

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) **[PACA-D]**
) **Docket No. 10-0250**
 Meza Sierra Enterprises, Inc.)
) **Decision and Order**
 Respondent) **on the Written Record**

Appearances:

Shelton S. Smallwood, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant (AMS);¹ and

Ricardo A. Rodriguez, Esq., McAllen, TX, for the Respondent (Meza Sierra).²

Decision Summary

1. Respondent Meza Sierra failed, during November 2008 through January 2009, to make full payment promptly in the amount of \$215,385.00 to produce seller Kingdom Fresh Produce, Inc., of Donna, Texas, for perishable agricultural commodities (tomatoes) that Meza Sierra purchased, received, and accepted in interstate commerce. Meza Sierra thereby committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (“PACA”) (7 U.S.C. § 499b(4)). The appropriate remedy is

¹ The Complainant (herein frequently “Complainant” or “AMS”) is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

² The Respondent (herein frequently “Respondent” or “Meza Sierra”) is Meza Sierra Enterprises, Inc. a corporation registered in Texas.

revocation of Meza Sierra's PACA license. If Meza Sierra's PACA license is no longer active, the facts and circumstances of the violations shall be published.

Parties and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant").
3. AMS is represented by Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, D.C. 20250-1417. AMS was previously represented by Brian P. Sylvester, Esq., with the same Office of the General Counsel.
4. The Respondent is Meza Sierra Enterprises, Inc., a corporation registered in the State of Texas (herein frequently "Meza Sierra" or "Respondent"). Meza Sierra's business address was in McAllen, Texas. Meza Sierra can be contacted through its attorney, Ricardo A. Rodriguez, Esq. *See* next paragraph.
5. Meza Sierra is represented by Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.
6. The Complaint, filed on April 26, 2010, alleges that Meza Sierra committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (herein frequently the "PACA" or the "Act") (7 U.S.C. § 499b(4)), and the regulations issued thereunder.

7. Meza Sierra, through Ricardo A. Rodriguez, Esq., filed its Answer on May 18, 2010. Meza Sierra objected to subject matter jurisdiction and denied all allegations contained in the Complaint. Affirmatively, Meza Sierra asserted that it disputes the claims of Kingdom Fresh Produce, Inc. and the claims of Grande Produce LTD, Co.; and that no violation of § 2(4) of the PACA [7 U.S.C. § 499b(4)] has been proven in any court of law with adjudicating authority with due process protection.

8. The case was scheduled for hearing in McAllen, Texas, originally for May 2011, and then for August 2011. Each party, for entirely different reasons, was reluctant to go to hearing. With the passage of time and events, I conclude that now a decision based on the written record provides due process to all parties and will suffice; consequently, no in-person (face-to-face) hearing is required.

Discussion

9. AMS filed, on July 20, 2011, a Motion entitled “Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued.” *See* 7 C.F.R. § 1.139. AMS filed, on August 10, 2011, two documents entitled “Complainant’s Amended Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.” Meza Sierra filed, on August 11, 2011, a “Response to Complainant’s Motion Requesting Order From Court Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.” AMS’s Reply was filed on September 13, 2011.

10. After my Second Ruling, AMS filed, on December 1, 2011, a Motion entitled “Complainant’s Motion for Reconsideration of Second Ruling Concerning Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued.” Meza Sierra filed, on December 21, 2011, a “Response to Complainant’s Motion for Reconsideration of Second Ruling Concerning Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.”

11. Again, I ruled. AMS filed, on January 18, 2012, a “Response to Ruling.”

12. What I have determined to do, is to dismiss, with prejudice, that portion of the case pertaining to the claims of Grande Produce LTD, Co., as to only this proceeding. I do that because Meza Sierra contests them and would be entitled to be heard.

13. With regard to that portion of the case pertaining to the claims of Kingdom Fresh Produce, Inc., the written record contains what is needed to decide this case. The claims of Kingdom Fresh Produce, Inc., involving the same tomatoes at issue here, have been fully litigated in the state courts of Texas. By taking official notice of certain documents from that state court litigation, I am able to issue a decision based on the written record that I am confident provides due process to all parties.

14. Nothing further is required of either party. Whether either of the produce sellers in Appendix A attached to the Complaint is already paid-in-full or will eventually be paid-in-full, or will eventually be paid nothing, my decision here would not change. Upon careful

consideration and reconsideration, I issue this Decision and Order on the Written Record without hearing or further procedure.

15. Section 2(4) of the PACA requires licensed produce dealers to make “full payment promptly” for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4). *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining “full payment promptly”). 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.” *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998). *See also, In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997).

16. Meza Sierra, a PACA licensee, failed to make prompt payment for produce and failed to be in compliance with the PACA within 120 days of having been served with the Complaint. Meza Sierra’s failure to achieve full compliance with the PACA within 120 days of having been served with the Complaint makes this a “no-pay” case. *See In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (1998).

17. The time within which to achieve full compliance with the PACA, to avoid a “no-pay” classification, expired during September 2010 or earlier. The appropriate sanction in a “no-pay” case where the violations are flagrant and repeated is license revocation. *See In re: Scamcorp, Inc., id.* A civil penalty is not appropriate 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 the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id.*, at 570-71.

18. Meza Sierra intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *See In re: Scamcorp, Inc.*, at 553. *See also In re: KDLO Enterprises, Inc.*, 70 Agric. Dec. ____ (2011), which can be found online at <http://www.nationalaglawcenter.org/assets/decisions/KDLO.pdf>, especially regarding the terms “repeated” “flagrant” and “willful.” Meza Sierra’s violations are “repeated” because repeated means more than one. Meza Sierra’s violations are “flagrant” because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997). Meza Sierra’s violations of the PACA are also “willful” as that term is used in the Administrative Procedure Act. 5 U.S.C. § 558(c). A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); and *Finer Foods Sales Co. v. Block*, 708 F. 2d 774, 777-78 (D.C. Cir. 1983). Willfulness is reflected by Meza Sierra’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 Meza Sierra committed the violations and the number and dollar amount of Meza Sierra’s violative transactions.

Findings of Fact

19. Meza Sierra Enterprises, Inc. is a corporation registered in the State of Texas.
20. The mailing address of Meza Sierra is in care of its attorney, Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.
21. Pursuant to the licensing provisions of the PACA, Meza Sierra was issued license number 20070589 on March 15, 2007.
22. Official notice is taken of certain documents from Cause No. C-1990-09-A in the District Court, 92nd Judicial District, Hidalgo County, Texas, a true and correct copy of which are attached (Attachment A) to AMS's Response to Ruling filed January 18, 2012. These documents establish, among other things, that the tomatoes from Kingdom Fresh Produce, Inc. that are the subject matter of that case, are the same tomatoes from Kingdom Fresh Produce, Inc. as are identified on Appendix A attached to the Complaint in this case. Official notice is taken also of the "Final Summary Judgment" from Cause No. C-1990-09-A, which is listed on AMS's "Complainant's Exhibits" filed May 24, 2011; **AMS shall search the record file and within 10 days after service of this Decision file identification of the location within the record file of the true and correct copy thereof, OR file a true and correct copy thereof.**
23. Official notice is taken of certain documents from Cause No. C-1990-09-A in the District Court, 92nd Judicial District, Hidalgo County, Texas, a true and correct copy of which accompanied Meza Sierra's "Respondent's Proposed Exhibits" filed July 11, 2011, and are marked RX 1 and RX 2.

24. Official notice is taken of certain documents from case number 13-11-00184-CV from the Court of Appeals, Thirteenth District of Texas, a true and correct copy of which are attached (Attachment A) to AMS's "Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued," filed December 1, 2011. These documents establish that Meza Sierra was not successful (untimely) in appealing the judgment entered against it on April 19, 2010, in favor of Kingdom Fresh Produce, Inc., in Cause No. C-1990-09-A.

25. The documents of which I have taken official notice establish, among other things, that Meza Sierra Enterprises, Inc., did not achieve full compliance with the PACA before the end of September 2010 (within 120 days of having been served with the Complaint), thereby establishing this is a "no-pay" case.

26. The documents of which I have taken official notice establish further that Meza Sierra Enterprises, Inc., during November 2008 through January 2009, failed to make full payment promptly of the purchase prices, or balances thereof, to Kingdom Fresh Produce, Inc., for \$215,385.00 in fruits and vegetables (tomatoes), all being perishable agricultural commodities, that Meza Sierra purchased, received, and accepted in the course of interstate commerce. *See* section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusions

27. The Secretary of Agriculture has jurisdiction over Respondent Meza Sierra and the subject matter involved herein.

28. The Administrative Law Judge is authorized to decide this case, and the Rules of Practice are applicable (Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes, 7 C.F.R. § 1.130 *et seq.*). Meza Sierra brought to my attention that the Rules of Practice specify certain statutory provisions under the Perishable Agricultural Commodities Act, 1930, as amended, to which the Rules of Practice are applicable, and that section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not one of them. *See* 7 C.F.R. § 1.131(a). Nevertheless, under Delegations of Authority, specifically, 7 C.F.R. § 2.27(a), I am designated to hold hearings and perform related duties under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), and I will apply the Rules of Practice as if 7 U.S.C. § 499b(4) were specified in 7 C.F.R. § 1.131(a) for two reasons:

- (a) other PACA provisions are found therein, especially 7 U.S.C. § 499h(a), which specifies the Secretary's authority when violations of 7 U.S.C. § 499b (Unfair conduct) have been determined to have occurred; and
- (b) the provisions of 7 C.F.R. § 1.131(b)(6) state that the Rules of Practice shall also be applicable to:

- (6) Other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

29. That portion of the case pertaining to the claims of Grande Produce LTD, Co., I have determined to dismiss, with prejudice. As to proof of those claims, Meza Sierra would be entitled to an in-person hearing during which witnesses, subject to cross-examination, would

be expected to present evidence, including laying a proper foundation for the admission of documents. Holding such an in-person hearing would increase time and money expenditures on this case for everyone involved, and the outcome of such an in-person hearing would not significantly change my conclusion.

30. Based on that portion of the case pertaining to the claims of Kingdom Fresh Produce, Inc., I have determined to issue a decision based on the written record by taking official notice of certain documents from state court litigation involving the same tomatoes that are the subject here.

31. Respondent Meza Sierra willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during November 2008 through January 2009, by failing to make full payment promptly of the purchase prices, or balances thereof, for \$215,385.00 in fruits and vegetables (tomatoes), all being perishable agricultural commodities, that Meza Sierra purchased, received, and accepted in the course of interstate commerce.

Order

32. The PACA license of Meza Sierra Enterprises, Inc., is revoked, because Meza Sierra committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

33. If Meza Sierra's PACA license is no longer active, Meza Sierra is found to have committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4), and the facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

34. That portion of the case pertaining to the claims of Grande Produce LTD, Co., is DISMISSED, with prejudice, as to only this proceeding.

35. AMS shall search the record file and within 10 days after service of this Decision shall file identification of the location within the record file of the true and correct copy of the “Final Summary Judgment” from Cause No. C-1990-09-A; OR shall file a true and correct copy thereof.

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

Finality

37. 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 on the Written Record shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 26th day of April 2012

s/ Jill S. Clifton

Jill S. Clifton
Administrative Law Judge

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