

AGRICULTURE DECISIONS

Volume 77

Book Two

Part Three (PACA)

Pages 268 – 303



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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2018

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENT DECISION

In re: MOZA, LLC.
Docket No. 18-0051.
Initial Decision and Order. 283

--

REPARATION DECISION

SANDHU BROS. GROWERS v. R & L SUNSET PRODUCE CORP.
Docket No. E-R-2018-012.
Reparation Order 296

--

DEFAULT DECISIONS

In re: PENNY TSIGARIS, d/b/a MANAVI PRODUCE CORP.
Docket No. 17-0217.
Default Decision and Order. 301

In re: C & D PRODUCE OUTLET, INC.
Docket No. 17-0268.
Default Decision and Order. 301

In re: C & D PRODUCE OUTLET, SOUTH, INC.
Docket No. 17-0269.
Default Decision and Order. 301

In re: VALLEY PRODUCE CORP. Docket No. 18-0030. Default Decision and Order.	301
In re: UNIFIED, LTD., d/b/a PAN AMERICAN BANANA. Docket No. 18-0035. Default Decision and Order.	301
In re: TUMI PRODUCE INTERNATIONAL CORP. Docket No. 18-0039. Default Decision and Order.	301
In re: FARMERS BEST OF NYC, INC. Docket No. 18-0023. Default Decision and Order.	302
In re: SARITA RANCH PROVISSION, INC. Docket No. 18-0073. Default Decision and Order.	302

--

CONSENT DECISIONS

Consent Decisions	303
-----------------------------	-----

--

Olympic Wholesale Produce, Inc.
77 Agric. Dec. 268

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENT DECISIONS

In re: OLYMPIC WHOLESALE PRODUCE, INC.

Docket No. 18-0009.

Decision and Order.

Filed August 28, 2018.

PACA-D.

Christopher P. Young, Esq., for AMS.

Stephen P. McCarron, Esq., and Louis W. Diess, III, Esq., for Respondent.

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

Strother, Acting Chief Administrative Law Judge.¹

DECISION AND ORDER ON THE WRITTEN RECORD

Preliminary Statement

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

The Associate Deputy Administrator of the Specialty Crops Program, Agricultural Marketing Service (“Complainant” or “AMS”), initiated this proceeding by filing a complaint on November 2, 2017 alleging that Olympic Wholesale Produce, Inc. (“Respondent”) willfully violated PACA and the Regulations. On July 24, 2018, AMS moved for a decision without hearing pursuant to section 1.139 of the

¹ Attorneys McCarron and Diess withdrew their appearances as counsel for Respondent on February 9, 2018.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Rules of Practice (7 C.F.R. § 1.139) and the policy set forth by the Judicial Officer in *Scamcorp, Inc.*²

For the reasons discussed herein, I find that no hearing is warranted in this matter and a decision on the record is appropriate.

Procedural History

On November 2, 2017, AMS filed a disciplinary complaint against Respondent. The Complaint alleged that, during the period December 2016 through May 2017, Respondent willfully, flagrantly, and repeatedly violated section 2(4) of PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to four sellers for 108 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$898,725.70. The Complaint requested I find that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of PACA (7 U.S.C. § 499b(4)) and order that Respondent's PACA license be revoked pursuant to section 8(a) of PACA (7 U.S.C. § 499h(a)).³

On December 8, 2017, Respondent filed a timely answer to the Complaint.⁴ The Answer admitted the jurisdictional allegations of the

² 57 Agric. Dec. 527 (U.S.D.A. 1998).

³ The Complaint also requested “[t]hat unless Respondent fails to file an answer within the time allowed, or admits all the material allegations of this Complaint, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the PACA[.]”). Compl. at 4.

⁴ United States Postal Service records reflect that the Complaint was sent to Respondent's business address via certified mail and delivered on November 9, 2017. Respondent had twenty days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's answer would have been due by November 29, 2017; however, on November 27, 2017, Respondent's counsel filed a request for a thirty-day extension to respond to the Complaint. On December 1, 2017, I entered an order granting Respondent's request and allowing Respondent until December 11, 2017 to file its answer.

Olympic Wholesale Produce, Inc.
77 Agric. Dec. 268

Complaint, generally denied the remaining allegations, and requested an oral hearing.⁵

On February 6, 2018, I issued an Order Setting Deadlines for Submissions (“Exchange Order”). The Exchange Order directed AMS to file with the Hearing Clerk a list of witnesses and exhibits to be used at hearing and to exchange copies of the list and exhibits with Respondent by April 9, 2018. Similarly, the Exchange Order directed Respondent to file with the Hearing Clerk a list of witnesses and exhibits to be used at hearing and to exchange copies of the list and exhibits with AMS by June 8, 2018.

On February 9, 2018, Respondent’s counsels of record filed a Notice of Withdrawal from the proceeding. On March 15, 2018, I entered an order granting the withdrawal with instruction that the filing deadlines established in the Exchange Order would remain effective, including Respondent’s June 8, 2018 deadline to file its list of witnesses and exhibits with the Hearing Clerk and exchange copies of the list and exhibits with AMS.

On April 5, 2018, AMS filed its Proposed Witness and Exhibit List with the Hearing Clerk. Respondent, however, failed to comply with the Exchange Order. Respondent has not filed a list of witnesses and exhibits with the Hearing Clerk, and AMS submits it “has been unable to reach or communicate with Respondent” since counsel’s withdrawal.⁶

On July 24, 2018, AMS filed a Motion for Decision Without Hearing and Memorandum in Support Thereof (“Motion for Decision Without Hearing”) and proposed Decision Without Hearing (“Proposed Decision”) pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and “the policy set forth by the Judicial

⁵ See Answer at 1 (“1. Respondent admits the allegations of Section II(a) and (b) of the Complaint. 2. Respondent denies the allegations of Sections III and IV of the Complaint.”).

⁶ Proposed Decision at 2.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness.*⁷
Respondent has not filed any objections thereto.⁸

Authorities

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 this matter. Pursuant to section 1.136, a respondent is required to file an answer within twenty days after service of a complaint.⁹ The Rules provide that an answer shall “[c]learly admit, deny, or explain each of the allegations of the Complaint *and shall clearly set forth any defense asserted by the respondent.*”¹⁰ Moreover, “[t]he failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing.”¹¹

Also applicable to the instant proceeding are sections 2(4) and 8(a) of PACA (7 U.S.C. §§ 499b(4), 499h(a)). Section 2(4) requires merchants and dealers to make “full payment promptly” for perishable

⁷ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). See Mot. for Decision Without Hr’g at 2 (“Complainant also moves for a Decision Without Hearing under the policy set forth by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, . . . since Respondent has not paid promptly and in full the past-due produce debt identified in the Complaint.”).

⁸ United States Postal Service records reflect that the Motion for Decision Without Hearing and Proposed Decision were sent to Respondent’s principal via certified mail and delivered on July 30, 2018. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent’s objections were due by August 20, 2018. Respondent has filed no objections as of this date.

⁹ 7 C.F.R. § 1.136(a).

¹⁰ 7 C.F.R. § 1.136(b)(1) (emphasis added).

¹¹ 7 C.F.R. § 1.139.

agricultural commodities, usually within ten days of acceptance, unless the parties have agreed to different terms prior to the purchase.¹² Specifically, section 2(4) makes it unlawful “[f]or any commission merchant, dealer, or broker to . . . fail or refuse truly and correctly to account and make full payment promptly in respect of any such transaction in any such commodity to the person with whom such transaction is had.”¹³ Section 8(a) provides:

Whenever . . . the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . . the Secretary may publish the 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.*¹⁴

In cases where a PCA licensee has failed to make full or prompt payment of perishable agricultural commodities, the Department’s policy is straightforward:

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in 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 PACA case will be treated as a “no-pay” case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a “no-pay” case. In any PACA disciplinary proceeding

¹² See 7 C.F.R. §§ 46.2(aa)(5), (11).

¹³ 7 U.S.C. § 499b(4).

¹⁴ 7 U.S.C. § 499h(a) (emphasis added).

PERISHABLE AGRICULTURAL COMMODITIES ACT

in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance with the PACA or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “no-pay” case. . . . In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of hearing, whichever occurs first, the PACA case will be treated as a “slow-pay” case.¹⁵

Further, “[i]n any ‘no-pay’ case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of PACA, will be revoked.”¹⁶

Discussion

I. Respondent Has Not Made Full Payment in Accordance with PACA and Controlling Case Law.

PACA requires licensed produced dealers to make full payment promptly for fruit and vegetable purchases within ten days after the produce is accepted, provided that parties may elect to use different payment terms so long as the terms are reduced to writing prior to the transaction.¹⁷ In cases where a respondent fails to make full payment promptly and “is not in full compliance 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’

¹⁵ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (emphasis added).

¹⁶ *Id.* at 549.

¹⁷ 7 C.F.R. § 46.2(aa)(5), (11).

case.”¹⁸ “Full compliance” requires a respondent to have paid all its produce sellers and “have no credit agreements with produce sellers for more than 30 days.”¹⁹

In its Appendix A to the Complaint, AMS identified four sellers to whom Respondent failed to make full payment promptly, in the total amount of \$898,725.70, for 108 lots of perishable agricultural commodities Respondent purchased, received, and accepted in the course of interstate and foreign commerce during the period December 2016 through May 2017.²⁰ Respondent was served with the Complaint on November 9, 2017.²¹ Therefore, in accordance with *Scamcorp*, Respondent had until March 9, 2018 to attain full compliance with PACA.²²

Respondent has made no assertion—in its Answer or in any other filing²³—that full payment has been made or that full compliance will be achieved pursuant to the parameters set forth by *Scamcorp*.²⁴ In response to allegations of PACA violations, the Answer merely stated: “Respondent denies the allegations of Sections III and IV of the Complaint.”²⁵ Subsequent investigation, however, indicates that as of July 10, 2018, all four of the sellers named in the Complaint were still owed a substantial

¹⁸ *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

¹⁹ *Id.* at 549.

²⁰ See Compl. App’x A.

²¹ See 7 C.F.R. § 1.147(c)(1) (“Any complaint . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party[.]”). United States Postal Service records indicate that a copy of the Complaint was sent via certified mail and delivered to Respondent’s business address on November 9, 2017.

²² See *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

²³ As previously stated, Respondent did not comply with my order regarding exhibit exchange and did not file any objections to AMS’s Motion for Decision Without Hearing.

²⁴ See *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

²⁵ Answer at 1.

PERISHABLE AGRICULTURAL COMMODITIES ACT

balance.²⁶ Respondent's general denial is not an acceptable defense to liability in a case such as this, where a complaint has been filed alleging the violation of section 2(4) of PACA due to the failure to make full payment promptly. There is no evidence to dispute AMS's allegations that Respondent's transactions resulted in an outstanding balance of more than \$800,000.00 owed to produce sellers.

Further, PACA records indicate that Respondent's license has been suspended since the Complaint was filed.²⁷ Accordingly, I find that Respondent has not achieved full compliance with PACA within 120 days after service of the Complaint.

II. Follow-Up Investigation Shows that Respondent Owes More than a *De Minimis* Amount to Sellers.

A follow-up compliance investigation conducted between June 20, 2018 and June 22, 2018 reveals that, as of the date of the investigation, all four creditors listed in Appendix A to the Complaint were still owed a significant balance.²⁸ The outstanding balance due far exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.²⁹

Senior Marketing Specialist of the PACA Division, Jacob Garcia, communicated with representatives of each of the creditors listed in Appendix A to the Complaint, who confirmed that collectively a total amount of at least \$889,233.70 of debt listed in the Complaint was still

²⁶ See discussion *infra* Part II.

²⁷ See Proposed Decision at 6; PACA Search Engine: License No. 19740290, USDA.GOV, <https://apps.ams.usda.gov/pacasearch/> (choose "Specialized Search," select "License Number" from drop-down box, and search the blank field for "19740290").

²⁸ See Mot. for Decision Without Hr'g at 5; Mot. for Decision Without Hr'g Attach. at 1 ¶¶ 2-6.

²⁹ See *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) ("[T]here is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, so long as the violations are not *de minimis*."); *Moore Mkt'g Int'l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988); *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

past due and unpaid.³⁰ Additionally, Mr. Garcia's investigation revealed that at least \$123,567.00 in new or roll-over debt was claimed by other produce sellers not listed in Appendix A to the Complaint as past due and owed by Respondent.³¹ Respondent has not denied either of these facts.

Further, a substantial amount—virtually the entire amount listed in the Complaint—of past-due and unpaid produce debt is owed to creditors listed in the Appendix A to the Complaint more than *one year* after the debt became due in accordance with PACA. Under the policy set forth in *Scamcorp*,³² this is a “no-pay” case for which revocation of Respondent's license is warranted.³³ Respondent failed to pay promptly for more than a *de minimis* amount of produce,³⁴ and a hearing is not necessary in this case.³⁵

III. Respondent's PACA Violations Were Repeated, Flagrant, and Willful.

The Secretary of Agriculture may revoke the license of a dealer who is found to have committed repeated, flagrant, and willful PACA violations.³⁶ As the Judicial Officer has explained:

³⁰ See Mot. for Decision Without Hr'g Attach. at 1 ¶¶ 2-6.

³¹ See *id.* at 1 ¶ 7. Roll-over debt is an aggravating factor when considering whether a respondent has made full payment in accordance with Department policy. See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 567-69 (U.S.D.A. 1998) (“The factors to be considered when deciding whether to impose a civil penalty or a license suspension in a ‘slow-pay’ case include . . . the roll-over debt, if any, incurred by the PACA violator[.]”).

³² 57 Agric. Dec. 527 (U.S.D.A. 1998).

³³ See *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

³⁴ See *id.*

³⁵ See *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984).

³⁶ See 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); *Norinsberg v. U.S. Dep't of Agric.*, 47 F.3d 1224, 1225 (D.C. Cir. 1995).

PERISHABLE AGRICULTURAL COMMODITIES ACT

[O]ne of the primary remedial purposes of the PACA [is] the financial protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even customers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay. *These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.*³⁷

First, Respondent's violations in this case were repeated. Violations are "repeated" under PACA when they are committed multiple times, non-simultaneously.³⁸ As Respondent failed to pay four sellers promptly and in full for 108 lots of perishable agricultural commodities over a nearly six-month period, its violations were clearly repeated.

Respondent's PACA violations were also flagrant. Flagrancy is determined by evaluating the number of violations, total money involved, and length of time during which the violations occurred.³⁹ The signed declaration by PACA employee Jacob Garcia provides that, as of July 10, 2018, Respondent owes a total of at least \$889,233.70 to the four sellers

³⁷ *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1273-74 (U.S.D.A. 1996) (emphasis added).

³⁸ See *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 592 (6th Cir. 2003); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

³⁹ *Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895; *Havana Potatoes*, 55 Agric. Dec. at 1270; see *Reese Sales Co. v. Hardin*, 458 F. 2d 183, 185 (9th Cir. 1972).

Olympic Wholesale Produce, Inc.
77 Agric. Dec. 268

named in Appendix A to the Complaint.⁴⁰ The declaration further states: “Since the completion of my compliance investigation there have been three additional informal complaints filed against Olympic Wholesale Produce, Inc., in the amount of \$123,567.00. Olympic Wholesale Produce, Inc., has not responded to two complaints, and is not disputing the other.”⁴¹ By failing to pay that money—far more than a *de minimis* amount—to multiple sellers over a near six-month period and proceeding to accumulate an additional \$123,567.00 in produce debt thereafter, Respondent has committed flagrant PACA violations.⁴² Respondent submits no evidence to the contrary.

Lastly, Respondent’s violations were willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent’s violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.⁴³

Given the many transactions, substantial amount of debt, and continuation of violations over a six-month period in this case, I find that Respondent’s violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of PACA.⁴⁴

IV. A Decision Without Hearing Is Appropriate.

⁴⁰ See Mot. for Decision Without Hr’g Attach. at 1 ¶¶ 3-6.

⁴¹ *Id.* at 1 ¶ 7.

⁴² AMS is not required to prove—and I am not required to find—the exact number of unpaid produce sellers or the exact amount Respondent owes each seller. See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1835-36 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2007); see also *Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

⁴³ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998).

⁴⁴ *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016).

PERISHABLE AGRICULTURAL COMMODITIES ACT

It is well settled 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.”⁴⁵

I find no genuine issue of fact in this case that would require a hearing.⁴⁶ Respondent’s Answer provided only non-specific, categorical denials and raised no defenses to the Complaint allegations. Respondent failed to comply with my Exchange Order and failed to submit any evidence that might contradict allegations that Respondent’s transactions resulted in a balance of approximately \$889,233.70 in produce debt.⁴⁷ Moreover, Respondent filed no objections to AMS’s Motion for Decision Without Hearing.⁴⁸ It has been well over 120 days since Respondent was served with the Complaint, yet Respondent has made no suggestion as to whether or when it expects to pay its vendors fully.⁴⁹

Furthermore, the appropriate sanction in a “no-pay” case is license revocation.⁵⁰ A civil penalty is not appropriate in this case because, as previously discussed, “limiting participation in the perishable agricultural

⁴⁵ *H. Schnell & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998).

⁴⁶ See *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (“Common sense suggests the futility of hearings when there is no factual dispute of substance.”).

⁴⁷ As the amount owed is not *de minimis*, I need not determine the exact amount Respondent failed to pay. See *The Square Group, LLC*, 75 Agric. Dec. at 695 (“[E]ven if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total owed more than *de minimis*.”); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question) (“[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine the precise amount owed.”).

⁴⁸ See 7 C.F.R. 1.139 (“If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.”).

⁴⁹ See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

⁵⁰ See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2007); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

Olympic Wholesale Produce, Inc.
77 Agric. Dec. 268

commodities industry to financially responsible persons is one of the primary goals of the PACA,” and it would not be consistent with congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid. Because there can be no debate over the appropriate sanction, a decision may be entered without hearing in this case.⁵¹

Having carefully considered the pleadings, relevant authorities, and arguments of the parties, the following Findings of Fact, Conclusions, and Order are entered without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and the Department’s policy set forth in *Scamcorp*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

Findings of Fact

1. Olympic Wholesale Produce, Inc. is or was a corporation organized and existing under the laws of the state of Illinois. Olympic Wholesale Produce, Inc.’s business and mailing address is or was 2404 South Wolcott, Unit 15, Chicago, Illinois 60608.
2. At all times material herein, Olympic Wholesale Produce, Inc. was licensed and/or operating subject to the provisions of PACA. License number 19740290 was issued to Olympic Wholesale Produce, Inc. on August 21, 1973 and was subject for renewal on August 21, 2018. USDA PACA records⁵² indicate that, as of this date, the license is suspended.

⁵¹ See 7 C.F.R. § 1.139; *Moore Mkt’g Int’l*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1998) (Order Dismissing Appeal) (“It is well-settled under the Department’s sanction policy that the license of a produce dealer who fails to pay more than a *de minimis* amount of produce is revoked, absent a legitimate dispute between the parties as to the amount due.”).

⁵² PACA Search Engine: License No. 19740290, USDA.GOV, <https://apps.ams.usda.gov/pacasearch/> (choose “Specialized Search,” select “License Number” from drop-down box, and search the blank field for “19740290”).

PERISHABLE AGRICULTURAL COMMODITIES ACT

3. During the period December 2016 through May 2017, on or about the dates and in the transactions set forth in Appendix A attached hereto and incorporated by reference, Olympic Wholesale Produce, Inc. failed to make full payment promptly to four sellers for 108 lots of perishable agricultural commodities which Olympic Wholesale Produce, Inc. purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$898,725.70.
4. Olympic Wholesale Produce, Inc. failed to achieve full compliance with PACA within 120 days after the Complaint was served.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Olympic Wholesale Produce, Inc.'s failure to pay promptly with respect to the transactions referenced in Finding of Fact No. 3 above, as set forth in attached Appendix A, constitutes willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)), for which the below Order is issued.
3. Where a dealer has committed repeated, flagrant, and willful PACA violations but has no license to be revoked, the appropriate sanction is publication of the facts and circumstances of the violations.⁵³

ORDER

1. Olympic Wholesale Produce, Inc.'s Request for Oral Hearing is DENIED.
2. AMS's Motion for Decision Without Hearing is GRANTED.

⁵³ See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2007); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

Olympic Wholesale Produce, Inc.
77 Agric. Dec. 268

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

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

**In re: MOZA, LLC.
Docket No. 18-0051.
Initial Decision and Order.
Filed October 17, 2018.**

PACA-D.

Shelton S. Smallwood, Esq., for AMS.
David M. Martin, non-attorney representative for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

**DECISION AND ORDER WITHOUT HEARING
BY REASON OF ADMISSIONS**

Preliminary Statement

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

The Associate Deputy Administrator, Fair Trade Practices Program, PACA Division, Agricultural Marketing Service, United States Department of Agriculture (“Complainant” or “AMS”), initiated this proceeding by filing a complaint on June 20, 2018 alleging that Moza, LLC (“Respondent”) willfully violated the PACA. On September 21, 2018, AMS moved for a decision without hearing based on admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

For the reasons discussed herein, I find that no hearing is warranted in this matter and a decision on the record is appropriate.

Procedural History

AMS initiated this proceeding against by filing a disciplinary complaint on June 20, 2018. The Complaint alleged that, during the period

Moza, LLC
77 Agric. Dec. 283

of July 2016 through June 2017, Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to ten sellers, in the total amount of \$357,144.67, for thirty lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce. AMS requested that an Administrative Law Judge find that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order that the facts and circumstances of Respondent's PACA violations be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

On August 22, 2018, Respondent filed an email communication with the Hearing Clerk's Office stating:

Hello,

I'm responding to a letter that was mailed to me in regards to Moza, LLC. The company has been dissolved and I've been out of the produce industry for quite some time but am aware there is still a balance due and owing please feel free to contact me.

Thank you,
David M. Martin

Based on the context of this email, I infer that the "letter" was a copy of the Complaint sent by the Hearing Clerk's Office.

¹ Given that Respondent's email was submitted in response to that "letter," I will treat the filing as Respondent's Answer to the Complaint.²

On September 21, 2018, AMS filed a Motion for Decision Without Hearing by Reason of Admissions ("Motion for Decision Without

¹ The Hearing Clerk's records reflect that the Complaint, Rules of Practice, and Hearing Clerk's service letter were sent to Respondent via certified mail on June 21, 2018. United States Postal Service records reflect that the documents were delivered on July 31, 2018.

² See 7 C.F.R. §§ 1.136(a),(b).

PERISHABLE AGRICULTURAL COMMODITIES ACT

Hearing”) and proposed Decision Without Hearing Based on Admissions (“Proposed Decision”). Respondent has not filed any objections thereto.³

Authorities

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 this matter. Pursuant to section 1.136, a respondent is required to file an answer within twenty days after service of a complaint.⁴ The Rules of Practice provide that an answer shall “[c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent.”⁵ Moreover, “[t]he failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing.”⁶

Also applicable to the instant proceeding are sections 2(4) and 8(a) of the PACA (7 U.S.C. §§ 499b(4), 499h(a)). Section 2(4) requires merchants and dealers to make “full payment promptly” for perishable agricultural commodities, usually within ten days of acceptance, unless the parties have agreed to different terms prior to the purchase.⁷ Specifically, section 2(4) makes it unlawful “[f]or any commission merchant, dealer, or booker to . . . fail or refuse truly and correctly to account and make full payment promptly in respect of any such transaction in any such commodity to the person with whom such transaction is had.”⁸ Section 8(a) provides:

³ United States Postal Service records reflect that the Motion for Decision Without Hearing and Proposed Decision were sent to Respondent via certified mail and delivered on September 25, 2018. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent’s objections were due by October 15, 2018. No objections have been filed as of this date.

⁴ 7 C.F.R. § 1.136(a).

⁵ 7 C.F.R. § 1.136(b)(1).

⁶ 7 C.F.R. § 1.139.

⁷ See 7 C.F.R. §§ 46.2(aa)(5), (11).

⁸ 7 U.S.C. § 499b(4).

Whenever . . . the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . . *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.*⁹

In cases where a PACA licensee has failed to make full or prompt payment of perishable agricultural commodities, the Department's policy is straightforward:

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in 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 PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. *In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and the respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case.* . . . In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA

⁹ 7 U.S.C. § 499h(a) (emphasis added).

PERISHABLE AGRICULTURAL COMMODITIES ACT

within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “slow-pay” case.¹⁰

Further, “[i]n any ‘no-pay’ case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of PACA, will be revoked.”¹¹

Discussion

I. Respondent Has Admitted the Material Allegations of the Complaint That Establish Violations of the PACA.

The PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases within ten days after the produce is accepted, provided that the parties may elect to use different payment terms so long as the terms are reduced to writing prior to the transaction.¹² In cases where a respondent fails to make full payment promptly and “is not in full compliance 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.”¹³

In its Answer, Respondent did not deny that it had failed to timely pay sellers for perishable agricultural commodities;¹⁴ to the contrary, Respondent acknowledged being “aware there is still a balance due and

¹⁰ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

¹¹ *Id.* at 549.

¹² 7 C.F.R. § 46.2(aa)(5), (11).

¹³ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998). “Full compliance” requires a respondent to have paid all its produce sellers and “have no credit agreements with produce sellers for more than 30 days.” *Id.* at 549.

¹⁴ *See Van Buren Cty. Fruit Exch., Inc.*, 51 Agric. Dec. 733, 740 (U.S.D.A. 1992) (holding that the failure to deny an allegation of the complaint is deemed admitted by virtue of the respondent’s failure to deny the allegation); *Kaplinsky*, 47 Agric. Dec. 613, 617 (U.S.D.A. 1988).

owing.”¹⁵ Accordingly, Respondent is deemed to have admitted the material allegations of the Complaint – those that charge Respondent committed willful violations of the PACA.¹⁶

Furthermore, Respondent has made no assertion that full payment would be made or that full compliance would be achieved pursuant to the policy established in *Scamcorp*. To achieve “full compliance” with the PACA, Respondent would need to pay all its produce sellers and “have no credit agreements with produce sellers for more than 30 days.”¹⁷ As Respondent failed to address whether or when it expects to pay its vendors fully, this is a “no-pay” case.¹⁸

By the statements provided in Respondent’s own Answer – which not only fail to deny the material allegations of the Complaint but explicitly admit to a balance owed – Respondent violated the prompt payment provisions of the PACA.¹⁹ The Judicial Officer has long held that default is appropriate where a respondent has failed to deny the material allegations of the complaint.²⁰ Therefore, a hearing is not necessary in this case, and Respondent shall be found to have willfully, flagrantly, and repeatedly violated the PACA.²¹

¹⁵ Answer at 1.

¹⁶ See 7 C.F.R. § 1.139(c) (“[F]ailure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation[.]”).

¹⁷ *Scamcorp, Inc.*, 57 Agric. Dec. at 549.

¹⁸ See *Kirby Produce, Inc. v. U.S. Dep’t of Agric.*, 256 F.3d 830, 831 (D.C. Cir. 2001); *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005); *Scamcorp, Inc.*, 57 Agric. Dec. at 549.

¹⁹ See Answer at 1 (“The company has been dissolved and I’ve been out of the produce industry for quite some time *but am aware there is still a balance due and owing*[.]”) (emphasis added).

²⁰ See, e.g., *Van Buren Cty. Fruit Exch.*, 51 Agric. Dec. at 740 (holding that the failure to deny an allegation of the complaint is deemed admitted by virtue of the respondent’s failure to deny the allegation); *Kaplinsky*, 47 Agric. Dec. at 617.

²¹ See *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) (“[T]here is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, as long as the violations are not *de minimis*.”); *Moore Mkt’g Int’l*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988) (Order Dismissing Appeal) (“It is well-settled under the

PERISHABLE AGRICULTURAL COMMODITIES ACT

II. Follow-Up Investigation Shows Respondent Owes More than a *De Minimis* Amount to Sellers.

A compliance investigation conducted between September 5, 2018 and September 6, 2018 revealed that nearly all the produce sellers listed in Appendix A to the Complaint²² were still owed substantial balances. The total outstanding balance far exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.²³

During the investigation, Sharlene Evans, Senior Marketing Specialist of the PACA Division, attempted to communicate with representatives for each of the creditors listed in Appendix A to determine the current balances of unpaid and past-due produce debt.²⁴ Ms. Evans was unsuccessful in contacting one creditor.²⁵ Of the remaining creditors, one indicated it had been paid in full while the other eight indicated that, as of the date of the compliance check, all debt listed in Appendix A remained unpaid.²⁶ Collectively, the past-due balance totaled \$333,328.00.²⁷ Respondent has not denied these facts.

Under the policy set forth in *Scamcorp*, this is a “no-pay” case for

Department’s sanction policy that the license of a produce dealer who fails to pay more than a *de minimis* amount of produce is revoked, absent a legitimate dispute between the parties as to the amount due.”); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question) (“[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed.”).

²² Hereinafter “Appendix A,” attached hereto and incorporated by reference.

²³ *Fava & Co.*, 46 Agric. Dec. 79, 81 (Ruling on Certified Question) (U.S.D.A. 1984).

²⁴ Mot. for Decision Without Hr’g Attach. A (“Declaration of Sharlene Evans”) at 1.

²⁵ *Id.* (Lider Fresh Company).

²⁶ *Id.* (Pro Pac Sales, LLC).

²⁷ *See id.* at 1-2 (\$24,165.00 owed to Ivan Big Tree, LLC; \$95,552.72 owed to Stephen Becker, d/b/a First Fruit; \$33,324.00 owed to Fruvermex, LLC GM Brokerage; \$24,516.00 owed to Sandhu Brothers Grower; \$35,591.30 owed to Fillmore-Pirus; \$9,180.00 owed to OBST & Gemuse, LLC; \$14,861.26 owed to Jones & Co., Inc; and \$96,137.72 owed to AMC Direct, Inc.).

which revocation of Respondent's license is warranted.²⁸ Respondent failed to pay promptly for more than a *de minimis* amount of produce, and a hearing is not necessary in this case.²⁹

III. Respondent's PACA Violations Were Repeated, Flagrant, and Willful.

The Secretary of Agriculture may revoke the license of a dealer who is found to have committed repeated, flagrant, and willful violations of the PACA.³⁰ Where a dealer has committed repeated, flagrant, and willful PACA violations but has no license to revoke, the appropriate sanction is publication of the facts and circumstances of the violations.³¹

First, Respondent's violations in this case were repeated. Violations are "repeated" under the PACA when they are committed multiple times, non-simultaneously.³² As Respondent failed to pay at least eight sellers promptly and in full for at least twenty-eight lots of perishable agricultural commodities over an eleventh-month period, its violations were clearly repeated.³³

Respondent's violations were also flagrant. Flagrancy is determined by evaluating the number of violations, total money involved, and length

²⁸ See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998). Revocation is no longer possible as Respondent's PACA license has terminated; therefore, publication is the appropriate sanction. See *infra* note 31 and accompanying text.

²⁹ *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49; *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83 ("[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the amount owed.").

³⁰ See 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); *Norinsberg v. U.S. Dep't of Agric.*, 47 F.3d 1224, 1225 (D.C. Cir. 1995).

³¹ *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2007); *Post & Taback, Inc.*, 62 Agric. Dec. 802, 831 (U.S.D.A. 2003).

³² See *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 592 (6th Cir. 2003); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *Five Star Food Distrbs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

³³ See App'x A; Mot. for Decision Without Hr'g Attach. A ("Declaration of Sharlene Evans").

PERISHABLE AGRICULTURAL COMMODITIES ACT

of time in which the violations occurred.³⁴

The signed declaration by Senior Marketing Specialist Sharlene Evans provides that, at the time of the compliance investigation in September 2018, Respondent owed a total of at least \$333,328.00 to eight of the ten sellers named in Appendix A.³⁵ By failing to pay that money—far more than a *de minimis* amount—to multiple sellers over an eleventh-month period, Respondent has committed flagrant PACA violations.³⁶ Respondent submits no evidence to the contrary.

Lastly, Respondent's violations were willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.³⁷

Given the many transactions, substantial amount of debt, and continuation of violations over an eleven-month period in this case, I find that Respondent's violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of the PACA.³⁸

³⁴ *Five Star Food Distribs*, 56 Agric. Dec. at 895; *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1270 (U.S.D.A. 1996); see *Reese Sales Co. v. Hardin*, 458 F.2d 183, 185 (9th Cir. 1972).

³⁵ See *id.* at 1-2 (\$24,165.00 owed to Ivan Big Tree, LLC; \$95,552.72 owed to Stephen Becker, d/b/a First Fruit; \$33,324.00 owed to Fruvermex, LLC GM Brokerage; \$24,516.00 owed to Sandhu Brothers Grower; \$35,591.30 owed to Fillmore-Pirus; \$9,180.00 owed to OBST & Gemuse, LLC; \$14,861.26 owed to Jones & Co., Inc; and \$96,137.72 owed to AMC Direct, Inc.).

³⁶ AMS is not required to prove—and I am not required to find—the exact number of unpaid produce sellers or the exact amount Respondent owes each seller. See *Baiardi Chain Food Corp.*, 64 Agric. Dec. at 1835-36; see also *Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

³⁷ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998).

³⁸ *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016).

IV. A Decision Without Hearing Is Appropriate.

As previously discussed, section 1.139 of the Rules of Practice allows for a decision without hearing by reason of admissions: “The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing.”³⁹ It is well settled 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.”⁴⁰

I find no genuine issues of fact that would require a hearing in this case; Respondent has admitted the material allegations of the Complaint and filed no objections to AMS’ Motion for Decision Without Hearing.⁴¹ As the amount admittedly owed is not *de minimis*, I need not determine the exact amount Respondent failed to pay.⁴²

Furthermore, the appropriate sanction in a “no-pay” case is license revocation, or where there is no longer any license to revoke—as is the case here—the appropriate sanction in lieu of revocation is a finding of repeated and flagrant PACA violations and publication of the facts and circumstances of the violations.⁴³ A civil penalty is not appropriate in this case because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA,” and it would not be consistent with congressional intent to require a PACA violator to pay the government

³⁹ 7 C.F.R. § 1.139.

⁴⁰ *H. Schnell & Co.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see, e.g., KDLO Enters., Inc.*, 70 Agric. Dec. 1098, 1104 (U.S.D.A. 2011).

⁴¹ *See* 7 C.F.R. § 1.139.

⁴² *See The Square Group, LLC*, 75 Agric. Dec. at 695 (“[E]ven if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total more than *de minimis*.”); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83 (“[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine the precise amount owed.”).

⁴³ *See Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

PERISHABLE AGRICULTURAL COMMODITIES ACT

while produce sellers remain unpaid.⁴⁴ Because there can be no debate over the appropriate sanction, a decision may be entered in this case based upon the admitted facts.⁴⁵

Having carefully considered pleadings, relevant authorities, and arguments of the parties, the following Findings of Fact, Conclusions, and Order are entered without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Moza, LLC is a limited liability company organized and existing under the laws of the State of Texas. Respondent's business address and mailing address is 922 Apple Tree Road, Moscow, Pennsylvania 18444. The Complaint was served on Respondent's 100% owner of record, David M. Martin, whose home address was provided to the Hearing Clerk's Office for service purposes but is withheld from this Decision and Order to protect the owner's personal information and privacy.
2. At all times material herein, Respondent Moza, LLC was licensed and/or operating subject to the provisions of the PACA. License number 20160554 was issued to Respondent on April 6, 2016. On November 4, 2016, the license terminated pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)) due to an unpaid reparation award. On April 6, 2018, the license was terminated 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 Mozza, LLC, during the period of July 2016 through June 2017, on or about the dates and in the transactions set forth in Appendix A, failed to make full payment promptly to at least eight of the ten sellers, in the total amount of \$333,328.00, for twenty-eight lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

⁴⁴ See *Scamcorp, Inc.*, 57 Agric. Dec. at 570-71.

⁴⁵ See 7 C.F.R. § 1.139.

Moza, LLC
77 Agric. Dec. 283

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Moza, LLC willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).
3. Moza, LLC's failure to pay promptly with respect to the transactions referenced in Finding of Fact No. 3 above and set forth in Appendix A constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as described in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)).
4. The total unpaid balance due to produce sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter.⁴⁶
5. As Moza, LLC's PACA license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Moza, LLC's violations.⁴⁷

ORDER

1. AMS' Motion for Decision Without Hearing by Reason of Admissions is GRANTED.
2. A finding is made that Moza, LLC has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).
3. The facts and circumstances of Moza, LLC's PACA violations shall be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

⁴⁶ See *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

⁴⁷ See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2007); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

PERISHABLE AGRICULTURAL COMMODITIES ACT

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

Sandhu Bros. Growers Co. v. R & L Sunset Produce Corp.
77 Agric. Dec. 296

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISION

SANDHU BROS. GROWERS v. R & L SUNSET PRODUCE CORP.
Docket No. E-R-2018-012.
Decision and Order.
Filed November 7, 2018.

PACA-R.

Jurisdiction – Promises to Pay or Notes

Reparation proceedings exist to resolve disputes between members of the produce industry involving perishable agricultural commodities. Where it is evident that the parties intended that their payment agreement would replace the original debt, thereby settling the matter in dispute in the reparation complaint, the complaint must be dismissed.

Complainant, *pro se*.

Respondent, Attard & Associates.

Leslie S. Wowk, Examiner.

Shelton S. Smallwood, Presiding Officer.

Order issued by Bobbie J. McCartney, Judicial Officer.

ORDER OF DISMISSAL

Preliminary Statement

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (“PACA”); and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) (“Rules of Practice”), by filing a timely Complaint. Complainant seeks a reparation award against Respondent in the amount of \$207,525.00 in connection with ten truckloads of yams shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation (“ROI”) prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, admitting liability to Complainant in the amount of \$146,751.00.

Although the amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure

PERISHABLE AGRICULTURAL COMMODITIES ACT

provided in section 47.20 of the Rules of Practice is applicable. (7 C.F.R. § 47.20.) Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Neither party elected to file any additional evidence or a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 301 W. Fulkerth Road, Crows Landing, CA 95313. At the time of the transactions involved herein, Complainant was licensed under the PACA.
2. Respondent is a corporation whose post office address is 1083 Nelson Avenue #1, Bronx, NY 10452. At the time of the transactions involved herein, Respondent was licensed under the PACA.
3. On January 17, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3545 billing Respondent for 963 cartons of jumbo Oriental yams at \$22.00 per carton, or \$21,186.00, and 36 cartons of #2 Oriental yams at \$12.00 per carton, or \$432.00, for a total invoice price of \$21,618.00. (ROI Ex. 003, 012.)
4. On January 24, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3556 billing Respondent for 108 cartons of #2 Oriental yams at \$12.00 per carton, or \$1,296.00, and 918 cartons of jumbo Oriental yams at \$23.00 per carton, or \$21,114.00, for a total invoice price of \$22,410.00. (Compl. Ex. 2, 12.)
5. On February 21, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3601 billing Respondent for 972 cartons of jumbo Oriental yams at \$23.00 per carton, or \$22,356.00, and 54 cartons of commercial Oriental yams at \$12.00 per carton, or \$648.00, for a total invoice price of \$23,004.00. (ROI Ex. 004, 017.)

Sandhu Bros. Growers Co. v. R & L Sunset Produce Corp.
77 Agric. Dec. 296

6. On February 28, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3611 billing Respondent for 162 cartons of jumbo Oriental yams at \$23.00 per carton, for a total invoice price of \$3,726.00. (ROI Ex. 005, 013.)
7. On March 4, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3616 billing Respondent for 918 cartons of jumbo Oriental yams at \$23.00 per carton, or \$21,114.00, and 108 cartons of commercial Oriental yams at \$12.00 per carton, or \$1,296.00, for a total invoice price of \$22,410.00. (ROI Ex. 006, 014.)
8. On March 14, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3636 billing Respondent for 540 cartons of jumbo Oriental yams at \$23.00 per carton, for a total invoice price of \$12,420.00. (ROI Ex. 007, 015.)
9. On April 15, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3717 billing Respondent for 117 cartons of commercial Oriental yams at \$12.00 per carton, or \$1,404.00, and 918 cartons of jumbo Oriental yams at \$23.50 per carton, or \$21,573.00, for a total invoice price of \$22,977.00. (ROI Ex. 008, 019.)
10. On May 1, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3731 billing Respondent for 1,026 cartons of jumbo Oriental yams at \$25.00 per carton, for a total invoice price of \$25,650.00. (ROI Ex. 009, 018.)
11. On May 8, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3737 billing Respondent for 1,026 cartons of jumbo Oriental yams at \$26.50 per carton, for a total invoice price of \$27,189.00. (ROI Ex. 010, 020.)
12. On July 4, 2017, Complainant sold and shipped to Respondent one truckload of Oriental yams. Complainant issued invoice number 3798 billing Respondent for 1,026 cartons of jumbo Oriental yams at \$21.50 per carton, for a total invoice price of \$22,059.00. (ROI Ex. 011, 016.)

PERISHABLE AGRICULTURAL COMMODITIES ACT

13. The informal complaint was filed on October 19, 2017 (ROI Ex. 001), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant submitted its Complaint seeking to recover \$207,525.00 from Respondent for ten truckloads of Oriental yams. (Compl. ¶ 10.) On June 19, 2018, Respondent submitted a sworn Answer wherein it asserted that the amount due Complainant as of that date was \$146,751.00. (Answer ¶ 10.) On September 4, 2018, the Department received notice from Respondent's attorney that the parties entered a settlement agreement. Counsel provided a copy of the settlement agreement, which reads, in pertinent part, as follows:

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties that the above entitled matter is hereby settled pursuant to the following terms and conditions:

1. Sandhu agrees to settle the matter against R & L for \$75,000.00 as a full and final settlement.
2. Based on the terms of the agreement, R & L will deliver to Sandhu at the offices at its offices [sic] at 301 W Fulkerth Rd, Crows Landing, CA 95313 the following checks based upon sufficient funds and payable to "Sandhu Brothers Growers" by the specified dates:

9/1/18-\$7,500.00; 10/1/18-\$7,500.00; 11/1/18-\$7,500.00; 12/1/18-\$7,500.00; 1/1/19-\$7,500.00; 2/1/19-\$7,500.00; 3/1/19-\$7,500.00; 4/1/19-\$7,500.00; 5/1/19-\$7,500.00; 6/1/19-\$7,500.00.
3. Once all payments required by this Stipulation have ben [sic] timely made. [sic] Sandhu will notify the US Department of Agriculture PACA Branch that the matter has been resolved.

Sandhu Bros. Growers Co. v. R & L Sunset Produce Corp.
77 Agric. Dec. 296

The agreement was signed on August 23, 2018, by Luis Fernandez, President of Respondent, and Gurinda Sandhu, President of Complainant.

Reparation proceedings exist to resolve disputes between members of the produce industry involving perishable agricultural commodities. *Oregon Onions, Inc. v. Paiute Frozen Foods Corp.*, 48 Agric. Dec. 1121, 1122 (U.S.D.A. 1989). No dispute exists here. The parties have agreed to extinguish the underlying debt in exchange for Respondent's agreement to pay Complainant the sum of \$75,000.00 in ten payments of \$7,500.00 each between September 1, 2018, and June 1, 2019. As the referenced agreement was made in settlement of PACA Docket No. E-R-2018-012, the Complaint must be dismissed.

1

ORDER

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

—

¹ Compare with *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872, 1873 (U.S.D.A. 1991), where it was held that in the absence of any indication that it was the complainant's intent to extinguish the underlying debt, the payment agreement signed by the parties served merely as conditional payment or as collateral security, or as an acknowledgment or memorandum of the amount ascertained to be due, and did not deprive the Department of jurisdiction under PACA. See also *Fed. Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121 (U.S.D.A. 1965); UNIF. COMMERCIAL CODE § 3-802.

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

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

**In re: PENNY TSIGARIS, d/b/a MANAVI PRODUCE CORP.
Docket No. 17-0217.
Default Decision and Order.
Filed July 3, 2018.**

**In re: C&D PRODUCE OUTLET, INC.
Docket No. 17-0268.
Default Decision and Order.
Filed July 26, 2018.**

**In re: C&D PRODUCE OUTLET SOUTH, INC.
Docket No. 17-0269.
Default Decision and Order.
Filed July 26, 2018.**

**In re: VALLEY PRODUCE CORP.
Docket No. 18-0030.
Default Decision and Order.
Filed August 24, 2018.**

**In re: UNIFIED, LTD., d/b/a PAN AMERICAN BANANA.
Docket No. 18-0035.
Default Decision and Order.
Filed August 24, 2018.**

**In re: TUMI PRODUCE INTERNATIONAL CORP.
Docket No. 18-0039.
Default Decision and Order.
Filed October 9, 2018.**

Default Decisions
77 Agric. Dec. 301 – 302

In re: FARMERS BEST OF NYC, INC.
Docket No. 18-0023.
Default Decision and Order.
Filed November 7, 2018.

In re: SARITA RANCH PROVISSION, INC.
Docket No. 18-0073.
Default Decision and Order.
Filed December 4, 2018.

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

CONSENT DECISIONS

In re: GREENDOM CORPORATION.

Docket No. 18-0014.
Consent Decision and Order.
Filed July 13, 2018.

In re: IMPERIAL FROZEN FOODS OP CO LLC.

Docket No. 18-0044.
Consent Decision and Order.
Filed September 11, 2018.

**In re: MCALLEN PRODUCE, LLC; BRENDA E. EDWARDS; and
CHARLES JEFFREY EDWARDS.**

Docket Nos. 17-0256; 17-0257; 17-0258.
Consent Decision and Order.
Filed September 21, 2018.

In re: FOREST CITY WEINGART PRODUCE CO.

Docket No. 18-0010.
Consent Decision and Order.
Filed September 21, 2018.

In re: NORTHWEST PRODUCE, LLC.

Docket No. 18-0047.
Consent Decision and Order.
Filed October 30, 2018.

—