

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-08-0036
)	
Rosenthal & Klein, Inc.,)	
)	Decision and Order
Respondent)	by Reason of Default

1. This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently “the PACA” or “the Act”), by a Complaint filed on December 19, 2007 (the Complainant’s signature date is corrected to “this 18th day of December 2007” as was requested in the Erratum filed January 2, 2008).
2. The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”), is represented by Charles L. Kendall, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave, SW, Washington DC 20250-1413.
3. The Complaint alleged, among other things, that during July 19, 2005, through October 26, 2005, the Respondent, Rosenthal & Klein, Inc. (herein frequently “Rosenthal & Klein” or “Respondent”), failed to make full payment promptly to 16 sellers of the agreed purchase

prices, or balances thereof, in the total amount of \$927,459.76 for 208 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. The Complaint requested that the Administrative Law Judge find that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances of the violations be published.

5. A copy of the Complaint was mailed, by certified mail, together with the Hearing Clerk's Notice Letter and a copy of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151; hereinafter "Rules of Practice"), to Rosenthal & Klein's attorney by certified mail on December 19, 2007, and received and signed for on December 21, 2007. No answer to the Complaint has been received. The time for filing an answer expired on January 10, 2008.

6. AMS's Motion for a Decision Without Hearing by Reason of Default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Rosenthal & Klein's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

7. Rosenthal & Klein, Inc. is a corporation organized and existing under the laws of the State of New York. Rosenthal & Klein ceased operating on October 1, 2005. Rosenthal & Klein's business address was 123-125 NYC Term. Mkt., Bronx, New York 10474.

Rosenthal & Klein is represented by Leslie S. Barr, Esq., Windels Marx Lane & Mittendorf, LLP, 156 West 56th Street, New York, New York 10019.

8. At all times material to this Decision, Rosenthal & Klein was licensed under the PACA. License number 1977-1984 was issued to Rosenthal & Klein on September 28, 1977. This license terminated on September 28, 2006, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Rosenthal & Klein failed to pay the required annual renewal fee.

9. As more fully set forth in paragraph III of the Complaint, including Attachment A to the Complaint, Rosenthal & Klein, during July 19, 2005, through October 26, 2005, failed to make full payment promptly to 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$927,459.76 for 208 lots of perishable agricultural commodities which Rosenthal & Klein purchased, received, and accepted in interstate and/or foreign commerce.

10. On October 12, 2005, Rosenthal & Klein filed for relief 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 New York (Manhattan). This Petition was designated Case No. 05-45649. Rosenthal & Klein admitted in its Bankruptcy schedules, filed November 4, 2005, that all 16 of the sellers listed Attachment A to the Complaint herein, hold unsecured claims that are equal to or greater than the amounts alleged in said Attachment A, for a total of

\$942,027.42. By Order dated October 12, 2006, Rosenthal & Klein (the debtor) was authorized to make final distributions to holders of allowed PACA trust claims. Rosenthal & Klein, had, when the Complaint herein was filed, made trust distribution payments totaling \$572,552.59 to seven (7) of the 16 produce creditors listed in said Attachment A, leaving a balance due and unpaid of \$354,907.17.

Conclusions

11. The Secretary of Agriculture has jurisdiction.

12. Rosenthal & Klein, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$927,459.76 for 208 lots of fruits and vegetables, all being perishable agricultural commodities, which Rosenthal & Klein purchased, received, and accepted in interstate and/or foreign commerce.

Order

13. Rosenthal & Klein, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

14. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

15. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after

service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.
this 21st day of February 2008

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Avenue, SW
Washington, DC 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

....

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of

objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the 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. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145