

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: )  
 )  
Mibo Fresh Foods, LLC, ) PACA-D Docket No. 20-J-0022  
 )  
Respondent. )

**DECISION AND ORDER DENYING RESPONDENT’S APPEAL PETITION  
AND AFFIRMING THE CHIEF JUDGE’S FEBRUARY 11, 2020  
INITIAL DECISION AND ORDER**

Appearances:

*Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Associate Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”); and*

*Bruce W. Akerly, Esq., Coppell (DFW), TX, for the Respondent, Mibo Fresh Foods, LLC.*

**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 thereunder (7 C.F.R. §§ 46.1 through 46.5) (“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”).

On February 11, 2020, Chief Administrative Law Judge Channing D. Strother (“Chief ALJ”), issued a decision and order without hearing by reason of default against the Respondent, Mibo Fresh Foods, LLC. On February 21, 2020, Respondent filed a petition for rehearing with respect to the Decision and Order. On May 14, 2020, the Chief ALJ issued an Order denying Respondent’s Petition for Rehearing. On June 12, 2020, Respondent filed a timely Appeal

Petition to the undersigned Judicial Officer. For the reasons discussed herein below, Respondent's Appeal Petition is **DENIED**.

### **Procedural History**

The Associate Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service, United States Department of Agriculture ("Complainant" or "AMS"), initiated this proceeding by filing a complaint against Mibo Fresh Foods, LLC ("Respondent") on December 9, 2019. The Complaint alleged that Respondent violated PACA section 2(4) (7 U.S.C. § 499 b(4)) by failing to make full payment promptly to fourteen sellers, in the total amount of \$1,861,502.93, for 165 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce during the period May 2018 through June 2019.<sup>1</sup> Further, the Complaint requested:

That the Administrative Law Judge find that Respondent has willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order the publication of the facts and circumstances of Respondent's violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Complaint at 4.

Respondent was duly served with a copy of the Complaint and did not file an answer within the twenty-day period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).<sup>2</sup>

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<sup>1</sup> See Complaint at 2-3.

<sup>2</sup> United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on December 12, 2019. 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 was due on or before January 2, 2020. Respondent did not file a response until January 27, 2020.

On January 9, 2020, Complainant filed a Motion for Decision Without Hearing by Reason of Default (“Motion for Default”) and Proposed Decision Without Hearing by Reason of Default (“Proposed Decision”). Respondent did not file objections to the Motion for Default or Proposed Decision.<sup>3</sup> However, on January 27, 2020, (b) (6), on behalf of Respondent, filed an untitled document (“Response”) stating in relevant part:

This is a response to Docket 20-J-0022.

Mibo Fresh Foods LLC (“mibo”) and I disagree with the premises and conclusion presented in this case for the following reasons:

- mibo does not owe fourteen (14) vendors the amount of \$1,861,502.93 for their invoices, load and lots presented in the exhibit;
- there is approximately \$504,461.70 due vendors on this list which are on an agreed scheduled to be paid off before the end of July;
- mibo has established payment agreements with its vendors for commodities purchased;
- these payments vary in the number of days and is specific to each individual vendor; and
- any outstanding payments from this lot of products will be on an existing and agreed to payment plans with the individual vendors.

Response at 1. Although Respondent did not specify whether it intended the filing to respond to the Complaint or to the Motion for Default, Respondent’s reference to “the exhibit” suggested that Respondent was answering the Complaint.<sup>4</sup> The Response, therefore, was twenty-five days

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<sup>3</sup> United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent via certified mail and delivered on January 16, 2020. 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 January 6, 2020. Respondent has not filed any objections.

<sup>4</sup> Attached to the Complaint was an “Appendix A,” which lists the details of transactions wherein Respondent failed to make full payment promptly to produce sellers. Neither the Motion for Default nor the Proposed Decision included any attachments.

late.<sup>5</sup>

On February 11, 2020, the Chief Administrative Law Judge (“Chief ALJ”) filed a decision and order granting Complainant’s Motion for Default on the basis that Respondent failed to file a timely answer to the Complaint (“Default Decision”).<sup>6</sup> The Default Decision also concluded, *inter alia*, that “[t]he total unpaid balance due to sellers represents more than a *de minimis* mount, thereby obviating the need for a hearing in this matter.”<sup>7</sup>

On February 21, 2020, Mr. Bruce W. Akerly, Esq.<sup>8</sup> filed on Respondent’s behalf a Verified Petition for Rehearing with Respect to Decision and Order Without Hearing by Reason of Default (“Petition for Rehearing”).<sup>9</sup> On March 16, 2020, Complainant filed a response thereto.

On May 14, 2020, the Chief ALJ issued an Order denying Respondent’s Petition for Rehearing affirming his conclusions that service of the Complaint was sufficient, that Respondent’s “Answer” was filed 25 days after the filing date required under the Rules of Practice, and, most importantly, that even if service of the Complaint was deemed ineffective and Respondent’s Answer was considered timely filed, a hearing would not be necessary because the “Answer” admits the material allegations of the Complaint.

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<sup>5</sup> *See supra* note 2.

<sup>6</sup> The Default Decision found that Respondent committed willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)) and ordered that the facts and circumstances of Respondent’s PACA violations be published. *See* Default Decision at 4-5.

<sup>7</sup> Default Decision at 5 (footnote omitted).

<sup>8</sup> Mr. Akerly has not filed a notice of appearance.

<sup>9</sup> *See* Petition for Rehearing at 5 (“Respondent seeks: (a) if necessary, reopening of the proceedings to allow Respondent’s answer to the Complaint to be recognized as filed out of time; (b) a rehearing on the issues raised by the Complaint, including an opportunity for hearing and presentation of evidence regarding Respondent’s position; and (c) reconsideration of the Decision.”).

**PERTINENT STATUTORY, REGULATORY, AND ADJUDICATORY  
ANALYTICAL FRAMEWORK**

The Department’s interpretation of PACA and policy in cases arising under the Act were set out in the Judicial Officer’s decision in *Baltimore Tomato Company, Inc.*,<sup>10</sup> reaffirmed by the Judicial Officer in *The Caito Produce Co.* (“*Caito Produce*”).<sup>11</sup> And, even more recently in *In re Nicholas Allen*,<sup>12</sup> the current, undersigned Judicial Officer has discussed and adopted the prior findings in *Balt. Tomato* and *Caito*.

The reasons underlying the Department’s policy are set forth at length in *Caito Produce* as well as *Allen*. Together, the jurisprudence of these and prior cases has created a substantial body of settled law. As noted by the Judicial Officer, the conclusions in *Caito Produce* are largely taken verbatim from prior decisions (including *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff’d*, 728 F.2d 347 (6th Cir. 1984)), issued for many years in similar cases (many affirmed on judicial review), each of which merely updates the citations previously used.<sup>13</sup> Likewise, this Decision and Order quotes extensively from *Caito Produce*<sup>14</sup> and prior decisions to provide context to the analysis under PACA applicable to this proceeding.

As discussed in pertinent part in *Caito Produce*:

The “goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act.” *Marvin Tragash Co. v. United States Dept. of Agr.*[524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:

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<sup>10</sup> See *Balt. Tomato Co.*, 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

<sup>11</sup> 48 Agric. Dec. 602 (U.S.D.A. 1989).

<sup>12</sup> PACA-APP Docket No. 15-J-0169, 78 Agric. Dec. \_\_\_\_ (U.S.D.A. 2019); 2019 WL 392884.

<sup>13</sup> See *The Caito Produce Co.*, 48 Agric. Dec. 602, 604 (U.S.D.A. 1989).

<sup>14</sup> Due to the length of the *Caito Produce* decision, only pertinent parts will be reproduced here to provide context to the analysis under PACA in this proceeding, but the full decision is hereby adopted and incorporated herein by reference for all purposes.

The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.” H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

\* \* \*

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee’s ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent’s undercapitalization or bad debt experience.

*The Caito Produce Co.*, 48 Agric. Dec. 602, 619-20 (U.S.D.A. 1989).

The peculiar vulnerability of producers of perishable agricultural commodities and livestock and the importance of the Department’s regulatory programs to assure payment for these commodities were also recognized by Congress in specifically excluding PACA disciplinary enforcement actions from section 525 of the 1978 Bankruptcy law (11 U.S.C. § 525). As referenced in *Caito Produce*:

Congressman Foley, Chairman of the House Agriculture Committee, explained the need for the . . . special provisions applicable to the Perishable Agricultural Commodities Act (as well as the Packers and Stockyards Act) as follows (Proceedings and Debates of the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [now 123 Cong. Rec. 35,671-72 (1977)]):

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

The Committee on Agriculture has no quarrel with the “fresh-start” philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

*The Caito Produce Co.*, 48 Agric. Dec. 602, 621 (U.S.D.A. 1989) (footnotes omitted).<sup>15</sup>

As further explained in *Caito*:

Revocation of respondent’s license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act ( 7 U.S.C. § 499h(a)) [footnote omitted], but is also consistent with other provisions of the Act, which are not applicable here. . . . ***Similarly, if a licensee fails to pay a reparation order under the Act, his license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. § 499g(d)).***

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<sup>15</sup> As shown above and in the lengthy quotation from the *Esposito* case cited in *Caito Produce* (*Esposito*, 38 Agric. Dec. 613, 632-40 (U.S.D.A. 1979)), in the 1978 Bankruptcy law, Congress specifically exempted two regulatory programs – the Perishable Agricultural Commodities Act and the Packers and Stockyards Act – from the provisions of section 525 of the Bankruptcy law (11 U.S.C. § 525) that otherwise would have prevented the revocation of a license because of bankruptcy or the failure to pay a debt dischargeable under the Bankruptcy law. Congress also enacted Public Law 94-410, which made extensive amendments to the Packers and Stockyards Act and the Act of July 12, 1943 to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in prior years. As the Judicial Officer has cautioned, “[b]oth of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer.” *The Caito Produce Co.*, 48 Agric. Dec. 602, 622 (U.S.D.A. 1989).

Although the Department's approach to enforcing the Perishable Commodities Act appears harsh, in many cases it is not as harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." See *In re John H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [aff'd per curiam, 568 F.2d 772 (4th Cir.) (unpublished), cert. denied, 439 U.S. 819 (1978)]; *Catanzaro*, 35 Agr Dec 26, 31 (1976), *affirmed sub nom. Catanzaro v. United States and Butz*, [556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agr Dec 467 (1977)]; *M. & H. Produce Co.*, 34 Agr Dec 700, 747 (1975), [aff'd, 549 F.2d 830 (D.C. Cir.) (unpublished), cert. denied, 434 U.S. 920 (1977)]; *George Steinberg & Son*, 32 Agric. Dec. 236, 243-244 (1973), *affirmed sub nom. George Steinberg & Son, Inc v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

*The Caito Produce Co.*, 48 Agric. Dec. 602, 619-22 (U.S.D.A. 1989) (emphasis added).

The undersigned Judicial Officer has consistently held that the provisions of the PACA which are intended to protect sellers of perishable goods are taken seriously and enforced strictly, for good reason. Here, Respondent has failed to bring its accumulated debt under a *de minimis* amount, and continues to disregard the rules, regulations and statutes governing its behavior. Agency precedent in this regard is clear.

#### **A. The Complaint Was Properly Served on December 12, 2019**

In its Petition for Rehearing, Respondent argued that service of the Complaint was ineffective or insufficient because Respondent's owner was on vacation when the Complaint was sent to his home address.<sup>16</sup> However, under the Rules of Practice, the Chief ALJ correctly found that service was properly made. Respondent asserts that since its owner, (b) (6), was on vacation until January 6, 2020, service of the Complaint cannot be assumed until that time.<sup>17</sup>

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<sup>16</sup> See Petition for Rehearing at 2.

<sup>17</sup> *Id.* at 2-3.

Similarly, Respondent argued that the copy of the Complaint that was served at Respondent's business address cannot be deemed to have been served on December 12, 2019 because "no one at Respondent advised [(b) (6)] of the Complaint and he (and consequently Respondent) did not become aware of the Complaint prior to January 6, 2020."<sup>18</sup> However, as noted by the Chief ALJ, Respondent's argument, which turns on its interpretation of the word "receipt," contradicts the service requirements set forth in the Rules of Practice, which state in pertinent part:

Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . **shall be deemed to be received** by any party to a proceeding . . . on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]

7 C.F.R. § 1.147(c)(1) (emphasis added).

According to United States Postal Service records, the Complaint in this matter was delivered to Respondent's last known principal place of business on December 12, 2019, and is therefore deemed to have been received on that date.<sup>19</sup> Since Respondent was served with a copy of the Complaint at its last known principal place of business, Respondent was put on notice that a response was due within twenty days. For these reasons, I affirm the Chief ALJ's findings that under the applicable Rules of Practice service of the Complaint was effectuated on December 12, 2019, and therefore Respondent's answer was required to be filed within twenty days thereafter.<sup>20</sup>

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<sup>18</sup> *Id.* at 2.

<sup>19</sup> *See supra* note 2.

<sup>20</sup> *See* 7 C.F.R. § 1.139.

**B. The Material Allegations of the Complaint Were Admitted, Thereby Obviating the Need for a Hearing.**

In his May 14, 2020 Order denying Respondent’s Petition for Rehearing, the Chief ALJ’s further explained that even if he were to accept Respondent’s argument that the Complaint was not properly served until January 6, 2020 and Respondent’s answer was therefore timely, a rehearing would still not be warranted under the circumstances because, although Respondent strongly objected to the amounts actually owed, Respondent nevertheless repeatedly admitted to owing far more than a *de minimis* amount to sellers.

On January 27, 2020, Respondent filed an “Answer” to the Complaint wherein it admitted to owing “approximately \$504,461.70” to PACA creditors listed in Appendix A to the Complaint. However, as clearly explained in the Default Decision and noted again in the Chief ALJ’s May 14, 2020 Order denying Respondent’s Petition for Rehearing:

Assuming, *arguendo*, the Response had been timely filed, Respondent admits to owing \$504,461.70 to sellers—far more than a *de minimis* amount. *See H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1998) (“[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 Mktg. Int’l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1998); *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). A hearing, still, would not be necessary. *See Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

Default Decision at 3 n.5.

In its Petition for Rehearing, Respondent once again admitted to owing more than a *de minimis* amount to the PACA creditors listed in Appendix A to the Complaint.<sup>21</sup> In that filing, Respondent admitted to owing \$474,476.15 to those creditors—an outstanding balance that far

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<sup>21</sup> *See* Petition for Rehearing at 5.

exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.<sup>22</sup> The Chief ALJ correctly determined that this admission supports his finding that an oral hearing was not necessary in this matter.<sup>23</sup>

On June 12, 2020, Respondent filed the instant Appeal Petition. In its Appeal Petition, Respondent makes the same arguments previously rejected by the Chief ALJ. While continuing to raise strong objections to the accuracy of the amounts alleged to be due based on the Audit of Respondent's accounting books and records conducted between February and March 2019, the USDA/PACA Division – Fort Worth, Texas, (“First Audit”) which concluded in May 2019 and upon which the Complaint allegations were based,<sup>24</sup> Respondent once again admitted to owing an outstanding balance to those creditors that far exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.<sup>25</sup>

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<sup>22</sup> 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 Mktg. Int'l*, 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).

<sup>23</sup> 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. 689, 695 (U.S.D.A. 1998) (“[N]o hearing is required if the sum of all undisputed debts is enough to make the total owed more than *de minimis*.”).

<sup>24</sup> See Respondent's September 17, 2020 Status Report - “Between February and March 2019, the USDA/PACA Division – Fort Worth, Texas, initiated an audit (the “**Audit**”) of Respondent's accounting books and records; the Audit concluded in May 2019. See Nwoko Record, pgs. 13-14. Based on the Audit, the USDA/PACA Division incorrectly concluded that Respondent owed \$1,861,502.93 to various agricultural vendors. See Nwoko Record, pgs. 2-11.”

<sup>25</sup> 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 Mktg. Int'l*, 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).

Moreover, an additional audit was conducted on September 10, 2020 (“Second Audit”), in which (b) (6), (b) (7)(C) of the PACA Division, Agricultural Marketing Service, performed a compliance check with the PACA creditors listed in Appendix A to the Complaint to determine the amount of debt that remained unpaid. This audit revealed that as of September 10, 2020, Respondent still owed nine of the fourteen vendors listed in Appendix A to the Complaint approximately \$510,624.79 for purchases of various perishable agricultural commodities. In its response to the Judicial Officer’s order to submit a Status report, Respondent argued it had made some payments to some vendors, but, notably, the total amount it now claims as still owing, \$474,476.15, is quite close to the \$504,461.70 it has previously admitted, and, in any event, is still far more than a *de minimis* amount.

### **C. Violations are Ongoing, Repeated, Flagrant, and 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 a careless disregard of statutory requirements. *In re: Ocean View Produce, Inc.*, 2009 WL 218027. That is, a violation is considered to be willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (1996).

Here, Respondent has shown willfulness by its admission that it was continuing in business, despite expiration of its USDA license. “License number 2013 0054 was issued to Respondent on October 15, 2012. The license terminated on October 15, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.” (Complaint at 2). However, in its Status Report, Respondent stated, “Because

**Respondent’s business continues** monthly and because Respondent **continually processes invoices** and payments from many of the same companies, Respondent’s payables change on a daily, weekly, and monthly basis.” (Respondent’s Status Report at 2; emphasis added).

As in *Caito* at 619-22, Respondent here has “continue[d] to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as ‘flagrant.’ See *In re John H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [aff’d per curiam, 568 F.2d 772 (4th Cir.) (unpublished), cert. denied, 439 U.S. 819 (1978)]; *Catanzaro*, 35 Agr Dec 26, 31 (1976), *affirmed sub nom.* *Catanzaro v. United States and Butz*, [556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agr Dec 467 (1977)]; *M. & H. Produce Co.*, 34 Agr Dec 700, 747 (1975), [aff’d, 549 F.2d 830 (D.C. Cir.) (unpublished), cert. denied, 434 U.S. 920 (1977)]; *George Steinberg & Son*, 32 Agric. Dec. 236, 243-244 (1973), *affirmed sub nom.* *George Steinberg & Son, Inc v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.”

That Respondent continues to do business, incurring further debt, despite an expired license, does not show good faith and supports the flagrant and willful nature of its violations. Notably, Respondent did not object to or deny the fact that its license was expired; in its Appeal Petition, it merely stated that “this finding appears to be premised on AMS’s statement instead of an analysis of the USDA licensing authorities.” (Appeal Petition and Supporting Brief at 4-5).

## ORDER

As prior Agency precedent reflects, the Judicial Officer has consistently held that, “[u]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine

the precise amount owed.”<sup>26</sup> A decision and order without hearing was, therefore, properly issued in this case. Accordingly, the Chief ALJ’s Orders are hereby AFFIRMED in their entirety and Respondent’s June 12, 2020 Appeal Petition is DENIED. The following findings are adopted:

1. The total unpaid balance due to sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter.<sup>27</sup>
2. As Respondent’s license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Respondent’s violations.<sup>28</sup>
3. Respondent Mibo Fresh Foods, LLC has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).
4. The facts and circumstances of Respondent’s PACA violations, as set forth above, shall be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

### **RIGHT TO SEEK JUDICIAL REVIEW**

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350.

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<sup>26</sup> *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. At 82-83.

<sup>27</sup> *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).

<sup>28</sup> *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. 2002); *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).

Judicial review must be sought within sixty (60) days after the date of entry of the Order in this Decision and Order, as indicated below.<sup>29</sup>

Copies of this Decision and Order shall be served by the Hearing Clerk upon each party. The Hearing Clerk will use both certified mail and regular mail for Respondent, and as a courtesy will in addition email Respondent at the email address he used to reach the Hearing Clerk.

Done at Washington, D.C.,  
this 15th day of October 2020

**Judge  
Bobbie J.  
McCartney** Digitally signed by  
Judge Bobbie J.  
McCartney  
Date: 2020.10.15  
12:01:59 -04'00'

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Judge Bobbie J. McCartney  
Judicial Officer

Hearing Clerk's Office  
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<sup>29</sup> 28 U.S.C. § 2344.