characterization of the PACA as unconstitutional; the exclusion from the PACA industry of "responsibly connected" persons is not irrational or arbitrary).

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An analogous situation to this was presented to the New York Court of Appeals in *Bradley v. Waterfront Comm'n of N.Y. Harbor*, 12 N.Y.2d 276, 239 N.Y.S.2d 97, 189 N.E.2d 601 (1963). Section 8 of the New York Waterfront Commission Act, McKinney's Unconsol. Laws, § 9933, which forbids unions from collecting dues from waterfront employees if any of the union's officers had been convicted of a felony was upheld by the United States Supreme Court in *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed.2d 1109 (1960). Discovering that the former officers continued to dominate the unions as "employees," the New York Legislature amended Section 8 so as to extend the section's application to employees of the union as well as to union officers. The court in *Bradley* had no difficulty in holding that this amendment to the statute did not violate due process because the amendment was no more than was necessary in order to carry out the original objectives of the statute. *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967) (footnote omitted).

Mr. Finch and Mr. Honeycutt offer no support for their contention that the PACA is unconstitutionally overbroad because it penalizes virtuous, non-culpable, and lawful conduct as if the conduct were contrary, and I reject Mr. Finch and Mr. Honeycutt's contention that the PACA is unconstitutionally overbroad.

Second, Mr. Finch and Mr. Honeycutt contend PACA "responsibly connected" proceedings violate principles of due process (Appeal Pet. ¶ 1B at 1).

The fundamental elements of procedural due process are notice and opportunity to be heard.²¹ Each person who has been initially determined to be responsibly connected is provided with notice of the

²¹ See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

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initial determination and an opportunity to be heard, and all PACA “responsibly connected” proceedings are conducted in accordance with the Administrative Procedure Act and the Rules of Practice.

On February 23, 2012, in accordance with 7 C.F.R. § 47.49(a)-(b), Phyllis Hall, Chief, Investigative Enforcement Branch, PACA Division, informed Mr. Finch and Mr. Honeycutt that she had made initial determinations that they were responsibly connected with Third Coast and that they could contest these initial determinations by submitting written responses, which would be reviewed by the Director in accordance with 7 C.F.R. § 47.49(c) (GFRX 2; JHRX 2). On March 12, 2012, Mr. Finch and Mr. Honeycutt submitted a joint response contesting Ms. Hall’s initial determinations (GFRX 3; JHRX 3). After review of Mr. Finch and Mr. Honeycutt’s joint response, the Director determined Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast, and on October 3, 2012, the Director notified Mr. Finch and Mr. Honeycutt of her “responsibly connected” determinations and their right under 7 C.F.R. § 47.49(d) to request review of her determinations by an administrative law judge in a proceeding which would be conducted in accordance with the Rules of Practice.

Mr. Finch and Mr. Honeycutt each filed a petition for review of the Director’s “responsibly connected” determination and participated in an administrative adjudicatory proceeding conducted by the Chief ALJ in accordance with the Administrative Procedure Act and the Rules of Practice. This proceeding included an oral hearing during which Mr. Finch and Mr. Honeycutt had an opportunity to, and did, present oral and documentary evidence and cross-examine the sole witness who testified on behalf of the Director. After the Chief ALJ issued a Decision and Order affirming the Director’s “responsibly connected” determinations, Mr. Finch and Mr. Honeycutt had the opportunity to, and did, appeal the Chief ALJ’s Decision and Order to the Judicial Officer. Moreover, Mr. Finch and Mr. Honeycutt have the right to seek judicial review of this Decision and Order.²² Therefore, I reject Mr. Finch and Mr. Honeycutt’s contention that PACA “responsibly connected” proceedings violate principles of due process, and I reject Mr. Finch and Mr. Honeycutt’s suggestion that they have been denied due process in

²² 28 U.S.C. § 2342(2).

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the instant proceeding.

Third, Mr. Finch and Mr. Honeycutt contend the PACA provides for the forfeiture of property to the United States in violation of “the spirit” of 18 U.S.C. §§ 981-987 (Appeal Pet. ¶ 1B at 1).

The imposition of licensing restrictions in accordance with 7 U.S.C. § 499d(b) and employment restrictions in accordance with 7 U.S.C. § 499h(b) does not constitute a forfeiture of property to the United States. Further, 18 U.S.C. §§ 981-987 are not applicable to the licensing restrictions in 7 U.S.C. § 499d(b) or the employment restrictions in 7 U.S.C. § 499h(b). Therefore, I reject Mr. Finch and Mr. Honeycutt’s contention that the PACA provides for the forfeiture of property to the United States in violation of “the spirit” of 18 U.S.C. §§ 981-987.

Fourth, Mr. Finch and Mr. Honeycutt contend the PACA violates the Bill of Attainder Clause in Article I, Section 9, of the Constitution of the United States (Appeal Pet. ¶ 1B at 1).

Article I, Section 9, Clause 3, of the Constitution of the United States provides that no bill of attainder shall be passed. A bill of attainder is defined as a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.²³ To constitute a bill of attainder, a statute must: (1) apply with specificity to affected persons; (2) impose punishment; and (3) assign guilt without a judicial trial.

The specificity requirement may be satisfied if a statute singles out a person or class by name or applies to easily ascertainable members of a group.²⁴ The “easily ascertainable” requirement is satisfied if the challenged statute describes the targeted members of the group in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.²⁵ The PACA does not identify Mr. Finch or Mr. Honeycutt by name. Moreover, the “responsibly

²³ Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846-47 (1984); Nixon v. Adm’r of General Services, 433 U.S. 425, 468 (1977); United States v. Lovett, 328 U.S. 303, 321-22 (1946).

²⁴ Foretich v. United States, 351 F.3d 1198, 1217 (D.C. Cir. 2003).

²⁵ Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961); Cummings v. Missouri, 71 U.S. 277, 323-24 (1866).

connected” provision of the PACA is open-ended in that it applies to any person who falls within the definition of “responsibly connected.”²⁶ A statute with open-ended applicability, namely, a statute that attaches not to specific persons or groups, but to anyone who commits certain acts or possesses certain characteristics, does not apply with specificity to specific persons or groups and does not constitute a bill of attainder.

The PACA does not impose punishment. The PACA provides for the imposition of licensing restrictions and employment restrictions on persons responsibly connected with a person who has been found to have committed violations of 7 U.S.C. § 499b.²⁷ However, the licensing and employment restrictions in the PACA are not “punishment,” but rather statutory civil sanctions to assist regulatory enforcement of the PACA.²⁸ The PACA does not assign guilt without a judicial trial. PACA’s license and employment restrictions may be imposed only after the person alleged to be responsibly connected has been afforded an opportunity for an administrative adjudicatory proceeding conducted in accordance with the Administrative Procedure Act and the Rules of Practice. Further, any final agency determination that a person is responsibly connected, is subject to judicial review.²⁹

Therefore, I reject Mr. Finch and Mr. Honeycutt’s contention that the PACA violates the Bill of Attainder Clause in Article I, Section 9, of the Constitution of the United States.

Fifth, Mr. Finch and Mr. Honeycutt contend they have proven the circumstances and events resulting in Third Coast’s violations of 7 U.S.C. § 499b(4) were due to independent acts of a third party (Appeal Pet. ¶ 1C at 2).

Mr. Finch and Mr. Honeycutt introduced evidence that, prior to the period when Third Coast violated the PACA, Javier Bueno, without Mr. Finch or Mr. Honeycutt’s participation, authorization, or knowledge, embezzled funds from Third Coast. This embezzlement was the

²⁶ *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (stating 7 U.S.C. § 499h(b) is not an invalid bill of attainder as it does not name or describe any persons or groups), *cert. denied*, 389 U.S. 835 (1967).

²⁷ 7 U.S.C. §§ 499d(b), 499h(b).

²⁸ *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating the employment restriction provided for in 7 U.S.C. § 499h(b) is not punitive in nature).

²⁹ 28 U.S.C. § 2342(2).

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proximate cause of Third Coast's serious cash shortage. However, proof of Javier Bueno's embezzlement of Third Coast's funds, by itself, is not proof by a preponderance of the evidence that Mr. Finch and Mr. Honeycutt were not actively involved in the activities that resulted in Third Coast's violations of the PACA. The record establishes, despite their knowledge of Third Coast's inability to pay all produce suppliers promptly, Mr. Finch and Mr. Honeycutt continued to purchase produce from sellers until Third Coast ceased operation (Tr. 37, 75-77). I find, under these circumstances, Mr. Finch and Mr. Honeycutt were actively involved in activities that resulted in Third Coast's violations of the PACA.

Sixth, Mr. Finch and Mr. Honeycutt stipulate they were officers and directors of Third Coast (Appeal Pet. Ex. A at 17); however, Mr. Finch and Mr. Honeycutt contend they were only nominal officers and directors of Third Coast *vis-a-vis* Javier Bueno's embezzlement of Third Coast's funds (Appeal Pet. ¶ 1C at 2, Ex. A at 17-18).

Mr. Finch and Mr. Honeycutt introduced evidence that, prior to the period when Third Coast violated the PACA, Javier Bueno, without Mr. Finch or Mr. Honeycutt's participation, authorization, or knowledge, embezzled funds from Third Coast. However, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test in 7 U.S.C. § 499a(b)(9), could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license[.]" (7 U.S.C. § 499a(b)(9)). Thus, Mr. Finch and Mr. Honeycutt's relationship to Javier Bueno's embezzlement, which occurred prior to Third Coast's violations of the PACA, is not at issue. Instead, the issue is Mr. Finch and Mr. Honeycutt's relationship to Third Coast during the period when Third Coast violated the PACA.

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³⁰ Cf. Margiotta, 65 Agric. Dec. 622, 644-46 (U.S.D.A. 2006) (concluding the petitioner failed to prove he was only a nominal officer of the violating PACA licensee, even though the petitioner proved that another employee of the PACA licensee committed the PACA violations and the petitioner did not authorize, or even know of, the violations).

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Based upon all of the evidence before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Finch is an individual residing in Friendswood, Texas. Mr. Finch has been in the food business all of his life, with more than 25 years of experience in the produce industry (Tr. 40). Mr. Finch acknowledged being aware of the PACA and the responsibilities it imposes (Tr. 55, 76-77).
2. Mr. Honeycutt is an individual residing in Katy, Texas. Mr. Honeycutt began his involvement in the produce industry at college age and for the six years prior to forming Third Coast worked for a produce company that he termed “the best in town.” (Tr. 79-82).
3. Mr. Finch, Mr. Honeycutt, and Artemio Bueno started Third Coast in May 1992 and built the enterprise from one with a single van and leased space into an operation in 2010 with 40 trucks, about 170 employees, a 60,000 square foot warehouse, and \$1,000,000 in weekly sales (Tr. 40-42, 55, 65-66, 82-84).
4. Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or the balances of the agreed purchase prices, in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010 (Tr. 6; *Third Coast Produce Co., Ltd.*, No. 12-0234, 71 Agric. Dec. __ (U.S.D.A. Apr. 27, 2012), *available at* http://www.oaljdecisions.dm.usda.gov/sites/default/files/120427_12-0234_DO_ThirdCoastProduceCompanyLtd.pdf (last visited Jan. 29, 2016)).
5. Mr. Finch and Mr. Honeycutt were officers and directors of Third Coast during the period when Third Coast violated the PACA (Tr. 6).

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6. Mr. Finch and Mr. Honeycutt first noticed cash flow problems in 2009 and in early 2010 and directed that Third Coast's financial information be sent to the CPA firm in Houston that monitored Third Coast's books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Mr. Finch and Mr. Honeycutt returned their focus to the sales operation until they learned that Third Coast's suppliers were not being paid. (Tr. 41).

7. After being informed that certain Third Coast suppliers had ceased selling to Third Coast and that Third Coast's bank raised its own concerns, Mr. Finch and Mr. Honeycutt retained an outside accounting firm near the end of January 2010. The resulting audit and monitoring of the receivables revealed a systematic diversion of Third Coast's receivables to previously unknown and unauthorized bank accounts established by Javier Bueno, Third Coast's Chief Financial Officer (Tr. 46-47). To conceal the diversions, Javier Bueno had been making fraudulent general ledger entries making it appear that suppliers were being paid when in fact Third Coast's suppliers were not being paid (Tr. 47-49).

8. Although the preliminary computation of the defalcation amounted to \$360,000 between September 2009 and January 2010, a more thorough and comprehensive investigation revealed shortages well in excess of \$1,000,000 (Tr. 49-53).

9. In February 2010, Mr. Finch and Mr. Honeycutt removed Javier Bueno from his position with Third Coast and assumed control of Third Coast (Tr. 37, 54-59, 72-75, 89).

10. Despite Mr. Finch and Mr. Honeycutt's best efforts to honor contractual obligations to provide produce, to keep Third Coast open so as to pay as many people possible, to maintain payments to the bank, and to pro-rate the amounts paid to suppliers and despite infusing Third Coast with personal funds and obtaining concessions from Third Coast's bank, it was necessary first to sell the processing portion of the business and finally to liquidate the assets of the distribution portion of the business and cease Third Coast's operation (Tr. 55-58, 75-76).

11. While under the control of Mr. Finch and Mr. Honeycutt, despite

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knowledge that Third Coast had failed to pay suppliers promptly, as required by the PACA, Mr. Finch and Mr. Honeycutt continued to purchase produce from produce sellers during the period when Third Coast violated the PACA (Tr. 69, 75-77, 89, 95-96).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities, which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010. *Third Coast Produce Co., Ltd.*, No. 12-0234, 71 Agric. Dec. __ (U.S.D.A. Apr. 27, 2012), *available at* http://www.oaljdecisions.dm.usda.gov/sites/default/files/120427_12-0234_DO_ThirdCoastProduceCompanyLtd.pdf (last visited Jan. 29, 2016).
3. Mr. Finch was responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), by virtue of his active involvement in the activities resulting in Third Coast's violations of the PACA and his status as an officer and a director of Third Coast.
4. By virtue of being responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), Mr. Finch is subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).
5. Mr. Honeycutt was responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), by virtue of his active involvement in the activities resulting in Third Coast's violations of the PACA and his status as an officer and a director of Third Coast.
6. By virtue of being responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), Mr. Honeycutt is

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subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).

For the foregoing reasons, the following Order is issued.

ORDER

1. The Director's October 3, 2012, determination that Mr. Finch was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed.
2. Mr. Finch is accordingly subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Finch.
3. The Director's October 3, 2012, determination that Mr. Honeycutt was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed.
4. Mr. Honeycutt is accordingly subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Honeycutt.

Right to Judicial Review

Mr. Finch and Mr. Honeycutt have 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. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.

³¹

The date of entry of the Order in this Decision and Order is June 6, 2014.

³¹ 28 U.S.C. § 2344.

Osteen Marketing, LLC
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In re: OSTEEN MARKETING, LLC.
Docket No. 13-0339.
Decision and Order.
Filed January 7, 2014.

PACA.

Charles L. Kendall, Esq. for Complainant.
Respondent, pro se.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA) and the regulations issued thereunder (7 C.F.R. Part 46) (Regulations), instituted by a Complaint filed on September 6, 2013 by the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture.

Complainant alleged in its Complaint that Respondent Osteen Marketing LLC (Respondent) committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to six (6) sellers for 45 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce, in the total amount of \$447,519.10 and requested that findings be entered that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order the facts and circumstances of these violations published.

On October 21, 2013, Respondent filed a one-page Answer to the Complaint with the Department's Hearing Clerk. In the fourth full paragraph of the Answer, Respondent stated, "Several debtors [sic] including Four Rivers Produce, Central Produce, National Onion, and Pure Country Produce have already filed law suits against Osteen

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Marketing and been awarded their claims and have placed judgments' against Osteen and William Osteen personally." Respondent, in its Answer, does not address the allegations in the Complaint regarding the two remaining sellers.

On November 21, 2013, Complainant filed a motion seeking a Decision Without Hearing by Reason of Admissions, based on the admissions made by Respondent in its Answer. Having carefully considered the pleadings and the authority cited by Complainant, the following Findings of fact, Conclusions of Law, and Order are entered pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (Emphasis added.)

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Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

- (a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Findings of Fact

1. Osteen Marketing LLC (Respondent) is a limited liability company organized and existing under the laws of the state of Wisconsin. Respondent is not currently operating. Respondent's last known business address was the home address of its sole principal.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 2009 0620 was issued to Respondent on April 7, 2009. The license terminated on April 7, 2012 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period August 2, 2010, through November 14, 2011, failed to make full payment promptly to six (6) sellers of the agreed purchase prices, or balances thereof, for 45 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce, in the total amount of \$447,519.10.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent admitted in its Answer that it failed to pay for perishable agricultural commodities it purchased, received, and accepted in interstate commerce from four (4) of the sellers named in the Complaint; the Complaint alleged that Respondent failed to pay these four sellers in the total amount of \$341,608.50.
3. Respondent failed to address the remaining two sellers named in the Complaint, which the Complaint alleged that Respondent failed to pay in a total amount of an additional \$105,910.60. Failure to specifically respond to the allegations in the Complaint regarding the remaining two sellers is deemed an admission of those allegations and Respondent will be deemed to have admitted to failing to pay the remaining two sellers as was alleged.
4. Respondent willfully, flagrantly and repeatedly violated Section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the above violations herein shall be published.
2. This Order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

Agri-Sales, Inc.
73 Agric. Dec. 327

In re: AGRI-SALES, INC.
Docket No. 13-0195.
Decision and Order.
Filed March 12, 2014.

PACA.

Christopher Young, Esq. for Complainant.
Mary E. Gardner, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the Act or PACA), instituted by a Complaint filed on March 21, 2013, by Bruce W. Summers, then the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA).

The Complaint filed by Complainant alleges that Respondent, during the period April of 2010 through February of 2012, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of \$403,741.90 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

A copy of the Complaint and the Rules of Practice were served upon Respondent by certified mail on or about March 29, 2013. Counsel for the Respondent entered her appearance on April 17, 2013¹ and filed a Motion to Enlarge Time to Answer.² There being no objection to the Motion, it was granted and Respondent was given until March 29, 2013 in which to file its Answer.

¹ Docket Entry #3.

² Docket Entry #4.

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The Answer filed on May 29, 2013 denied that it purchased Produce from Eddy Produce for which that vendor had not been paid, admitted that it owed some funds to the other six vendors, and denied any willful violation of the PACA.

The case was assigned to my docket on June 6, 2013.³ On June 11, 2013 I directed the parties to file their witness and exhibit lists with the Hearing Clerk and to exchange copies of the exhibits intended to be introduced at any hearing.⁴ On June 28, 2013, a joint request for extension of time was filed and the filing and exchange dates were extended by Order dated July 1, 2013.⁵ On September 5, 2013, Complainant filed its witness and exhibit lists.⁶ Although there is some indication that Respondent's counsel provided Complainant's counsel with the Respondent's exhibits, no witness or exhibit list was filed with the Hearing Clerk until January 6, 2014.⁷ On review of the status of the case, I directed the parties to file cross motions for summary judgment and this matter is before the Administrative Law Judge upon the Motion of the Complainant for Summary Judgment. Respondent failed to avail itself of the opportunity to file a cross motion for summary judgment on behalf of the Respondent, or otherwise rebut the allegations of the Complainant with factual evidence of any type.

The Summary Judgment Standard

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (the Rules or the Rules of Practice) set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance. *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*,⁸ 68

³ Docket Entry # 8.

⁴ Docket Entry # 9.

⁵ Docket Entries #10 and 11.

⁶ Docket Entry # 12.

⁷ Docket Entry # 13.

⁸ See *supra* notes 6 and 7, at 858-59, where the use of summary judgment is discussed in a variety of cases.

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Agric. Dec. 853, 858-59 (U.S.D.A. 2009); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).

While not an exact match, “no factual dispute of substance” may be equated with the “no genuine issue as to any material fact” language found in the Supreme Court’s decision construing Fed. R. Civ. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is “genuine” if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is “material” if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

If a moving party supports its motion,⁹ the burden shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial. *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Fed. R. Civ. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler*, 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts, on speculation or suspicions, and may not avoid summary judgment on a hope that something may show up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-

⁹ *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

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movant's favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Anderson*, 477 U.S. at 254. In absence of a response to Complainant's Motion for Summary Judgment or cross motion for summary judgment, the record is completely and totally devoid of the type of supporting documentation discussed above.

As discussed in *Anderson*, the judge's function is not himself to weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson, id.* at 250. The standard to be used mirrors that for a directed verdict under Fed. R. Civ. P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Formerly it was held that if there was what was called a scintilla of evidence, a judge was obligated to leave that determination to a jury, but recent decisions have established a more reasonable rule that in every case the question for the judge is not whether there is literally no evidence, but whether there is any upon which the jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed. *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872). While administrative proceedings typically do not have juries, the rule's application remains applicable for a judge sitting as a fact finder performing the same function.

Discussion

Applying the foregoing standard to the evidence before me, it is necessary to determine whether Respondent established the existence of genuine issues of material fact as to each of the allegations addressed in Complainant's Motion. An evaluation of the evidence supporting the allegations contained in the Complaint follows.

The first two paragraphs of the Complaint contain a reference to the PACA and deal with the Respondent's identity and contain no

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substantive allegations of violations. The third paragraph is a summary paragraph of the alleged violations and references and incorporated an Appendix setting forth the specifics of those transactions. The fourth paragraph alleges that the violations alleged in the third paragraph constitute willful, flagrant and repeated violations of the PACA.

As Respondent failed to submit any cross motion, any response to Complainant's Motion for Summary Judgment, or any rebutting factual evidence concerning the violations, only Respondent's Answer exists to address the allegations before me. Accordingly, consistent with *T. W. Electric* and *Much*, Complainant's Motion must be granted. Consistent with the burden shifting requirements set forth in *T. W. Electric*, *Muck*, *Anderson* and *Adler*, the admissions in the Answer and the evidence of record compel the only possible conclusion that as a result of a combination of the Respondent's 100% shareholder's health problems and the failure of its own produced buyers to pay for produce, produce purchases were not paid for in a time manner and the violations alleged in the Complaint will be deemed established.

Although Complainant suggests that the amount owed to Eddy Produce set forth on Appendix A should be increased by some \$19,565.00, any additional amount was not alleged in the Complaint and accordingly is not before me.¹⁰ As to the other six sellers, Natures Finest Produce was also out of business, and although the other five reported lesser amounts owed as of January 24, 2014, the amount owed was still more than *de minimus*. See *Moore Marketing, International, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988).

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

¹⁰ Complainant's Motion for Summary Judgment, p.5 (Docket Entry # 15). Eddy Produce is no longer in business and could not be contacted to determine any amount currently owed, Attachment 3 (Declaration of Mark Hudson) to Motion for Summary Judgment. *Id.*

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Findings of Fact

1. Respondent Agri-Sales, Inc. is a corporation organized and existing under the laws of the state of Illinois. Respondent's business address is the home address of its 100% shareholder.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 20000783 was issued to Respondent on March 7, 2000. That license was succeeded on April 22, 2011 by License No. 21000806 which was next subject to renewal on April 22, 2013.
3. Respondent, during the period April of 2010 through February of 2012, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of \$403,741.90¹¹ for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions of Law

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

ORDER

1. The facts and circumstances of Respondent's violations shall be published.
2. If not already terminated by reason of failing to pay the renewal fee, PACA License No. 20110806 issued to Respondent is revoked.
3. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding

¹¹ It is recognized that as of January 24, 2014, a lesser amount was owed; however, given the absence of evidence on behalf of the Respondent, the record establishes that for the period in question, the amounts alleged are deemed correct.

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within thirty (30) days, pursuant to section 1.145 of the Rules of Practice,
7 C.F.R. §1.145.

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

In re: FLORIDA EUROPEAN EXPORT-IMPORT CO., INC.
Docket No. 13-0263.
Decision and Order.
Filed April 15, 2014.

PACA.

Christopher Young, Esq. for Complainant.
Lawrence H. Meuers, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the Act or PACA), instituted by a Complaint filed on June 12, 2013, by Bruce W. Summers, then the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA).

The Complaint filed by Complainant alleges that Respondent, during the period from December of 2010 through June of 2012, failed to make full payment promptly to nine (9) sellers of the agreed purchase prices in the total amount of \$383,991.14 for 139 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). A copy of the Complaint and the Rules of Practice were served upon Respondent by certified mail.

On June 25, 2013, the Hearing Clerk's Office received a facsimile request for an extension of time in which to file an Answer, and on June

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26, 2013, an Order was granted giving the Respondent until July 25, 2013 in which to answer.

On August 9, 2013, a Notice of Appearance was entered by Lawrence H. Meurers, Esquire of Naples, Florida, which was accompanied by a request for a further extension of time in which to file an answer and an Answer that was tendered in the event the Department was not inclined to grant the request for extension of time.
1

On January 28, 2014, after review of the record indicated that the matter might be resolved without the necessity of a hearing, I entered an Order directing the parties to file cross motions for summary judgment, together with supporting memoranda and documentary evidence. The Complainant complied; however, despite the time for filing its motion and supporting documents, nothing has been received from the Respondent.

Respondent failed to file an answer to the Complaint within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) as further extended by the Administrative Law Judge on two occasions until July 25, 2013 and having further failed to comply with my Order of January 28, 2014. Accordingly, the following Findings of Fact, Conclusions of Law, and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and consistent with Departmental policy as set forth in *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Florida with a business address formerly in Miami, Florida. Respondent is no longer operating, and the Complaint was served on its majority owners of record.

¹ It will be noted that the matter is pending before an Administrative Law Judge who makes decisions independently of the Department and that the Answer tendered was not timely.

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2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 19792062 was issued to Respondent on September 19, 1979. The license was terminated on September 19, 2012 when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period from December of 2010 through June of 2012, failed to make full payment promptly to nine (9) sellers of the agreed purchase prices in the total amount of \$383,991.14 for 139 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

4. On July 5, 2012, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101, *et seq.*) in the United States Bankruptcy Court for the Southern District of Florida, the same being designated as Docket No. 12-26338. The schedules filed with the Petition contain undisputed debts to two of the nine produce seller listed in the Appendix to the Complaint in the amount of \$179,063.12.

Conclusions of Law

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

ORDER

1. The facts and circumstances of Respondent's violations shall be published.
2. This order shall take effect on the day that this Decision becomes final.
3. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the

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proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

In re: SNOKIST GROWERS.¹

Docket No. 13-0020.

Decision and Order.

Filed June 20, 2014.

PACA.

Charles L. Kendall, Esq. for Complainant.

Roger W. Bailey, Esq. for Respondent.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture (“Complainant”; “USDA”) against Snokist Growers (“Respondent”) alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a *et seq.* (“PACA”; “the Act”). The Complaint alleged that Respondent failed to make full payment promptly in the aggregate amount of \$696,853.95 to eight (8) growers for 402 lots of perishable agricultural commodities during the period from July, 2011 through September, 2011.

I. Procedural History

On March 29, 2013, Complainant filed a Complaint against Respondent alleging violations of the PACA. Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for USDA (“Hearing Clerk”) on April 16, 2013. By Order issued May 13, 2013, I set deadlines for the exchange of evidence and filing of witness and exhibit lists. Upon the request of the parties, I

¹ The complaints against other parties related to this action were resolved by other means.

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subsequently suspended action in the proceeding. In a status report filed November 12, 2013, counsel for Complainant advised that the parties were discussing settlement of the matter. On May 14, 2014, Complainant moved for a Decision and Order on the Record by Reason of Admissions. Respondent did not file a response.

This Decision and Order is issued on unopposed motion of Complainant and incorporates all of the pleadings of the parties and all other evidence of record.

II. Findings of Fact & Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (“Rules of Practice”), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. § 1.139). In addition, the Secretary has recognized that “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 & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998).

Respondent’s admissions and documentary evidence establish that there is no material issue of fact requiring a hearing. Additionally, it is uncontested that the outstanding balance due to sellers is in excess of \$5,000.00, which represents more than a de minimis amount. *See Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (1985). “[U]nless the amount admittedly owed is de minimis, there is no basis for a hearing merely to determine the precise amount owed.” *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). I find that a hearing is not necessary in this matter, as there is no genuine issue of material fact, and because the amount remaining unpaid to growers exceeds \$5,000.00.

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are

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reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). PACA requires “full payment promptly” for produce purchases and where “respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case.” *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

In its Answer to the Complaint, Respondent specifically admitted that it had received pears from the eight growers identified in Appendix A to the Complaint. Respondent further admitted that on December 7, 2011, it had filed a voluntary petition under Chapter 11 of the Bankruptcy code (11 U.S.C. § 101 *et seq.*), Petition No. 11-05868-FLK11 in the Eastern District of Washington. Respondent admitted that it had filed schedules in support of the petition wherein Respondent admitted to owing amounts to the identified growers that were equal to or in excess of the payment balances identified in Appendix A.

Respondent asserted that it had entered into contracts to pay the growers in a manner different from that required by 7 C.F.R. § 46.2(aa)(5). Respondent filed the bankruptcy petition over a month before the date of the second installment payment was due under the contracts to growers, January 31, 2012.

Respondent admitted that not all of the growers were paid in full through the bankruptcy proceeding. Respondent reached settlement with growers Rivermaid Trading Co., Naumes, Inc., Scully Packing Co. LLC, and David Elliott & Son. Respondent advised that growers who did not file state lien claims were not paid, and identified Adobe Creek Packing Co., Pauli Ranch, and Miles Oswald as growers who did not receive payment. Respondent denied having willfully violated PACA and asserted that its “inability to pay growers in accordance with their contracts resulted from factors, including Bankruptcy court orders and rules, beyond Snokist’s control.” See ¶ 2.13 of Respondent’s Answer.

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I find that Respondent has admitted to owing growers for produce and further admitted to failing to meet contractual payment obligations.² I reject Respondent's contention that its inability to pay was beyond its control, noting that Respondent voluntarily filed a petition in bankruptcy, thereby staying payment obligations. Furthermore, Respondent filed its petition before the date that the contractual payments were due. Respondent admitted that some growers were not paid at all. There has been no contention that unpaid growers have been paid any additional amounts since the Complaint and Answer were filed.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *Id.* at 1678. In the instant matter, Respondent has admitted that produce growers remain unpaid for purchases it made. Respondent's failure to pay sellers promptly for the purchase of products covered by section 2(4) of the PACA is willful, and the violations are repeated and flagrant. See 7 U.S.C. § 499b(4). Therefore, publication of the facts and circumstances of Respondent's violations is an appropriate sanction.

B. Findings of Fact

1. Respondent Snokist Growers is a cooperative formed and existing under the law of the state of Washington, with a business address in Yakima, Washington.
2. Respondent is not currently operating.
3. At all times material hereto, Respondent was licensed and operated subject to the provisions of the PACA, under license number 1916 3299, issued on March 12, 1956.

² In its Motion for a Decision and Order by Reason of Admissions, Complainant relies upon Respondent's Bankruptcy proceeding and filings therein as an additional admission of culpability. However, Complainant failed to include any of Respondent's bankruptcy documents with the motion, despite alluding to them as attachments. My search of Complainant's submissions, including a DVD, failed to reveal bankruptcy documents.

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4. Respondent's license terminated on March 4, 2008, after Respondent reported to USDA that it was no longer operating subject to PACA.
5. During the period from July 27, 2011, through September 30, 2011, Respondent failed to make full payment promptly of the agreed purchase prices in the aggregate of \$696,853.95 for 402 lots of pears, a perishable agricultural commodity purchased, received, and accepted by Respondent in interstate and foreign commerce from eight (8) growers.
6. The transactions that demonstrate violations of the PACA are described and enumerated in Appendix A of the Complaint filed in this matter, which is incorporated herein by reference.
7. Respondent entered into contracts to pay the growers pursuant to 7 C.F.R. § 46.2(aa)(11).
8. On December 7, 2011, more than a month before payment was due under the contracts, Respondent filed a voluntary petition under Chapter 11 of the Bankruptcy Code, Petition No. 11-05868-FLK11, in the Eastern District of Washington.
9. Through the bankruptcy proceeding, Respondent reached settlement with some of the unpaid growers, but some growers remained unpaid.
10. The unpaid balances represent more than de minimis amounts, thereby obviating a need for a hearing.

C. Conclusions of Law

1. The Secretary has jurisdiction over this matter.
2. Respondent's failure to make full payment promptly of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate commerce

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constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA. (7 U.S.C. § 499b(4)).

ORDER

Respondent Snokist Growers willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances underlying Respondent's violations shall be published.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS DECISIONS

GLOBAL RELIANCE, INC. v. PINNACLE FOOD GROUPS LLC.

Docket No. E-R-2012-183.

Decision and Order.

Filed April 10, 2014.

PACA – Reparations.

Rejection - Not effective if not prompt

Respondent buyer received frozen potatoes and did not reject them within 24 hours as specified by 7 C.F.R. 46.2(cc)(1), so there was no effective rejection.

Revocation of Acceptance – Justified when buyer’s evidence is uncontroverted

Respondent took samples of the frozen potatoes, performed microbiological testing in its own lab, and submitted samples to an independent lab for chemical testing. When buyer later attempted to revoke the acceptance based on the lab results, complainant seller refused to reclaim the potatoes without retesting. Respondent buyer made two of the four lots available for retesting, and withheld the other two lots. Complainant did not refute buyer’s evidence through evidence from retesting, so buyer’s revocation of acceptance was justified for the two lots it made available. Since buyer’s evidence was controverted, its revocation of acceptance was not justified for the two lots it withheld from retesting.

Negative Inference – Drawn when a party fails to provide obviously necessary evidence

Buyer attempted to revoke acceptance of frozen potatoes after microbiological testing by buyer’s lab. When seller requested retesting, buyer made two lots available for retesting and withheld two other lots. A negative inference was drawn against buyer for the lots it withheld, and its revocation of acceptance deemed unjustified. A negative inference was drawn against seller on the two available lots when it failed to show results of retesting, and buyer’s revocation of acceptance was deemed justified as to those two lots.

Complainant, pro se.

McCarron & Diess, Counsel for Complainant.

Charles L. Kendall, Presiding Officer.

Decision and 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 *et seq.*) (PACA). Complainant instituted this proceeding under the PACA, and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) (Rules of Practice), by filing a timely Complaint (Complaint) seeking reparation against Respondent, in the amount of \$145,152.00 plus interest of 18% per annum, in connection with five (5) shipments of individually quick frozen (IQF) baby potatoes with skins that Complainant delivered to Respondent in October 2011 pursuant to a supply agreement between the parties.

Copies of the Report of Investigation (ROI) prepared by the Department were served upon the parties. The Department also prepared, and served upon the parties, a Supplemental Report of Investigation, correcting certain omissions in one of the exhibits of the initial ROI. A copy of the Complaint was served upon the Respondent. Respondent filed a timely Answer, Counterclaim and Request for Oral Hearing (Answer), in which it denied liability to Complainant and entered a counterclaim seeking: 1) incidental damages resulting from Complainant's alleged breach and Respondent's rejection of four (4) of the loads in question, in the amount of \$15,660.73 for labor, storage, handling and disposal of the potatoes; and 2) repayment from Complainant of \$32,805.00 for frozen potatoes which Complainant delivered in June 2011, Respondent alleges that it validly rejected, and Respondent alleges it mistakenly paid. Complainant filed a timely Reply (Reply) to Respondent's counterclaim.

Upon review of the Supply Agreement between the parties, we noted that it required the parties to resolve their disputes through arbitration and specified the process that the parties should undertake. The Department will give effect to such agreements. Therefore, we issued an Order to Show Cause Why Complaint Should not be Dismissed. In reply, Complainant indicated that there had been oral agreement to proceed in this forum in lieu of arbitration. The Supply Agreement specified, however, that none of its provisions may be changed, waived, discharged

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or terminated orally. The parties then submitted writings waiving the arbitration provisions of the Supply Agreement, and this case continued.

The amounts claimed in both the Complaint and the Counterclaim exceed \$30,000.00, and Respondent, in its Answer and Counterclaim, requested an oral hearing. On April 26, 2013, a teleconference was held among the parties and the Presiding Officer. After additional e-mail exchanges with the parties, the Presiding Officer issued a Summary of Teleconference and Cancellation of Hearing on May 31, 2013. Thereafter, by agreement of the parties, the case proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice under the PACA (7 C.F.R. § 47.20).

Under the documentary procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI)¹. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement (Op. St.), Respondent filed an Answering Statement (Ans. St.), and Complainant filed a Statement in Reply (St. in R.). Complainant and Respondent also submitted briefs (CB and RB, respectively).

Findings of Fact

1. Complainant, Global Reliance, Inc., is a corporation whose address is 3705 Quaker Bridge Road, #215, Hamilton, New Jersey 08619 (ROI, Ex. A at 1).
2. Respondent, Pinnacle Foods Group LLC, is a limited liability company whose address is 1 Old Bloomfield Ave, Mt. Lakes, NJ 07046-1429 (ROI, Ex. E at 2).
3. At the time of the transactions involved herein, Respondent was licensed under the PACA (ROI, cover sheet).
4. Complainant began supplying Respondent with potatoes in 1998, and

¹ The exhibits in the Report of Investigation are designated as "ROI Ex. A" through "ROI Ex. P"; where "ROI Ex. O" is referenced, the document(s) are found in the Supplemental Report of Investigation.

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Respondent's Purchasing Manager stated in a letter dated April 23, 2004 that Respondent had always been very satisfied with Complainant's product and had never had any issues with regard to quality (St. in R. at 3).

5. A broker, Marshall Sales Company, Inc., issued a Sales Memorandum dated March 29, 2011 for a supply contract under which Complainant sold to Respondent 520,000 lbs. of individually quick frozen (IQF) whole baby potatoes, size 1 1/16" to 1 1/8", in 50 lb. cases at a price of \$0.81 per pound delivered to Darien, WI, for a total price of \$421,200.00. The goods were to be shipped to order during the delivery period from April 1, 2011 through March 31, 2012 (Complaint Ex. 1A).
6. The sales for this supply contract were made pursuant to a Supply Agreement between the parties, effective as of April 1, 2011 (ROI, Ex. P at 24-32).
7. The Report of Investigation contains a document titled, "Bulk Case Specification Whole Baby Potatoes" (ROI, Ex. O, at 7-7b). The requirements include specified color, quality, (absence of) enzymes, maximum acceptable bacterial levels, packaging and shipping requirements, and a list of General Requirements. Included in the list of General Requirements, at number 10, A., is a requirement that "... any pesticide residues present on the product delivered do not exceed the tolerance set by EPA, USDA, FDA, State Laws for any pesticide residue." (ROI, Ex. O at 7b). Respondent's Vice President of Quality Systems, Kurt Buckman, avers that Respondent sent the "Bulk Case Specification Whole Baby Potatoes" to Complainant in June 2009 (Ans. St. at 1). Complainant's President, Sanjiv Kakkar, states in contrast that the only specs Complainant ever received were in 1998, and that those specs do not mention anything about chemical levels (St. in R. at 1).
8. On April 8, April 15, and April 22, 2011, per Respondent's purchase orders, Complainant delivered to Respondent six (6) loads of potatoes, for which Respondent paid in full (Compl.; Ex. 2-2E).
9. In October 2011, Complainant delivered five shipments of potatoes to

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Respondent. One of the five shipments is not in dispute: on October 13, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4457 (ROI, Ex. F at 5). Complainant's invoice #3767 for that shipment totals \$34,020.00 (ROI, Ex. A at 1), and Respondent acknowledges that at least that sum is due to Complainant (RB at 13).

10. On October 11, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4454 (ROI, Ex. F at 3). Complainant's invoice #3769 for that shipment totals \$34,020.00 (ROI, Ex. A at 1). Hereinafter, this shipment will be referred to as "Lot A."
11. On October 11, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4456 (ROI, Ex. F. at 4). Complainant's invoice #3768 for that shipment totals \$34,020.00 (ROI, Ex. J at 3). Hereinafter, this shipment will be referred to as "Lot B."
12. On October 13, 2011, Complainant delivered 840 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 4458 (ROI, Ex. F at 2). Complainant's invoice #3766 for that shipment totals \$34,020.00 (ROI, Ex. J at 4). Hereinafter, this shipment will be referred to as "Lot C."
13. On October 20, 2011, Complainant delivered 224 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI under Respondent's Purchase Order (PO) number 5654 (ROI, Ex. F at 6). Complainant's invoice #3771 for that shipment totals \$9,072.00 (ROI, Ex. J at 5). Hereinafter, this shipment will be referred to as "Lot D."
14. After receiving each of the lots, Respondent drew samples from each lot and subjected the samples to bacteriological examination in Respondent's laboratory (ROI, Ex. O at 41-44). Respondent's laboratory had in place a rigorous Quality Assurance Plan (ROI, Ex. O at 19-24), had undertaken a recent Internal Laboratory Audit (ROI, Ex. O at 27-32), and had undergone an evaluation by an independent third-party auditor, the American Proficiency Institute (ROI, Ex. O at

33-40).

15. Respondent's laboratory reported the results of its testing (ROI, Ex. E at 3), which indicated that all four of the lots (Lot A, Lot B, Lot C, and Lot D) exceeded the bacterial limits contained in the "Bulk Case Specification Whole Baby Potatoes" (ROI, Ex. O at 7A) that Respondent asserts is part of the supply agreement between the parties. Respondent's lab reported the following : excessive levels of E. Coli in the samples of potatoes from Lot A (ROI, Ex. O at 41); excessive Aerobic Plate Count (APC) in the samples of potatoes from Lot B (ROI, Ex. O at 42); excessive levels of E. Coli in the samples of potatoes from Lot C (ROI, Ex. O at 43); and excessive levels of E. Coli and excessive levels of Coliform bacteria in the potatoes under PO 5654 (ROI, Ex. O at 43).
16. For each of the lots, Respondent generated a Supplier Corrective Action Request (SCAR) indicating Respondent's intent to reject the lot, and the reason(s) for the rejection. Lot A is addressed in SCAR 2284 (ROI, Ex. E at 7-8); Lot B is addressed in SCAR 2285 (ROI, Ex. E at 12-13); Lot C is addressed in SCAR 2286 (ROI, Ex. E at 5-6); Lot D is addressed in SCAR 2287 (ROI, Ex. E at 10-11). All of the SCARs were dated October 30, 2011. Respondent asserts that it issued the SCARs to Complainant on that date (Ans. St. at 4), and Complainant has not refuted that assertion.
17. Respondent also sent samples of each of the lots for pesticide testing at National Food Lab (NFL) in Livermore, CA (ROI, Ex. K at 1, 4-7). NFL is an accredited food testing laboratory (ROI, Ex. O at 9-13). NFL issued reports to Respondent, dated November 4, 2011, indicating the presence of a pesticide, Chlorpyrifos, in samples from Lot B (ROI, Ex. E at 9), and Lot C (ROI, Ex. E at 4). The United States Environmental Protection Agency (EPA) has established tolerances for Chlorpyrifos residue for numerous food commodities, listed at 40 C.F.R. 180.342; no tolerances, however, have been established for potatoes (ROI, Ex. O at 45-48). An agricultural commodity or processed food is deemed to be adulterated and subject to action by the Food and Drug Administration if it contains pesticide residue for which no tolerance or exemption has been established (ROI, Ex. O at 49).

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18. At some time after November 4, 2011, Respondent updated its SCARs for Lot B and Lot C to include presence of Chlorpyrifos as a reason for rejection of those lots.
19. After sending the SCARs for the four lots to Complainant, Respondent then added a notation on the second page of each SCAR, stating that Complainant had replied, "we do not accept your results and shall ask an independent lab to test the product again." Each SCAR listed a "Corrective Action Due Date" of November 11, 2011 (ROI, Ex. E at 6, 8, 11, 13).
20. Mark Hooper, Respondent's Senior Director, QA Supply Chain, sent an email dated December 1, 2011, to Complainant's President, Sanjiv Kakkar, addressing Respondent's intent to reject the four lots, and Complainant's objection to Respondent's proffered rejection of the lots (ROI Ex. E, pp. 14-15). The email stated, in pertinent part:
 21.

According to Sandy, you would like to schedule the USDA – Fruits and Vegetable Division, to come in and sample the product in question, composite samples by container and submit to a designated third party for testing.

Two containers, PO 4456 [Lot B] and 4458 [Lot C] were found to be positive for chemical residue not allowed in potatoes. These two PO's are not subject to further review. . . .

The other two containers [Lot A and Lot D] were found to be non-compliant per the attached excel file. As you are contesting our internal results, we will agree to a retest of these two containers to determine whether or not they truly meet our purchase specifications as you have argued.
22. Dennis Ramthun, Respondent's Senior Director of Procurement, sent a letter dated January 17, 2012, to Complainant's President, Sanjiv

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Kakkar (ROI, Ex. E at 2). The letter stated that it served as official notice that Respondent was rejecting the four lots, and that the letter reiterated Respondent's request that Complainant remove the lots from Respondent's Darien, WI facility. If Complainant did not remove the lots by 5:00 pm CST on January 25, 2012, Respondent would send them for disposal and bill Complainant for the resulting cost.

23. On January 26, 2012, Complainant filed its informal complaint, which was within nine months of when the cause of action accrued.

Conclusions

It is undisputed that Complainant delivered four (4) shipments of 50-lb. boxes of IQF baby potatoes to Respondent in Darien, WI, as follows: Lot A, on October 11, 2011, with 840 boxes at an invoice price of \$34,020.00; Lot B, on October 11, 2011, with 840 boxes at an invoice price of \$34,020.00; Lot C, on October 13, 2011, with 840 boxes at an invoice price of \$34,020.00; Lot D, on October 20, 2011, with 224 boxes at an invoice price of \$9,072.00. It is also undisputed that on October 13, 2011, Complainant delivered 840 50-lb. boxes at an invoice price of \$34,020.00 (hereinafter "Lot E"); Respondent has acknowledged that it owes Complainant the invoice price for Lot E.

Complainant asserts that Respondent accepted all five shipments in compliance with the contract, and has failed to make payment for them (Complaint, pg. 2). Complainant therefore seeks reparation in the amount of \$145,152.00, plus interest at a rate of 18% per annum.

Respondent contends that it rejected four (4) of the loads [Lot A, Lot B, Lot C, and Lot D] (RB at 11). Respondent also filed a counterclaim for: 1) damages of \$15,660.73 incidental to Complainant's breach on the four (4) rejected loads; and 2) repayment of \$32,805.00 for a lot of potatoes that Complainant delivered to Respondent in June 2011, and that Respondent alleges that it mistakenly paid for in July 2011 and properly rejected in August 2011 (Answer at 2). Respondent seeks reparation on its counterclaim in the total amount of \$48,465.73, minus an amount due Complainant for Lot E of \$36,450.00, for a net counterclaim amount of \$12,015.73 (RB at 14).

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An initial question here is whether Respondent accepted or rejected the four lots in question upon delivery. Respondent received Lot A and Lot B on October 11, 2011, Lot C on October 13, 2011, and Lot D on October 20, 2011. Respondent communicated its intent to reject the lots when it issued the SCARs, dated October 30, 2011, to Complainant. The notations on the SCARs (ROI Ex. E, pp. 6, 8, 11, 13) indicate that Complainant did not accept the [test] results upon which the SCARs were based, and so, in effect, refused to accept Respondent's intended rejection of the goods.

Respondent notes, "A rejection, or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance, reverts title to the goods in the seller." (RB at 13). We agree that an *effective* rejection reverts title to the goods in the seller. We have previously held that:

Once a buyer has made a procedurally effective rejection title to the goods automatically reverts to the seller. Thereupon a seller must take possession of the goods even if the rejection was substantively wrongful. It is therefore meaningless for a seller to state that it refuses to accept an effective rejection. In addition, following an effective rejection the seller has the burden of proving by a preponderance of the evidence that the rejection was substantively wrongful.

Crowley, 55 Agric. Dec. 674, 677-78 (U.S.D.A. 1996) (citations omitted).

We have, on the other hand, held that a seller can refuse to accept a rejection (that is, a seller may refuse to retake possession of purportedly rejected produce) when the rejection is ineffective (but not when it is effective but wrongful). An offer to conditionally accept an ineffective rejection does not impose a positive duty on the seller to retake possession of produce unless the terms of the conditional offer are accepted. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (U.S.D.A. 1994).

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Respondent states, “To justify a rejection, the buyer has the burden of proving its rejection was procedurally effective and substantively rightful.” (RB at 11). Was Respondent’s rejection of the four lots procedurally effective? We have stated, “An effective rejection must be in clear, unmistakable terms, and mere complaints regarding a shipment are insufficient.” *Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429, 431 (U.S.D.A. 1983).

The documents generated by Respondent on October 30, 2011 are titled “SCAR”, which stands for “Supplier Corrective Action Request.” In and of themselves, “SCAR” and “Supplier Corrective Action Request” are not unmistakable terms communicating that Respondent is rejecting the goods in question, and neither are the “Additional Details” on the SCARs describing microbial and/or Chlorpyrifos counts. On the first page of each SCAR (ROI Ex. E, pp. 5, 7, 10, 12), however, under Quality Disposition, are notations “Disposition of Materials: Rejection” and “Disposition Comments: return to seller.” These notations in Respondent’s records do not constitute clear and unmistakable *communication to the seller* (Complainant) that the product was rejected. Respondent did communicate its rejection of the goods in clear, unmistakable terms to Complainant through Respondent’s letter dated January 17, 2012 (ROI, Ex. E at 2).

A rejection is not effective unless the buyer seasonably notifies the seller, and the burden of proving seasonable notice rests upon the buyer. *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867 (U.S.D.A. 1979). Respondent asserts that it provided Complainant with timely notice of Complainant’s breach, stating, “Under the circumstances of this case, which involves frozen product and food safety laboratory testing, the notice of breach to [Complainant] was within a reasonable time.” (RB at 11). Notice to a seller of a seller’s breach, however, is not the same thing as seasonable notice of rejection. As Respondent notes, under U.C.C. § 2-602(1):

A rejection is procedurally effective when it is made within a reasonable time after delivery, and seasonably conveyed to the seller. However, the buyer has a reasonable time to inspect the goods in a reasonable manner before acceptance occurs. Acceptance occurs

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only when: the buyer signifies it will take the goods after a reasonable opportunity to inspect the goods; or, after a reasonable opportunity to inspect, fails to make an effective rejection.

(RB at 11-12) (citations omitted.) Respondent contends further that the issuance of its SCARs on October 30, 2011, in regard to frozen product requiring lab analysis, was rejection within a reasonable time from delivery (RB at 13).

Questions of acceptance or rejection of fresh or frozen fruits and vegetables in commerce are governed by the regulations promulgated under the PACA. The regulations, at 7 C.F.R. 46.2, provide:

(cc) *Reasonable time*, as used in paragraph (bb) of this section, means:

(1) For frozen fruits and vegetables with respect to rail shipments, 48 hours after notice of arrival and the produce is made accessible for inspection, and with respect to truck shipments, not to exceed 12 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection;

* * *

(dd) *Acceptance* means:

* * *

(3) Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section: Provided, That acceptance shall not affect any claim for damages because of failure of the produce to meet the terms of the contract.

These regulations govern our consideration of whether a buyer has given seasonable notice of rejection, and thus whether a buyer's rejection of goods is procedurally effective. The last of the four lots in question here

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was delivered to Respondent on October 20, 2011. The record indicates that Respondent first gave Complainant clear, unmistakable notice of Respondent's rejection by means of its January 17, 2012 letter (ROI, Ex. E at 2), some 89 days later. Even if Respondent's SCARs were considered to constitute adequately clear notice of rejection, such notice given to Complainant on October 30, 2011, ten (10) days after the last delivery, was not seasonable notice of rejection. Therefore, Respondent's rejection was not procedurally effective. An ineffective rejection has the same legal consequence as acceptance. *Dew-Grow, Inc. v. First National Supermarkets, Inc.*, 42 Agric. Dec. 2020, 2025 (U.S.D.A. 1983). It is concluded that Respondent accepted the potatoes.

In the alternative, Respondent argues that even if it were deemed to have accepted the lots, it validly revoked its acceptance. Respondent references UCC § 2-608 for the proposition that, even if a buyer accepts the goods, it may revoke its acceptance if the buyer was unable to discover the non-conformity before acceptance, and revokes its acceptance within a reasonable time after discovery before any substantial change in condition of the goods not caused by their own defects (RB at 12). Respondent further cites decisions in which we have recognized such a revocation of acceptance under UCC § 2-608 (*Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475 (U.S.D.A. 1978); *Highland Grape Juice Co. v. T. W. Garner Food Co.*, 38 Agric. Dec. 1001 (U.S.D.A. 1979)).

Respondent asserts that it could not have discovered the defects that constituted the non-conformity of the goods until the goods underwent microbiological and chemical analysis (RB at 13). Such testing would serve to determine whether the goods met the terms of the contract, because Respondent argues that Respondent's specifications for acceptable levels both of microbes and of pesticides were part of the bargain between the parties. As evidence that these specifications were included in the bargain, Respondent offers its Bulk Case Specification (ROI, Ex. O at 7-7b), which Respondent's Kurt Buckman attests was sent to Complainant in June of 2009 (Ans. St. at 1).

Complainant states that, "Only specs we ever recd. were in 1998 when we started business with Birdseye. Those specs do not mention about chemical levels." (St. in R. at 1). By implication, even if the 1998

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specs do not mention chemical levels, they do address levels of microbes. Further, Complainant has offered evidence that the potatoes at issue in this proceeding were subjected to testing for the same microbes before being imported from India (Compl., Ex. 4, 4A, 4B, 4C). We find that the requirements regarding microbial counts in the Bulk Case Specification (ROI, Ex. O at 7-7b) were a part of the bargain between the parties.

We also find that the bargain between the parties required that the goods be free of any pesticide residues which are not permit by law. The record includes the document “Bulk Case Specification Whole Baby Potatoes.” Included in that document’s list of General Requirements, at number 10. A., is a requirement that “. . . any pesticide residues present on the product delivered do not exceed the tolerance set by EPA, USDA, FDA, State Laws for any pesticide residue.” (ROI, Ex. O at 7b).²

In order to establish a revocation of acceptance, Respondent must prove by a preponderance of the evidence that the product failed to conform to the terms of the contract. *Highland Grape Juice Co. v. T. W. Garner Food Co.*, 38 Agric. Dec. 1001, 1008 (U.S.D.A. 1979). Respondent performed microbiological testing of the potatoes in its lab. Respondent’s lab had a program in place which set standards and procedures for its microbiological tests, and those procedures were internally audited (ROI, Ex. O. at 19-33). Respondent’s laboratory and its procedures were also subjected quality audits in 2010 and 2011(ROI, Ex. O at 33-40). Respondent’s microbiological tests showed that the product in each of the four (4) rejected loads contained microbes in excess of the levels permitted in the Bulk Case Specifications (ROI, Ex. O at 41-44).

Respondent also submitted samples from each of the loads to National Food Lab (NFL), and asserts that the samples were frozen and

² We note that where it is determined that produce was grown using pesticides which have not been approved for that crop, even if the fruits or vegetables themselves do not show residues, the goods are deemed to be devoid of commercial value. See *Froerer Farms, Inc.*, Docket No. W-R-2007-433, available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5100548> and at <https://advance.lexis.com/api/document/collection/administrative-materials/id/5BPH-KW50-00D0-R0CN-00000-00?context=1000516> (2011).

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in good condition upon receipt by NFL. NFL reported that the potatoes from Lot B and Lot C contained Chlorpyrifos, a pesticide for which EPA has not issued a specified tolerance and has not granted any tolerance exemption (ROI, Ex. E at 4 & 9; Ex. O at 13-14). Complainant notes that EPA does not specify any limit [tolerance] for Chlorpyrifos in fresh or frozen potatoes (Ans. St. at 3), but seems confused about the import of that fact. The absence of a tolerance or tolerance exception means that a pesticide may not be used. The presence of pesticide residue at any detectable level in a commodity means that the commodity is deemed by FDA to be adulterated (ROI, Ex. O at 49).

Complainant claims that all baby potatoes have some level of Chlorpyrifos, and suggests that Chlorpyrifos (an organophosphate pesticide) may be mistaken for naturally occurring compounds in potatoes, glycoalkaloids (St. in R. at 5-6). Given the accreditation of National Food Lab (NFL) (ROI, Ex. O at 9-13), we find it unlikely that NFL would have mistaken the two substances and erroneously reported the presence of Chlorpyrifos in the potatoes from Lot B and Lot C. We, therefore, accept the NFL lab results as accurate.

Respondent, then, has provided some evidence that all four lots failed to meet the contract specifications for microbial levels, and that Lot B and Lot C failed to meet the contract specifications due to the presence of a banned pesticide. Respondent's evidence consists of Respondent's own internal microbiological testing, and testing of samples drawn by Respondent and analyzed by NFL. Complainant has challenged that evidence and requested retesting (ROI Ex. E, pp 6, 8, 11, 13). Respondent offered to allow for retesting of Lot A and Lot D, but not for Lot B and Lot C (ROI, Ex. E at 14; RB at 10).

Normally, in the absence of an inspection by a neutral party at destination, the buyer fails to prove breach. *Tantum v. Weller*, 41 Agric. Dec. 2456, 2457 (U.S.D.A. 1982). The microbiological analysis by Respondent's own laboratory cannot be viewed as an inspection by a neutral third party. The chemical analysis by NFL could potentially be viewed as inspection by a neutral party. The difficulty with the NFL testing results offered here, however, is that they were derived from samples drawn by Respondent itself.

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Sampling is a critical component of testing. As noted by a white paper from the United Fresh Produce Association Food Safety & Technology Council, Microbiological Testing of Fresh Produce, at page 15:

The accuracy of a test is as dependent on proper sampling technique as on the test itself. . . . The sample collector must be trained in aseptic sampling procedures. This minimizes the potential for contamination from other sources, including the individual collecting the sample, and from causing a false positive reaction.

*Id.*³

Respondent has offered evidence that its laboratory had in place a rigorous Quality Assurance Plan (ROI, Ex. O at 19-24), had undertaken a recent Internal Laboratory Audit (ROI, Ex. O at 27-32), and had undergone an evaluation by an independent third-party auditor, the American Proficiency Institute (ROI, Ex. O at 33-40). The program in place in Respondent's laboratory called for rigorous sampling procedures. Respondent's laboratory appears competent and scrupulous. Nonetheless, Respondent, as a party to the proceeding, cannot be viewed as neutral.

In a series of cases, we have permitted revocation of acceptance based on testing which disclosed defects which would not otherwise have been discovered or discoverable, so long as there was no change in the condition of the product from the time of delivery to the time the acceptance was revoked. In none of these cases, however, did the buyer draw its own samples: *Silver Star Processors, Inc. v. Costa Fruit & Produce Co., Inc.*, 53 Agric. Dec. 897, 904 (U.S.D.A. 1994) (director of third-party laboratory was personally present when samples were randomly selected and collected from unopened pails of palletized product.); *Steve Dart, Inc. v. Mecca Farms, Inc.*, 49 Agric. Dec. 638, 639 (U.S.D.A. 1990) (inspectors of the Canada Health & Welfare

³ Available at http://www.unitedfresh.org/assets/food_safety/MicroWhite%20Paper-%20Final.pdf.

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Department arrived at the complainant's warehouse and took samples of peppers for analysis.); *Highland Grape Juice Co. v. T. W. Garner Food Co.*, 38 Agric. Dec. 1001, 1005-06 (U.S.D.A. 1979) (samples of frozen grape pulp were drawn by USDA).

The product specifications in this case call for a complete absence of a substance, Chlopyrifos. EPA has established nonzero tolerance levels for the pesticide in numerous food commodities (ROI, Ex. O at 45-48). As a large-scale processor of frozen foods, Respondent could be expected to process some of those dozens of commodities. It is especially important, then, that samples be drawn by a neutral party, or by the seller under the buyer's supervision, so as to minimize the likelihood, or the appearance thereof, that the product in question may have been cross-contaminated by products with nonzero tolerance levels in Respondent's facility.

Again, Respondent has offered some evidence, in the form of its own sworn statements, that all four lots failed to meet the contract specifications as to microbial levels, and that Lot B and Lot C also failed due to the presence of Chlopyrifos. A sworn statement which has not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982).

Prior to December 1, 2011, there were various communications between the parties, but none of which rose to the level of an unambiguous rejection (in this case, actually, revocation of acceptance). On December 1, 2011, Respondent offered to allow for retesting of Lot A and Lot D, but not for Lot B and Lot C (ROI, Ex. E at 14; RB at 10). In so doing, it foreclosed the possibility of either verifying or rebutting the evidence that it had offered of Complainant's breach as to Lot B and Lot C. In regard to Lot A and Lot D, however, Respondent afforded Complainant the opportunity to rebut Respondent's evidence of breach. Complainant has provided no evidence that any results of retesting rebutted Respondent's evidence.

The simple resolution of the issues in this case might have been accomplished by sampling and retesting of the four lots of potatoes by a

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neutral party. In this regard, each party has contributed to the difficulty. Respondent failed to make Lot B and Lot C available for retesting. Complainant either failed to have Lot A and Lot D sampled and retested, or failed to provide the results of retesting in this proceeding. In the absence of clear and definitive evidence of the actual state of the potatoes, we will resolve this dispute by application of the negative inference rule.

The negative inference rule is one in which the tribunal will infer that when something was not done by a party, if it had done so the information would have been against its best interest. *Burnac Produce, Inc. v. Calavo Growers of California*, 47 Agric. Dec. 1624, 1627 (U.S.D.A. 1988). Here, we infer that had Respondent made Lot B and Lot C available for retesting, the results would have shown no breach of the contract specifications by Complainant as to Lot B and Lot C. Therefore, Respondent has failed to prove that its revocation of acceptance was justified as to those two lots, and Respondent is liable to Complainant for their invoice price. Similarly, we infer that had Complainant provided results of retesting on Lot A and Lot D, those results would have shown that the lots failed to meet the contract specifications. Therefore, Respondent's revocation of acceptance was justified as to those two lots, and Respondent has no liability on Lot A or Lot D.

Respondent has made a counterclaim seeking: 1) incidental damages resulting from Complainant's alleged breach and Respondent's rejection of the four loads in question, in the amount of \$15,660.73 for labor, storage, handling and disposal of the potatoes; and 2) repayment from Complainant of \$32,805.00 for frozen potatoes which Complainant delivered in June 2011, Respondent alleges that it validly rejected, and Respondent alleges it mistakenly paid. We deem Respondent's evidence as to the costs of storage and disposal (ROI Ex. O, pg. 50) to be reasonable in its particulars. For Lot A, Respondent incurred storage costs of \$1,270.00 and handling costs of \$870.00, for a total of \$2,140.00. For Lot D, Respondent incurred storage costs of \$357.00 and handling costs of \$261.00, for a total of \$618.00. Respondent incurred total incidental damages as a result of Complainant's breach in a total amount of \$2,758.00.

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Respondent also asserted a Counterclaim for payment of \$32,805.00 for frozen potatoes delivered by Complainant to Respondent under PO 279957 in June 2011 (Answer at 2). Respondent alleges that the June 2011 shipment underwent microbiological testing in June 2011, which showed the potatoes failed to conform to the microbiological specifications (Ans. St. at 4-5). Respondent paid Complainant \$32,805.00 for these potatoes in July 2011. *Id.* Respondent further alleges that they were retested in August 2011, at the request of Complainant, and again failed to conform to the microbiological specifications, and were rejected on August 26, 2011. *Id.*

We first must consider whether we have jurisdiction over Respondent's counterclaim for the June 2011 transaction. We have stated:

There are four basic jurisdictional requirements under the act; they are: (1) the transaction must involve perishable agricultural commodities (7 U.S.C. 499a(4)); (2) the transaction must involve interstate or foreign commerce (7 U.S.C. 99a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. 499f(a)); and (4) the respondent must be a licensee under the act or operating subject to the licensing requirements of the act (7 U.S.C. 499d(a)).

Jebavy-Sorenson Orchard Co. v. Lynn Foods Corp., 32 Agric. Dec. 529, 531 (U.S.D.A. 1973).

In this case, there is no dispute that the transaction involved perishable agricultural commodities and interstate or foreign commerce. At the time of the transactions at issue in this case, Complainant (the respondent to the counterclaim) was not licensed under the PACA. Complainant did, however, subsequently apply for a license; its license was issued on January 24, 2012. In a previous case, where the file contained a copy of a license application filed by respondent, we found that the respondent was operating subject to the PACA and was thus subject to our jurisdiction. *Garden State Farms, Inc. v. Pinapfel*, 36 Agric. Dec. 933, 936 (U.S.D.A. 1977). We find in this case that

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Complainant was operating subject to the PACA at all times material herein.

Did Respondent petition the Secretary within nine months after its cause of action accrued? As Respondent has noted, its counterclaim on this load was filed on May 23, 2012 (RB at 14). Respondent describes the handling of this lot as follows (RB at 13-14):

The frozen potatoes under PO 279957 were delivered in June 2011, and underwent microbiological testing in June 2011, which showed the potatoes failed to conform to the microbiological specifications. *See* ROI, Ex. O at 52. They were retested in August 2011, at the request of Global, and again failed to conform to the microbiological specifications. *Id.* The potatoes were rejected on August 26, 2011. *Id.* at 5354. However, Pinnacle had already paid Global \$32,805.00 for these potatoes, which were validly rejected in July 2011. *Id.* at 55.

The following events were more than nine months before Respondent filed its May 23, 2012, counterclaim on its PO 279957: 1) the potatoes were delivered in June 2011; 2) the potatoes underwent microbiological testing [in Respondent's lab], also in June 2011; 3) Respondent paid for the lot "by mistake" in July 2011; 4) the potatoes were retested in August 2011; and 5) Respondent's lab returned the results of its retesting on August 12, 2011 (ROI Ex. O, pg. 52). Respondent's cause of action accrued, at the latest, on August 12, 2011, when Respondent determined, upon retesting, that the potatoes failed to meet the contract specifications. The May 23, 2012 counterclaim was not within nine months of that event. Respondent argues that its cause of action accrued when it rejected the potatoes on August 26, 2011, and it filed its counterclaim within nine months of that date. Respondent's failure to press its cause of action promptly does not alter the fact of the cause of action having accrued, at the latest, on August 12, 2011. Therefore, we have no jurisdiction over Respondent's counterclaim on this transaction.

Even if we did have jurisdiction over Respondent's counterclaim as to its PO 279957, the circumstance described by Respondent could not be

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deemed an effective rejection, since Respondent provided no evidence of a clear statement of rejection in the Answer, its Answering Statement, or in the exhibits to which those pleadings refer (ROI, Ex. O at 51-55), nor any proof of seasonable notice of rejection to Complainant. Therefore, there was no procedurally effective rejection as to this lot.

Neither is there clear and dispositive evidence of breach by Complainant, nor proof that Respondent seasonably communicated an intention to revoke its acceptance of the goods. Respondent's sworn statements are not uncontroverted, as Complainant has denied that it was informed about any disposition of the goods (St. in R. at 2). Respondent's payment for the shipment the month after delivery is a strong indication of acceptance of the goods. Revocation of that acceptance would require very strong evidence of both breach and notice, and neither of these appears in the record.

The amounts due to Complainant for Lot A, Lot D, and Lot E are the invoice prices of \$34,020.00 apiece, for a total amount of \$102,060.00. Respondent is due \$2,758.00 from Complainant for incidental damages due to Complainant's breach regarding Lot B and Lot C. The net amount due to Complainant from Respondent is \$99,302.00. Complainant has also claimed, in its Complaint, that it is due interest of 18% per annum. Complainant has not, however, provided any evidence that such an interest term was a part of the agreement between the parties. Therefore, we decline to award it.

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

Respondent's failure to make prompt payment for its purchases is a violation of section 2 of the Act for which reparation should be awarded to Complainant in the net amount of \$99,302.00. 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*

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Valley Tie Co., 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n, Inc.*, 22 Agric. Dec. 66, 67 (U.S.D.A. 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 Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 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).

ORDER

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$99,302.00, plus the amount of \$500.00, with interest thereon at the rate of 0.12% per annum from November 1, 2011, until paid.

Copies of this Order shall be served upon the parties.

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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: www.dm.usda.gov/oaljdecisions].

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEBORAH D. DROBNICK.

Docket No. 12-0490.

Order of Dismissal.

Filed February 28, 2014.

ERIK F. JARQUIN.

Docket No. 13-0256.

Order of Dismissal.

Filed March 19, 2014.

In re: RDM International, Inc.

Docket Nos. 12-0458, 12-0601.

Miscellaneous Order.

Filed April 8, 2014.

PACA – Administrative procedure – Extension of time.

Charles L. Kendall, Esq. for Complainant.

Robert D. Moore for Respondent.

Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

Ruling entered by William G. Jenson, Judicial Officer.

RULING DENYING RDM INTERNATIONAL, INC.'S
REQUEST FOR AN EXTENSION OF TIME
TO FILE A PETITION TO RECONSIDER

On April 2, 2014, RDM International, Inc. [hereinafter RDM], filed a motion requesting that I extend to April 10, 2014, the time for filing a petition to reconsider *RDM International, Inc.*, 73 Agric. Dec. ____ (U.S.D.A. Feb. 12, 2014). The United States Postal Service Product &

MISCELLANEOUS ORDERS & DISMISSALS

Tracking Information indicates the Hearing Clerk served RDM with *RDM International, Inc.*, 73 Agric. Dec. __ (U.S.D.A. Feb. 12, 2014), on March 20, 2014.¹

The rules of practice applicable to this proceeding² provide that a petition to reconsider a decision of the Judicial Officer must be filed with the Hearing Clerk within 10 days after the date of service of the Judicial Officer's decision on the party filing the petition to reconsider.³ As RDM filed its request for an extension of time after the expiration of RDM's time for filing a petition to reconsider *RDM International, Inc.*, 73 Agric. Dec. __ (U.S.D.A. Feb. 12, 2014), I deny RDM's request to extend the time for filing a petition to reconsider.

In re: AGRI-SALES, INC.
Docket No. D-13-0195.
Miscellaneous Order.
Filed April 15, 2014.

PACA- D – Administrative procedure – Extension of time.

Christopher Young, Esq. for Complainant.
Mary E. Gardner, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling entered by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING AGRI-SALES, INC.'S APPEAL PETITION AND SUPPORTING BRIEF

On April 15, 2014, Agri-Sales, Inc., by telephone, requested that I extend to April 23, 2014 the time for filing an appeal petition and supporting brief.

For good reason stated, Agri-Sales, Inc.'s motion to extend the time

¹ See Attach. A.

² 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).

³ 7 C.F.R. § 1.146(a)(3).

Miscellaneous Orders & Dismissals

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for filing an appeal petition and supporting brief is granted. The time for
filing Agri-Sales, Inc.'s appeal petition and supporting brief is extended
to, _____ and _____ includes, _____ April 23, _____ 2014.
¹

¹ The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Agri-Sales, Inc., must ensure its appeal petition and supporting brief are received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, April 23, 2014.

DEFAULT DECISIONS

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and 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/.

PERISHABLE AGRICULTURAL COMMODITIES ACT

KHALID A. MOHMAND.

Docket No. 13-0306.

Default Decision and Order.

Filed January 14, 2014.

AZTECA RANCH MARKET, INC. # 2.

Docket No. D-14-0038.

Default Decision and Order.

Filed January 27, 2014.

LIBORIO MARKETS #5, INC.

Docket No. 13-0215.

Default Decision and Order.

Filed March 11, 2014.

AZTECA RANCH MARKET, INC. #3.

Docket No. D-14-0039.

Default Decision and Order.

Filed March 13, 2014.

CHAPARRAL FRUIT SALES, INC.

Docket No. 14-0060.

Default Decision and Order.

Filed March 25, 2014.

LA MERCED PRODUCE, LLC.

Docket No. 13-0307.

Default Decision and Order.

Filed April 25, 2014.

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DANIEL S. McCLELLAN.
Docket No. 14-0070.
Default Decision and Order.
Filed April 25, 2014.

TRIPLE R DISTRIBUTING, LLC.
Docket No. D-13-0340.
Default Decision and Order.
Filed May 5, 2014.

AZTECA RANCH MARKET, INC.
Docket No. 14-0037.
Default Decision and Order.
Filed May 5, 2014.

CONSENT DECISIONS

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Big Bear Storage and Packing, Inc.

Docket No. D-14-0051.

Filed March 4, 2014.

Drobnick Distributing, Inc.

Docket No. D-12-0001.

Filed March 12, 2014.

Deborah D. Drobnick.

Docket No. D-12-0490.

Filed March 12, 2014.

Staunton Food and Produce Co., Inc.

Docket No. D-13-0054.

Filed March 12, 2014.

De Bruyn Produce Co.

Docket No. D-14-0072.

Filed April 23, 2014.

Fresh World One, Inc.

Docket No. D-13-0211.

Filed June 19, 2014.

El Matate Foods, Inc., D/B/A El Metate Market.

Docket No. D-14-0028.

Filed June 23, 2014.

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