

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
)	
J&R Fresh Produce, LLC,)	PACA-D Docket No. 17-0224
)	
Respondent.)	

**DECISION AND ORDER WITHOUT HEARING
BASED ON RESPONDENT’S ADMISSIONS**

Appearances:

Christopher P. Young, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Agricultural Marketing Service (“AMS”); and

Shaheed Jimmy Ackbar for the Respondent, J&R Fresh Produce, LLC.

Before Administrative Law Judge Channing D. Strother.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“PACA”), and the regulations promulgated thereunder (7 C.F.R. Part 46) (“Regulations”). The proceeding was instituted by a complaint (“Complaint”) filed on February 23, 2017, by the Associate Deputy Administrator of the Agricultural Marketing Service, Specialty Crops Program, PACA Division (“Complainant”) against J&R Fresh Produce, LLC (“Respondent”).

The Complaint alleges that, during the period August 2015 through June 2016, Respondent failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$281,225.30 for thirty lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce. The Complaint requested that I find that Respondent willfully, flagrantly, and repeatedly violated

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and issue an order revoking Respondent's PACA license.¹

On March 14, 2017, Respondent requested a twenty-day extension to file an answer, which I granted by order dated March 15, 2017. On April 4, 2017, Respondent filed with the Hearing Clerk's Office, via email, an answer ("Answer"), but, as discussed below, that Answer failed to deny the material allegations of the Complaint.²

On April 19, 2017, I issued an "Order Setting Deadlines for Submissions," wherein I: (1) directed Complainant to exchange with Respondent its proposed hearing exhibits and to file with the Hearing Clerk its exhibit and witness list by June 19, 2017; and (2) directed Respondent to exchange with Complainant its proposed hearing exhibits and to file with the Hearing Clerk its exhibit and witness list by August 18, 2017. Complainant filed its witness and exhibit list with the Hearing Clerk's Office on August 18, 2017. As of this date, Respondent has not filed its list.

On October 31, 2017, Complainant filed a "Motion for Decision Without Hearing and Supporting Memorandum" ("Motion") and a proposed decision based upon the admissions provided in Respondent's Answer. Respondent filed a response to the Motion with the Hearing Clerk's Office via email on November 3, 2017 ("Answer to Motion").

Based upon Complainant's Motion and Respondent's failure to deny the material allegations of the Complaint, I find that circumstances exist that obviate the need for a hearing

¹ Following the filing of the Complaint, Respondent's license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)) on April 15, 2017, when Respondent failed to pay the required annual fee. Complainant subsequently requested, by motion, that an order be issued publishing the facts and circumstances of Respondent's PACA violations pursuant to Section 8(a) of the PACA (7 U.S.C. § 499h(a)).

² See Answer at 1.

and warrant the issuance of a decision without hearing in this case. Accordingly, this Decision and Order is issued pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (“Rules of Practice”), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. 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.” (7 C.F.R. § 1.139). 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.”³

Respondent has failed to deny the allegations that it failed to pay fully the past-due produce debt identified in the Complaint, and a recent follow-up investigation has shown that the amounts alleged as unpaid in the Complaint are still owed. Respondent cannot show full compliance with the PACA within 120 days after having been served with the Complaint. Therefore, I find that no hearing is warranted in this matter.⁴

³ 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); Kirby Produce Co., 58 Agric. Dec. 1011, 1027 (U.S.D.A. 1999).

⁴ *See id.*

1. Respondent Failed to Deny the Allegations of the Complaint and Has Admitted Liability.

Pursuant to the PACA, “it is unlawful for buyers of produce to fail to make prompt payment for a shipment of produce.”⁵ 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.⁶ In cases where a respondent has failed to make full payment promptly and “admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served . . . or the date of hearing, whichever occurs first, the [matter] will be treated as a no-pay case.”⁷

In its Answer, Respondent did not deny that it had failed to timely pay seven sellers for thirty lots perishable agricultural commodities.⁸ The Answer states:

Ayco farms>>> These sales were all price after sale. documents showed that product was mediocre and the market was flooded.. vendor agent requested to sell for whatever..

Tindall cattle>> Information provided to show the farmer did not use proper harvest techniques resulting in poor quality..

Agrifact>>>information provided to show vendor did not ship the quality as requested...

Supreme Harvest>>>information showed rejected load with an inspection... I was pressured to help the vendor which I did, but could not recover any monies from the poor quality product..⁹

⁵ Biardi Food Chain v. United States, 482 F.3d 238, 241 (3rd Cir. 2007).

⁶ 7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11).

⁷ Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

⁸ See Answer at 1.

⁹ *Id.*

First, Respondent's Answer addresses only four out of the seven sellers listed in Appendix A to the Complaint. Respondent makes no mention of the seller Seminole Produce Distributing, Inc., owed \$15,600.00; of the seller EA Parker & Sons LLC, d/b/a Parker Farms, owed \$50,101.80; or of the seller La Familia Produce, owed \$90,391.50. These three sellers, whom Respondent fails to address in the Answer, are collectively owed a total in past-due and unpaid produce debt of \$156,093.30. Respondent's failure to address these sellers or the debt owed to them constitutes an admission that Respondent violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay those sellers promptly for that debt.¹⁰

Second, as to the four sellers mentioned in the Answer, Respondent offers unsubstantiated explanations as to why it believes that its failure to make full payment promptly to these sellers was somehow appropriate.¹¹ Such explanations do not satisfy the specific requirements for an answer under Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which requires Respondent to "clearly admit, deny, or explain"¹² the allegations that it failed to pay for produce in accordance with Section 2(4) of the PACA (7 U.S.C. § 499b(4)).¹³ Moreover,

¹⁰ See 7 C.F.R. 1.136(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...."); Van Buren Cnty. Fruit Exch., Inc. 51 Agric. Dec. 733, 740 (U.S.D.A. 1992).

¹¹ See Answer at 1.

¹² 7 C.F.R. § 1.136(b) (The answer shall: (1) *Clearly admit, deny, or explain each of the allegations of the Complaint* and shall clearly set forth any defense asserted by the respondent; or (2) State that the respondent admits all the facts alleged in the complaint; or (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.") (emphasis added).

¹³ See Blaser, 45 Agric. Dec. 1727, 1728 (U.S.D.A. 1986) (holding that an answer which admits one allegation of the complaint and fails to respond to the other allegations constitutes an admission of all allegations in the complaint); Stolfus, 44 Agric. Dec. 1161, 1162 (U.S.D.A. 1985) (holding that an answer stating "no violation was intended" does not deny or otherwise respond to the complaint and is deemed an admission of the allegations of the complaint under 7

these explanations are not relevant to whether Respondent actually violated Section 2(4) of the PACA. As the Judicial Officer has previously held, “the Act calls for payment -- not excuses,”¹⁴ and the damage to the produce industry is the same regardless of the reasons underlying Respondent’s payment violations.¹⁵

Moreover, Respondent’s explanations in its Answer to the Complaint do not provide an acceptable defense to liability in a case such as this, wherein a complaint has been filed alleging violation of Section 2(4) of the PACA due to the failure to make full payment promptly. The Judicial Officer has ruled:

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times.... In any PACA disciplinary proceeding in which it is shown 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 *or will* achieve full compliance within 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 the

C.F.R. § 1.136(c)); Lucas, 43 Agric. Dec. 1721, 1722, 1725 (U.S.D.A. 1984) (where an answer which raised concerns that were extraneous to the complaint failed to admit, deny, or otherwise respond to allegations of the complaint and was deemed an admission of the complaint allegations).

¹⁴ The Caito Produce Co., 48 Agric. Dec. 602, 615 (U.S.D.A. 1989).

¹⁵ See Great Am. Veal, Inc. 48 Agric. Dec. 182, 211 (U.S.D.A. 1989) (comparing the failure-to-pay provisions under the Packers and Stockyards Act to the failure-to-pay provisions under the PACA); The Caito Produce Co., 48 Agric. Dec. at 614 (“Even though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent’s failure to pay from being considered flagrant or willful.”).

hearing, whichever occurs first, the PACA case will be treated as a “slow-pay” case.¹⁶

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 the PACA, will be revoked.”¹⁷ The Judicial Officer has also stated that “full compliance” requires “not only that a respondent have paid all produce sellers in accordance with the PACA, but also that a respondent have no credit agreements with produce sellers for more than 30 days.”¹⁸

Respondent has made no assertion—in either its Answer to the Complaint or its Response to Complainant’s Motion—that full payment will be made or full compliance will be achieved pursuant to the policy established in *Scamcorp*.¹⁹ By the statements provided in Respondent’s own Answer to the Complaint and Answer to the Motion—which do not clearly deny or respond to all material allegations of the Complaint—Respondent has violated the prompt payment provisions of the PACA. 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

¹⁶ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (emphasis added).

¹⁷ *Id.* at 549 n.13.

¹⁸ *Id.* at 549.

¹⁹ *See, supra*, n 9 and accompanying text..

²⁰ *See, e.g.*, *Van Buren Cnty. 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).

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

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

A follow-up compliance investigation revealed that, as of September 26, 2017, the sellers listed in Appendix A to the Complaint were still owed substantial balances. The outstanding balance due exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.²²

During the follow-up investigation, AMS Marketing Specialist Todd Gilbert contacted representatives of each seller listed in Appendix A to the Complaint, discussed in the amounts listed as owed in Appendix A to the Complaint, and was told the current balance of the debt owed past due and unpaid to each seller as of the date of the compliance investigation.²³ Mr. Gilbert learned that, as of the date of his compliance investigation, out of the \$281,225.30 alleged as owed in the Complaint, the entire balance of \$281,255.30 was still owed to the seven produce sellers listed in Appendix A.²⁴ Respondent does not deny that this is true in its November 3, 2017 Answer to the Motion.

Under the policy set forth in *Scamcorp*,²⁵ this is a “no-pay” case for which revocation of Respondent’s license is warranted.²⁶ Respondent failed to pay promptly for more than a *de*

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 (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 *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984).

²³ Mot. for Decision Without Hr’g, Attachment at 1 ¶¶ 2-9.

²⁴ *Id.* at 2 ¶ 10.

²⁵ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998); *see supra* note 9 and accompanying text.

²⁶ *See Scamcorp, Inc.*, 57 Agric. Dec. at 548-49. Revocation is no longer possible as Respondent’s PACA license has terminated; therefore, publication is the appropriate sanction. *See supra* note 1; *Post & Taback, Inc.*, 62 Agric. Dec. 802, 831 (U.S.D.A. 2003).

minimis amount of produce.²⁷ A hearing is not necessary in this case.²⁸

3. Respondent's Violations Were Flagrant, Repeated, and Willful.

It is plain that Respondent's violations were flagrant, repeated, and willful.²⁹ "A violation is repeated whenever there is more than one violation of the Act," and a violation is flagrant "whenever the total amount due and owing exceeds \$5,000.00."³⁰ "A violation 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."³¹

Here, Respondent's violations were "repeated" because there was more than one violation. Respondent's violations were "flagrant" due to the number of violations, the large sum of money involved, and the lengthy time period during which the violations occurred.³² Finally, Respondent's violations are also "willful," as that term is used in the Administrative Procedure Act:

The Respondent knew or should have known that it could not make prompt payment for the large number of perishables it ordered, yet it continued to make purchases over a lengthy period of time. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and, consequently, could not pay its suppliers. Under these circumstances, Respondent intentionally violated the PACA and clearly operated in careless disregard of the payment requirements of PACA. Its actions

²⁷ *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49; *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) ("[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed.").

²⁸ *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

²⁹ *See D.W. Produce, Inc.* 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

³⁰ *Id.*

³¹ *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 560 (1991) (citations omitted).

³² *See Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

constitute violations that were willful.³³

Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which Respondent committed the violations and the number and dollar amount of Respondent's violative transactions.

4. Respondent Did Not File Meritorious Objections to Complainant's Motion for Decision Without Hearing.

The Rules of Practice provide:

§ 1.139 Procedure upon failure to file an answer or admission of facts.

*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. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof.... Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.*³⁴

Although Respondent filed an email Answer to Complainant's Motion in this case, stating certain objections, those objections in effect admit the material allegations of fact contained in the Complaint. The Answer states, without attachments:

. . . . I would contest as follows[:]

Ayco Farms.. As mentioned in my report and findings, they shipped product that was below US #stds(overripe[sic] and shipped PAS), but PACA failed to acknowledge this. Todd claims to have spoken to them but no findings were presented to me in writing. seems totally biased.

³³ D.W. Produce, Inc., 53 Agric. Dec. at 1678.

³⁴ 7 C.F.R. § 1.139 (emphasis added).

Supreme Harvest> Adrian Bazan has acknowledge[d] to me as early as this week, he would remove his PACA claim against me. please contact him for the TRUTH.

Tindall Cattle> they still have to prove to PACA and me that my claims in writing to PACA was[sic] false. How can a grower pack his product in unsanitary conditions and expect to be paid for it. USDA needs to do a full investigation on this farm before putting blame on me. all the peppers bought from them were packed in unapproved facility as mentioned in my claims.

Todd Gilbert requested to meet me but did not mention he was doing an investigation on my company. Upon arrival at his hotel in Tampa FL, he told me he was in town to discuss the PACA claims against me.³⁵

At least three of these four items involve sellers referenced in Respondent's Answer to the Complaint—"Ayco Farms," "Supreme Harvest," and "Tindall Cattle." Respondent has not even referenced—much less denied—Complaint allegations, as to all seven sellers in its Answer to Complaint and Answer to the Motion, combined.

As was the case with its Answer to the Complaint, Respondent's "objections" are essentially excuses for not making timely payments are thus not defenses to violations Section 2(4) of the PACA alleged in the Complaint.³⁶ These excuses do not negate the fact that Respondent failed to make full payment promptly in accordance with the PACA and cannot show that compliance will be achieved. I find that Respondent's objections are not "meritorious" under Rule 1.139³⁷ and, therefore, issue this decision without further procedure or hearing pursuant to that Rule.

³⁵ Resp. at 1.

³⁶ See *supra* note 13 and accompanying text.

³⁷ 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent is or was a limited liability company organized and existing under the laws of the state of Florida. Respondent's business and mailing address is or was 8601 Chadwick Drive, Tampa, Florida 33635.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 20140661 was issued to Respondent on April 15, 2014. The license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)) on April 15, 2017, when Respondent failed to pay the required annual fee.
3. Respondent, during the period of August 2015 through June 2016, on or about the dates and in the transactions set forth in Appendix A attached hereto and incorporated herein by reference, failed to make full payment promptly to seven sellers for thirty lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$281,255.30.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
3. The failure of Respondent to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER


1. I find Respondent committed willful, flagrant, and repeated violations of Section 2(4)

of the PACA.

2. The facts and circumstances of Respondent's violations shall be published.
3. 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, pursuant to Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).
4. Potentially interested or affected parties are alerted that any licensing and/or employment sanctions attendant to this Decision and Order pursuant to PACA Sections 4(b) and 8(b) will take effect on the 11th day after this Decision and Order becomes final. Persons "responsibly connected" to Respondent during the period of the Respondent's violations are hereby alerted that they will be subject to the licensing restrictions under PACA Section 4(b) and the employment restrictions under PACA Section 8(b) of PACA.
5. Provisions allowing licensing after a finding of responsible connection are found in 7 U.S.C. § 499d.
6. Provisions allowing employment after a finding of responsible connection are found in 7 U.S.C. § 499h.

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

Done at Washington, D.C.,
this 6th day of December 2017,


Channing D. Strother
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776
SM.OHA.HearingClerks@OHA.USDA.GOV

Seller's Name	No. Lots	Commodity	Dates Accepted	Dates Payment Due	Amounts Past Due & Unpaid
1 Seminole Produce Distributing, Inc. Sanford, FL	2	MXVG	10/15/15	10/25/15	\$15,600.00
2 Supreme Harvest LLC Hidalgo, TX	1	Tomatoes	08/18/15	08/28/15	\$12,320.00
3 Agrifact Capital LLC Monterey, CA	1	Broccoli	09/29/15	10/14/15	\$15,272.60
4 Tindall Cattle LLC Fort Pierce, FL	4	MXVG	11/20/15 to 01/18/16	11/30/15 to 01/28/16	\$61,133.00
5 E A Parker & Sons LLC D/B/A Parker Farms Oak Grove, VA	7	Broccoli	02/11/16 to 03/16/16	02/21/16 to 03/26/16	\$50,101.80
6 La Familia Produce Homestead, FL	11	MXVG	04/08/16 to 04/30/16	04/29/16 to 05/21/16	\$90,391.50
7 Ayco Farms, Inc. Pompano Beach, FL	4	Mangoes	06/01/16 to 06/13/16	06/11/16 to 06/23/16	\$36,406.40
7 Sellers	30	Lots		Total	<u>\$281,225.30</u>

APPENDIX A