

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	PACA Docket No. D-03-0014
Hunts Point Tomato Co., Inc.	)	
	)	
Respondent	)	
	)	

**Decision**

In this decision, I find that Respondent Hunts Point Tomato Co., Inc. (Hunts Point) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities. By way of sanction, I order that the facts and circumstances of the violations be published.

**Procedural History**

On March 21, 2003, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service of the U. S. Department of Agriculture issued a complaint against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint alleged that during the period September 2001 through June 2002 Respondent failed to make full payment promptly to 33 sellers in the amount of over \$795,000 for 118 lots of perishable agricultural commodities, and that such failure constituted the commission of willful,

flagrant and repeated violations of the PACA. Respondent filed an answer, denying the commission of any violations, on July 29, 2003.

A hearing was conducted on August 10, 2004 in New York City. Andrew Stanton represented Complainant and Paul Gentile represented Respondent. At the start of the hearing, Respondent moved that the hearing be postponed so that Respondent could attempt to fully pay all of the creditors cited in the complaint. Complainant objected to a postponement at such a late date, and contended that it was entitled to prove its case at the scheduled hearing. I denied the motion to postpone the proceedings.

Complainant called two witnesses and introduced 36 exhibits into evidence (CX 1-CX 36). Respondent called no witnesses and introduced two exhibits into evidence (RX 1-2).

### **Factual Background**

Respondent is a corporation that was licensed under the PACA from July 25, 1979 until its license automatically terminated for failure to pay the required license renewal fee on July 25, 2002. CX 1. Anthony Guerra was Respondent's president, sole director, and sole stockholder since July 2000. CX 1, pp. 7-8. Complainant received at least 10 reparation complaints against Respondent and, in June 2002, initiated an investigation of Respondent's alleged failures to pay, fully and promptly, for perishable agricultural commodities. Tr. 23-24. Wayne Shelby and Timothy Swainhart were assigned to conduct the investigation. *Id.* After sending Respondent a letter notifying it of the initiation of an investigation of these claims, Shelby and Swainhart visited Respondent's place of business on July 24, 2002. Tr. 31. Lenny Guerra, Respondent's office manager, met with Shelby and Swainhart. Guerra identified Respondent's

accounts payable files, each of which was in a separate jacket, which the investigators removed from the premises, copied, and returned. Tr. 33-35. The investigators conducted an exit conference with Frederick, Anthony and Lenny Guerra on August 7, 2002, at Respondent's place of business, at which time they handed a Notice of Investigation to Anthony Guerra. Tr. 35-36. (Lenny Guerra had refused to accept the Notice on July 24, Tr. 35.)

The accounts payable files indicated that between September 2001 and June 2002, Respondent had unpaid invoices for over \$795,000 for 118 lots of perishable agricultural commodities purchased from 33 sellers in the course of interstate commerce. CX 3-35, Tr. 37-49. Anthony Guerra admitted that over a million dollars in produce had not been paid for by Respondent, Tr. 46, but in the absence of evidence that several transactions were in the course of interstate commerce, Complainant excluded those apparently intra-state transactions from the complaint, resulting in the \$795,000 amount actually alleged to be in violation. Tr. 47. Anthony Guerra said that the business had been having difficulties since September 11, 2001. Tr. 46-47.

Shortly before the hearing, Josephine Jenkins, a PACA Branch marketing specialist, made follow-up telephone calls to attempt to determine whether the largest creditors of Respondent had been paid. Tr. 73. She determined, by speaking with Lawrence Meuers, an attorney representing a number of creditors in a PACA trust action, that eight of the creditors, who the complaint alleged were owed over \$321,000, had been paid over \$275,000, and were still owed over \$45,000. She also contacted two of the other creditors listed in the complaint and determined that they had not been paid any of the over \$68,000 they were owed. CX 36, Tr. 77.

On May 31, 2002, months after the commencement of Complainant's investigation but nearly 10 months before the filing of the instant complaint, a PACA Trust complaint was filed against Respondent in the United States District Court for the Southern District in New York pursuant to 7 U.S.C. § 499e (c). On that day, Judge Casey issued a temporary restraining order "enjoining and restraining" Respondent "from dissipating, paying, transferring assigning any and all assets." RX-2. On October 2, 2002, Judge McKenna issued a Preliminary Injunction and Order, superseding Judge Casey's TRO, on behalf of 16 plaintiff companies. RX 1. The Order recognized that Respondent was in possession of 100% of the assets at issue, and set up a PACA Trust Account into which all of Respondents assets would be deposited, and appointed an Escrow Agent, and set up a procedure for establishing and paying claims.

On August 6, 2004, the Friday before the hearing, Counsel for Respondent suggested to Counsel for Complainant that the hearing should be postponed so that Respondent could fully pay all its creditors. At the hearing, Respondent suggested that the hearing be postponed so that the creditors could be paid. Tr. 5-7. No evidence was introduced suggesting that Respondent had petitioned the Southern District to unfreeze Respondent's assets so that any of the creditors could be paid, and no one testified as to how long the process would take, or why the suggestion was made on the eve of the hearing.

### **Statutory and Regulatory Background**

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other

things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b 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 any 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 499e(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 chapter.

7 U.S.C. § 499a(b) 4.

When the Secretary of Agriculture determines that a “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.

The regulations define “full payment promptly” and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

(aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: Provided, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

7 U.S.C. § 499e (c) allows unpaid sellers of perishable commodities to seek the establishment of a trust “for the benefit of all unpaid suppliers or sellers of such commodities . . . until full payment of the sums owing in connection with such transactions has been received.”

### **Findings of Fact**

1. Hunts Point Tomato Co., Inc. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 791770 from July 25, 1979 until the license terminated on July 25, 2002, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after it received at least 10 complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist, and Timothy Swainhart, Assistant Regional Director of Complainant’s North Brunswick office, went to Respondent’s place of business on July 24, 2002. They met with Lenny Guerra, Respondent’s office manager, who identified and provided for copying Respondent’s accounts payable files.

3. The files provided Complainant indicated that, between September 2001 and June 2002, Respondent had purchased and not paid for 118 lots of perishable agricultural commodities from 33 sellers in the course of interstate or foreign commerce, for a total of over \$795,000.

4. At an exit conference on August 7, 2002, Respondent's president and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than a million dollars for produce purchased and received, some of which was not in interstate or foreign commerce.

5. On May 31, 2002 a PACA Trust proceeding under 7 U.S.C. § 499e (c) was instituted against Respondent. On that day, a temporary restraining order was issued against Respondent, superseded on September 30, 2002 by a preliminary injunction and order, requiring Respondent to put all its assets into a PACA Trust, and preventing it from otherwise distributing any of its assets. The injunction and order were still in effect at the time of the instant hearing.

### **Discussion and Conclusions of Law**

**Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 33 sellers of produce listed in the complaint.** Respondent's failure to pay the 33 sellers listed in the complaint fully and in a timely manner is essentially undisputed. The 11<sup>th</sup> hour offer of Respondent to pay the 33 sellers in full does not change the nature of this case to a slow-pay situation. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful,

flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

**1. Respondent failed to timely pay any of the 33 sellers listed in the complaint the initial agreed upon purchase price for perishable agricultural commodities.** There is no legitimate dispute that Respondent failed to pay 33 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Respondent's own payable files, which were inspected and copied by Complainant's representatives, indicated that at the time of the inspection, Respondent had purchased, and not paid for, 118 lots of perishable agricultural commodities from 33 sellers, in the course of interstate or foreign commerce, and in the amount of over \$795,000.

Subsequent to the initial investigation, approximately 16 of Respondent's creditors joined in a PACA trust action filed under 7 U.S.C. § 499e (c) (3). In a preliminary injunction and order issuing out of that action, the Escrow Agent appointed by the court was directed to pay off the undisputed valid PACA claims against Respondent at 95 cents on the dollar, subject to availability of funds. No evidence was submitted as to how many creditors were actually paid. Complainant submitted, through the testimony of Josephine Jenkins, evidence that of the ten creditors she had contacted either directly or through their counsel, approximately a week before the hearing, none of them had been paid either in full or on time. In particular, she was notified that of eight creditors represented by Lawrence Meuers, all had been partially compensated by the PACA trust. These eight creditors had been paid \$275,338 out of the \$321,082 owed to them, which represents a payout of approximately 85.7%, significantly under the 95%



authorized in the PACA trust action. Two other companies contacted by Ms. Jenkins indicated that they had not been paid any of the \$68,302 owed to them.

There is no evidence in this record that any of the 33 creditors listed in the complaint have been paid in full.

**2. The court order in the PACA Trust case does not excuse Respondent's failure to pay.** While Judge McKenna enjoined Respondent from disbursing any of its assets other than through the actions of the court-appointed escrow agent operating the PACA Trust, the injunction does not act as a relief from Respondent's "no-pay" status. Since the PACA Trust action arose directly from Respondent's failure to pay its creditors in the first place, to allow it to act as a protection against no-pay sanctions would be counter to the clear purposes of the Act. While Respondent protests that it has the assets to pay all creditors fully, the record clearly indicates that as of the hearing date creditors were only being paid off at 85 cents on the dollar, rather than the 95 cents on the dollar authorized in the PACA Trust action. This is hardly consistent with Respondent's contention that it has sufficient assets to pay all creditors in full. Postponing a hearing based on Respondent's contention that it could now pay all creditors in full, where there is no evidence that Respondent petitioned Judge McKenna to allow such payment, and there is no affirmative evidence that such financial capability actually exists, is unwarranted.

Oddly, Respondent implies in its brief (p. 5) that *Complainant* had some sort of an obligation to "attempt to have Judge McKenna modify his order." I see no basis for this suggestion. Clearly, if Respondent had the funds to fully pay all creditors, such funds would have been required to be deposited in the PACA Trust account established in the

federal district court case. Presumably, if the funds existed, all creditors would have been paid—a circumstance that undisputedly has not occurred here.

**3. Respondent’s failure to pay creditors renders this matter a “no-pay” case.**

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is In re Scamcorp, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in Scamcorp that he was distinguishing “slow-pay” cases, where generally only civil penalties would be assessed, from “no-pay” cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve “full compliance” with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a “no-pay” case. *Id.*, at 548-9.

Although Respondent has “offered” to settle this case by paying all creditors in full, the court order issued by Judge McKenna, which Respondent has not sought to lift, indicates that Respondent’s offer was made without any legitimate basis and is quite speculative, to say the least. While it is unusual to even hear the discussion of settlement offers in open court, Complainant was under no obligation to accept Respondent’s offer, particularly when there is no indication that the offer could even be honored, given Judge McKenna’s preliminary injunction. Given the uncertainty as to whether Respondent’s offer to pay in full could even be effectuated, Respondent’s contention in its brief (p. 6) that the failure of Complainant to accept its offer was “arbitrary, capricious and an abuse of discretion” has no basis.

Further, rescheduling a hearing to allow a settlement of a PACA case is inconsistent with the Agency’s case law. In Scamcorp, the Judicial Officer held:

Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R. § 1.141(b)) that "the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties."

Scamcorp, supra, at 548.

**4. Respondent's Violations are Willful, Flagrant and Repeated.** In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. In re. Frank Tambone, Inc., 53 Agric. Dec. 703 ,714-15 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, from September 2001 through June 2002, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA," Id., and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. In re. N. Pugatch, Inc., 55 Agric. Dec. 581 (1995), Scamcorp, supra. The number of sellers and transactions involved in Pugatch and Scamcorp were similar to those involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 9-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 118 occurrences.

**5. Given the nature and number of the violations, a significant penalty is warranted.** Normally, under the Scamcorp rule, license revocation would be one aspect of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Hunts Point Tomato Co, Inc., has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.  
this     day of April, 2005

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**MARC R. HILLSON**  
Chief Administrative Law Judge