AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent decisions entered subsequent to December 31, 1986, are no longer published. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1082 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

* * *

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarpy, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office.

2. During the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15.

3. As of March 26, 2002, $1,305,148.78 of the $1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final August 19, 2002. - Editor]

LIST OF DECISIONS REPORTED

JULY - DECEMBER 2002

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISION

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MISCELLANEOUS ORDERS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISION

In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Decision and Order.
Filed July 8, 2002.

PACA – Payment, failure to make prompt – Penalties, revocation – No pay/slow pay.

Respondent found to have admitted to all material facts in complaint when respondent did not appear at scheduled oral hearing. Complainant presented evidence of failure to pay in full sellers of produce. Respondent tendered copies of promissory notes to sellers, but failed to show that the notes were accepted by the sellers as extinguishing the debt by the time of the hearing.

Eric Paul, for Complainant.
Paul T. Gentile, for Respondent.
Decision issued by James W. Hunt, Chief Administrative Law Judge.

This decision is made pursuant to a remand from the Court of Appeals for the District of Columbia (*Kirby Produce Company, Inc. v. USDA,* 256 F.3d 830 (2001)) and from the Judicial Officer (*In re Kirby Produce Company, Inc*., 60 Agric. Dec. 847 (2001)).

The proceeding originally was instituted by a complaint filed on October 20, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, Kirby Produce Company, Inc., had committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 20 sellers for purchases of 206 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $1,609,859.45 during the period August 1995 through July 1996. Section 2(4) of the PACA requires "full payment promptly" for produce purchases. The Department's regulations interpret this as payment within ten days after the day the produce is accepted. (7 C.F.R. § 46.2(aa)(5).)

Respondent filed an answer to the complaint on November 12, 1997, and an amended answer on December 4, 1997. A hearing was set for January 13, 1999. On November 12, 1998, Respondent sought a delay of the scheduled hearing so that it could make full payment to all trust creditors pursuant to an order entered on June 25, 1996, by a United States District Court (*Brown's Produce, et al. v. Kirby Produce Company, et al.*, Case No. 3:96-CV-526 (E.D. Tenn. 1996)). The request

was denied on November 16, 1998.

On December 4, 1998, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions and a request for official notice of the District Court's order and attachments. On December 31, 1998, I issued a Decision Without Hearing by Reason of Admissions finding that, based on the Court's order and attachments thereto, Respondent had admitted failing to pay $1,602.736.16 to 19 sellers of perishable agricultural commodities, and that $1,215,723.99 of this amount remained past due and unpaid as of December 2, 1998. I found that Respondent committed wilful, repeated, and flagrant violations of section 2(4) of the PACA and ordered that its license be revoked. The hearing scheduled for January 13, 1999, was canceled.

On July 12, 1999, the Judicial Officer issued a decision and order affirming my initial decision. *Kirby Produce Co.,* 58 Agric. Dec. 1011 (1999). Respondent appealed this order to the United States Court of Appeals for the District of Columbia Circuit. On November 13, 2000, the court issued an order requiring Respondent, Kirby Produce, to certify whether the PACA creditors named in the complaint of October 20, 1997, were paid in full prior to the hearing date of January 13, 1999. On November 17, 2000, Kirby stated that the creditors had been paid.

On August 3, 2001, the Court, in *Kirby Produce Company, Inc. v. USDA*, supra, issued an opinion granting Kirby's petition for review and remanded the case for proceedings consistent with its opinion. In its opinion, the Court affirmed the Judicial Officer's finding that Kirby had not promptly paid its PACA creditors, but found that a material issue of fact existed whether Kirby could have paid its creditors by the date of the hearing scheduled for January 13, 1999. The significance of the payment date is that it would determine the penalty for Kirby's violation of the PACA. Payment by the hearing date would convert the case from "no-pay" to "slow-pay" which would result in a PACA license suspension rather than a license revocation under the Judicial Officer's policy in effect at the time the complaint was filed. *See Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984).[1] On August 27, 2001, the Judicial Officer remanded the matter to me to conduct a hearing to determine "whether Respondent is in full compliance with the PACA at the time the hearing in this proceeding actually commences."

A hearing on remand was held on March 26, 2002, in New York City. Complainant was represented by Eric Paul, Esq. Respondent did not appear at the

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[1]This policy was changed in 1998 in *Scamcorp, Inc.*, 57 Agric. Dec. 527. Under the new policy, the date of the hearing no longer necessarily controls whether a license is suspended or revoked. A license will now be revoked if full payment is not made within 120 days after a complaint is served on a respondent or by the date of the hearing, whichever occurs first.

hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

* * *

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarpy, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office.

Kindly make this letter part of the record of this proceeding.

Very truly yours,

/s/

Paul T. Gentile

PTG:ah
cc: Kirby Produce Company, Inc.

* * *

I ruled that Mr. Gentile's letter and the promissory notes referred to therein be made a part of the record in order to comply with the Court's remand order to determine whether Respondent had made full payment to its creditors.[2]

At the hearing on March 26, 2002, Complainant presented evidence that Respondent had made partial payment on its debt of $1,609,858.45 to its produce creditors, but that Respondent had failed to make full payment as of that date. Josephine Jenkins, a marketing specialist, testified that she reviewed the records relating to payments that Respondent had made and that she had also attempted to contact the creditors. She determined that, as of February 22, 2002, the amount remaining unpaid came to $1,346,859.78. (Tr. 63; CX 45.)

Respondent's promissory notes that I entered in the record are all dated June 26, 1966, and are all identical, except for a different produce creditor and amount due on each note. (RX 1.) They provide:

PROMISSORY NOTE

June 26, 1996

For value received, Kirby Produce Company (Kirby) hereby promises to pay to [name of creditor] the principal sum of [amount owed the named creditor] plus interest at the rate of 5-1/4% pursuant to the Order of the United States District Court for the Eastern District of Tennessee Case

[2]I made this ruling as I believe, in this case, the Court's directive overrides the Department's Rules of Practice which provide that a respondent who fails to appear at a hearing is deemed to have admitted any facts which may be presented at the hearing and is considered to have admitted all the material allegations of fact contained in the complaint. 7 C.F.R. § 1.141(e).

Number 3:96-CV-526. This represents payment in full of any and all claims the holder of this note may have against Kirby under the Perishable Agricultural Commodities Act. In the event of default on this note, holder's remedy shall be limited to its rights under the Order of the Court and this note.

Apart from Mr. Gentile's statement that creditors had not returned or rejected the notes that Respondent had given them, Respondent offered no evidence on whether these promissory notes were accepted by any of its creditors as constituting payment of its debt to them.

Complainant's exhibit CX 41 indicates that one creditor, Juniper Tomato Growers, Inc., may have accepted a promissory note as payment in full for the produce it sold to Respondent. However, there is no evidence that any of the other creditors accepted the notes as payment. Moreover, Ms. Jenkins testified that the creditors she contacted told her that they did not accept the notes as payment. (Tr. 50-53.) Complainant also presented as witnesses representatives from three of Respondent's produce creditors who jointly were owed over one million dollars. They all testified that they did not accept the notes as payment for the produce debt.

Gordon Tantum, president of Gordon Tantum, Inc.:

Q. Did you, in fact, when you received this promissory note, consider it full payment?

A. No, I did not. (Tr. 78.)

Charles Weisinger, president of Weis-Buy Services, Inc.:

Q. I'm assuming you never agreed to accept a promissory note as full payment of the outstanding debt?

A. No, sir. (Tr. 103.)

Garford Tony Hill, president and owner of Apple Action Fruit Sales, Inc.:

Q. You did not at any time agree with Mr. Randy Kirby to accept a promissory note in full payment for your debt, is that correct?

A. You mean to write my debt off in exchange for a promissory note?

Q. That's correct.

A. Absolutely not. (Tr. 123.)

Discussion

In its remand opinion the Court of Appeals affirmed the finding by the Judicial Officer that Respondent, as alleged in the complaint, had failed to make full and prompt payment for its produce purchases. Accordingly, as I found previously, Respondent's failure to pay promptly constitutes wilful, repeated and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Judicial Officer's policy at the time the complaint in this matter was filed in 1997, and his policy since at least 1965, was that a promissory note that a produce buyer gives to a creditor as payment on the debt it incurred when it purchased produce does not extinguish that debt in the absence of an agreement to that effect. *Federal Fruit & Produce Company v. Sandy's Produce*, 24 Agric. Dec. 1121 (1965); *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991).[3]

Respondent here has not shown that its creditors, except for perhaps one, agreed to accept promissory notes as payment for Respondent's purchases of perishable agricultural commodities. The failure of creditors to expressly reject or return the notes to Respondent does not constitute an implicit agreement by them to accept the notes. 17A Am. Jur. 2d Contracts § 71. Indeed, what evidence was presented shows that the creditors spurned the notes. Respondent presented no other evidence that, as of the date of the remand hearing, it had paid in full the $1,346,895.78 that remained unpaid. As Respondent failed to be in compliance with the full and prompt payment requirement of the PACA as of the hearing on March 26, 2002, the sanction for its non-compliance is revocation of its license.

Findings of Fact

1. Respondent, Kirby Produce Company, Inc., a Tennessee corporation, whose business address is 2127 Chipman Street, Knoxville, TN 37916, was issued PACA license number 931573. (CX 1.) This license has been renewed annually and is next subject to renewal on or before October 27, 2002.

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[3]This policy was changed in *Scamcorp, supra*. Under the new policy, a promissory note does not extinguish the debt, even if the parties so agree, unless it is also shown that the agreement was arrived at through arm's length negotiations.

2. During the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15.

3. As of March 26, 2002, $1,305,148.78 of the $1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final August 19, 2002. - Editor]

PERISHABLE AGRICULTURE COMMODITIES ACT

REPARATION DECISIONS

JODY DESOMMA d/b/a IMPACT BROKERAGE v. ALL WORLD FARMS, INC.
PACA Docket R-01-190.
Decision and Order.
Filed August 21, 2002.

Collateral Attack on State Court Judgment.
Accord and Satisfaction — Payment did not specify account to which it was to be applied.
F.O.B. Acceptance Final — Material breach of contract.
Damages for Material Breach — Alternative determination.
Damages — Accounting without breakdown of sales utilized in restricted circumstances.

Where a reparation respondent brought an action in state court against an out of state reparation complainant, and the reparation complainant was served with process under the forum state's long arm statute, the judgment of the state court was subject to collateral attack in the reparation forum if minimal contacts were not present between the reparation complainant and the state where the civil suit was brought.
Where a partial payment check was tendered on the condition that it be accepted as payment in full, but the debtor did not specify to what debt it was to be applied, and there were several open accounts at the time of tender, the creditor was within its rights when it applied the payment to an open freight bill, and no accord and satisfaction of the produce debt was accomplished.
Where contract terms were f.o.b. acceptance final, the supply of vine ripe tomatoes when the contract specified gas green tomatoes was a material breach.
Where an f.o.b.a.f. contract called for the supply of gas green tomatoes, and, at a distant destination, the contract was discovered to have been breached by the supply of vine ripe tomatoes which could not be expected to carry to a distant destination as well as gas green tomatoes, it was held that it was reasonable under the peculiar circumstances of the case to assess damages by the differential between market price and the value of delivered product at destination even though the warranty of suitable shipping condition was not applicable, and even though acceptance took place at shipping point.
An accounting that supplied the sales total rather than showing a breakdown of sales could be utilized where sales were reasonably close to market price, and the difference could be accounted for because of the ripeness of the product.

George S. Whitten, Presiding Officer.
Pro se, for Complainant.
Robert E. Goldman, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). A timely complaint was filed in

which Complainant seeks an award of reparation in the amount of $14,216.50 in connection with a transaction in interstate commerce involving a truckload of tomatoes.

A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. The Department did not file a report of investigation.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Respondent filed a brief.

In conjunction with the filing of the brief, on June 8, 2001, Respondent's counsel also filed a motion to reopen the proceeding to take further evidence. In this motion Respondent's counsel pointed out that a copy of his client's check, tendered as an accord and satisfaction of the claim at issue in this proceeding, was attached to his client's answering statement. Respondent's counsel then stated that in the statement in reply Complainant claimed "that 'On the check that All World Farms sent to Impact Brokerage there was no invoice, lot or file number to apply it to,' and that he did not know that 'this specific check was to be applyed [sic] to the trouble file in question.'" Respondent's counsel stated that by moving to reopen the proceeding he sought to respond to Complainant's claim as stated above. However, Respondent's counsel failed to disclose in his motion that accord and satisfaction was pleaded in his client's answer, and that in its opening statement Complainant set forth essentially the same claim that is reiterated in its statement in reply, and quoted above. Complainant's opening statement states:

> At the time All World Farms said it paid Impact Brokerage on this file, All World Farms owed Impact Brokerage for several files. All World sent Impact a check for $2,679.50 with no lot # or statement. Impact applied the check to the oldest file which was not paid yet, not the file in question. Then All World Farms sent another check for that old file that Impact thought it had paid. This showed as an over payment on an old file so impact applied it to the file in question. All World Farms puts "payment in full" on almost all of it [sic] checks, and again there is no lot # on the check to show what file it belongs to. . . .

Obviously, Respondent's counsel had ample opportunity to submit responsive

evidence in the answering statement. The Rules of Practice (7 C.F.R. § 47.24(b)) require that a petition to reopen the hearing to take further evidence shall set forth a good reason why such evidence was not adduced at the hearing. By stating that he sought, by moving for a reopening of this matter, to reply to the allegation in Complainant's statement in reply (the last evidentiary submission permitted under the Documentary Procedure) Respondent's counsel clearly implied that there had been no previous opportunity to respond to such evidence. This implication was not true. The Presiding Officer correctly denied the motion to reopen.

Findings of Fact

1. Complainant, Jody DeSomma, is an individual doing business as Impact Brokerage, whose address is 144 South Hillside Ave., Nesconset, New York 11767.

2. Respondent, All World Farms, Inc., is a corporation whose address is 1180 S. Powerline Rd., Suite 208, Pompano Beach, Florida 33069.

3. On or about April 5, 2000, Complainant sold to Respondent one truckload containing 1,600 cartons of size 6 x 6 gas green "Mr. Tasty" brand tomatoes at $10.50 per carton, plus $96.00 for a federal shipping point inspection, or $16,896.00, F.O.B. Acceptance Final.

4. The tomatoes were grown in Florida by Dimare Homestead of Florida City, Florida. While physically located in Hapeville, Georgia, and without moving from that location, the tomatoes were sold by Fresh Pac, LLC of Hapeville, Georgia to D & C Produce of Bass, North Carolina, by D & C Produce to Jody DeSomma d/b/a Impact Brokerage (Complainant) of Nesconset, New York, by Jody DeSomma to All World Farms, Inc. (Respondent) of Pompano Beach, Florida, and by All World Farms, Inc. to R & R Fresh Fruit & Vegetables, Inc. of Boca Raton, Florida. The tomatoes were then sold by R & R Fresh Fruit & Vegetables, Inc. to Global M.J.L. Ltd., and shipped from Hapeville, Georgia, to Global M.J.L. Ltd. in Montreal, Quebec, Canada.

5. On April 5, 2000, at 7:55 a.m., a federal inspection was made of the tomatoes, following unloading from the transport, while they were stored in the warehouse of Fresh Pac, LLC, in Hapeville, Georgia. That inspection showed in relevant part as follows:

LOT: A
TEMPERATURES: 53 to 57°F.
PRODUCT: Tomatoes
BRAND/MARKINGS: "Mr. Tasty" Dimare 6x6 25lbs
ORIGINS: FL
LOT ID.: See Remarks
NUMBER OF CONTAINERS: 1,600 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	04 %	01 %	00 %	Quality - misshappen (sic), scars	Corresponds to size as marked. Average approximately 20% Turning & Pink, 75% Light Red & Red
	04 %	00 %	00 %	Abnormal color	
	01 %	01 %	01 %	Soft	
	0½ %	0½ %	0½ %	Decay	
	09 %	02 %	01 %	Checksum	

GRADE: U S No 1

REMARKS: USDA/FL PLI: 12930CGR14; 12928C50; 12928CGR86; 12927CGR50; 12929CGR14; 12930CGR14; 12929C48; 12929CGR60.

6. Following arrival at the place of business of Global M.J.L. Ltd. in Montreal, Canada, a Canadian inspection was made of the tomatoes on April 9, 2000, between 9:55 and 11:00 a.m., which showed the following in relevant part:

[illegible] Packages: Produce of U.S.A. Mr. Tasty brand, The Dimare Co., Homestead, Fl. 33090. USDA/FL. 129[??]C. [??] 15-86-12-14-48-60-50-47.

Produce or [illegible] Variety: Tomatoes
No. [illegible] of Pkgs.: 1313 ctns. [illegible]
Size of Produce: 6X6
Temperature: Product: 12°C
Condition of Vehicle [illegible] Pkgs. and Pack: Clean containers, in good order, properly packed.
Condition: Decay - average 10%, range nil to 24%
Mature green - average 1%
Semi ripe - average 2%
Ripe - average 87%
[illegible] - average 4%
Soft areas - average 6%

Inspection requested for and restricted to condition only.

7. On or about April 9, 2000, Respondent received a faxed notice from the party to which it sold the tomatoes that the tomatoes received were vine ripe instead of the gas green tomatoes ordered. On April 10, 2000, Respondent notified Complainant by telephone of the trouble with the load, and faxed a copy of the Canadian inspection to Complainant. On April 12, 2000, Respondent faxed a copy of Complainant's invoice back to Complainant. Complainant's invoice clearly

stated: "FOB ACCEPTANCE FINAL WITH USDA INSPECTION US # 1." Across the bottom of the invoice Respondent had hand written the following: "Jody - After further review, I had thought we had discussed doing FOB Final on the second load which never materialized, not on this load. Thanks, George."

8. The Canadian firm rendered an accounting of its handling of the tomatoes which showed the following in relevant part:

ACCOUNT OF SALE
DATE: 4/18/00
SHIPPER: R&R FRESH FRUIT & VEG
BOCA RATON, FLA.

BROKER: BRUCE
. . .
SHIPMENT DATE 04/05/00 DATE RCV'D: 04/09/00
. . .
LOT ITEM, QUANTITY, DESCRIPTION; 1600 LG TOMATOES
LABEL: M TASTY

EXPENSES IN U.S. DOLLARS
QUANTITY 1600
FREIGHT $ 1.25
RYAN & OTHER $ 0.01
ENTRY $ 0.02
INSPECTION $ 0.19
OTHER
REPACKING $ 0.75
DUMPING $ 0.05 202 CRTN LOST IN REGRADING ($80.00)
. . .
TOTAL $ 2.27 TOTAL EXPENSES: $3,632.00

SALES IN CANADIAN DOLLARS		SALES IN U.S. DOLLARS	
SALES AVE ON 1600 ONLY 1398 SOLD			
TOTAL SALES THIS LOT	$16,259.00	TOTAL SALES . . .	$10,912.08
AVERAGE PER PACKAGE	$ 10.16	AVERAGE . . .	$ 6.82

. . .
EXCHANGE RATE USED: 149%

TOTAL RECEIPTS LESS TOTAL EXPENSES: $7,280.08
COMMISSION (15% OF SALES) . . . $1,636.81
TOTAL NET RETURN (LOSS) $5,643.27
NET RETURN (LOSS) PER PACKAGE $ 3.53

9. The Canadian firm, Global M.J.L. Ltd., paid R & R $5,643.27. R & R paid Respondent $5,248.00. On October 24, 2000, Respondent sent Complainant a check for $2,679.50. This check had stamped upside down on its face the following:

"CASHING THIS CHECK CONSTITUTES ACCEPTANCE OF PAYMENT IN FULL FOR A DISPUTED DEBT." The same stamp appeared on the back of the check. No information was on the check, or accompanied the check, that would indicate what transaction was being paid, and there was no direction from Respondent as to how the payment was to be applied. Complainant applied the payment to an open freight invoice.

10. The formal complaint was filed on December 1, 2000, which was within nine months after the cause of action alleged herein accrued.

Conclusions

On September 6, 2001, Respondent's counsel filed a motion to dismiss the complaint. The background facts relevant to this motion are as follows. On March 19, 2001, approximately one week prior to the filing of Respondent's answering statement, Respondent filed a civil complaint, against Jody DeSomma doing business as Impact Brokerage, in the County Court of the 17th Judicial Circuit in and for Broward County, Florida. This civil complaint alleged fraud and breach of contract arising out of the same transaction, and embracing the principal issue,[1] involved in this proceeding before the Secretary. The complaint was personally served upon Jody DeSomma at his place of business in Nesconset, New York, on March 29, 2001. Thereafter, on June 13, 2001, Jody Desoma d/b/a Impact Brokerage, acting pro se, filed a paper with the Florida court which disclosed the existence of "USDA PACA case NO:R-9889,"[2] acknowledged that "both cases pertain to the same information," and stated that he could "not supply all evidence pertaining to [the Florida civil case] until the first case is finished." On August 13, 2001, the Florida court issued an order in which, after stating that "Jody DeSomma, d/b/a Impact Brokerage did not appear," it made findings of fact based on the sworn testimony of a witness who appeared on behalf of All World Farms, Inc., concluded that the parties contracted for gas green tomatoes, and that Impact knew or should have known that it was not delivering gas green tomatoes, but instead delivering vine ripe tomatoes. On this basis the Court concluded that All World Farms, Inc. suffered a cessation of business with the customer to which it supplied the tomatoes, and consequent damages. The Court entered an order in favor of All World Farms, Inc. for $15,000.00, the maximum jurisdictional award of the Court. Respondent's

[1]That issue is whether Complainant herein contracted to supply gas green tomatoes, and instead breached the contract by supplying vine ripe tomatoes.

[2]This was the number assigned to this case during the informal stages of the proceeding.

motion to dismiss relies upon the judgment of the Florida court as being res judicata of the issues before the Secretary.

Under 28 U.S.C. section 1738 all courts of the United States are required to give full faith and credit to the judgements of the courts of the several states. Although this tribunal is not a court, its rulings are appealable to the district courts of the United States, and we obviously fall within the intent of the statute. The only way in which we would not be bound by the judgment of the Florida Court would be if that Court did not have jurisdiction over the person of the defendant in that Court, Jody DeSomma.[3]

Personal service was apparently effectuated on Mr. DeSomma under the Florida long-arm statute. The United States Supreme Court, in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985), affirmed the constitutionality of personal service under the Florida long-arm statute on individual residents of Michigan. The Michigan residents, Rudzewicz, and a partner, had entered into a contract with Burger King whereby they became the owner of a Burger King franchise. The contract provided that the franchise relationship would be established in Miami and governed by Florida law. Burger King maintained a Michigan district office that carried on day-to-day monitoring of the franchisees. Rudzewicz and the partner executed the contract in Michigan, and never visited Florida. When a dispute arose over the operation of the franchise Burger King brought a diversity action in Federal District Court in Florida, alleging that the franchisees had breached their franchise obligations, and requesting damages and injunctive relief. The franchisees claimed that, because they were Michigan residents, and because appellant's claim did not "arise" within Florida, the District Court lacked personal jurisdiction over them. The Court held that the District Court's exercise of jurisdiction pursuant to Florida's long arm statute did not violate the Due Process clause of the Fourteenth Amendment. The Court stated:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a *472 forum with which he has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where

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[3] *Old Wayne Mut. Life Ass'n v. McDonough* 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907).

that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 *473 (1984).15 Thus "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. *World-Wide Volkswagen Corp. v. Woodson, supra*, at 297-298. Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. *Keeton v. Hustler Magazine, Inc*., *supra; see also Calder v. Jones*, 465 U.S. 783 (1984) (suit against author and editor). And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950). *See also McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957).
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> . . .
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> Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton v. Hustler Magazine, Inc., supra,* at 774-775; *see also Calder v. Jones*, 465 U.S., at 788-790; *McGee v.*

International Life Insurance Co., 355 U.S., at 222-223. *Cf. Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 317 (1943).

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S., at 320. Thus *477 courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 292. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *See, e. g., Keeton v. Hustler Magazine, Inc., supra,* at 780; *Calder v. Jones, supra,* at 788-789; *McGee v. International Life Insurance Co., supra,* at 223-224. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial *478 justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. *World-Wide Volkswagen Corp. v. Woodson, supra,* at 292; *see also* Restatement (Second) of Conflict of Laws 36-37 (1971). As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. The *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (re forum-selection provisions); *McGee v. International*

Life Insurance Co., supra, at 223-224.[4]

In this case since personal service was effected upon Mr. DeSoma[,] we will assume that the requirements of the Florida long arm statute were met.[5] Complainant herein has filed a reply to Respondent's motion to dismiss this action. In its reply Complainant, now represented by counsel, contends that the determination of the Florida county court should not be given res judicata effect herein. Complainant thus seeks to collaterally attack the decision of the Florida court. The grounds alleged by Complainant for not giving effect to the Florida court's order are that the merits of the Florida action were never litigated, that the receipt of evidence herein was well underway prior to the institution of the Florida action, and that Respondent's motion to dismiss "is a sham and constitutes nothing more that a "end run" seeking to circumvent the jurisdiction of P.A.C.A. to determine this case."

In determining whether the Florida court rightly exercised jurisdiction, the first question that must be answered is whether the minimum contacts requirement necessary to satisfy the due process clause, as delineated by the Supreme Court in Burger King, was met. The complaint filed by All World in the Florida county court states that "[v]enue is appropriate in this jurisdiction because the parties entered into the subject transaction in part in Broward County, Florida, and because the transaction concerns perishable agricultural commodities grown in Florida." While it is certainly true that the tomatoes were grown in Florida, at the time the contract was entered into the tomatoes were physically located in Georgia, and did not move from Georgia by reason of that contract. Subsequently they were shipped to the ultimate purchaser in Canada.[6] While the record in this proceeding discloses that at

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[4]*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at 471-478 (1985). (footnotes omitted.)

[5]The provisions of that statute are not before us.

[6]The subject tomatoes were grown in Florida by Dimare Homestead. This record does not disclose how the tomatoes came into the possession of Fresh Pac, LLC in Hapeville, Georgia, but no doubt it was through direct sale by Dimare, or by sale through undisclosed intermediaries. Then, without physically changing hands, the tomatoes were sold by Fresh Pac in Georgia to D & C Produce in North Carolina, by D & C to Complainant in New York, by Complainant to Respondent in Florida, and by Respondent to R & R Fresh Fruit & Vegetables, Inc. in Florida. Finally, by R & R they were sold, and shipped from Georgia, to the ultimate purchaser, Global M.J.L. Ltd., in Canada.

least two other transactions had occurred between the parties to this proceeding,[7] the initiating party to those transactions is not disclosed.[8] The complaint before the Florida county court does not make any reference to other transactions, nor does the order of that court. There is nothing to show that the subject tomato transaction was initiated by Complainant. The usual nature of transactions in perishables such as the one between Complainant and Respondent is fairly informal, and these transactions are not normally preceded by extensive negotiation in terms of substance or time. The number of times the subject tomatoes were traded is indicative of the fact that quick turnover and small profits were contemplated. There is no reason to believe that Mr. DeSomma had any reason to contemplate that he was subjecting himself to the jurisdiction of the Florida courts by these transactions. It should be remembered that only the actions of the non-resident defendant determine whether the court has jurisdiction over him.[9] In defining the "minimum contacts" needed to establish personal jurisdiction, the Supreme Court has prescribed that the defendant must "purposely avail[ ] itself of the privilege of conducting activities within the forum State. . . ."[10] The Fourth Circuit has stated the law as follows:

> For a defendant to be subject to suit in a forum where it is not physically present, due process demands certain "minimum contacts" with the forum such "as make it reasonable . . . to require the corporation to defend the particular suit which is brought there." *International Shoe*, 326 U.S. at 316-17, 66 S.Ct. at 158-59. Ordinarily these contacts should be "continuous and systematic," as opposed to "casual . . . single or isolated," *id.* at 317, 66 S.Ct. at 159, a requirement springing from the essential principle "that there

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[7]In its opening statement Complainant states that the time of Respondent's payment it "owed [Complainant] for several files. In its statement in reply Complainant disclosed that these several files were a freight bill and a cucumber transaction. In addition, another transaction was apparently contemplated, but failed to occur. Attached to Respondent's answering statement is a copy of Complainant's invoice on which a "George" connected with Respondent wrote a note to "Jody" stating: "After further review, I had thought we had discussed doing the FOB Final on the second load which never materialized, not on this load."

[8]These transactions appear to fit within the characterization "casual . . . single or isolated" as used in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, at 317, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). See also *Choon Young Chung v. Nana Development Corporation*, 783 F.2d 1124 (4th Cir.1986).

[9]*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1984).

[10]*See Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958).

be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1240.

> The significant contacts considered are those actually generated by the defendant. It is firmly established that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id. See also World-Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. at 567. Jurisdiction may not be manufactured by the conduct of others. Rather, "the defendant's conduct and connection with the forum State [must be] . . . such that he should reasonably anticipate being ha[u]led into court there." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. at 567. Absent foreseeability of this sort, derived from purposeful contacts, it is irrelevant that a defendant could foresee the likelihood that its product would arrive in the forum state. Id.[11]

As regards interstate contractual obligations the Court in *Burger King* stated that the required minimum contacts would be such as create "continuing relationships and obligations with citizens of another state." We do not see these type contacts as being present between the parties to the litigation before the Florida court. We find that the Florida court did not have jurisdiction to enter the order upon which Respondent relies herein in its motion for dismissal on res judicata grounds.

Although not the basis of our finding of lack of jurisdiction in the Florida court, there are other considerations that bear upon that finding which should be mentioned. The jurisdiction accorded to the Secretary of Agriculture under the Act is not exclusive jurisdiction. On the contrary, the Act specifically provides that liability for violation of section 2:

> may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.[12]

However, once a reparation complaint is filed with the Secretary against a

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[11] *Choon Young Chung v. Nana Development Corporation*, 783 F.2d 1124 (1986).

[12] 7 U.S.C. 499(e)(b).

licensee the matter is then within the Secretary's jurisdiction, and some deference should be accorded by other tribunals to that jurisdiction. This is particularly true where a licensee under the Act, properly before the Secretary as a reparation respondent, files an action in another forum based upon the same subject matter as that before the Secretary, and seeks damages arising out of that subject matter that could have been sought before the Secretary. Respondent's action in the Florida court was not filed until the submission of evidence before the Secretary under the documentary procedure was well underway. It is our opinion that under the doctrine of primary jurisdiction[13] the Florida court should have deferred to this administrative agency.[14] While this, in and of itself, is insufficient to sustain a collateral attack on the judgment of the Florida court, it is relevant to one of the other factors listed by the Court in *Burger King* for the determination of whether the assertion of personal jurisdiction would comport with "fair play and substantial justice," namely, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." In this regard it is relevant that Mr. DeSomma, acting pro se, notified the Florida court of the pendency of this action. Apparently, the Florida court correctly treated this notice as a special appearance, because the order of the Florida court specifically states that Mr. DeSomma did not appear in that proceeding.

Another factor impinging upon the "fair play and substantial justice"

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[13]The primary jurisdiction doctrine applies where a court and agency have concurrent jurisdiction to decide issues within the special competence of the administrative agency. Under the doctrine the court is required to stay or dismiss the action before it in favor of the jurisdiction of the agency. The doctrine has no application where only a question of law is concerned. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). The purpose of the doctrine is to promote uniformity and consistency in the regulation of business entrusted to an administrative agency (*Weinberger v. Bendex Pharmaceuticals, Inc*. 412 U.S. 645 (1973)), to promote the employment of agency expertise in cases raising issues of fact not within the conventional experience of judges (*Nader v. Allegheny Airlines, Inc*., 426 U.S. 290 (1976)), and the promotion of efficiency (*Christian v. New York State Board of Labor*, 414 U.S. 614 (1974)). State courts also apply the primary jurisdiction doctrine. See, for example, *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc*, 361 So.2d 695(Fla. 1978); *Florida Marine Fisheries Commission, et al. v. Raymond S. Pringle, Jr. and Ronald Fred Crum*, 736 So.2d 17 (Fla. Dist. Ct. App.1999) *The State Bar of Texas v. David Lee McGee*, 972 S.W.2d 770 (Tex. App. 1998); *South Lake Worth Inlet District v. Town of Ocean Ridge, et al*., 633 So.2d 79 (Fla. Dist. Ct. App. 1994); *Dioxin/Organochlorine Center v. The Department of Ecology*, 119 Wash. 2d 761, 837 P.2d 1007 (1992); and *Hawaii Blind Vendors Assn. v. Department of Human Services*, 71 Haw. 367, 791 P.2d 1261 (1990).

[14]The variable caducity of the different commodities subject to the Act has occasioned the development of unique expertise in this administrative agency in the assessment of whether there is a breach relative to the sale of such commodities under differing terms of sale, and in the assessment of damages for breach.

determination is the fact that since Complainant is a licensee under the Act, Respondent could have filed a counterclaim in the action before the Secretary, but did not do so. Thus "the [Florida] plaintiff's interest in obtaining convenient and effective relief" was not furthered by subjection of the non-resident to the jurisdiction of the Florida court. These additional considerations bolster our opinion that the Florida court's assertion of jurisdiction over Mr. DeSomma involved a violation of due process which deprived it of jurisdiction. For these reasons Respondent's motion to dismiss is denied.

Turning to the substantive allegations of the parties, we will first deal with Respondent's defense of accord and satisfaction, already discussed in another context in the preliminary statement. As stated in the Findings of Fact, no information was on Respondent's payment check, or accompanied the check, that would indicate what transaction was being paid, and there was no direction from Respondent as to how the payment was to be applied. Where a debtor does not specify to what debt a payment is to be applied the creditor may apply the payment to whatever open account it wishes.[15] Without such information the implied mutual assent consequent upon the negotiation of the check could not be present, and no accord could be accomplished. We find, therefore, that there was no accord and satisfaction relative to the subject tomato transaction.

We turn now to consideration of the merits of Complainant's claim. We note initially that the acceptance of the tomato load by Respondent is embodied in the contract terms, and accordingly, Respondent is liable to Complainant for the full purchase price of the load, less any damages caused by any breach of contract by Complainant. Although Respondent disputes that the terms of the contract were f.o.b. acceptance final, it is clear that Complainant's invoice, stating those terms in all caps clearly on its face, was issued very promptly on the day of the sale, April 5, 2000, and was faxed on that day to Respondent. However, the somewhat equivocal objection to those terms written across the bottom of the invoice by Respondent was not faxed to Complainant until April 12, 2000. The Regulations provide that:

> "F.o.b. acceptance final" or "Shipping point acceptance final" means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by

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[15] *Mendelson-Zeller Co. v. Bleier*, 34 Agric. Dec. 683 (1975).

recovery of damages from the seller and not by rejection of the shipment.[16]

The question, therefore, is not whether the Canadian inspection demonstrates a breach of the suitable shipping condition warranty, but whether Complainant committed a material breach of the contract by failing to supply gas green tomatoes. Complainant asserts that the contract did not call for gas green tomatoes, and that, therefore, there was no breach. However, this assertion is made in the statement in reply following Respondent's submission of an affidavit from the grower stating that the "Mr. Tasty" label is applied only to vine ripe tomatoes. In the opening statement Complainant contended strongly that he had supplied gas green tomatoes. We conclude that the contract called for gas green tomatoes, and that Complainant breached that contract by supplying vine ripe tomatoes.

The Uniform Commercial Code, section 2-714 provides that:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
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> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
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> (3) In a proper case any incidental and consequential damages under section 2-715 may also be recovered.

The place of acceptance for this f.o.b. acceptance final contract was the place of shipment in Georgia. Market reports furnished by the Federal-State Market News Service of this Department (of which we take official notice) show that on April 5, 2000, the day of sale and shipment, 6x6 vine ripe tomatoes were selling for $2.25 more per carton than mature green tomatoes. Thus it would appear that under the measure of damages suggested by the UCC Respondent was not damaged by the breach. However, this ignores the peculiar facts of this transaction. The fact that a material breach occurred was not discovered until the arrival of the tomatoes in Canada, and the nature of the breach, meant that the tomatoes supplied were not as appropriate for transport to a distant market as gas green tomatoes would have been.

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[16] 7 C.F.R. §46.43(m).

The above quoted section of the UCC provides, in addition to the measure of damages set forth in paragraph (2), that the buyer may "recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." As stated earlier, the f.o.b. acceptance final terms of the sale negate any applicability of the warranty of suitable shipping condition.[17] However, to allow recovery of reasonable damages "resulting in the ordinary course of events from the seller's breach" will, in the peculiar circumstances of this case, require an assessment very similar to that in which we engage when we award damages for breach of the warranty of suitable shipping condition. The similarity, however, is only that, and is occasioned by the nature of the breach, and the fact that it was not discovered until arrival of the

[17]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) are made applicable in f.o.b. sales. The Regulations (7 C.F.R. § 46.43 (i)) define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The rule is based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. See *Pinnacle Produce, Ltd. v. Produce Products, Inc*., 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co*., 39 Agric. Dec. 703 (1980).

tomatoes in Canada.[18]

One reasonable way to assess damages flowing from Complainant's breach is to allow Respondent the difference between the value the tomatoes would have had in Montreal if they had met contract specifications, and the value of the non-conforming tomatoes. Market quotations in Montreal do not list any quotations for mature green tomatoes, but only for vine ripe tomatoes. However, it was no doubt contemplated that the sale in Montreal would be of tomatoes that were at a greater degree of ripeness, and the order for gas green tomatoes was made to assure their arriving without being overripe. The accounting supplied by Respondent from the Canadian firm was reasonably prompt and detailed as to expenses, and how the tomatoes were handled, but did not break down the sales on a lot by lot basis. However, the total sales accord with both the condition of the tomatoes and the quotations for vine ripe tomatoes on the Montreal market. The tomatoes were reworked by the Canadian firm which recorded the loss of 202 cartons out of the original 1,600. This loss is not at all excessive considering the degree of decay, softness, and ripeness recorded by the Canadian inspection. Gross sales for the remaining 1,398 cartons amounted to $16,259.00 Canadian. This amounts to $11.63 per carton for each of the cartons sold. Prices in Montreal on April 12, 2000, the first date for which there are any available prices after April 7, averaged $15.55 per carton. Since the tomatoes were ripe they would not likely bring as much, even after reworking, as the average sales for vine ripes. Accordingly, we will accept the $16,259.00, Canadian, realized from the sales in Montreal as showing the value of the tomatoes accepted.[19] As the value of the tomatoes if they had been as warranted we will accept the $15.55 average market price for vine ripes. The difference between these two figures, is $3.92 per carton, or $6,272.00 Canadian for the 1,600 cartons, or $4,209.39 U.S. funds. This constitutes Respondent's basic damages. In addition we should allow the $1,200.00 for repacking, the $80.00 cost of dumping, and the $304.00 cost of inspection, or $1,584.00. Respondent's total damages, therefore, amount to $5,793.39.

As stated earlier, since Respondent accepted the tomatoes it became liable to

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[18]It might be objected that under the f.o.b. acceptance final terms Respondent should have inspected the tomatoes at shipping point in Georgia, and should not be allowed damages based on the discovery of the breach in Canada. However, this ignores the fact that Complainant knew that Respondent was not located in Georgia, and the multiple trades of the tomatoes were by firms not located there. It also ignores the fact that by the express provision of the f.o.b. acceptance final terms the seller is liable for any material breach.

[19]*See Great American Farms, Inc. v. William P. Hearne Produce Co., Inc.*, 59 Agric. Dec. 466 (2000).

Complainant for the full purchase price of $16,896.00. Respondent's damages deducted from this amount leaves $11,102.61 as Respondent's basic liability for this load. Respondent has already paid Complainant $2,679.50, which leaves $8,423.11 still owing to Complainant. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[20] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[21] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order Respondent shall pay to Complainant, as reparation, $8,423.11, with interest thereon at the rate of 10% per annum from May 1, 2000, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

C.H. ROBINSON COMPANY v. BUDDY'S PRODUCE, INC.
PACA Docket No. R-02-0021.
Order of Dismissal.
Filed August 21, 2002.

Election of Remedies – trust action in federal district court as affecting Res judicata – effect of voluntary dismissal with prejudice on parallel litigation before the Secretary.

Where Complainant filed a trust action in federal district court involving the same parties and subject

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[20] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[21] *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

matter as in a reparation action before the Secretary, and the trust action was opposed by Respondent, there was no election of remedies under section 5(b) of the Act. A voluntary dismissal with prejudice in the trust action by order of the District Court upon stipulation of the parties was res judicata of all the issues before the Secretary, and precluded maintenance of the claim before the Secretary. The complaint was dismissed.

George S. Whitten, Presiding Officer.
Ben G. Campbell, for Complainant.
Pro se, for Respondent.
Order of Dismissal issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). On January 16, 2001, Complainant filed a formal complaint alleging the sale and shipment to Respondent of various lots of perishable produce between January 31, 2000, and July 10, 2000.[1] In addition Complainant alleged Respondent's acceptance of the produce, and that Respondent failed to pay the contract prices totaling $26,510.00.

On February 26, 2001, Complainant filed a trust action under section 5(c) of the Act[2] against Respondent, and Respondent's principals, in the United States District Court for the Western District of Oklahoma alleging failure to maintain the statutory trust as to the same transactions that are covered by the complaint herein, and, inter alia, breach of contract by failure to pay for the produce. Respondent filed an answer in the reparation proceeding before the Secretary on March 30, 2001, alleging that the produce shipped was distressed, and that the transactions were adjusted between the parties. On April 4, 2001, Respondent filed an answer in the trust action denying any liability to Complainant. On July 27, 2001, the parties were notified in the reparation action that the submission of evidence had been completed, and that the record was closed. On October 2, 2001, the parties to the reparation proceeding were notified that the time for the filing of briefs had expired, and that the matter was being assigned to a Presiding Officer for the preparation of a decision.

On January 25, 2002, the parties to the District Court action filed with the Court a "STIPULATION AND ORDER FOR DISMISSAL." This document was signed by the attorneys for each party. The body of the document consisted of one sentence as follows: "The undersigned counsel for Plaintiff and Defendants hereby stipulate and agree that the within civil action may be dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a)." On January

[1] A timely informal complaint covering the same transactions was filed on October 26, 2000.

[2] 7 U.S.C. 499(e)(c).

28, 2002, the court entered the following order:

ORDER

> Now, on this 28th day of January, 2002, this matter comes before this Court upon the stipulation of the parties that the civil matter designated as CIV-01-349(R) should be dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a), and this Court, being advised in the premises and for good cause shown, finds that this Order should be granted.
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the civil matter CIV-01-349(R) is hereby dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a).

On January 31, 2002, Respondent's counsel filed a motion with this Department to dismiss the reparation action on the basis of lack of jurisdiction resulting form Complainant's having made an election of remedies by the filing of the trust action, and on the basis of claim preclusion resulting from the voluntary dismissal in the District Court. On April 15, 2002, Complainant filed a response to this motion.

The District Court action was an action for the enforcement of the statutory trust, and, in and of itself, would not normally involve an election of remedies. In the event that a trust claim is contested on the merits it is our policy to stay reparation actions pending the outcome of the district court action, and to treat the final judgment in the district court as res judicata of the issues in the reparation case. Furthermore, it is also our policy to not treat the filing of a separate civil court action as an election of remedies under section 5(b) when there is a voluntary dismissal by the party instituting the action.[3] We conclude that Respondent has not shown that an election of remedies pursuant to section 5(b) took place.

In this case the voluntary dismissal in the District Court was with prejudice. A dismissal with prejudice implies an adjudication on the merits, which bars the right

[3] *See Han Yang Trade Co., Inc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765 (1993); *Spring Acres Sales Company, Inc., v. Freshville Produce Distributors, Inc.*, 45 Agric. Dec. 2181 (1986); and *Gilliland & Co. v. San Antonio Commission Co.*, 2 Agric. Dec. 492, at 495 (1943).

to bring or maintain an action on the same claim.[4] Normally such a dismissal is res judicata as to every matter in issue. Complainant, however, in its response to the motion to dismiss, alleges that the intent of the parties was that the dismissal not preclude the continuance of this reparation case, and that the purpose of the dismissal was to avoid duplicate litigation and conform with the election of remedies requirement of section 5(b). Complainant's counsel attached an affidavit to the response to the motion to dismiss. This affidavit was given by Mark A. Amendola, Esq., an Ohio attorney who was retained by Complainant to handle the trust litigation, and who negotiated and signed the dismissal stipulation. Mr. Amendola stated in part:

> There was no settlement or compromise of the District Court case. Moreover, there was no value and no consideration for the dismissal of the District Court case. Prior to executing the Stipulation for Dismissal, I discussed with Buddy's counsel the possibility of Robinson agreeing to also dismiss its pending reparation claim in exchange for an appropriate settlement payment. Buddy's did not accept that proposal and it was my understanding that both parties preferred to obtain a final adjudication on Robinson's claim from the Secretary of Agriculture.

Complainant asserts that in "determining the preclusive effect of a stipulation of dismissal, the courts . . . routinely look to the intent of the parties," and urges that, in accord with the affidavit of the Ohio attorney quoted above, the intent of the parties was that the dismissal not have preclusive effect. In 1975 the United States Supreme Court stated that:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree . . .[5]

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[4] *See Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir.1995); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir.1986); *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir.), *cert. denied,* 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992).

[5] *United States v. ITT Continental Baking Co.*, 420 U.S. 223 at 238 (1975).

The Court was interpreting an elaborate consent decree issued in a Federal Trade Commission case that prohibited the "acquiring" of certain assets. It was undisputed that the decree had been violated, but for purposes of assessment of penalty it was questioned whether daily penalties could be assessed for the violation of a decree that prohibited only acquisition, allegedly a one time event. The Court found, in essence, that reference to the agreement between the parties and supporting documents was permissible to ascertain the meaning of an ambiguous word in the consent decree. Numerous circuits have followed this case in stating that the intent of the parties is an element for inquiry in connection with the determination of whether a voluntary dismissal with prejudice based upon a settlement agreement should have a claim preclusive effect.[6] However, it should be noted that the holding of the Court was based squarely upon the contractual nature of the consent decree, and the cases that have followed this holding have made similar observations. However, in this case Complainant's contention that "[t]here was no settlement or compromise of the District Court case," and that "there was no value and no consideration for the dismissal . . .," argues against considering the intent of the parties, since it eliminates any contractual element in the voluntary dismissal.

There is another consideration that bears upon this question. Were we to say, in spite of the above reasoning, that there is a substantial contractual element to the voluntary dismissal so as to open the possibility of an inquiry into the intent of the parties, the cases which allow such an inquiry presuppose an ambiguity in the stipulation such as would make an inquiry as to the intent of the parties appropriate in the same manner in which it would be in a purely contractual context.[7] Here there

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[6] *See*, for example, *Ronald F. Keith v. Edward C. Aldridge, Jr.*, 900 F.2d 736 (Fourth Cir. 1990), *cert. denied,* 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990), where the court stated: "When a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties. . . . This approach, following from the contractual nature of consent judgments, dictates application of contract interpretation principles to determine the intent of the parties." The court then looked to the "mutually manifested . . . intentions" of the parties, noting that "the settlement agreement and the dismissal order entered pursuant to it do not expressly reserve to Keith the right to raise due process or other substantive claims in subsequent litigation."

[7] *Israel v. Carpenter*, 120 F.3d 361(2nd Cir. 1997) (applying Massachusetts law that "in order to utilize extrinsic evidence of the parties' intent, a court need not invariably find facial ambiguity."); *Coakley & Williams Construction, Incorporated v. Structural Concrete Equipment, Incorporated*, 973 F.2d 349 (4th Cir. 1992); *Marvel Characters, Inc. v. Simon,* No. 00 CIV. 1393(RCC), 2002 WL 313865 (S.D.N.Y. Feb. 27, 2002); *WILJ International Limited v.Biochem Immonusystems, Inc*., 4 F.Supp.2d 1(D. Mass. 1998).

was no ambiguity in the stipulation or order, and it must be deemed a final adjudication on the merits for res judicata purposes of the claims asserted, or which could have been asserted, in the District Court trust action.[8] Furthermore, a misunderstanding by the parties as to the legal effect of an agreed upon dismissal with prejudice does not warrant voiding the agreement,[9] and, where "a genuine misunderstanding had occurred concerning the stipulation's scope" it was held that counsel's misunderstanding could not void the agreement, even though "the consequences of entering into [the] agreement were not fully weighed" and "the choice was poor."[10]

Complainant, in resisting Respondent's motion for dismissal, asserts that a 1913 Oklahoma case requires that for a dismissal of a suit to have a preclusive effect it must be "based upon an agreement between the parties by which a settlement and adjustment of the subject matter is made."[11] Complainant argues that since there was no settlement or adjustment between the parties to the District Court action, preclusive effect should not be given to the voluntary dismissal with prejudice. However, we are here dealing with an order of a federal district court in a federal trust case, not a diversity case, and it is clear that federal law must determine the interpretation of the order.[12] Under federal law:

> . . . where there is no settlement agreement at all, there is nothing for the court to consider other than the voluntary dismissal with prejudice, which

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[8] *Marvel Characters, Inc. v. Simon*, No. 00 CIV. 1393(RCC), 2002 WL 313865 (S.D.N.Y. Feb. 27, 2002).

[9] *TCBY Systems, Inc. v. EGB Associates, Inc.*, 2 F.3d 288 (8th Cir. 1993); and *Citibank, N.A. v. Data Lease Financial Corporation*, 904 F.2d 1498 (1990) ". . . misunderstanding as to the legal effect of a dismissal with prejudice does not warrant a hearing."

[10] *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir.1986).

[11] *Turner v. Fleming,* 130 P. 551(OK 1913).

[12] *Semtek International Incorporated v. Lockheed Martin Corporation*, 531 U.S. 497 (2001); *Heck v. Humphrey*, 512 U.S. 477, at 488 n. 9 (1994) "It is clear that where the federal court decided a federal question, federal res judicata rules govern," quoting P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1604 (3d ed. 1988); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903). *See also Hallco Manufacturing Co., Inc. v. Raymond Keith Foster*, 256 F.3d 1290 (Fed. Cir. 2001); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469 (Fed.Cir.1991); *PRC Harris, Inc. v. the Boeing Company,* 700 F.2d 894 at n. 1(2nd Cir.1983).

. . . is sufficient by itself to invoke the preclusive effect of res judicata.[13]

We conclude that Complainant's claim in this reparation proceeding is precluded by the dismissal with prejudice of the trust action in the District Court. The complaint should be, and hereby is, dismissed.

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[13] *Edward T. Hanley v. Cafe Des Artistes, Inc.*, No. 97 Civ. 9360(DC), 1999 WL 688426 (S.D.N.Y. Sept. 3, 1999) (mem.)

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: CAPTAIN JACK'S TOMATOES, INC., AND THE FRESH GROUP, LTD., d/b/a MAGLIO AND COMPANY.
PACA Docket No. D-00-0008.
Stay Order as to The Fresh Group, Ltd., d/b/a Maglio and Company.
Filed July 16, 2002.

Ruben D. Rudolph, Jr., for Complainant.
Jordan B. Reich,, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On April 30, 2002, I issued a Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company: (1) concluding that beginning on December 7, 1998, and continuing through December 29, 1998, The Fresh Group, Ltd., d/b/a Maglio and Company [hereinafter Respondent], committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce; (2) assessing Respondent a $150,000 civil penalty; and (3) stating that in the event the $150,000 civil penalty is not paid in accordance with the April 30, 2002, Order, Respondent's PACA license shall be suspended for 60 days. *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company),* 61 Agric. Dec. 356 (2002).

On July 1, 2002, Respondent filed "Motion to Stay Order of Judicial Officer, United States Department of Agriculture Pending Review of Decision and Order" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company)*, 61 Agric. Dec. 356 (2002), pending the outcome of proceedings for judicial review. On July 15, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

On July 16, 2002, Ruben D. Rudolph, Jr., counsel for the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], contacted the Office of the Judicial Officer by telephone and stated that Complainant does not object to Respondent's Motion for Stay.

Respondent appealed *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company),* 61 Agric. Dec. 356 (2002), to the

United States Court of Appeals for the Seventh Circuit.[1] Therefore, in accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.

For the foregoing reasons, the following Order should be issued.

ORDER

The Order issued in *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company)*, 61 Agric. Dec. 356 (2002), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: CAPE FEAR PRODUCE, INC.
PACA Docket No. D-02-0009.
Order Dismissing the Complaint.
Filed August 29, 2002.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant's motion to dismiss the disciplinary complaint filed on February 14, 2002 against Cape Fear Produce, Inc., alleging willful violations of Section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a et seq.) is granted. The complaint in the above-captioned matter is dismissed without prejudice.

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[1] *The Fresh Group, Ltd. v. United States Dep't of Agric.*, *appeal docketed*, No. 02-2636 (7th Cir. June 24, 2002).

In re: SHK PRODUCE BROKERS, INC.
PACA Docket No. D-03-0004.
Order Dismissing Case.
Filed December 3, 2002.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, for Respondent.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Agricultural Marketing Service, Fruit and Vegetable Programs, has withdrawn its Notice to Show Cause and has withdrawn its Motin for Expedited Hearing, for the reason that SHK Produce Brokers, Inc. has withdrawn its PACA license application.

Accordingly, this case is DISMISSED.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed and the mailing dates.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: T. RODES AND SONS, INC.
PACA Docket No. D-01-0002.
Decision Without Hearing.
Filed November 8, 2001.

PACA – Default – Prompt payment, failure to make.

Christopher Young-Morales, for Complainant
Andrew M. Osborne for Respondent
Decision and Order issued by Dorthea A. Baker, Administrative Law Judge

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) hereinafter referred to as the "Act", instituted by a Complaint filed on October 24, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period February through December 1999, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 119 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $323,016.67.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. On July 10 through July 20, 2001 a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of July 18, 2001, 13 of the 16 sellers listed in the Complaint were still owed $71,766.97. Based on the results of the investigation, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued; Respondent did not answer the Motion.

Hearing no objection, Administrative Law Judge Baker issued a Notice To Show Cause Why A Decision Without Hearing Should Not Be Issued, based upon Complainant's allegation in its Motion, substantiated by affidavit, that Respondent

failed to pay the produce debt alleged in the Complaint within 120 days of the service of the Complaint.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcomp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998), "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 [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case . . .. In 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." *Id.* at 548-549.

According to the Judicial Officer's policy set forth in *ScamCorp*, this Respondent had 120 days from the date the complaint was served upon it, or until March 14, 2001, to come into full compliance with the PACA. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and revoking Respondent's license.

As Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1 . Respondent is a corporation organized and existing under the laws of the state of Massachusetts. Its business mailing address is 126-127 New England Produce Center, Chelsea, Massachusetts 02150-1711.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 991579 was issued to Respondent on August 24, 1999. This license was renewed on its anniversary date on August 24, 2000, but was not renewed on August 24, 2001.

3. As more fully set forth in paragraph III of the Complaint, during the period February through December 1999, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 119 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of $323,016.67.

4. Respondent failed to pay the produce debt described above and to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

Conclusions

Respondent's failure to make full payment promptly with respect to the 119 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the license of Respondent shall be revoked.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139 and 1.145).

Copies hereof shall be served upon parties.
[Note: This decision and order became final December 29, 2001- Editor]

In re: SOUND COMMODITIES, INC.
PACA Docket No. 01-0031.
Decision Without Hearing by Reason of Default.
Filed April 4, 2002.

PACA – Default – Payment, failure to make full, prompt.

Ann K. Parnes, for Complainant,
Respondent, Pro se.
Decision issued by James W. Hunt, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) hereinafter referred to as "the Act," instituted by a complaint filed on September 13, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period September 2, 1998, through August 28, 1999, Sound Commodities, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 15 sellers of the agreed purchase prices in the total amount of $707,373.62 for 296 lots of perishable agricultural commodities that it received, accepted, and sold in interstate commerce. A distribution of trust assets in 2000 reduced the amount that remains past due and unpaid by Respondent to $601,786.97.

A copy of the complaint was served upon Respondent by certified mail on September 24, 2001. Respondent did not file an answer. The time for filing an answer having run, and upon Complainant's motion for the issuance of a Decision without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondent, Sound Commodities, Inc., is a corporation organized and existing under the laws of the state of Washington. Respondent's business mailing address is 218 Main Street, PMB 516, Kirkland, Washington 98033.

2. At all times material herein, Respondent was licensed under the Act. License number 890812 was issued to Respondent on March 6,1989. This license was suspended on September 28, 1999, for failing to pay a reparation order pursuant to

Section 7(d) of the Act (7 U.S.C. §499g(d)). Subsequently, eight additional reparation orders were issued against Respondent. These nine orders remain unsatisfied. Respondent's license terminated on March 6, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period September 2, 1998, through August 28, 1999, Respondent failed to make full payment promptly to 15 sellers for 296 lots of fruits and vegetables that it received, accepted, and sold in interstate commerce in the total amount of $707,373.62. In 2000, a distribution of trust assets totaling $105,586.65 was made to 11 PACA claimants who protected their trust rights under Section 5(c)(2) of the Act (7 U.S.C. §499e(c)(2)). This distribution reduced the amount that remains past due and unpaid for purchases made by Respondent in the course of interstate commerce to $601,786.97.

Conclusions

Respondent's failure to make full payment promptly with respect to the 296 transactions set forth in Finding of Fact 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), and the facts and circumstances of the violations shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final July 2, 2002. - Editor]

In re: OPC LIQUIDATION CORPORATION, formerly d/b/a OREGON POTATO COMPANY.
PACA Docket No. D-02-0007.
Decision Without Hearing by Reason of Default.
Filed June 20, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) hereinafter referred to as the "Act," instituted by a complaint filed on February 6, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of March 1999 through June 2000, Respondent OPC Liquidation Corporation, formerly known as the Oregon Potato Company, (hereinafter the "Respondent"), failed to make full payment promptly to 40 sellers of the agreed purchase prices in the total amount of $6,792,743.62 for 2,869 lots of perishable agricultural commodities, which it purchased, received and accepted and in interstate and foreign commerce.

A copy of the complaint was served on the Respondent by certified mail on February 12, 2002, which complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, OPC Liquidation Corporation, formerly known as Oregon Potato Company, is a corporation organized and existing under the laws of the State of Oregon, also formerly doing business as Washington Potato Company. Oregon Potato Company changed the name of the company to OPC Liquidation Corporation on January 8, 2001, while in bankruptcy, in order to facilitate the sale of the company's assets, including the Oregon Potato Company name and Washington Potato Company trade name. OPC Liquidation Corporation and the

former Oregon Potato Company's business address is East Columbia Avenue, Boardman, Oregon 97818. The mailing address is P.O. Box 169, Boardman, Oregon 97818.

2. At all times material herein, OPC Liquidation Corporation and the former Oregon Potato Company were licensed under the provisions of the PACA. The License and Program Review Branch, PACA Branch, Fruit and Vegetable Division, were informed when the company changed names and permitted OPC Liquidation Corporation to retain PACA license number 810641, which had been issued to the former Oregon Potato Company on March 4, 1981. Respondent's license was terminated on March 4, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when OPC Liquidation Corporation failed to renew it.

3. During the period March 1999 through June 2000, Respondent failed to make full payment promptly to 40 sellers of the agreed purchase prices in the total amount of $6,792,743.62 for 2,869 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 2,869 transactions described above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145). [This Decision and Order became final July 30, 2002. - Editor]

In re: JANNY WATERMELON & PRODUCE, INC.
PACA Docket No. D-01-0021.
Decision Without Hearing by Reason of Default.
Filed July 15, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) hereinafter referred to as "the Act," instituted by a complaint filed on June 28, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of December 1999 through September 2000, Respondent Janny Watermelon & Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to six sellers of the agreed purchase prices, or balances thereof, in the total amount of $195,352.54 for 30 lots of perishable agricultural commodities that it received, accepted and sold in interstate and foreign commerce.

A copy of the complaint filed on June 28, 2001 was sent to Respondent at 2438 Nostrand Avenue, Brooklyn, New York 11210 by certified mail on the filing date. On July 9, 2001, the Hearing Clerk wrote to the Postmaster in Brooklyn, New York requesting delivery date confirmation and the signature card. When no response was forthcoming, on September 18, 2001, the Hearing Clerk once again requested that the delivering post office provide delivery date confirmation and a signature. When no response was received, the complaint was sent once again to the same address by certified mail on October 4, 2001. The delivery receipt for the complaint mailed on October 4th returned to the Hearing Clerk on October 30, 2001. It was signed on October 1, 2001 and date stamped by the post office on October 16th. The return receipt for the complaint mailed on June 28, 2001 was also subsequently returned to the Hearing Clerk with a signed receipt date of October 14, 2001 and post office date stamp of October 16, 2001.

The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of New York. Its business mailing address is 2438 Nostrand Avenue, Brooklyn, New York 11210.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 981714 was issued to Respondent on August 3, 1998.[1] This license terminated on August 3, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period of December 1999 through September 2000, Respondent purchased, received, and accepted in interstate and foreign commerce, from six sellers, 30 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $195,352.54.

Conclusions

Respondent's failure to make full payment promptly with respect to the 30 transactions described above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service

[1] A typographical error in the complaint mistakenly identified Respondent's license number as 980214.

hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145). [This Decision and Order became final September 9, 2002. - Editor]

In re: D&E PRODUCE, LLC t/a ALLRED PRODUCE, LLC.
PACA Docket No. D-02-0006.
Decision Without Hearing by Reason of Default.
Filed July 19, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.), hereinafter referred to as "the Act," instituted by a complaint filed on January 15, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of February through October 2000, Respondent D&E Produce, LLC, trading as Allred Produce, (hereinafter "Respondent") failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of $228,287.45 for 33 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate commerce. The complaint further alleges that Respondent's PACA license was obtained through false and misleading statements and that Respondent continued to use a denied trade name.

A copy of the complaint was sent to Respondent by certified mail on January 15, 2002 and received by the Respondent on January 24, 2002. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a limited liability company organized and existing under the laws of the State of Texas. Its business mailing address is 1901 Fir Avenue, McAllen, Texas 78501. Its business mailing address is P.O. Box 3866, McAllen, Texas 78502.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 001843 was issued to Respondent on August 31, 2000. This license terminated on August 31, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. On July 20, 2000, Respondent was denied a license for the name "Allred's Produce" based on a determination by the agency that the use of that name would be deceptive, misleading or confusing to the trade. In obtaining PACA license number 001843 in the name of D&E Produce, LLC, Respondent reported no intention of using any additional trade or fictitious names in the licensing application. Question 3 of the license application specifically required Respondent to list any additional trade or fictitious names. Despite being denied a license for the use of the name "Allred's Produce," and failing to report its intention to continue to use the name "Allred's Produce" on its license application, at all times material herein, Respondent continued to use the trade name "Allred's Produce."

4. During the period of February through October 2000, Respondent purchased, received, and accepted in interstate commerce, from seven sellers, 33 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $228,287.45.

Conclusions

Respondent's continued use of a denied trade name, "Allred's Produce," constitutes a violation of Section 3(c) of the Act (7 U.S.C. § 499c(c)).

Respondent's failure to disclose its continued use of the denied trade name "Allred's Produce" on its licensing application constitutes a violation of Section 8(c) of the Act (7 U.S.C. § 499h(c)).

Respondent's failure to make full payment promptly with respect to the 33 transactions described above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

Order

A finding is made that Respondent has violated Sections 3(c) and 8(c) of the

Act (7 U.S.C. §§ 499c(c), 499h(c)) and committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

The facts and circumstances of the violations set forth herein shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145). [This Decision and Order became final September 9, 2002. - Editor]

In re: C.L. CONTRERAS PRODUCE, INC.
PACA Docket No. D-01-0009.
Decision Without Hearing by Reason of Default.
Filed August 6, 2002.

PACA – Default – Payment, failure to make full, prompt.

Ruben D. Rudolph, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a et seq.) hereinafter referred to as the "PACA", instituted by a Complaint filed on February 28, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint was served on Respondent by certified mail on March 3, 2001. Respondent has failed to file an answer to the complaint.

The Complaint alleges that during the period September 1997 through March 1998, C. L. Contreras Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $181,093.38 for 78 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce. The Complaint also noted that on March 6, 1998, Respondent filed a voluntary petition in the United States Bankruptcy Court, Southern District of Texas pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C § 701 et seq.), designated Case No. 98-32553. Complainant requested that a finding be made that Respondent committed willful,

flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

On March 6, 1998, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 et seq.) in the United States Bankruptcy Court, Southern District of Texas. This petition has been designated Case Number 98-32553. According to Schedule F of the Petition, Respondent admits that all of the 10 sellers listed in Paragraph III of the Complaint hold unsecured claims that are more than or equal to the amounts alleged in the Complaint, for a total of $259,558.00.

Findings of Fact

1. Respondent was a corporation organized and existing under the laws of the State of Texas. Its business mailing address was 4910 North Main Street, Houston, Texas 77009.

2. Pursuant to the licensing provisions of the PACA, license number 951040 was issued to Respondent on April 4, 1995. This license terminated on April 4, 1998, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period September 1997 through March 1998 failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $181,093.38 for 78 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent failed to make payment for purchases of produce, as set forth in Finding of Fact 3 (above). Respondent's failure to make full payment constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this

Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).
[This Decision and Order became final September 14, 2002. - Editor]

In re: ARMENO FOODS, INC.
PACA Docket No. D-02-0010.
Decision Without Hearing by Reason of Default.
Filed August 13, 2002.

PACA – Default – Payment, failure to make full, prompt.

Clara Kim, for Complainant.
Respondent, Pro se.
Decision issued by James W. Hunt, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter referred to as the "Act" or "PACA"), instituted by a Notice to Show Cause and Complaint filed on February 27, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period July 2001 through November 2001, Respondent, Armeno Foods, Inc., (hereinafter "Respondent") failed to make full payment promptly to 4 sellers of the agreed purchase prices, or balances thereof, in the total amount of $96,520.88 for 53 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

Respondent's PACA license terminated on August 22, 2001, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), because Respondent failed to pay the required renewal fee. On January 28, 2002, Complainant received Respondent's completed application for a new PACA license. Due to Respondent's failures to make full payment promptly for its purchases of perishable agricultural commodities as stated above, Complainant alleges that Respondent has engaged in practices of a character prohibited by the PACA and is therefore unfit to engage in the business of a commission merchant, dealer, or broker. In accordance with Section 4(d) of the Act (7 U.S.C. § 499d(d)), Complainant withheld the issuance of a new license pending

its investigation to determine whether Respondent was unfit to engage in business subject to the Act. Subsequently, the Associate Deputy Administrator filed the Notice to Show Cause why Respondent should not be denied a PACA license and Complaint on February 27, 2002. On February 28, 2002, the Hearing Clerk mailed the Notice to Show Cause and Complaint to Respondent via certified mail at its last known business address at 109 Prospect Place, Hillsdale, New Jersey 07642 but it was returned unclaimed by the U.S. Postal Service on April 9, 2002. On April 11, 2002, the Hearing Clerk re-sent the Notice to Show Cause and Complaint, via regular mail, to the home of Respondent's President, Gregory Minasian at 137 Patrick Avenue, Emerson, New Jersey 07630.

Complainant's counsel filed a Motion for Expedited Hearing on March 27, 2002. In that motion, Complainant's counsel requested that a hearing be held on or before March 29, 2002, in order to meet the statutory mandate of providing Respondent an opportunity for hearing within 60 days from the date of the license application (7 U.S.C. § 499d(d)).

The case was assigned to the undersigned on March 27, 2002. I attempted to contact Gregory Minasian, President of Respondent, by telephone, but those attempts were unsuccessful. On March 28, 2002, I issued an Order Scheduling Hearing. That order directed that an oral hearing be conducted by telephone on March 29, 2002, at a time acceptable to Respondent. It further stated that Respondent might contact me to waive the right to a hearing by March 29, 2002, and request a hearing at another date. The Hearing Clerk sent the Order Scheduling Hearing to Respondent via over-night express mail on March 28, 2002, to Respondent's last known business address at 109 Prospect Place, Hillsdale, New Jersey 07642. It was returned because Respondent was no longer located at that address. Respondent did not notify the Department of its current business address.

The hearing by telephone commenced in this proceeding at approximately 2:45 p.m. on March 29, 2002. Complainant was represented by Clara Kim, Esq. Respondent did not make an appearance in person or by telephone. Due to these circumstances, I stated that the hearing would be continued in order to allow Respondent further opportunity to participate. On April 1, 2002, I issued an Order Continuing Hearing and directed Respondent to contact my office to schedule a date to reconvene the hearing.

On April 3, 2002, Respondent was served the following documents at the home of its President, Gregory Minasian, at 137 Patrick Avenue, Emerson, New Jersey 07630: Notice to Show Cause and Complaint; Order Scheduling Hearing; Order Continuing Hearing; and Rules of Practice (7 C.F.R. § 1.130 et seq.).

On May 3, 2002, Complainant filed a Motion for Decision Without Hearing by Reason of Default.

On June 3, 2002, Mr. Minasian filed a letter stating that he had received the Complaint at his home address on May 10, 2002, and acknowledged that "the only thing I am guilty of is paying my vendors late." He also stated that Respondent's office location was 192 Third Avenue, Westwood, New Jersey 07675.

On July 2, 2002, I issued an order denying Complainant's Motion for Default Decision "at this time" and ordered Respondent to provide by July 15, 2002, its current business address, telephone and facsimile numbers in order to re-schedule the hearing. The order was sent to addresses for both Respondent and Mr. Minasian. There was no reply from either Respondent or Mr. Minasian. On July 29, 2002, Respondent was directed to show cause by August 9, 2002, why a default decision should not be issued. Respondent did not reply to the show cause order.

Accordingly as Respondent has failed to request a new date for a continuance of the hearing, failed to avail itself of the opportunity to show cause why its application for license should not be denied, and failed to file an answer, Complainant's motion for the issuance of a Default Order Without Hearing by Reason of Default is now granted.[1] The following Decision and Order is therefore issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Armeno Foods, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Its business addresses have been 109 Prospect Place, Hillsdale, New Jersey 07642 and 192 Third Avenue, Westwood, New Jersey 07675. Respondent's president is Gregory Minasian. His mailing address is Gregory Minasian, 137 Patrick Avenue, Emerson, New Jersey 07630.

2. PACA license number 951813 was issued to Respondent on August 22, 1995. This license terminated on August 22, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. At all times material herein, Respondent has operated subject to the PACA.

4. During the period June 2001 through October 2001, Respondent purchased, received, and accepted in interstate and foreign commerce, from 4 sellers, 53 lots of vegetables, all being perishable agricultural commodities, but failed to make full

[1]In the event Mr. Minasian's June 3, 2002, letter could be considered an answer, it admits the allegations in the Complaint and thus warrants a default decision pursuant to Section 1.136 (7 C.F.R. § 1.136).

payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $96,520.88.

5. On January 28, 2002, Complainant received Respondent's completed application for a PACA license.

6. A Complaint was filed against Respondent alleging that it violated Section 2(4) of the Act (7 U.S.C. § 499b(4)) for failing to make full payment promptly for the purchases found in paragraph 4 above.

7. Respondent failed to file an Answer.

Conclusions

Respondent was given an opportunity for a hearing to show cause why its application for a PACA license should not be denied, pursuant to Section 4(d) of the Act (7 U.S.C. § 499d(d)). Respondent failed to avail itself of its right to a hearing and failed to file an Answer to the Complaint. A hearing was held on March 29, 2002, during which Respondent did not make an appearance. Respondent's failures to make full payment promptly with respect to the 53 transactions set forth in Finding of Fact No. 4 above, constitute willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. §499b(4)). As a result of Respondent's failures to make full payment promptly for its purchases of perishable agricultural commodities, Respondent has engaged in practices of a character prohibited by the PACA. Pursuant to Section 4(d) of the Act (7 U.S.C. § 499d(d)), Respondent is unfit to engage in the business of a PACA commission merchant, dealer, or broker.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)). The facts and circumstances of the violations set forth above shall be published.

Respondent is unfit to be licensed under the PACA. Its application for a PACA license is denied.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final October 24, 2002. - Editor]

In re: OTERO FROZEN FOODS, L.L.C.
PACA Docket No. D-02-0008.
Decision Without Hearing by Reason of Default.
Filed September 26, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles Kendall, for Complainant.
Respondent, Pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter referred to as the "Act"), instituted by a Complaint filed on February 12, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period October 2, 2000, through February 3, 2001, Respondent Otero Frozen Foods, L.L.C. (hereinafter "Respondent") failed to make full payment promptly to 10 sellers of the agreed purchase prices, or balances thereof, in the total amount of $211,467.40 for 85 lots of onions which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business on February 12, 2002, and was returned with the notation "Moved–Left No Address" to the office of the Hearing Clerk on March 5, 2002. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on March 19, 2002 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 et seq., hereinafter "Rules of Practice"). Also, a copy of the Complaint was sent to the forwarding address and it is indicated it was received March 14, 2002, by signed receipt of Certified Mail #70993400001388058317. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Finding of Fact

1. Respondent is a limited liability company registered in the State of Colorado on April 23, 1999. Respondent's mailing address is P. O. Box 4835, Blue Jay, California 92317-4835. Its business address is 20094 Hwy. 50, Rocky Ford, Colorado 81067-9473.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 991073 was issued to Respondent on May 20, 1999. This license terminated on May 20, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period October 2, 2000, through February 3, 2001, Respondent purchased, received, and accepted in interstate commerce, from 10 sellers, 85 lots of onions, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $211,467.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 85 transactions set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final November 8, 2002. - Editor]

In re: DEL CAMPO PRODUCE, INC.
PACA Docket No. D-02-0018.
Decision Without Hearing by Reason of Default.
Filed October 17, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), [hereinafter referred to as the "Act"], instituted by a complaint filed on May 20, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period November 1998 through June 2000, Respondent Del Campo Produce, Inc., [hereinafter "Respondent"], failed to make full payment promptly to fifteen sellers of the agreed purchase prices, or balances thereof, in the total amount of $335,174.93 for 193 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the complaint filed on May 20, 2002 was sent to the Respondent at 60 East Terminal Produce Drive, Nogales, Arizona 85621 and P.O. Box 1404, Nogales, Arizona 85628 by certified mail on the filing date. The complaints were unclaimed or refused by Respondent and returned by the postal service to the Hearing Clerk. Pursuant to section 1.147(c) of the Rules of Practice, (7 C.F.R. § 1.147(c)), on June 6, 2002, the complaint was sent by regular mail to 60 East Terminal Produce Drive, Nogales, Arizona 85621. Similarly, on June 13, 2002 the complaint was sent once again by regular mail to P.O. Box 1404, Nogales, Arizona 85628. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further proceedings pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Arizona. Its business address was 60 East Terminal Produce Drive,

Nogales, Arizona 85621. Its mailing address is P.O. Box 1404, Nogales, Arizona 85628-1404.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 800264 was issued to Respondent on December 12, 1979. This license terminated on December 12, 2000, pursuant to Section 4(a) of the Act, (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during the period November 1998 through June 2000, Respondent purchased, received and accepted in interstate and foreign commerce, from fifteen sellers, 193 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $335,174.93.

Conclusions

Respondent's failure to make full payment promptly with respect to the 193 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b(4)), and the facts and circumstances set forth above shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final December 4, 2002. - Editor]

CONSENT DECISIONS

(Not published herein - Editor)

Western Fresh Fruit Sales. PACA Docket No. 02-0022. 7/31/02.

Lonny Saverino d/b/a Green Thumb Produce. PACA Docket No. 02-0022. 7/31/02.

Harvest Distributing, Inc. PACA Docket No. 01-0016. 8/2/02.

John Alascio. PACA Docket No. D-01-0007. 8/30/02.

Lexington Produce Co., Inc. PACA Docket No. D-01-007. 8/30/02.

A.L Harrison Company Distributors. PACA Docket No. D-02-0026. 9/9/02.

Turbeville Food Products Corporation. PACA Docket No. D-02-0012. 9/17/02.