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Volume 74

Book Two

Part Three (PACA)

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SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

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COURT DECISION

SPADA PROPERTIES, INC. v. UNIFIED GROCERS, INC.

Case No. 3:13-cv-01760-SI.

Court Decision.

Filed August 6, 2015.

PACA – Perishable Agricultural Commodity Act, statutory background of – Bankruptcy – Course of dealing – Fiduciary duty, breach of – Laches – Partial payment – Pre-default agreements – Post-default agreements – Prompt payment – Statute of limitations – Trust rights – Waiver of rights.

[Cite as: 121 F. Supp. 3d 1070 (D. Or. 2015).]

**United States District Court,
District of Oregon.**

OPINION AND ORDER

MICHAEL H. SIMON, DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Spada Properties, Inc., doing business as United Salad Co. (“USC” or “Plaintiff”), brings this action against Unified Grocers, Inc. (“Unified” or “Defendant”), alleging claims regarding the bankruptcy of a “Food 4 Less” grocery store to which both USC and Unified supplied groceries. Plaintiff asserts four claims: (1) violation of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499b, 499e; (2) conversion of trust funds; (3) money had and received; and (4) breach of fiduciary duty. Before the Court is Defendant’s Motion for Summary Judgment on all claims. Dkt. 59. For the reasons that follow, Unified’s motion is granted and this case is dismissed.

STANDARDS

A party is entitled to summary judgment if the “movant shows that there is no genuine dispute as to any material fact and the movant is

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entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant’s favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir.2001). Although “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ... ruling on a motion for summary judgment,” the “mere existence of a scintilla of evidence in support of the plaintiff’s position [is] insufficient....” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation and quotation marks omitted).

BACKGROUND

The Perishable Agricultural Commodities Act (“PACA”) comprehensively regulates the nation’s produce industry. Congress enacted PACA in 1930 “in order to provide growers and sellers of agricultural commodities with ‘a self-help tool ... enabl[ing] them to protect themselves against the abnormal risk of losses resulting from slow-pay and no-pay practices by buyers or receivers of fruits and vegetables.’ ” *D.M. Rothman & Co. v. Korea Commercial Bank of New York*, 411 F.3d 90, 93 (2d Cir.2005) (alterations in original) (citing *Regulations Under the Perishable Agricultural Commodities Act; Addition of Provisions to Effect a Statutory Trust*, Final Rule, 49 Fed.Reg. 45735, 45737 (USDA Nov. 20, 1984)). PACA requires purchasers of perishable produce to provide full and prompt payment to produce sellers. 7 U.S.C. § 499b(4). As described more fully below, § 499e(c)(2) of PACA creates a non-segregated, floating trust for the benefit of a seller of perishable commodities. The trust comes into existence when produce is delivered, and remains in effect until payment is received. *See Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 281 (9th Cir.1997). PACA trust rights are superior to the rights of secured creditors, who can in certain circumstances be required to disgorge any

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PACA trust proceeds received. *See Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1067 (2d Cir.1995); *Consumers Produce Co. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1381 (3d Cir.1994).

USC is an Oregon corporation that sells and distributes fresh fruit and produce and is licensed by the Secretary of Agriculture under PACA. For almost 20 years, USC was the primary wholesale produce supplier for Food Ventures 87, Inc., doing business as “Food 4 Less” (“Food 4 Less”). The allegations in USC’s Amended Complaint, however, deal only with produce shipments made by USC to Food 4 Less between July 21, 2011 and April 24, 2012.

Unified is a secured seller of non-PACA qualified food and also supplies groceries to Food 4 Less. In 2007, Food 4 Less became a member of Unified, which operates as a retailer-owned grocery cooperative. As part of the initial purchase agreement between Food 4 Less and Unified, Food 4 Less authorized Unified to withdraw automatic payments from Food 4 Less’ bank accounts. During the period at issue, Unified received payments from Food 4 Less totaling \$8,099,459.16. These payments to Unified were made through automatic withdrawals authorized by Food 4 Less.

Between July 21, 2011 and April 24, 2012, among other times, USC sold fresh fruit and produce to Food 4 Less on stated terms requiring payment within ten days after invoice. The invoice date was also the date of delivery. Each invoice sent by USC to Food 4 Less included the following statement:

The perishable agricultural commodities listed on this statement are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities and any receivables or proceeds from the sale of these commodities until full payment is received.

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Spada Decl. ¶ 8, Dkt. 16.¹

Although the formal stated terms included in USC's invoices to Food 4 Less required payment in full within ten days of delivery, in the course of practice, USC often allowed Food 4 Less to pay within 30 days of delivery from some period. In fact, at some point in time, Food 4 Less began to pay even later than 30 days after delivery. USC chose not to commence collection actions against Food 4 Less based on USC's long relationship with Food 4 Less and the reassurances made to USC by the owners of Food 4 Less. This practice continued for some time.

After Food 4 Less began to experience financial difficulties, it got further and further behind on payments owed to USC. By January of 2009, Food 4 Less was at least five months behind on its payments. Ernest Spada, the owner of USC, and Michael Leech, the owner of Food 4 Less, talked frequently about Food 4 Less' growing inability timely to pay USC. In July of 2009, USC asked for and received from Food 4 Less a promissory note in the amount of \$500,000. USC used the payments received on the \$500,000 promissory note to reduce a portion of Food 4 Less' past due account. The note required Food 4 Less to pay \$22,000 a month to USC for two years. This covered both principal and interest due on the \$500,000 note. The note was paid off by August 2011, at which time Food 4 Less was eight months behind on its produce payments to USC. Around this time, Mr. Leech offered USC a security agreement on his personal boathouse, worth approximately \$180,000, which USC accepted. In April 2012, USC began selling produce to Food 4 Less only on a cash-on-delivery basis.

On or about April 30, 2013, Food 4 Less filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The bankruptcy matter was closed as a "no asset" case without any distribution to creditors on or about August 21, 2013. USC alleges that as of January 28, 2013, Food 4 Less still owed USC the total principal amount of \$830,711.13.

DISCUSSION

Plaintiff filed an Amended Complaint (Dkt. 55) on September 23,

¹ This statement is taken verbatim from 7 C.F.R. § 46.46(f)(3).

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2014, asserting four claims: (1) violation of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499b, 499e; (2) conversion of trust funds; (3) money had and received; and (4) breach of fiduciary duty. Defendant moves for summary judgment on all of Plaintiff's claims.

A. PACA Claims Under 7 U.S.C. §§ 499b and 499e

Plaintiff's first claim for relief asserts PACA trust rights in the proceeds of Food 4 Less' sales of PACA-qualified goods, and thus asserts its PACA claim against Defendant as a third-party transferee of PACA trust assets, or proceeds. Defendant moves for summary judgment on this claim on three alternative grounds: (1) Plaintiff's PACA claim is barred by the two-year statute of limitations; (2) Plaintiff's PACA claim is barred by the doctrine of laches; and (3) Plaintiff's course of dealing with Food 4 Less waived, or voided, Plaintiff's PACA trust rights. The Court first reviews the relevant portions of PACA applicable to this claim and then addresses each of Defendant's three arguments in turn.

1. The Perishable Agricultural Commodities Act

Congress enacted PACA in 1930 "to regulate the sale of perishable agricultural commodities." *Endico Potatoes, Inc. v. CIT Grp./ Factoring, Inc.*, 67 F.3d 1063, 1066 (2d Cir.1995). PACA was intended to encourage fair trading practices, suppress unfair and fraudulent business practices in the marketing of perishable commodities and provide remedies for breach of contractual obligations. *See id.* To this end, produce dealers violate PACA if they do not promptly pay in full for any perishable commodity purchased in interstate commerce. 7 U.S.C. § 499b(4); *see also Sunkist Growers, Inc.*, 104 F.3d at 282. Failure promptly to pay in full exposes the violating buyer to civil liability in favor of the seller.² 7 U.S.C. § 499e.

In the early 1980s, Congress reexamined PACA in the wake of a

² The elements of a PACA trust claim are: (1) plaintiff is a PACA licensee; (2) plaintiff sold perishable agricultural commodities; (3) the buyer was subject to the trust provisions of PACA; (4) the perishable agricultural commodities traveled through interstate commerce; (5) plaintiff preserved their PACA trust rights by providing requisite notice to the buyer; and the buyer has not made full payment on at least some of the produce provided by plaintiff. *See* 7 C.F.R. § 46.46; *Belleza Fruit, Inc. v. Suffolk Banana Co.*, 2012 WL 2675066, at *8 (E.D.N.Y. July 5, 2012).

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sharp increase in payment defaults by produce buyers. Although it found that PACA generally worked well in making the marketing of perishable agricultural commodities more orderly and efficient, Congress determined that sellers still needed greater protection. *See American Banana Co. v. Republic Nat. Bank of New York, N.A.*, 362 F.3d 33, 37 (2d Cir.2004) (discussing history and purpose of PACA); *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 670 (7th Cir.2002) (same). Congress noted that, as a result of the exigencies of the perishable commodities business, sellers were typically required to sell their produce quickly and often found themselves in the position of unsecured creditors of buyers whose creditworthiness could not be verified. If buyers defaulted, sellers could look only to the commodities (which would have perished) or to the sales proceeds of the commodities. Because sellers were typically unsecured creditors, they generally stood in line behind banks and other lenders who had obtained security interests in the defaulting purchaser's inventories, proceeds, and receivables. As a result, produce sellers were often unable to collect all of the monies owed to them. *See American Banana*, 362 F.3d at 37 (citing 7 U.S.C. § 499e(c)(1), 1984 U.S.C.C.A.N. 405, 406–07, and *Endico Potatoes*, 67 F.3d at 1067).

In 1984, Congress amended PACA to add an additional protection for produce suppliers—a non-segregated, floating trust that gives sellers a security interest in the produce and its proceeds and makes the security interest superior to the claims of the buyer's other secured creditors. *See An Act to Amend the Perishable Agricultural Commodities Act, 1930*, Pub.L. No. 98–273, 98 Stat. 165 (codified as amended 7 U.S.C. § 499e(c) (1984)); 7 C.F.R. § 46.46(b) (2011). As the Ninth Circuit explained:

The PACA provisions provide for the establishment of a nonsegregated trust under which a produce dealer holds its produce-related assets as a fiduciary until full payment is made to the produce seller. The trust automatically arises in favor of a produce seller upon delivery of produce and is for the benefit of all unpaid suppliers or sellers involved in the transaction until full payment of the sums owing has been received.

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In re Milton Poulos, Inc., 947 F.2d 1351, 1352 (9th Cir.1991) (citations omitted). In return for these “extraordinary protections,” however, PACA establishes certain “strict eligibility requirements.” *Patterson*, 307 F.3d at 669 (discussing PACA’s history and statutory text).

One requirement involves notice given to buyers of PACA goods. In order to preserve its PACA trust rights, a seller must comply with the notice provisions of 7 U.S.C. §§ 499e(c)(3) or (4). Subsection (4) provides in relevant part:

In addition to the method of preserving the benefits of the trust specified in paragraph (3), a licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee’s intent to preserve the trust. The bill or invoice statement must include the information required by the last sentence of paragraph (3) and contain on the face of the statement the following: “The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.”

7 U.S.C. § 499e(c)(4).³

Another requirement for PACA eligibility is that PACA applies only to those selling produce on a short-term credit basis. *Patterson*, 307 F.3d at 669 (7th Cir.2002); 7 C.F.R. § 46.46(e)(1) and (2). Thus, to preserve PACA trust rights, sellers are required to have a “prompt payment” agreement with buyers. The relevant regulations are found in 7 C.F.R. §

³ A previous version of PACA also required that the seller provide notice to the Secretary of Agriculture in order to preserve trust rights. This requirement was eliminated in the 1995 amendments. *See* An Act to Amend the Perishable Agricultural Commodities Act, 1930, Pub.L. No. 104-48, §§ 6, 8(b), 109 Stat. 427, 429.

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46.46. Specifically, paragraph (e)(1) of § 46.46, provides a ten-day statutory default for prompt accounting and prompt payments and explains that parties that agree to other payment schedules must reduce the agreement to writing. 7 C.F.R. § 46.46(e)(1) (defining “prompt payment” as ten days after delivery in most instances). Paragraph (e)(2) of § 46.46 states that the maximum time for payment after shipment that the seller and buyer can agree to “*prior to the transaction*, and still be eligible for benefits under the trust is 30 days after receipt and acceptance of the commodities.” 7 C.F.R. § 46.46(e)(2) (emphasis added). This limitation to short-term credit arrangements balances a seller’s right to payment against a buyer’s need to finance its operations, thus serving the public interest by alleviating the “burden on commerce,” 7 U.S.C. § 499e(c)(1), with which Congress was primarily concerned.⁴

Despite the strict time limitations for payment schedules, the regulations also provide that a seller’s acceptance of partial payments or agreement to payment schedules after a buyer’s default will not disqualify a seller from being able to exercise its PACA trust rights:

If there is a default in payment as defined in § 46.46(a)(3), the seller, supplier, or agent who has met the eligibility requirements of paragraphs (e)(1) and (2) of this section will not forfeit eligibility under the trust by agreeing in any manner to a schedule for payment of the past due amount or by accepting a partial payment.

7 C.F.R. § 46.46(e)(3). Therefore, the regulations distinguish between pre-default payment agreements and post-default arrangements.

⁴ Describing the purpose of PACA, 7 U.S.C. § 499e(c)(1) states:

[A] burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and ... such arrangements are contrary to the public interest. This [Act] is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

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This regulation is discussed in more detail below in relation to Defendant's argument that Plaintiff waived its PACA rights. Before addressing that claim, however, the Court addresses Defendant's statute of limitations and laches arguments. An explanation of why those two arguments fail will help clarify how and why Defendant's waiver argument succeeds.

2. Statute of Limitations

In an earlier opinion in this matter, denying Plaintiff's motion for summary judgment, the Court held that a two-year statute of limitations applies to Plaintiff's PACA claim. *Spada Properties, Inc. v. Unified Grocers, Inc.*, 38 F.Supp.3d 1223 (D.Or.2014), *as amended* (Sept. 22, 2014). The Court further held that:

[T]he statute of limitations began to run when USC knew that Food 4 Less was violating PACA. USC moved for summary judgment on the statute of limitations affirmative defense based solely on the contention that the statute of limitations began to run from the date designated in this lawsuit, July 21, 2011. Because Unified did not cross move for summary judgment on this affirmative defense and because neither party has briefed the issue of when USC became aware that Food 4 Less was violating PACA, the Court does not reach whether there is a dispute of fact as to when the statute of limitations began to run, but rather denies summary judgment on this point as a matter of law.

Id. at 1237. Defendant now moves for summary judgment on its statute of limitations defense, contending that Plaintiff's PACA claim accrued more than a decade ago, when Plaintiff first became aware that Food 4 Less was breaching the PACA trust provisions.

Defendant's argument in support of its statute of limitations defense is based upon Plaintiff's long history of accepting or tolerating⁵ late

⁵ Plaintiff argues that Defendant's reference to Plaintiff "accepting" late payments from Food 4 Less is a "gross distortion of the facts," and instead claims that Plaintiff "merely

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payments from Food 4 Less. Plaintiff concedes that as early as 1998, Food 4 Less was more than 10 days late, and often more than 30 days late, on its payments owed to Plaintiff. Over time, Food 4 Less fell further and further behind on its payments to Plaintiff. Defendant submitted the declaration of Jeremy D. Sacks (Dkt. 60), which includes an analysis of Plaintiff's "A/R Customer Inquiry and its Customer Ledger" dating back to late 1998.⁶ This analysis shows that, since at least late 1998, Food 4 Less has never paid Plaintiff within 10 days after delivery. By January 6, 1999, Food 4 Less invoice payments were paid 6 weeks after the date of delivery and Food 4 Less was \$94,860.25 behind on its payments to Plaintiff. With the exception of a brief period around 2001, the delay between delivery and payment by Food 4 Less steadily increased and the amount owed to Plaintiff grew larger. After February 23, 2004, Food 4 Less did not pay a single invoice within 30 days of delivery. By April 2012, when Plaintiff began selling produce to Food 4 Less on a cash-on-delivery basis only, Food 4 Less was paying Plaintiff at least 8 months late and owed Plaintiff more than one million dollars. By the time Food 4 Less' bankruptcy case was closed in August 2013, Food 4 Less owed Plaintiff \$830,711.13.

Defendant also relies on the Court's earlier opinion in this case, stating that "the statute of limitations began to run when USC knew that Food 4 Less was violating PACA." *Spada*, 38 F.Supp.3d at 1237. Based upon this conclusion and the payment data discussed above, Defendant reasons that, because Plaintiff was "aware" that Food 4 Less was violating PACA as early as 1998, Plaintiff's PACA claim is barred by the two-year statute of limitations. Plaintiff, however, responds that it only seeks to recover for specific invoices dated between July 21, 2011 and April 24, 2012, and that the statute of limitations should therefore begin to run no earlier than the date designated in Plaintiff's Amended

tolerated" late payment by Food 4 Less and "was forced to do so for practical business reasons." Specifically, Plaintiff contends that "[h]ad USC not continued to do business with Food 4 Less, any possibility of ever being paid in full would have been destroyed." This contention is discussed more fully below regarding Defendant's arguments regarding laches and Plaintiff's waiver of PACA rights.

⁶ Plaintiff does not dispute the accuracy of Defendant's analysis of this data, but instead argues that it is unable to "verify Defendant's factual representations about remote historical facts." Plaintiff, however, states that it has reviewed data back to January 1, 2002 on Food 4 Less' "main account" and September 23, 2005 on Food 4 Less' "special account."

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Complaint, July 21, 2011, the date of the earliest invoice that Plaintiff contends is at issue.

Consistent with the Court’s earlier ruling in this case, the statute of limitations on Plaintiff’s PACA claim began to run when Plaintiff, being unpaid, first becomes aware that Food 4 Less was violating PACA. The logical difficulty, however, with Defendant’s position—that Plaintiff’s PACA claim accrued as early as 1998—is that it would require the Court to find that the statute of limitations began to run long before Food 4 Less ever contracted with Plaintiff to deliver the majority of produce shipments between 1998 and 2013. This makes little sense. The text of PACA demonstrates that each shipment of goods made by a PACA beneficiary logically exists as a separate unit or transaction for purposes of PACA protection. *See* 7 C.F.R. § 46.46(e)(2) (declaring that “[t]he maximum time for payment *for a shipment* to which a seller, supplier, or agent can agree ... and still be eligible for benefits under the [PACA] trust is 30 days after receipt and acceptance of the commodities”) (emphasis added); 7 C.F.R. § 46.46(f)(1) (declaring that “notice of intent to preserve [trust] benefits” must include certain information “*for each shipment*”) (emphasis added); *see also Hiller Cranberry Products, Inc. v. Koplowsky*, 165 F.3d 1, 12 (1st Cir.1999) (“Congress and the Secretary of Agriculture have made reasonably clear their intention to treat each shipment of perishable goods as a unit for the purpose of determining that shipment’s eligibility for PACA protection.”). Moreover, as a matter of basic legal principle, the statute of limitations “requires a lawsuit to be filed within a specified period of time *after* a legal right has been violated.” *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779–80 (9th Cir.2008) (emphasis added). Here, Plaintiff’s PACA rights in a specific shipment of goods could not be violated before Plaintiff ever contracted with Food 4 Less to make that particular shipment to Plaintiff.

In addition to the plain meaning of the statutory text, this interpretation is logical. Consider the following: A hypothetical seller of PACA goods sells a shipment of green apples to a buyer on 10–day payment terms and a shipment of red apples on 90–day terms. The seller would maintain PACA rights over the shipment of green apples, but not the red apples, assuming that the seller met all other PACA requirements. The shipment of green apples complies with 7 C.F.R. § 46.46(e)(1)’s default ten-day terms; the shipment of red apples, however, violates 7

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C.F.R. § 46.46(e)(2)'s 30-day statutory maximum time for payment to which a buyer and seller may agree and still be eligible for PACA benefits. PACA does not prohibit sellers from selling some goods under PACA's terms and other goods outside of them. Each shipment logically stands as a separate unit or transaction for the purpose of determining whether that shipment qualifies for PACA protection. Accordingly, the statute of limitations as to a particular shipment of goods from Plaintiff (sold on 10-day terms) could not have run out before Food 4 Less ever agreed to purchase that shipment from Plaintiff.

This distinction is important given the factual circumstances of this case. Specifically, Defendant objects to the Court's previously-expressed reasoning on the grounds that between July 21, 2012 and April 24, 2012 (the end dates of Plaintiff's claims), Plaintiff received \$882,606.99 from Food 4 Less, which is an amount greater than the combined total for all invoices at issue in this action. Plaintiff, however, applied these payments to older invoices that were dated months before July 21, 2012. In the Court's view, this fact is relevant to Defendant's argument that Plaintiff's agreements with Food 4 Less waived Plaintiff's PACA rights (as discussed below). It is not, however, relevant to the statute of limitations analysis because it goes only to the merits of Plaintiff's claim, not the date by which Plaintiff was required to file its claim. *See generally Underwood Cotton Co., Inc. v. Hyundai*, 288 F.3d 405, 408-09 (9th Cir.2002) (statute of limitation "preclude a plaintiff from proceeding ... the right (moral or legal) goes on, but the plaintiff simply cannot go to court in order to enforce it") (citation omitted).

Thus, as to each shipment invoice for which Plaintiff seeks restitution from Defendant, the statute of limitations began to run the moment Plaintiff knew Food 4 Less had violated the terms of PACA with respect to that shipment. Because it is undisputed that the formal terms of Plaintiff's contracts with Food 4 Less included ten-day terms, the statutory default under 7 C.F.R. § 46.46(e)(1), Plaintiff's claims accrued ten days after the date of delivery of each shipment of produce. Because the earliest invoice for which Plaintiff seeks restitution was dated July 21, 2011, and the parties entered a tolling agreement commencing July 1, 2013, Plaintiff's claims are not barred by the two-year statute of limitations.

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3. Laches

The Court previously denied Plaintiff's motion for summary judgment against Defendant's laches defense. *See Spada*, 38 F.Supp.3d at 1237. As the Court explained,

For the same reasons discussed regarding the statute of limitations defense, Unified has demonstrated an issue of fact as to the first two elements of the laches defense. Unified has also demonstrated an issue of fact as to the third element of prejudice. If Unified were to have known that Food 4 Less was breaching its fiduciary duty to USC as a trustee, Unified could have made the decision to stop selling groceries to Food 4 Less years ago. Therefore, there is an issue of fact as to all three elements of the laches defense, and USC's motion for summary judgment is denied on this affirmative defense.

Id. Defendant now moves for summary judgment on this defense. To prevail on a laches defense, a defendant must prove:

(1) plaintiff[] delayed asserting [its] claim for an unreasonable length of time, (2) with full knowledge of all relevant facts (and laches does not start to run until such knowledge is shown to exist), (3) resulting in such substantial prejudice to defendant[] that it would be inequitable for the court to grant relief.

Mattson v. Commercial Credit Bus. Loans, Inc., 301 Or. 407, 419, 723 P.2d 996 (1986).⁷

⁷ Courts often reduce these three elements of laches to only two elements, "unreasonable delay" and "prejudice," presumably because a plaintiff's delay cannot fairly be considered "unreasonable" if the plaintiff lacked knowledge of all relevant facts. *See generally Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir.2002) ("As the party asserting laches, [defendant] must show that (1) [plaintiff's] delay in filing suit was unreasonable, and (2) [defendant] would suffer prejudice caused by the delay if the suit were to continue."); *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir.2000) ("To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself.").

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Here, Defendant's laches defense fails for the same reasons that its statute of limitations defense fails. As explained above, each shipment of PACA goods stands as a separate transaction for the purpose of determining that shipment's eligibility for PACA protection. Accordingly, only shipments made by Plaintiff to Food 4 Less between July 21, 2011 and April 24, 2012 are at issue here. As to those specific shipments, Defendant fails to demonstrate either unreasonable delay or undue prejudice as a result of Plaintiff's present claims for these allegedly unpaid shipments of PACA goods.

Indeed, Defendant's statute of limitations and laches defenses both rest upon alleged prejudice resulting from Plaintiff's longstanding practice of routinely accepting late payments from Food 4 Less and then applying all payments to the oldest then-outstanding invoices. As explained above, Defendant claims it was prejudiced by this behavior because, between July 21, 2012 and April 24, 2012 (the end dates of Plaintiff's claims in this case), Plaintiff received \$882,606.99 from Food 4 Less, an amount greater than the combined total for all invoices at issue in this action, and Plaintiff chose to apply this entire amount to older invoices dated months before July 21, 2012. These facts, however, go to the underlying merits of Plaintiff's claim—namely, whether Plaintiff's actions waived or voided Plaintiff's PACA rights; they do not establish unreasonable delay in bringing the claim itself. Accordingly, Defendant's motion for summary judgment on its laches defense is denied.

4. Plaintiff's Waiver of PACA Rights

Defendant also moves for summary judgment on Plaintiff's PACA claim on the grounds that Plaintiff's agreements with Food 4 Less waived Plaintiff's PACA trust rights. Plaintiff contends that no such waiver has occurred because the formal stated terms of Plaintiff's contracts with Food 4 Less never varied from PACA-compliant 10-day payment terms.

a. *Regulations Governing Pre-Default and Post-Default Agreements*

Central to the Court's inquiry is the proper interpretation of 7 C.F.R. §§ 46.46(e)(1), (2), and (3), which are a portion of the Secretary of Agriculture's regulations implementing PACA. As discussed above,

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paragraph (e)(1) of § 46.46 provides for a ten-day statutory default for prompt accounting and prompt payment and explains that parties that agree to other payment schedules must reduce their agreements to writing. 7 C.F.R. § 46.46(e)(1) (defining prompt payment as within ten days after delivery, in most instances). Paragraph (e)(2) of § 46.46 states that the maximum time for payment after shipment to which the seller and buyer may agree “*prior to the transaction*, and still be eligible for benefits under the trust is 30 days after receipt and acceptance of the commodities.” 7 C.F.R. § 46.46(e)(2) (emphasis added). Accordingly, parties who agree *in advance* to payment terms later than 30 days after delivery are not entitled to PACA trust protections.

Despite these strict time limitations for payment schedules, the regulations also provide that a seller’s acceptance of partial payments or agreement to payment schedules *after* a buyer’s default will not disqualify a seller from being able to exercise its PACA trust rights:

If there is a default in payment as defined in § 46.46(a)(3), the seller, supplier, or agent who has met the eligibility requirements of paragraphs (e)(1) and (2) of this section will not forfeit eligibility under the trust by agreeing in any manner to a schedule for payment of the past due amount or by accepting a partial payment.

7 C.F.R. § 46.46(e)(3). Therefore, the regulations expressly distinguish between pre-default agreements and post-default agreements.

The precise legal effect of post-default agreements on a seller’s PACA trust rights has long been a disputed issue. *See, e.g., American Banana Co. v. Republic National Bank of New York, N.A.*, 362 F.3d 33, 38 (2d Cir.2004); *Patterson Frozen Foods, Inc. v. Crown Foods Int’l, Inc.*, 307 F.3d 666, 671 (7th Cir.2002); *Hiller Cranberry Products, Inc. v. Koplovsky*, 165 F.3d 1 (1st Cir.1999); *Greg Orchards & Produce, Inc. v. P. Roncone*, 180 F.3d 888, 892 (7th Cir.1999); *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 205 (3d Cir.1998); *In re Lombardo Fruit and Produce Co.*, 12 F.3d 806, 809 (8th Cir.1993); *Hull Co. v. Hauser’s Foods, Inc.*, 924 F.2d 777, 781–82 (8th Cir.1991). The Department of Agriculture, however, clarified this issue by amending 7 C.F.R. § 46.46 in 2011. These amendments were accompanied by a

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Department of Agriculture notice of rulemaking, titled “Perishable Agricultural Commodities Act: Impact of Post–Default Agreements on Trust Protection Eligibility.” 76 F.R. 20217–01.⁸ In its 2011 rulemaking, the Department of Agriculture stated:

(USDA) is amending the regulations under the Perishable Agricultural Commodities Act (PACA) to allow, if there is a default in payment as defined in the regulations, a seller, supplier, or agent who has met the PACA trust eligibility requirements to enter into a scheduled agreement for payment of the past due amount without foregoing its trust eligibility. USDA is also amending 7 CFR 46.46(e)(2) by adding the words “prior to the transaction.” This change clarifies that the 30–day maximum time period for payment to which a seller can agree and still qualify for coverage under the trust refers to pre-transaction agreements.

Id. at 20217.

Further, citing *American Banana*, *Patterson Foods*, and other cases, the USDA explained that in recent years “several federal courts have invalidated the trust rights of unpaid creditors because these creditors agreed ... after default on payment, to accept payments over time from financially troubled buyers,” based on interpretations of 7 C.F.R. § 46.46(e)(2). *Id.* USDA disagreed with these judicial interpretations of the statute and regulations, stating, “[i]t is our interpretation that § 46.46(e)(2), like paragraph (e)(1) of the regulations ... addresses

⁸ The Court applies *Auer* deference to an agency’s interpretation of its own ambiguous regulations. See *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); *Peterson v. ConAgra Foods Inc.*, 2014 WL 3741853, at *3 (S.D.Cal. July 29, 2014) (“[W]here an agency interprets its own regulation, ... its interpretation of an ambiguous regulation is controlling under *Auer* unless plainly erroneous or inconsistent with the regulation.” (citations and quotation marks omitted)); see also *Hillsborough Cty. v. Automated Med. Labs.*, 471 U.S. 707, 718, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (noting that the preamble to a rulemaking is a way that “agencies normally address problems in a detailed manner”). Because the USDA’s interpretation of its PACA regulations is not plainly erroneous or inconsistent, it is controlling. But see *Decker v. Nw. Env’tl. Def. Ctr.*, — U.S. —, 133 S.Ct. 1326, 1339, 185 L.Ed.2d 447 (2013) (Scalia, J., concurring in part dissenting in part) (urging rejection of the *Auer* doctrine).

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pre-transaction agreements only.” *Id.* (citations omitted). In explaining the amendment, the USDA emphasized the broad trust rights that PACA provides:

In the context of the PACA trust, the right to make a claim against the trust are vested in the seller, supplier, or agent who has met the eligibility requirements of paragraph (e)(1) and (2) of § 46.46. The seller, supplier, or agent remains a beneficiary of the PACA trust until the debt owed is paid in full as stated in section 5(c)(4) of the statute. An agreement to pay the antecedent debt in installments is not considered payment in full. Thus, we do not believe that a post-default payment agreement should constitute a waiver of a seller’s previously perfected trust rights.
Id. at 20217–18.

b. *Application to Plaintiff’s Contracts With Food 4 Less*

Based upon disparate interpretations of the above regulatory structure, Plaintiff and Defendant disagree over whether Plaintiff’s agreements with Food 4 Less resulted in a waiver of Plaintiff’s PACA trust rights. Defendant argues that, despite Plaintiff’s argument that the formal terms between Plaintiff and Food 4 Less stated that payment was due within ten days of delivery, Plaintiff’s longstanding practice of accepting late payments constitutes a continuing series of *pre-default* agreements in violation of 7 C.F.R. § 46.46(e)(2). Plaintiff responds that, consistent with the 2011 amendments to 7 C.F.R. § 46.46, because the written agreements between Plaintiff and Food 4 Less expressly stated that payment was due within ten days of delivery, any post-default acceptance of late payments “in any manner” does not waive Plaintiff’s PACA trust protections. The factual underpinnings of each party’s argument are not disputed. The relevant question is whether Plaintiff and Food 4 Less “agreed,” *pre-default*, through their course of dealing or otherwise, that payments could be made after the 30–day statutory maximum under 7 C.F.R. § 46.46(e).

A district court in the Southern District of New York provided reasoning that is consistent with Defendant’s interpretation of the PACA

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regulations here. In *A & J Produce Corp. v. City Produce Operating Corp.*, the district court denied the plaintiff's motion for summary judgment on its PACA claim, holding that the parties' course of dealings created a question of fact as to whether the plaintiff had "agreed" to payment terms in violation of PACA. The court noted that if the factfinder concluded that there was a course of dealing or oral agreement "between the parties by which plaintiff agreed to accept payment more than 30 days after receipt of the produce," then that agreement "would appear to remove plaintiff from the protections afforded by a PACA trust." 2011 WL 6780614, at *5 (S.D.N.Y. Dec. 23, 2011). The court interpreted the 2011 amendments to 7 C.F.R. § 46.46(e) as merely clarifying that PACA trust protection may be lost by *pre*-transaction agreements to extend payment beyond 30 days, but not by scheduled post-default accommodations. *Id.* at *4. The Court finds this reasoning persuasive. A course of dealing between Plaintiff and Food 4 Less reflecting an implicit agreement to accept payment more than 30 days after receipt of produce waives Plaintiff's PACA protections because it would result in a *pre*-default "agreement" to longer payment terms that are in violation of 7 C.F.R. § 46.46(e).

Plaintiff, however, objects to any reference to *A & J Produce*, arguing that this case was "expressly based" on *American Banana*, a 2004 Second Circuit opinion that, as discussed above, the USDA declined to follow in its 2011 amendments to 7 C.F.R. § 46.46(e). Thus, according to Plaintiff, *American Banana* and any case premised upon its reasoning represents "an outlier, a contagion of error" spreading through PACA jurisprudence. The Court disagrees. *A & J Produce* expressly grounded its holding in an analysis of the statutory text of PACA and the USDA's 2011 amendments to 7 C.F.R. § 46.46(e). In fact, the court in *A & J Produce* carefully discussed the *American Banana* opinion in order to explain the effect of the 2011 amendments. Moreover, contrary to Plaintiff's suggestion, a careful reading of *American Banana* contributes much to a proper understanding of PACA.

In *American Banana*, the court, after discussing the history, text, and purpose of PACA, found that there was no meaningful difference between pre-default and post-default agreements for PACA purposes. 362 F.3d at 44. In reaching this conclusion, the court found that "Congress made its intention to protect short-term payment arrangements

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clear by expressly refusing to bestow trust protection upon any credit transaction that extends beyond a reasonable period.” *Id.* (citation omitted). As the court explained:

We recognize that a post-default agreement is often the product of a reasonable effort by a seller to recover at least some of the debt owed to it without incurring the risks and costs of litigating under PACA, and that such an agreement therefore can be a useful tool for the recovery of unpaid debts. However, the result of a post-default agreement extending the payment period beyond thirty days is no different than that of a pre-transaction agreement doing the same: both are inconsistent with the prompt-payment objective, which is fundamental to PACA. *Whether the agreement is reached before the transaction or after a buyer has defaulted, it constitutes a credit arrangement permitting a buyer to make payments that are not considered prompt by Congress and the USDA.*

Id. (emphasis added). The court further emphasized that allowing post-default agreements would permit financially unsound produce buyers to remain in business, increasing systemic risk in the produce industry by exposing other unsuspecting persons to risk of nonpayment. *Id.* at 44–45 (citation omitted). Thus, the court found, consistent with its understanding of congressional intent, that a PACA seller waived its PACA rights if it agreed to a post-default payment plan with a buyer.

The Department of Agriculture, disagreeing with *American Banana* and other circuit courts opinions addressing this point, clarified this issue by amending 7 C.F.R. § 46.46 in 2011. These specific amendments, and the USDA’s explanation for them, have been discussed in detail above. Critical to understanding the correct interpretation of 7 C.F.R. § 46.46 is USDA’s reasoning for those amendments. USDA explained that, “[i]t is our interpretation that § 46.46(e)(2), like paragraph (e)(1) of the regulations ... addresses pre-transaction agreements only.” 76 F.R. 20217–01 (citation omitted). In explaining the amendments, the USDA emphasized the broad trust rights that PACA provides:

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In the context of the PACA trust, the right to make a claim against the trust are vested in the seller, supplier, or agent *who has met the eligibility requirements* of paragraph (e)(1) and (e)(2) of § 46.46. The seller, supplier, or agent remains a beneficiary of the PACA trust *until the debt owed is paid in full* as stated in section 5(c)(4) of the statute. An agreement to pay the antecedent debt in installments is not considered payment in full. Thus, we do not believe that a post-default payment agreement should constitute a waiver of a seller's *previously perfected trust rights*.

Id. at 20217–18 (emphasis added). Thus, USDA disagreed with the holding in *American Banana* that *any* post-default payment agreement waived PACA trust rights, because the PACA seller had not been “paid in full” within the meaning of the statute. As the emphasized text above indicates, however, the 2011 amendments limited post-default PACA protection to those PACA sellers with previously protected trust rights who had met the eligibility requirements under § 46.46. This is exactly what the Court in *A & J Produce* correctly understood: USDA’s 2011 amendments to PACA applied only to post-default agreements; PACA sellers may still lose PACA trust rights through pre-default agreements that do not meet § 46.46’s requirements.

In effect, Plaintiff’s argument in this case amounts to a claim that, as long as PACA buyers and sellers include PACA-compliant language in their invoices, any *de facto* agreements to other than short-term credit arrangements based on a longstanding course of conduct, are still protected by PACA. This is not so, and in fact violates the core purposes of PACA. The relevant distinction and the one that makes all the difference in this case, involves what PACA sellers do *after* they agree to a post-default agreement with a buyer. By entering into a post-default agreement with a buyer, a PACA seller maintains any previously perfected trust rights in that particular shipment. This is because each shipment of PACA good stands as a separate unit or transaction for the purposes of PACA protection. If a PACA seller, like Plaintiff, however, agrees with a buyer to only apply future payments to the oldest then-outstanding invoice, the PACA seller has virtually guaranteed that the buyer cannot meet PACA compliant net–10 or net–30 payment terms

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as to subsequent shipments. The formal stated invoice terms for subsequent shipments then would directly contradict the parties' other agreement to apply future payments to old invoices. The parties have thus effectively turned a series of shipments, which should function as separate individual transactions for PACA purposes, into a revolving line of credit. Such arrangements, however, amount to pre-default agreements to extend payment terms beyond PACA-compliant terms in violation of 7 C.F.R. § 46.46(e)(2). This is contrary to the express text and congressional intent of PACA, as articulated in *American Banana* and other cases, because "it constitutes a credit arrangement permitting a buyer to make payments that are not considered prompt by Congress and the USDA." *American Banana*, 362 F.3d at 44.

Thus, with the proper interpretation of 7 C.F.R. § 46.46 clarified, the final relevant question is whether, drawing all inferences in favor of Plaintiff, there is any genuine dispute of material fact that the Plaintiff and Food 4 Less agreed to pre-default payment terms that are in violation of PACA eligibility requirements. Based upon all the evidence in the record, viewed in the light most favorable to Plaintiff as the non-moving party, there is no genuine dispute of material fact that Plaintiff and Food 4 Less agreed to allow payments to be made outside the requirements of PACA. The record before the Court shows that Food 4 Less made no payments within ten days for at least 13 years and made no payments within 30 days for eight years. During this time, the amounts owed by Food 4 Less on overdue invoices continued to grow ever larger, at one point reaching almost nine months overdue.

Further, Plaintiff concedes that it agreed with Food 4 Less to apply all payments to the oldest outstanding invoices. Thus, every time Plaintiff entered into a new transaction with Food 4 Less, it knew exactly how much money it was still owed, and as a result, was fully aware that Food 4 Less would be unable to pay within the PACA compliant terms, notwithstanding what was stated on the invoice. Plaintiff's agreement with Food 4 Less to apply all payments to old invoices, despite the ever-growing debt owed by Food 4 Less, made strict compliance with PACA highly unlikely, and, as a practical matter, impossible for the foreseeable future. This arrangement amounts to a *de facto* pre-default agreement to extend payment terms outside of PACA requirements in violation of 7 C.F.R. § 46.46(e)(2). This is contrary to the clear text and

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congressional intent that PACA protect only short-term credit arrangements. *American Banana*, 362 F.3d at 44; *Patterson*, 307 F.3d at 669.

Plaintiff objects to this conclusion on multiple grounds, arguing that: (1) Oregon law required Plaintiff to apply payments to the oldest outstanding invoices; (2) Plaintiff and Food 4 Less genuinely believed that Food 4 Less would eventually bring its accounts current and then move forward strictly within PACA-compliant terms; and (3) Plaintiff had no choice but to forego filing a PACA claim and continue selling goods to Food 4 Less lest its customer go bankrupt, foreclosing any possibility of Plaintiff ever being paid in full. Plaintiff contends that these points disprove that there was any agreement to accept payments outside of PACA terms.

Plaintiff's first argument is not only irrelevant, it is also wrong as a matter of Oregon law. Plaintiff first concedes that it agreed, at Food 4 Less' request, to apply all payments to the oldest of the outstanding invoices. As the Court explained above, this agreement resulted in the loss of Plaintiff's PACA rights as to future shipments of PACA goods because it made it essentially impossible for Food 4 Less to comply with PACA-compliant short-term payment terms, at least for the foreseeable future. This ends the relevant analysis. Despite this, Plaintiff argues that it should somehow be excused from these PACA requirements because Oregon law required it to apply payments to outstanding invoices in this way. The Court, however, can find no such Oregon law, and Defendant presents none,⁹ that would prohibit the parties from arranging their

⁹ Plaintiff cites *Fowler v. Courtemanche*, 202 Or. 413, 274 P.2d 258 (1954), and *Matter of Marriage of Gayer*, 326 Or. 436, 952 P.2d 1030 (1998), for this proposition. Neither case supports Plaintiff's argument here. In fact, citing *Fowler*, the court in *Gayer* held:

[T]hat, in the absence of a statute or an agreement by the parties to the contrary, the common law rule regarding the application of payments made by a debtor to a creditor is as follows: "(1) A debtor who makes payment to his creditor having two or more claims may designate the claim to which the payment is to be applied; (2) if the debtor fails to do so, the creditor may make the application; and (3) if neither of them makes the application, then it is the duty of the court to make it." If the court can determine with reasonable certainty the intention of the parties, either express or implied, the court shall apply payment accordingly. Generally, when neither the debtor nor the creditor directs application of the payment and the court cannot infer the intention of the parties, payment is applied to the earliest matured debt.

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business dealings in strict compliance with PACA eligibility requirements.

As to Plaintiff's second argument, that the parties genuinely believed that Food 4 Less would eventually bring its accounts current and then move forward in accordance with PACA-compliant terms, Plaintiff has provided the declaration of Michael Leech, the owner of Food 4 Less. Mr. Leech states:

[W]hen Food 4 Less could not pay on time, USC chose to keep trading with Food 4 Less and to forebear from filing a lawsuit in response to my requests. I honestly believed, as I repeatedly told USC, that Food 4 Less would be able to overcome its difficulties, bring its overdue bills current, and *then* move forward within the ten-day terms.

Leech Supp. Decl. ¶ 3, Dkt. 60 (emphasis added). Mr. Leech's statement, however, explicitly acknowledges that Food 4 Less would be unable to comply with PACA until it brought its overdue bills current. Moreover, the undisputed record shows that Mr. Leech and Food 4 Less did not pay Plaintiff on time for at least eight years. Mr. Leech's own declaration, combined with the undisputed payment history, is undisputed evidence that both Plaintiff and Food 4 Less knew in advance of each transaction at issue this lawsuit that Food 4 Less would not comply with PACA's prompt payment requirements, at least until its overdue invoices were first paid in full, which never occurred. This is exactly the sort of revolving line of credit arrangement that is prohibited by PACA's strict "prompt payment" eligibility requirements.

Finally, Plaintiff's third contention—that it had no practical choice but to continue doing business with Food 4 Less lest Food 4 Less go bankrupt—ignores the relevant legal analysis at this stage. Each separate shipment of produce by a PACA beneficiary exists as a separate transaction for the purposes of PACA protection. If Plaintiff wished to

Id. at 443, 952 P.2d 1030 (citing *Fowler*, 202 Or. at 426, 274 P.2d 258) (emphasis added). The emphasized language makes all the difference: the parties may agree, absent a specific statute directing otherwise, to apply future payments to outstanding debts as they wish.

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arrange alternate payments terms to assist Food 4 Less overcome its financial difficulties, it could have continued doing business on non-PACA terms, such as cash-on-delivery, until Food 4 Less would be able to continue on PACA-compliant 10-day terms. Instead, Plaintiff agreed to apply all new payments for Food 4 Less to long overdue invoices, while simultaneously claiming that each subsequent transaction would be made under PACA-compliant terms. As Defendant notes, between July 21, 2012 and April 24, 2012, Plaintiff received \$882,606.99 from Food 4 Less, an amount greater than the combined total for all invoices at issue in this action, but Plaintiff applied this entire amount to older invoices dated months before July 21, 2012. The effect of this practice is to circumvent the strict prompt payment requirements of PACA.

The large debt still owed Plaintiff at the time of Food 4 Less' bankruptcy is the consequence of Plaintiff's own repeated agreements to extend credit to Food 4 Less outside of PACA's express eligibility requirements. The Court does not question the sincerity of Plaintiff's belief, as articulated by Mr. Leech in his declaration, that Food 4 Less might, or even would, eventually, someday bring its accounts current and then move forward with PACA-compliant terms. This was a business decision that Plaintiff was free to make. Plaintiff, however, cannot agree to payment terms outside of PACA's strict eligibility requirements for its own business reasons and simultaneously avail itself of PACA's extraordinary protections. Such agreements are contrary to USDA's regulations and the congressional directive that PACA protect only short-term credit arrangements between buyers and sellers of PACA goods.

There is no genuine dispute of material fact that Plaintiff's agreements with Food 4 Less violated 7 C.F.R. § 46.46. Accordingly, Defendant is entitled to summary judgment on Plaintiff's PACA claim.

5. Conversion of Trust Funds and Money Had and Received

In addition to its PACA claim brought under 7 U.S.C. §§ 499b and 499e, Plaintiff also asserts common law claims for conversion of trust funds and money had and received. The parties agree, however, that both claims are dependent upon the existence of Plaintiff's PACA-created

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trust rights.¹⁰ As discussed above, because the Court finds that Plaintiff's agreements with Food 4 Less resulted in Plaintiff waiving its PACA trust rights as to all shipments made between July 21, 2011 and April 24, 2012, Plaintiff cannot maintain common law claims that are dependent upon the existence of PACA-created rights in those shipments. Thus, Defendant is entitled to summary judgment on these claims.

6. Breach of Fiduciary Duty

Under Oregon law, to recover for breach of fiduciary duty, the plaintiff must prove: (1) the existence of a fiduciary relationship between the parties; (2) a breach of one or more of the fiduciary duties arising out of that relationship; and (3) damage to the plaintiff resulting from a breach of one or more of those duties. *Evergreen West Bus. Ctr., LLC v. Emmert*, 254 Or. App. 361, 367, 296 P.3d 545 (2012).

Plaintiff's fourth claim for relief alleges that a fiduciary relationship existed between Defendant and either Food 4 Less or Plaintiff and that Defendant breached its fiduciary duties by failing to "fairly allocate the limited funds available to Food 4 Less between itself and Plaintiff." According to Plaintiff, the combination of Defendant's status as the supplier of the vast majority of Food 4 Less' non-PACA groceries and Defendant's contractual right to access Food 4 Less' bank account by automatic debit "created a relationship of control and dependency between [Defendant] and Food 4 Less such that Defendant should be held accountable as a fiduciary to both Food 4 Less and Plaintiff." Defendant responds that Plaintiff's fiduciary duty claim fails as a matter of law because no fiduciary or other special relationship existed between Defendant and either Food 4 Less or Plaintiff that would have conferred upon Defendant any duty to monitor Food 4 Less' payment of its creditors. According to Defendant, the relationship between Defendant and Food 4 Less was strictly arm's-length as seller and buyer and there was no relationship between Defendant and Plaintiff.

Under Oregon law, a fiduciary duty exists only where the parties are in a "special relationship" in which one party is obliged to pursue the other party's best interests. *Conway v. Pacific University*, 324 Or. 231,

¹⁰ Plaintiff's fourth claim, alleging breach of fiduciary duty, does not similarly depend upon PACA trust rights. This claim is addressed separately below.

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237, 924 P.2d 818 (1996). In determining whether such a relationship exists:

The focus [of the Court's inquiry] is not on the subject matter of the relationship, such as one party's financial future; nor is it on whether one party, in fact, relinquished control to the other. The focus instead is on whether the *nature of the parties' relationship itself* allowed one party to exercise control in the first party's best interests. In other words, the law does not imply a tort duty simply because one party to a business relationship begins to dominate and to control the other party's financial future. Rather, the law implies a tort duty only when that relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf.

Bennett v. Farmers Ins. Co., 332 Or. 138, 161–162, 26 P.3d 785 (2001) (emphasis in original) (citing *Conway*, 324 Or. at 241, 924 P.2d 818).

The Oregon Supreme Court's opinions in both *Conway* and *Bennett* establish that a special relationship giving rise to a fiduciary duty exists only "when one party is acting, at least in part, to further the economic interests of the other party." *Conway*, 324 Or. at 236, 924 P.2d 818 (citing *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or. 149, 161, 843 P.2d 890 (1992)). Such relationships include "certain professional relationships in which one party has a professional obligation to protect the interests of the other party," or contractual relationships of a kind that give rise to a "status upon which the general law predicates a duty independent of the terms of the contract." *Conway*, 324 at 237, 239, 924 P.2d 818. The court in *Conway* emphasized that where both parties act "in their *own* behalf, each for their own benefit," no special relationship exists. *Id.* at 242, 924 P.2d 818 (emphasis in original). Similarly, the court in *Bennett* reasoned that, where the parties' contract does not suggest that the alleged principal would "relinquish control over [its] business" or that the alleged fiduciary would "exercise independent judgment" over the principal's concerns, the nature of the relationship created is "not one in which [the fiduciary] was to step into [the principal's] shoes and to manage [its] business affairs," and

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consequently, the parties are not in a fiduciary relationship. *Bennett*, 332 Or. at 162–63, 26 P.3d 785; *see also A.T. Kearney, Inc. v. Int'l Bus. Machines Corp.*, 73 F.3d 238, 244 (9th Cir.1995) (“The common thread in the special relationships that the [Oregon] Supreme Court has recognized as giving rise to a duty of care to protect against purely economic loss is that the professional is acting, at least in part, to further the economic interests of the person to whom the duty is owed.”).

Plaintiff, however, urges the Court to ignore the Oregon Supreme Court’s decisions in *Bennett* and *Conway*, arguing that neither decision is on point because those cases did not involve “commercial debtor/creditor” relationships. Instead, Plaintiff directs the Court to *Hampton Tree Farms, Inc. v. Jewett*, 125 Or. App. 178, 865 P.2d 420 (1993), a decision by the Oregon Court of Appeals that pre-dates both *Conway* and *Bennett*. Plaintiff contends that the Court of Appeals’ decision in *Hampton Tree Farms* supports the proposition that “when a creditor exercises too much control over its debtor, that overly zealous creditor subjects itself to the same fiduciary duties imposed on the debtor’s own officers and directors.”

Plaintiff’s argument rests entirely on the following paragraph from the Oregon Court of Appeals’ opinion in *Hampton Tree Farms*:

In the light of the parties’ business and debtor-creditor relationship, the question is whether plaintiff’s role could ever have become that of a fiduciary. In *Georgetown Realty v. The Home Ins. Co.*, 313 Or. 97, 111, 831 P.2d 7 (1992), the Supreme Court held that circumstances between contracting parties might give rise to a relationship beyond the parties’ contractual dealings. It has been held that, ‘in the rare circumstance’ where a creditor exercises such control over the decision-making processes of the debtor as amounts to a domination of its will, it may be held accountable for its actions under a fiduciary standard. *Matter of Teltronics Services, Inc.*, 29 B.R. 139, 170 (Bankr.E.D.N.Y.1983).

Id. at 191–92, 865 P.2d 420. The Oregon Supreme Court, however, in this same case, affirmed the Oregon Court of Appeals’ decision on much

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narrower grounds. In *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 892 P.2d 683 (1995), the Oregon Supreme Court held only that a jury could find that a creditor who agreed to represent a log seller in a business transaction, for the purpose of selling the log seller's business, acted as the log seller's *agent* and thus owed the log seller fiduciary duties as part of that traditional principal-agent relationship. The Supreme Court further emphasized that, in order to find a principal-agent relationship, there must be evidence that both parties consented to their respective roles. *Id.* at 617, 892 P.2d 683; *see also Bennett*, 332 Or. at 160, 26 P.3d 785 (rejecting a plaintiff's argument, premised on *Hampton Tree Farms* and *Georgetown Realty v. Home Ins. Co.*, 313 Or. 97, 831 P.2d 7 (1992), that a special relationship exists when "one party's financial interests are dependent on the other's control"). Accordingly, Plaintiff's reliance on the Oregon Court of Appeals' decision in *Hampton Tree Farms* is misplaced, and the Court follows the Oregon Supreme Court's later analysis in *Conway* and *Bennett*.¹¹

Further, at oral argument, Plaintiff urged the Court to consider *In re Horton*, 152 B.R. 912 (Bankr.S.D.Tex.1993), which Plaintiff contends stands for the proposition that grocery cooperatives owe fiduciary duties to their members.¹² *Horton* was a bankruptcy case in which a creditor (a grocery cooperative stock association) sought a nondischargeability determination with regard to debt arising from a Chapter 7 debtor's (the principal of a cooperative member) guaranty and note that the debtor executed personally and on behalf of a cooperative member. The bankruptcy court's only discussion of fiduciary duties was the following paragraph:

[Creditor] was a cooperative stock association whose

¹¹ In supplemental briefing, Plaintiff argues that where, as in this case, the parties have no contract, "the applicable rule is the 'control and dominance' rule" articulated by the Oregon Court of Appeals in *Hampton Tree Farms*, and that the Oregon Supreme Court's analysis in *Conway* and *Bennett* does not apply. This distinction is not supported by any Oregon Supreme Court decision. Moreover, the Court finds that, to the extent the "control and dominance" theory was ever recognized by Oregon courts, it is not good law in light of *Conway* and *Bennett*. *See Bennett*, 332 Or. at 161-162, 26 P.3d 785 ("[T]he law does not imply a tort duty simply because one party to a business relationship begins to dominate and to control the other party's financial future.").

¹² *Horton* was not originally briefed by either party, so the Court allowed supplemental briefing on *Horton* after oral argument.

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members were dependent upon one another for the association's ongoing success. Each member guaranteed its debts to the association, and a personal guaranty was required of all officers, directors, and equity holders. The members were responsible for providing accurate information as to their solvency. Therefore, the members of the association had a fiduciary relationship among themselves and with [Creditor] itself.

Id. at 916 (citation omitted). This brief analysis does not support Plaintiff's argument. *Horton* holds only that, under certain circumstances, cooperative members may owe fiduciary duties to each other and to their cooperative association. *Horton* does not hold—and indeed, does not even address—when a cooperative association owes fiduciary duties to its individual members.¹³ More importantly, Plaintiff's interpretation of *Horton*—a case interpreting bankruptcy law in the context of a Texas statute—conflicts with the rule articulated by the Oregon Supreme Court's decisions in *Conway* and *Bennett*, which require a legally recognized special relationship between the parties to establish extra-contractual fiduciary duties. Accordingly, even if Plaintiff's interpretation of *Horton* were correct, the Court would still follow Oregon Supreme Court precedent on this point.

With the appropriate legal standard clarified, the Court turns to the facts underlying Plaintiff's claim. Plaintiff's breach of fiduciary duty claim is based entirely on facts related to two characteristics of Defendant's business relationship with Food 4 Less: (1) Defendant's status as the supplier of substantially all of Food 4 Less' non-PACA groceries and (2) Defendant's contractual right to obtain payment of its invoices from Food 4 Less' bank account by automatic withdrawal. As to the first characteristic, Plaintiff presents the opinion of Plaintiff's expert witness Patrick A. Davidson, who asserts that, because Unified had supplied the majority of Food 4 Less' non-PACA goods, “the key

¹³ The grocery cooperative stock association at issue in *Horton* also appears to have been structured very differently than Unified. Each cooperative member in *Horton* “guaranteed its debts to the association, and a personal guaranty was required of all officers, directors, and equity holders.” *Id.* at 916. Unified had no such requirement with Food 4 Less, and instead dealt only on cash-on-delivery terms with payment made via automatic withdrawal. Even if the former structure could give rise to fiduciary duties under Oregon law, the latter does not.

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management powers belonged to Unified.” As to the second characteristic, Plaintiff presents the declaration of Michael Leech, the owner of Food 4 Less, who asserts that Unified’s “control over both Food 4 Less’ inventory and cash, in practical effect, gave Unified control over the key operations of Food 4 Less.”

Neither of these characteristics, however, addresses the actual legal question before the Court: whether the parties’ relationship “*by its nature*, allows one party to exercise judgment *on the other party’s behalf*.” *Bennett*, 332 Or. at 161–162, 26 P.3d 785 (emphasis added). The declarations of Mr. Davidson and Mr. Leech, on their face, fail to show that the relationship between Defendant and Food 4 Less was such that Defendant agreed to act “for the benefit” of Food 4 Less. Even taken in the light most favorable to Plaintiff, these declarations show, at most, that Defendant engaged in hard bargaining solely for its own benefit. At its core, Plaintiff’s fiduciary duty claim reduces to a contention that business agreements entered into at arm’s-length solely out of business necessity may, without more, create special relationships with concomitant fiduciary duties. This position is contrary to Oregon law, which, as discussed above, emphasizes that a putative agent or fiduciary must *agree* to exercise its judgment for the benefit of the putative principal rather than for itself before being subject to the duties of a fiduciary.

Further, Plaintiff’s argument that Defendant maintained complete domination and control over Food 4 Less is undermined by the undisputed fact that Defendant’s contract with Food 4 Less regarding both automatic debit payments and membership in Unified’s grocery wholesale cooperative was revocable at will by either party. It may be the case that Food 4 Less had no economically viable alternative to its contractual arrangement with Defendant. The absence of an economically viable alternative, however, does not create a fiduciary relationship between mere buyers and sellers of goods. Thus, the Court finds as a matter of law that Defendant did not have a fiduciary or special relationship with Food 4 Less, and Defendant is entitled to summary judgment on Plaintiff’s claim for breach of fiduciary duty.

CONCLUSION

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Defendant's Motion for Summary Judgment (Dkt. 59) is GRANTED.

This case is dismissed.

IT IS SO ORDERED.

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PERISHABLE AGRICULTURAL COMMODITIES ACT
DISCIPLINARY DECISIONS

In re: CHEUNG CHAU TRADING, INC.; SUPER ALOHA, LTD.;
SUPER SAVE MARKET, LLC; AND TONY S. LIU.
Docket Nos. 14-0099, 14-0010, 14-0101, 14-0102.
Decision and Order.
Filed July 30, 2015.

PACA-D.

Christopher P. Young, Esq. for Complainant.¹
Tony S. Lieu, pro se, for Respondents.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

DECISION SUMMARY

Four Respondents (Cheung Chau Trading, Inc.; Super Aloha, Ltd.; Super Save Market, LLC; and Tony S. Liu) willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during 2011 through 2013 by failing to make full payment promptly of the purchase prices, or balances thereof, for a combined total of \$120,931.25 for fruits and vegetables, all being perishable agricultural commodities that Respondents purchased, received, and accepted in the course of interstate or foreign commerce.

PARTIES AND ALLEGATIONS

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

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

This “Decision and Order on the Written Record” decides the allegations brought under the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder (7 C.F.R. Part 46), regarding four Respondents.² The four Respondents are: Cheung Chau Trading, Inc., a corporation; Super Aloha, Ltd., a limited company; Super Save Market, LLC, a limited liability company; and Tony S. Liu, an individual [“Respondents”].

Cheung Chau Trading, Inc. is a corporation organized and existing under the laws of the state of Hawaii. Super Save Market, LLC is a limited liability company organized and existing under the laws of the state of Hawaii. Super Aloha, Ltd. is a limited company organized and existing under the laws of the state of Hawaii. Tony S. Liu is an individual who directed, controlled, and managed each of these three entities at all times material herein.

AMS alleged in the Complaint filed on April 30, 2014, that the Respondents willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that they purchased, received, and accepted in interstate and foreign commerce, as more particularly described in the Complaint and in Appendix A,³ Appendix B, Appendix C, and Appendix D to the Complaint. AMS asks the judge so to find,

² This “Decision and Order on the Written Record” does not address allegations regarding Paradise Corner, LLC, Honolulu, Hawaii. Allegations regarding Paradise Corner, LLC [PACA-D] Docket No. 14-0098, will be decided separately. Paradise Corner, LLC, is another entity which is directed, controlled, and managed by Tony S. Liu.

³ Appendix A relates to Paradise Corner, LLC and has not been considered for purposes of this “Decision and Order on the Written Record.”

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and to order the facts and circumstances of the violations published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

The four Respondents participated in two telephone conferences with counsel for AMS Christopher Young and me on February 18, 2015 and on June 26, 2015. These four Respondents represented that they would file something responsive to Appendix B, Appendix C, and Appendix D to the Complaint (*see*, for example, Respondents' letter filed June 23, 2014, requesting additional time), but they never did. Filings that were received from Respondents relate to Appendix A and Paradise Corner, LLC, PACA Docket No. D-14-0098, which I will decide separately.

My Notice filed June 26, 2015 confirmed what I stated to Mr. Young and to Mr. Liu during our telephone conference on June 26, 2015: that I would issue a Decision on the Written Record. As to these four Respondents, the record closed on July 22, 2015, as stated in that Notice.

The Respondents' request for a fourteen-day extension from July 22, 2015 is denied. For purposes of this "Decision and Order on the Written Record," additional filings would not change the Findings of Fact, Conclusions, and Order. Even if these four Respondents were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

I measure at two times the past due amounts that determine the outcome of this "Decision and Order on the Written Record": (a) when the amounts were first past due and unpaid; that is, during 2011 through 2013; and (b) when AMS employee Scott McKenna, Senior Marketing Specialist, determined the remaining balances in January 2015, because more than 120 days had passed since the Complaint was served.

DISCUSSION

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Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires licensed produce dealers to make “full payment promptly” for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 C.F.R. § 46.2(aa)(5) and (11) (defining “full payment promptly”).

The policy of the U.S. Department of Agriculture in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “no-pay” case. In any “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.

Scamcorp, Inc., 57 Agric. Dec. 527, 549 (U.S.D.A. 1998).

The appropriate sanction in a “no-pay” case where the violations are flagrant and repeated is license revocation. A civil penalty is not appropriate because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA,” and it would not be consistent with the purposes of the PACA to require a PACA violator to pay a civil penalty rather than pay produce sellers to whom the PACA violator owes money. *Id.* at 571.

Here, the four Respondents “shifted the risk of nonpayment to sellers of the perishable agricultural commodities,” intentionally or with careless disregard for the payment requirements in section 2(4) of the

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PACA (7 U.S.C. § 499b(4)). *Scamcorp, Inc.*, 57 Agric. Dec. at 553. Here, buying perishable agricultural commodities without sufficient funds to comply with the prompt-payment provision of the PACA is regarded as an intentional violation of the PACA or, at the least, careless disregard of the statutory requirements.

Where there is no license to revoke, the appropriate sanction is a finding of willful, flagrant, and repeated violations of section 2(4) of the PACA and publication of that finding. *Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-87 (U.S.D.A. 2003).

A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held. *H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998). *See also, Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997).

**A.Findings of Fact Regarding Cheung Chau Trading, Inc.,
Honolulu, Hawaii**

1. Cheung Chau Trading, Inc., Respondent, is or was a corporation organized and existing under the laws of the state of Hawaii. Cheung Chau Trading, Inc.'s business and mailing address is or was 1290 C Maunakea Street, Honolulu, Hawaii 96817.

2. At all times material herein, Cheung Chau Trading, Inc. was not licensed under the PACA but was operating subject to the provisions of the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

3. At all times material herein, Tony S. Liu, an individual, directed, controlled, and managed Cheung Chau Trading, Inc. Tony S. Liu's business and mailing address is [REDACTED].

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4. Cheung Chau Trading, Inc. failed, during October 10, 2011 through December 3, 2011, to make full payment promptly of the purchase prices, or balances thereof, of \$64,295.81 for fruits and vegetables, in sixty-five lots, all being perishable agricultural commodities that Cheung Chau Trading, Inc. purchased, received, and accepted in the course of interstate or foreign commerce from Aloun Farms, Inc., Kapolei, Hawaii. *See* Appendix B to Complaint.

5. Cheung Chau Trading, Inc. still owed, past due and unpaid, to Aloun Farms, Inc., Kapolei, Hawaii, the bulk of that \$64,295.81 more than two years later. Controller Sunisa (Kae) Sou stated to AMS employee Scott McKenna, Senior Marketing Specialist, on January 15, 2015, that Aloun Farms, Inc. continues to sell fresh produce to Cheung Chau Trading, Inc. on a cash basis and has received \$8,328.81 toward the debt and is still owed \$55,967.00. *See* Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.

6. The Complaint was served May 3, 2014. More than 120 days later, Cheung Chau Trading, Inc. still had failed to pay past due amounts (at minimum, the \$55,967.00 still owed to fruit and vegetable seller Aloun Farms, Inc., Kapolei, Hawaii, on January 15, 2015). Cheung Chau Trading Inc.'s inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than 30 days. *Scamcorp, Inc.*, 57 Agric. Dec. at 549 (U.S.D.A. 1998); *Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (U.S.D.A. 1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988).

7. Cheung Chau Trading Inc.'s violations of the PACA are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)) because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *Scamcorp, Inc.*, 57 Agric. Dec. at 553; *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S.

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1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

8. Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 2009 WL 218027, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

9. Cheung Chau Trading, Inc. intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

10. Cheung Chau Trading Inc.’s violations are “repeated” (repeated means more than one), and Cheung Chau Trading Inc.’s violations are “flagrant.” Whether violations are “flagrant” under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred’s Produce*, 178 F.3d at 748; *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

**B. Findings of Fact Regarding Super Aloha, Ltd., Honolulu,
Hawaii**

1. Super Aloha, Ltd., Respondent, is or was a limited company organized and existing under the laws of the state of Hawaii. Super Aloha Ltd.’s business and mailing address is or was 1290 C Maunakea Street, Honolulu, Hawaii 96817.

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2. At all times material herein, Super Aloha, Ltd. was not licensed under the PACA, but was operating subject to the provisions of the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

3. At all times material herein, Tony S. Liu, an individual, directed, controlled and managed Super Aloha, Ltd. Tony S. Liu's business and mailing address is [REDACTED]

4. Super Aloha, Ltd. failed, during June 5, 2012 through September 7, 2012, to make full payment promptly of the purchase prices, or balances thereof, of \$12,945.54 for fruits and vegetables, in eight (8) lots, all being perishable agricultural commodities, that Super Aloha, Ltd. purchased, received, and accepted in the course of interstate or foreign commerce from Aloha Products, Honolulu, Hawaii. *See* Appendix D to Complaint.

5. Super Aloha, Ltd. still owed, past due and unpaid, the entire \$12,945.54 to Aloha Products more than two years later. Aloha Products President Paul Kim stated to AMS employee Scott McKenna, Senior Marketing Specialist, on January 14, 2015, that Super Aloha, Ltd. still owed \$12,945.54. *See* Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.

6. Super Aloha, Ltd. failed, during April 26, 2013 through May 17, 2013, to make full payment promptly of the purchase prices, or balances thereof, of \$27,339.10 for fruits and vegetables, in thirteen (13) lots, all being perishable agricultural commodities, that Super Aloha, Ltd. purchased, received, and accepted in the course of interstate or foreign commerce from Y. Fukunaga Products, Ltd., Honolulu, Hawaii. *See* Appendix D to Complaint.

7. Super Aloha, Ltd. still owed, past due and unpaid, \$29,494.87 to Y. Fukunaga Products, Ltd. more than a year later. President Neal Otani stated to AMS employee Scott McKenna, Senior Marketing Specialist, on January 8, 2015, that Y. Fukunaga Products, Ltd. continues to sell

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fresh produce to Super Aloha, Ltd. on a cash basis. Secretary Karen Wakuzawa stated to AMS employee Scott McKenna, Senior Marketing Specialist, on January 29, 2015, that Y. Fukunaga Products, Ltd. has received \$1,072.87 toward the debt and is still owed \$29,494.87, which includes charges for non-subject commodities, services and fees which were excluded from the \$27,339.10 amount listed in Appendix D to Complaint). For purposes of this Decision, I will subtract \$1,072.87 from \$27,339.10 and find that \$26,266.23 of the amount past due as of May 17, 2013, remained past due as of January 29, 2015. *See* Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.

8. The Complaint was served May 3, 2014. More than 120 days later, Super Aloha, Ltd. still had failed to pay past due amounts (at minimum, the \$12,945.54 still owed to fruit and vegetable seller Aloha Products; plus the \$26,266.23 still owed to fruit and vegetable seller Y. Fukunaga Products, Ltd.). Super Aloha, Ltd.'s inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than thirty (30) days. *Scamcorp, Inc.*, 57 Agric. Dec. at 549; *Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (U.S.D.A. 1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988).

9. Super Aloha, Ltd.'s violations of the PACA are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)) because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert.*

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denied, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

10. Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 2009 WL 218027, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

36. Super Aloha, Ltd. intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

11. Super Aloha, Ltd.’s violations are “repeated” (repeated means more than one); and Super Aloha, Ltd.’s violations are “flagrant”. Whether violations are “flagrant” under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred’s Produce v. U.S. Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

C. Findings of Fact Regarding Super Save Market, LLC, Honolulu, Hawaii

1. Super Save Market, LLC, Respondent, is or was a limited liability company organized and existing under the laws of the state of Hawaii. Super Save Market, LLC’s business and mailing address is or was 1290 C Maunakea Street, Honolulu, Hawaii 96817.

2. At all times material herein, Super Save Market, LLC was not licensed under the PACA, but was operating subject to the provisions of the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

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3. At all times material herein, Tony S. Liu, an individual, directed, controlled and managed Super Save Market, LLC. Tony S. Liu's business and mailing address is [REDACTED]

4. Super Save Market, LLC failed, during July 17, 2012 through August 25, 2012, to make full payment promptly of the purchase prices, or balances thereof, of \$7,845.00 for fruits and vegetables (papaya), in 12 lots, all being perishable agricultural commodities, that Super Save Market, LLC purchased, received, and accepted in the course of interstate or foreign commerce from A & T Belmes, Keaau, Hawaii. *See Appx. C to Complaint.*

5. Super Save Market, LLC still owed, past due and unpaid, the entire \$7,845.00 to A & T Belmes, Keaau, Hawaii, more than two years later. A & T Belmes owner Teresita Belmes stated to AMS employee Scott McKenna, Senior Marketing Specialist, on January 14, 2015, that Super Save Market, LLC still owed the entire \$7,845.00. *See Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.*

6. Super Save Market, LLC failed, during April 24, 2013 through June 6, 2013, to make full payment promptly of the purchase prices, or balances thereof, of \$8,505.80 for fruits and vegetables, in seven (7) lots, all being perishable agricultural commodities, that Super Save Market, LLC purchased, received, and accepted in the course of interstate or foreign commerce from Choe Produce, Inc., Honolulu, Hawaii. *See Appx. C to Complaint.*

7. Super Save Market, LLC still owed, more than a year later, the entire \$8,505.80 to Choe Produce, Inc. President Young Choe stated to AMS employee Scott McKenna, Senior Marketing Specialist, on January 14, 2015, that Super Save Market, LLC still owed the entire \$8,505.80. *See Declaration of Scott McKenna, attached to AMS's Additional Information filed July 22, 2015.*

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8. The Complaint was served May 3, 2014. More than 120 days later, Super Save Market, LLC still had failed to pay past due amounts (at minimum, the \$7,845.00 still owed to fruit and vegetable seller A & T Belmes; plus the \$8,505.80 still owed to fruit and vegetable seller Choe Produce, Inc.). Super Save Market, LLC's inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than thirty (30) days. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (U.S.D.A. 1998); *Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (U.S.D.A. 1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988).

9. Super Save Market, LLC's violations of the PACA are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)) because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

10. Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 2009 WL 218027, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

11. Super Save Market, LLC intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

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12. Super Save Market, LLC's violations are "repeated" (repeated means more than one); and Super Save Market, LLC's violations are "flagrant". Whether violations are "flagrant" under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

CONCLUSIONS

1. The Secretary of Agriculture has jurisdiction over the four Respondents, Cheung Chau Trading, Inc., Super Aloha, Ltd., Super Save Market, LLC, and Tony S. Liu, and the subject matter involved herein.
2. The four Respondents, Cheung Chau Trading, Inc., Super Aloha, Ltd., Super Save Market, LLC, and Tony S. Liu, failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.
3. Even if the Respondents were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).
4. Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the violations detailed above in the Findings of Fact are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)).
5. Each of the four Respondents, Cheung Chau Trading, Inc., Super Aloha, Ltd., Super Save Market, LLC, and Tony S. Liu, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, or balances thereof, during 2011 through 2013, totaling \$120,931.25 for fruits and vegetables, all being perishable agricultural

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commodities that Cheung Chau Trading, Inc., Super Aloha, Ltd., Super Save Market, LLC, and Tony S. Liu purchased, received, and accepted in the course of interstate or foreign commerce, comprised of:

\$ 64,295.81 not paid in full promptly to Aloun Farms, Inc., Kapolei, Hawaii

\$ 12,945.54 not paid in full promptly to Aloha Products, Honolulu, Hawaii

\$ 27,339.10 not paid in full promptly to Y. Fukunaga Products, Ltd., Honolulu, Hawaii

\$ 7,845.00 not paid in full promptly to A & T Belmes, Keaau, Hawaii

\$ 8,505.80 not paid in full promptly to Choe Produce, Inc., Honolulu, Hawaii

\$120,931.25

=====

6. Tony S. Liu, day-to-day during 2011 through 2013, directed, controlled, and managed Cheung Chau Trading, Inc., Super Aloha, Ltd., and Super Save Market, LLC, including the timing and amount of payments to suppliers of perishable agricultural commodities such as Aloun Farms, Inc., Kapolei, Hawaii; Aloha Products, Honolulu, Hawaii; Y. Fukunaga Products, Ltd., Honolulu, Hawaii; A & T Belmes, Keaau, Hawaii; and Choe Produce, Inc., Honolulu, Hawaii.

7. More than 120 days after the Complaint was served, the amounts still owed and unpaid in January 2015 by the four Respondents, Cheung Chau Trading, Inc., Super Aloha, Ltd., Super Save Market, LLC, and Tony S. Liu, for the purchases shown in paragraph 54, totaled \$111,529.57, comprised of:

\$ 55,967.00 still owed in January 2015 to Aloun Farms, Inc., Kapolei, Hawaii

\$ 12,945.54 (no change) still owed in January 2015 to Aloha Products, Honolulu, Hawaii

\$ 26,266.23 still owed in January 2015 to Y. Fukunaga Products, Ltd., Honolulu, Hawaii

Cheung Chau Trading, Inc., et al.
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\$ 7,845.00 (no change) still owed in January 2015 to A & T Belmes,
Keaau, Hawaii
\$ 8,505.80 (no change) still owed in January 2015 to Choe Produce,
Inc., Honolulu, HI

\$111,529.57
=====

ORDER

The Respondents, Cheung Chau Trading, Inc., Super Aloha, Ltd., Super Save Market, LLC, and Tony S. Liu, are each found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

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

Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect on the 11th day after this Decision and Order becomes final.

FINALITY

This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145; *see* Appx. A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties (to each of the four Respondents separately by certified mail; and to AMS's counsel by in-person delivery to an Office of the General Counsel representative).

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: ALLENS INC., a/k/a VEG LIQUIDATION, INC.
Docket No. 14-0109.
Decision and Order.
Filed October 11, 2015.

PACA-D.

Charles Kendall, Esq. for Complainant.

Jason Klinowski, Esq. for Respondent.

Decision and Order entered by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER; **ORDER CONSOLIDATING MATTERS FOR HEARING**

I. INTRODUCTION

The instant matter involves a complaint filed by the United States Department of Agriculture (“Complainant”; “USDA”) against Aliens Inc. (“Respondent”), alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et seq. (“PACA”; “the Act”). The complaint alleged that Respondent failed to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities during the period from October 3, 2013, through January 6, 2014. Complainant asserted that Respondent's alleged violations of PACA warranted revocation of Respondent's license to conduct business pursuant to that statute.

This Decision and Order is issued pursuant to Complainant's Motion for a Decision Without Hearing, which I hereby GRANT.

II. PROCEDURAL HISTORY

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On May 8, 2014, Complainant filed a complaint against Respondent alleging violations of PACA. On June 3, 2015,¹ Respondent's counsel entered appearance and moved for an extension of time to file an Answer, which was granted by Order issued June 4, 2014. On June 24, 2015, Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ") for the United States Department of Agriculture ("Hearing Clerk").

On June 24, 2014, Chapter 7 Bankruptcy Trustee R. Ray Fulmer, II, filed correspondence together with a copy of a notice of Chapter 7 Bankruptcy and Creditor's meeting for "All Veg, LLC"² and requested additional time to file an answer. On July 17, 2014, Complainant's counsel requested a hearing in this matter. The case was reassigned to me on that date. On August 13, 2014, counsel Samuel T. Sessions, Esq., and counsel Stephen P. Leara, Esq, both filed entry of appearance on behalf of Chapter 7 Trustee R. Ray Fulmer, II.

On September 9, 2014, I held a telephone conference with counsel, who noted the complexities of the case and the pending bankruptcy proceeding. Counsel asked me to stay the matter. By Order issued September 10, 2014, I granted that motion and set a schedule for the submission of a status report regarding the parties' positions. On December 9, 2015, counsel for Complainant filed a status report notifying that the parties' positions remained unchanged.

On February 3, 2015, Complainant filed a motion for the issuance of an Order directing Respondent to show cause why a decision without hearing should not be issued. On February 26, 2015, and February 27, 2015, Respondent's counsel moved for extensions to respond to Complainant's motion, which I granted by Order issued February 27, 2015. On March 23, 2015, Attorney Klinowski, on behalf of all counsel,

¹ The notice and motion were originally filed by facsimile, and the originals were filed by regular mail and docketed on June 11, 2014.

² According to Respondent's Answer, Mr. Fulmer was the Chapter 7 Trustee for "Veg Liquidation, Inc.," formerly known as "Allens, Inc.," which was in bankruptcy and was being administered in conjunction with "All Veg, LLC."

PERISHABLE AGRICULTURAL COMMODITIES ACT

filed an opposition to Complainant's motion, together with a supporting brief.

On March 31, 2015, Complainant filed an opposed motion for leave to reply to Respondent's response in opposition. By Order issued April 1, 2015, I granted Complainant's motion, notwithstanding Respondent's objection. On April 23, 2015, Complainant filed its response to Respondent's opposition, and on April 28, 2015, filed a corrected response. On May 15, 2015, Respondent filed an unopposed motion to extend the time within which to file a surreply, which was filed on June 1, 2015.

Upon review of the documents and arguments submitted by the parties, I conclude that Complainant's motion is fully supported by the pleadings and documents submitted by both parties. Therefore, a hearing in this matter is not necessary. I hereby admit to the record the Attachments to Complainant's motion for decision on the record and the Appendices to Complainant's complaint, and the Attachment to the Chapter 7 Trustee's answer.

Pursuant to my telephone conference with counsel for the parties on September 9, 2015, the actions brought by Petitioners associated with this Respondent against USDA are hereby consolidated for purposes of a hearing pursuant to 7 C.F.R. § 1.137(b). Those cases are: Roderick L. Allen (15-0083); Joshua C. Allen (15-0084); Nicholas E. Allen (15-0085); and Mark Towry (15-0095).

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Discussion

1. Respondent's Affirmative Defenses

Respondent contends that by participating in Respondent's bankruptcy proceedings as a creditor, Complainant USDA has deprived me of jurisdiction to consider Complainant's administrative complaint. I

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reject Respondent's "election of remedies" argument as lacking in merit. An administrative disciplinary proceeding is provided for by the PACA. Similarly, I find no grounds for the assertion that USDA has failed to state a claim for which relief can be granted. In filing the instant action, USDA is not seeking relief, but is exercising its regulatory enforcement powers under the PACA. USDA has not waived its right to enforce PACA because of Respondent's conduct viz-a-viz third parties.

2. Decision on the Record

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.* apply to the adjudication of the instant matter. Pursuant to 7 C.F.R. § 1.139, the Rules allow for a Decision Without Hearing by Reason of Admissions: ". . . a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *H Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729, 1998 WL 667268 (U.S.D.A. 1998).

In its response to Complainant's motion, reiterated in its surreply, Respondent contends that a material issue of fact exists because Complainant failed to plead that Respondent willfully violated PACA, which failure impacts the sanction that may be imposed. Further, Respondent maintains that Complainant's mistakenly relies on the holding in *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49, 1998 WL 92817 (U.S.D.A. 1998), because the holding in that matter was reached in conflict with sanction authority imposed by the Administrative Procedures Act, 5 U.S.C. § 551(10)(A)-(G). Respondent also suggests that Complainant failed to introduce sufficient evidence of outstanding balances that Respondent failed to pay promptly to suppliers, other than Respondent's bankruptcy schedules which list four (4) unpaid sellers of agricultural commodities, which Respondent asserts do not demonstrate intentional or negligent conduct that would result in willfulness as understood by 5 U.S.C. § 558(c). Respondent contends that the Chapter 7 trustee is entitled to a hearing to address the merits of the instant case.

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PACA requires payment by a buyer of perishable agricultural commodities within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice; is repeated whenever there is more than one violation of the Act; and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. *D. W Produce, Inc.*, 53 Agric. Dec. 1672, 1678, 1994 WL 643691 (U.S.D.A. 1994). Respondent's bankruptcy schedules corroborate that Respondent had failed to make prompt payments as contemplated by the P ACA, and as interpreted by the Judicial Officer for the Secretary of USDA, who concluded that the "PACA requires full payment promptly, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of PACA at all times . . . In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a 'no-pay' case," and Respondent's license shall be revoked where violations are flagrant or repeated." *Scamcorp*, 57 Agric. Dec. at 548-49.

USDA adopted the holding in *Scamcorp* and issued a policy addressing enforcement of "no-pay" and "slow-pay" violations of the PACA. Complainant cites the policy, which in essence states that any case where a respondent fails to pay for products in accordance with the PACA and is not in full compliance with the PACA within the earlier of 120 days after a complaint is served on the Respondents, or the date of the hearing, shall be treated as a "no-pay" case. Any disciplinary proceeding in which a respondent admits the material allegations in the complaint and does not assert that it has achieved compliance with the PACA, or will achieve compliance within the time frame stated shall 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

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violated the payment provisions of the PACA will be revoked. In addition to being current on payments for purchases, a respondent must not have credit agreements with the produce sellers for more than thirty (30) days. *Scamcorp*, 57 Agric. Dec. at 548-49.

A notice of appearance by counsel was filed with the Hearing Clerk for OALJ on June 3, 2014, which demonstrates that the complaint was served on Respondent before that date. In its Answer to the Complaint, Respondent did not specifically deny that it failed to promptly pay sellers of perishable agricultural commodities, but rather, tacitly admitted that it had failed to pay at least some buyers. By filing for bankruptcy protection and including in a schedule of unsecured creditors the unpaid balances for purchases of perishable agricultural commodities, Respondent further admits that it had failed to comply with the prompt payment requirements of the PACA. USDA conducted an investigation that disclosed that the amounts identified in the complaint as unpaid to sellers remained unpaid as of October 2, 2014. In its adversary action in bankruptcy court, as of November 10, 2014, Respondent admitted to debts of no less than \$24,850,743.05 due to produce suppliers. Accordingly, Respondent remained non-compliant with the PACA more than 180 days after being served notice of the complaint in this matter.

I need not determine the exact amount that Respondent failed to pay, as Respondent's bankruptcy filings demonstrate that the outstanding balance due to sellers is in excess of \$5,000.00, which represents more than a *de minimis* amount. [U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed." *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83, 1984 WL 55519 (U.S.D.A. 1984). I owe no duty to the Chapter 7 Trustee to make this determination for him.

Respondent argues that it failed to receive notice of USDA's reliance upon Respondent's bankruptcy filings and pleadings in violation of the Administrative Procedures Act. I find little merit in that argument, as the complaint set forth sufficient information regarding the violations alleged by Complainant so as to allow Respondent to specifically address them. Respondent is not prejudiced by Complainant producing Respondent's

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own bankruptcy pleadings as admissions of its non-compliance with prompt payment requirements of PACA. I take official notice of schedules and pleadings filed in connection with Respondent's bankruptcy petition. Administrative Law Judges presiding over hearings in matters initiated by the Secretary of USDA shall take official notice "of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, commercial fact of established character. . ." 7 C.F.R. § 1.141 (h)(6). Documents filed in bankruptcy proceedings by debtors that are involved in P ACA disciplinary proceedings may be officially noticed. *KDLO Enterprises, Inc.*, 70 Agric. Dec. 1098, 2011 WL 3503526, (unpub. 9th Cir. 2011, *affirming* Decision and Order of Judicial Officer for USDA, *KDLO Enterprises, Inc.*, 70 Agric. Dec. 1118 (U.S.D.A. Sept. 21 , 2011)).

I also reject Respondent's theory that the Administrative Procedures Act (APA) mandates consideration of a variety of sanctions. *See* 5 U.S.C. § 551(10). I find no inherent conflict between the APA's description of sanctions available to agencies, and the sanctions provided by the PACA. Congress vested USDA with the authority to impose specific sanctions for violations of the Act. *See* 7 U.S.C. § 499h. Further, the Secretary's interpretation of statutes and regulations that Congress has enacted is entitled to deference.

Respondent asserts that a material issue of fact remains because it may be argued under some court decisions that its conduct is not "willful", thereby potentially impacting the sanction apportioned in this case. However, I find that Respondent's arguments are not supported by the statutory, regulatory, and policy requirements that determine what constitutes willful, flagrant, and repeated violations of section 2(4) of PACA. The Judicial Officer has concluded that cases of repeated failure to promptly make payments required by the P ACA demonstrate willful violations, because Respondent knew or should have known that it could not meet its payment obligations. *Scarpaci Bros., Inc.*, 60 Agric. Dec. 874, 883-884, 2001 WL 1891230 (U.S.D.A. 2001). The Judicial Officer observed, "Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the P ACA

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and operated in careless disregard of the payment requirement in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful." *Scarpaci*, 60 Agric. Dec. at 883-84.

In order to reach "full compliance" with the PACA, Respondent would have to have paid all produce sellers within 120 days of being served with a complaint. *Scamcorp* at 549. Failure to meet this obligation results in a "no-pay" case. *Id.* The preponderance of the evidence demonstrates that Respondent has not paid sellers within that time, and therefore, Respondent has failed to reach full compliance with PACA. Respondent suggests that its use of PACA trust assets to improve the position of trust beneficiaries negates a finding of willfulness. However, nothing refutes the fact that Respondent failed to make prompt payment in many instances over a long period of time. Complainant need not establish that Respondent deliberately intended not to make prompt payment for produce purchases. Payment violations similar to those established herein are willful violations of PACA because they represent gross neglect of PACA's mandate to make prompt payment. *See Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 896-97, 1997 WL 41357 (U.S.D.A. 1997). Respondent's actions were willful and represented repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). It is appropriate to consider the instant matter as a "no-pay" case warranting revocation of Respondent's license under the PACA.

B. Findings of Fact

1. Veg Liquidation, Inc., formerly known as Aliens, Inc. ("Respondent") is a corporation organized and existing under the laws of the state of Arkansas and at all times material hereto, its business address was 305 East Main Street, Siloam Springs, Arkansas 72761-0250.
2. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number No. 19202120, issued on September 23, 1963.

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3. Respondent's license was due for renewal on September 23, 2015.³
4. During the period from October 3, 2013, through January 6, 2014, Respondent failed to make full payment promptly to 40 sellers of the agreed purchase prices, or balances thereof, for 2, 31 2 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of \$9,759,84 .86.
5. On October 28, 2013, Respondent filed a petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the United States Bankruptcy Court for the Western Division of Arkansas.
6. Respondent's case and that of its parent company, All Veg LLC, are jointly administered under Case No. 13-73597.
7. In the amended Schedule F that Respondent filed with the bankruptcy court, Respondent listed unsecured debts to all 40 produce suppliers listed in Appendix A attached to the complaint filed herein, for a total amount of \$9,231,780.81.
8. On June 6, 2014, Respondent's bankruptcy petition was converted to a case under chapter 7 of the Bankruptcy Code, and Trustee R. Ray Fulmer, II, was appointed Chapter 7 Trustee.
9. An investigation conducted by USDA disclosed that as of October 2, 2014, the amount of due to the 40 sellers identified in Appendix A attached to the complaint, remained unpaid.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's admissions in its bankruptcy filings and pleadings, and its failure to outright deny the allegations of the complaint in the answer

³ The record does not disclose whether Respondent has renewed or attempted to renew its license.

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filed with OALJ, constitute admissions of the allegations set forth in the complaint and provide reason to dispense with a formal hearing in this matter.

3. The unpaid balances due to produce sellers represent more than *de minimis* amounts.

4. Because the unpaid balances are more than *de minimis*, and because there are no disputes of material fact regarding the issue of payment due to Respondent's admissions, a hearing in this matter is not necessary.

5. Respondent's failure to make full payment promptly of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. The violations are flagrant because of their number, the amount of money involved, and the lengthy period of time during which the violations occurred.

7. The violations are repeated because there was more than one violation.

8. The violations were willful because Respondent failed to make prompt payments or otherwise arrange for payments in compliance with the Act and regulations, within 120 days after the complaint was served on Respondent.

ORDER

Respondent Veg Liquidation Inc., formerly known as Aliens, Inc. , has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b), and Respondent' s PACA license shall be revoked.

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order shall become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary 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).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

**In re: SUPREME CUTS, LLC.
Docket No. 14-0165.
Decision and Order.
Filed October 21, 2015.**

PACA-D.

Patrice H. Harps, Esq. for Complainant.

Paul T. Gentile, Esq. for Respondent.

Decision and Order entered by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the Agricultural Marketing Service of the United States Department of Agriculture (“AMS”; “USDA”; “Complainant”) against Supreme Cuts, LLC (“Respondent”) alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a, *et seq.* (“PACA”; “the Act”). The complaint alleged that Respondent failed to make full payment promptly in the aggregate amount of \$385,683.29 to seventeen (17) sellers of the agreed purchase prices for seventy-five (75) lots of perishable agricultural commodities during the period of August 2011 through January 2014.

I. PROCEDURAL HISTORY

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On August 11, 2014, Complainant filed a Complaint with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for USDA (“Hearing Clerk”) against Respondent alleging violations of the PACA. On September 18, 2014, Respondent filed an Answer. On December 9, 2014, the parties filed a consent decision, which was signed by Chief Administrative Law Judge Peter Davenport (ret.).

On June 9, 2015, Respondent filed a motion to stay the actions that were agreed upon in the consent decision. On June 10, 2015, Respondent filed a motion for the entry of a Decision and Order pursuant to Respondent’s failure to comply with the consent decision.

On June 15, 2015, I reassigned the matter to myself and denied the motion to stay the provisions of the consent decision. On July 31, 2015, substitute counsel for Complainant entered an appearance and filed a status report requesting entry of the decision. Respondent did not file a response to Complainant’s motion or status report.¹ This Decision and Order is issued on unopposed motion of Complainant and incorporates all of the pleadings of the parties and all other evidence of record.

II. FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Discussion

The PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11).

The consent decision signed by Respondent concluded that Respondent had failed to make full payment promptly to seventeen (17) sellers of the agreed purchase prices of perishable agricultural commodities. The consent decision further found that Respondent’s failure to make full payment promptly constituted willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)).

¹ The reassignment was not made in the Hearing Clerk’s electronic filing system, and I thereafter failed to monitor the progress of this case.

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The consent decision issued a finding that as the result of Respondent's willful, flagrant, and repeated violations of the PACA, Respondent's PACA license would be revoked; however, the revocation would not be effective if Respondent paid the produce sellers identified in Appendix A to the Complaint and satisfied the amounts owed to each in full within six (6) months (180 days) of the effective date of the Consent Decision and Order.

The consent decision also imposed a civil penalty of \$75,000.00 payable within the 180 days.

According to the consent decision, the PACA Branch of AMS would be the final arbiter of whether full payment, as contemplated by the terms of the consent decision, was made. Respondent is obliged to demonstrate that full payment has been made. Respondent agreed that in the event that Respondent failed to make full payment within the terms of the consent decision, then Respondent's license under the PACA would be revoked without further proceeding, other than notice to the Office of Administrative Law Judges that Respondent had failed to meet the terms of the consent decision. Respondent expressly waived all further procedure in the matter following the Consent Decision and Order.

As of the date of Complainant's motion filed June 10, 2015, Complainant had determined, and Respondent had admitted, that the payment of the agreed civil penalty had not been made. Therefore, revocation of Respondent's PACA license and publication of the facts and circumstances of Respondent's violations are appropriate sanctions.

B. Findings of Fact

1. Respondent is or was a corporation organized and existing under the laws of the state of New Jersey, with a business and mailing address in Mahwah, New Jersey.
2. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number ****0940, issued December 5, 2001.

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3. Respondent's license was subject to renewal on December 5, 2014.²
4. During the period from August 2011 through January 2014, on or about the dates identifying the transactions set forth in Appendix A to the complaint filed in the instant matter, Respondent failed to make full payment promptly of the agreed purchase prices, or the balances thereof, in the aggregate of \$385,683.29 for seventy-five (75) lots of perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce from seventeen (17) sellers.
5. In a consent decision entered on December 9, 2014, Respondent agreed to make full payment of any balance due to the sellers and agreed to pay a civil penalty in the amount of \$75,000.00.
6. As of the date of the consent decision, Respondent had paid the full amount owed to twelve (12) of the seventeen (17) sellers identified in Appendix A of the complaint.
7. As of the date of Complainant's motion, Respondent had paid the remaining five (5) sellers listed on Appendix A but had failed to pay the civil penalty.

C. Conclusions of Law

Respondent's failure to make full payment promptly of the agreed purchase prices in the total amount of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

Respondent Supreme Cuts, LLC willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

² It is unclear if Respondent renewed its license at that time. If so, then the next date for renewal is December 5, 2015.

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The PACA license issued to Respondent Supreme Cuts, LLC is hereby revoked.

The facts and circumstances underlying Respondent's violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceeding thirty-five (35) days after service hereof unless appealed to the Secretary 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).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

La Valencia Avocados Corp. v. Tomato Specialties, LLC
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PERISHABLE AGRICULTURAL COMMODITIES ACT
REPARATIONS DECISIONS

**LA VALENCIA AVOCADOS CORP. v. TOMATO SPECIALITES,
LLC, d/b/a THE AVOCADO COMPANY INTERNATIONAL.**
Docket No. W-R-2013-403.
Decision and Order.
Filed July 22, 2015.

PACA-R.

Contracts, F.O.B.

In an F.O.B. contract, it is the seller's obligation to load subject produce at shipping point which conforms to the contract, and which is in suitable shipping condition.

Contracts, F.O.B.

In an F.O.B. contract, where the parties agree upon a destination, it is a seller's obligation to ship produce that arrives at the destination in suitable shipping condition.

Inspection, time between arrival and inspection

An inspection performed 7 days after arrival at a destination agreed upon by the parties is too remote in time to be considered as evidence in assessing the condition of the produce and whether it was in suitable shipping condition at time of shipment or arrival.

Transportation, temperature tapes

Where no temperature recorders are placed on trucks in transit, inspections performed after arrival in transit are accorded little weight.

Agency, employee or agent of principal

According to section 16 of the PACA (7 U.S.C. § 499p), the "act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

Agency, apparent authority

When a party acts in a manner which creates apparent authority in an agent it may be bound by the acts of the agent. It is a maxim of agency law that a principal is responsible for its agent's actions, even where the agent exceeds the scope of its actual authority.

Juan Betancourt for Complainant.
Isaac Castro for Respondent.
Christopher Young, Presiding Officer.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA). A timely Complaint in this case was filed with the Department on December 6, 2013 in which Complainant La Valenciana Avocados Corp. (Complainant or La Valenciana) sought a reparation award against Respondent Tomato Specialties, LLC, d/b/a The Avocado Company International (Respondent or The Avocado Company) in the amount of \$108,800.00 (plus applicable interest), which was alleged to be past due and owing in connection with two (2) shipments of the perishable agricultural commodity avocados, sold to Respondent in the course of interstate commerce. A Report of Investigation (ROI) was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto on January 28, 2014, denying liability and requesting an oral hearing.

An oral hearing was held in Tucson, Arizona, on November 20, 2014. At the hearing, Complainant was represented by Juan Betancourt, produce salesman for Complainant La Valenciana, and Respondent was represented by Isaac Castro, owner of Respondent The Avocado Company. Complainant submitted Exhibits 1-3 (CX) and Respondent submitted Exhibits 1-2 (RX). Additional evidence is contained in the Department's Report of Investigation.

At the hearing, other than narrative from both party representatives, no witnesses testified for either party. A transcript of the hearing was prepared (Tr.). Neither party filed post-hearing briefs or claims for fees and expenses.

FINDINGS OF FACT

1. Complainant is a corporation whose business mailing address is 2101 W. Military Highway, Unit K-8, McAllen, TX 78503. At the time of the transactions alleged in the Complaint, Complainant was licensed

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under the PACA¹ (Complainant's Compl. at 1).

2. Respondent is a corporation whose business address is 450 W. Gold Hill Road, Suite #8, Nogales, AZ 85621. (Complainant's Complaint, pg. 1.) At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA² (PACA license records and information).

3. On July 1, 2013, Complainant sold to Respondent two (2) loads of U.S. #1 avocados consisting of 1600 cartons each, at the agreed upon price of \$34.00 per carton (Complainant's Compl. at 1; ROI Ex. A at 21-22; Complainant's Opening Statement attachments). The contract was reached between Juan Betancourt, salesman for Complainant, and Jeff Cox, salesman for Respondent (*Id.*).

4. Mr. Betancourt and Mr. Cox agreed, at the time the contract was formed, that the two loads would be sent by Complainant from Mexico to Respondent's warehouse and cold storage facility in Hildago, TX. (ROI Ex. A at 22; Complainant's Compl. Attachments, July 1, 2013 emails between Juan Betancourt and Jeff Cox; Complainant's Opening Statement Attachments.)

5. The parties agreed, throughout the informal complaint, the formal complaint, and at hearing, that the transaction was f.o.b. Hildalgo, Texas (ROI Ex. E at 2; Tr. 38, 74-75).³

6. On July 2, 2013, the first load arrived at Hildago Cold Storage (ROI Ex. A at 3, 7). The load was inspected by the USDA, Agricultural Marketing Service, Fruit and Vegetable Programs (AMS) upon arrival from Mexico at Hidalgo Cold Storage, pursuant to the Agricultural

¹ PACA license number 20120811 (PACA license records and information.)

² PACA license number 19940988 (PACA license records and information.)

³ The parties also agreed, at hearing, that the locations McAllen and Hidalgo, Texas were interchangeable with respect to the meaning of the contract (Tr. 148-151). While Respondent agreed at hearing that the loads were F.O.B. McAllen, TX, it appears to have some misunderstanding of the term "F.O.B. McAllen, TX", (or at the least, a misunderstanding of the evidence as it currently stands in the record) and maintains that the destination to which Complainant impliedly warranted that the product would make good delivery (be in suitable shipping condition according to USDA standards) was Nogales, Arizona (ROI Ex. E at 2-3; Tr. 197-199, 267). This will be addressed in the discussion, *infra*.

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Marketing Act, and the inspection showed that the load was U.S. #1 and that it met all requirements of section 8(e) of the Agricultural Marketing Agreement Act of 1937 as amended, based on U.S. Grade Standards for Florida Avocados per Import Requirements (ROI Ex. D at 5; Tr. 45-47).

7. On July 3, 2013, the second load arrived at Hildago Cold Storage (ROI Ex. A at 2, 8). The load was inspected by the USDA, Agricultural Marketing Service, Fruit and Vegetable Programs upon arrival at Hidalgo Cold Storage, pursuant to the Agricultural Marketing Act, and the inspection showed that the load was U.S. #1 and that it met all requirements of section 8(e) of the Agricultural Marketing Agreement Act of 1937 as amended, based on U.S. Grade Standards for Florida Avocados per Import Requirements (ROI Ex. D at 4; Tr. 45-47).

8. Respondent picked up the first load from Hidalgo Cold Storage on July 4, 2013, and the second load on July 5, 2013, to be shipped to its customers (ROI Ex. G at 1-2).

9. The two loads were sent by Respondent to Nogales, AZ. (ROI Exhibit A, pg. 21, ROI Exhibit F, pgs. 1-6.) Emails between Respondent's employees show that there was some indication of "trouble" with the two loads, involving Respondent's customer(s). (ROI Exhibit A, pgs. 12-13 19-20.) From the emails it is clear that "Oscar" was Oscar Lopez of Respondent, and that Mr. Lopez communicated to Jeff Cox that he would like to get price discounts from Complainant on the two loads (ROI Ex. A at 13, 19-20; Tr. 76-86, 160-163, 195).

10. The "trouble" was first communicated by Jeff Cox of Respondent to Juan Betancourt of Complainant on July 8, 2013, by email of 11:53 am. Jeff Cox stated that "he was trying to find out more info" from "Oscar" in the "Nogales office" of Respondent (ROI Ex. A at 19).

11. Juan Betancourt of Complainant immediately asked for an inspection, and inquired of Jeff Cox of Respondent whether a temperature recorder was present on Respondent's truck to Nogales, and at what temperatures the loads were being held at their destination (ROI Ex. A at 19-20, Tr. 192).

12. Jeff Cox responded by email on July 9, 2013, at 10:59 am that

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there were no temperature recorders placed on Respondent's trucks to Nogales (ROI Ex. A at 21).

13. The first load was inspected on July 9, 2013 at 5:00 pm, and showed total defects of 8% including 8% decay. The carrier and lot identification portion of the inspection states "no ID". (ROI Exhibit A, pg. 11.) The second load was inspected on July 10, 2013 at 2:15 pm, and showed total defects of 11% including 11% decay. The carrier and lot identification portion of the inspection states "no ID" (ROI Ex. A at 12).

14. On July 11, 2013, at 12:04 pm, Oscar Lopez of Respondent sent an email to Juan Betancourt of Complainant stating, *inter alia*, that "the customer has ran a good portion of the 3200 packages and will have a return in the next couple of weeks" (ROI Ex. A at 16).

15. On July 11, 2013, at 12:19 pm, Juan Betancourt of Complainant responded by email stating, *inter alia*: "I never agreed for you to work this on a consignment basis...The fruit would have been picked up immediately if you had communicated with me your intentions...we expect payment in full for these two invoices."

DISCUSSION

As to the actual terms of the contract, Complainant and Respondent, as noted *supra* in Finding of Fact no. 5, are in agreement as to that issue: 2 loads of U.S. #1 Avocados, 1600 cartons each, at the agreed upon price of \$34.00 per carton, F.O.B. "Hidalgo/McAllen, Texas" (Complainant's Compl. at 1; ROI Ex. A at 21-22; Complainant's Opening Statement attachments). However, as also noted *supra* at pg. 3, footnote 3, Respondent appears to have some misunderstanding of the term "F.O.B. McAllen, TX", (or at the least, a misunderstanding of the evidence as it currently stands in the record) and maintains that the destination to which Complainant impliedly warranted that the product would make good delivery (be in suitable shipping condition according to USDA standards) was Nogales, Arizona (ROI Ex. E at 23; Tr. 197-199, 267).

F.O.B. means that "the produce quoted or sold is to be placed free on board the boat, car, or other agency...through land transportation at

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shipping point, in suitable 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.” 7 C.F.R. § 46.43(i); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-976 (U.S.D.A. 1997). “The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment . . .” 7 C.F.R. § 46.43(i).

Section 2-319 of the Uniform Commercial Code (UCC) provides additional guidance as to F.O.B transactions:

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which;

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503); (c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board;

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

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In this case, that the parties expressly agreed to “F.O.B. Hidalgo/McAllen” (and did *not* expressly agree to any other location) means, according to PACA regulations and the UCC, that it was Complainant’s obligation to get the two loads to Hidalgo/McAllen, TX in suitable shipping condition (i.e., that the two loads must make “good delivery” by USDA standards at that location).

The evidence of record supports this conclusion. Complainant’s representative, Juan Betancourt, has asserted from the time the controversy arose on or about July 8, 2013, up through the hearing, that the contract reached between he and Jeff Cox contemplated that the two loads were F.O.B., and that they were to be delivered to the cold storage facility in Hidalgo, TX, used by Respondent (i.e., the agreed upon F.O.B. location was Hidalgo TX) (ROI Ex. at 22; Complainant’s Complaint Attachments, July 1, 2013 emails between Juan Betancourt and Jeff Cox; Complainant’s Opening Statement Attachments; Tr. 38-51, 75-79, 88-92, 104, 107, 149-151). The emails between Juan Betancourt of Complainant and Jeff Cox at the time the two formed the contract also lend to the conclusion that it was agreed that Complainant’s obligation was to deliver the two loads to Hidalgo/McAllen, TX. Moreover, on July 19, 2013, Jeff Cox sent an email (or letter, the record is unclear as to which) to Respondent’s owner, Isaac Castro, stating, *inter alia*, that the two loads of 1600 cartons of avocados were purchased by him at \$34.00 per carton, and that they were to be delivered to “our warehouse in Hidalgo direct from Mexico” (ROI Ex. A at 25).

The term F.O.B. Hidalgo/McAllen, TX does not mean, as Isaac Castro suggests, that the F.O.B. contract *began* at Hidalgo/McAllen and ended when the product got to Nogales, or to Respondent’s customer elsewhere, and that the warranty of suitable shipping condition extended to Nogales or some other location. If such was the case, the parties would need to agree as such during the formation of the contract; however, there is no evidence in the record that this was done. *See Clark Produce v. Primary Export International, Inc.*, 52 Agric. Dec. 1715 (U.S.D.A. 1993); *see also Gourmet Produce Specialties v. Russo Farms, Inc.* 44 Agric. Dec. 1652, 1655-56 (U.S.D.A. 1985). Accordingly, we find that the contract formed contemplated that the two loads would

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make good delivery at Hildago/McAllen, TX. ⁴

Respondent argued, in its Answer and at hearing, that Respondent's owner, Isaac Castro, "never authorized" that the two loads be sent to the cold storage facility in Hildago, TX, and never agreed to a final destination for the two loads. However, the evidence of record shows that while Respondent's owner, Isaac Castro, may not have had a hand in agreeing to a contract destination, as discussed above, Respondent's salesman, Jeff Cox, *did*. According to section 16 of the PACA (7 U.S.C. § 499p), "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person" (emphasis added). The common law of agency and the *respondeat superior* theory of corporate liability support a finding that Jeff Cox's agreements with Complainant were made "within the scope of his employment and office." The Restatement defines "scope of employment" as follows:

Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

The *respondeat superior* theory of corporate liability provides that to be within the "scope of the employment," the "servant's conduct" must

⁴ It matters not whether we deem this an "F.O.B. place of shipment" or an "F.O.B. place of destination" contract as described in Section 2-319 UCC; in either case the evidence shows that the agreement in this case was for the loads to be delivered by Complainant to and received by Respondent at the "place" of Hidalgo, TX.

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be "the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated at least in part, by a desire to serve the master." *See* PROSSER, TORTS 352 (1955). *See also United States v. Sun Diamond Growers of California*, 138 F.3d 961, 970 (D.C. Cir. 1998); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-407 (4th Cir. 1985); *United States v. Cincotta*, 689 F.2d 238, 241-242 (1st Cir. 1982). The doctrine of *respondeat superior* was underlined and strengthened by Congress through its enactment of section 16 of the PACA, which explicitly provides an identity of action between a licensee and its employees, agents, and officers acting within the scope of their employment. *See Koam Produce, Inc. v. Dimare Homestead, Inc.*, 213 F. Supp. 2d 314 (S.D.N.Y. 2002); *Koam Produce, Inc. v. Dimare Homestead, Inc.*, 329 F. 3d 123, 130 (2d Cir. 2003). Jeff Cox, Respondent's salesman, was employed by Respondent for the very purpose of entering into purchase and sales contracts (*See* ROI Ex. D at 3 of 5). He negotiated the purchase contract in this case with Complainant while Mr. Cox was at Respondent's place of business, during regular business hours, and in connection with the purchase of produce loads made as part of Respondent's business (ROI Ex. At at 21-22, 25, ROI Ex. A at 2122; Complainant's Opening Statement attachments). Therefore, Jeff Cox was acting within the scope of his employment when he negotiated the contract with Juan Betancourt of Complainant, and whether Isaac Castro expressly "authorized" the contract is irrelevant to its formation.

We have found that the agreed upon destination of the contract was the cold storage facility used by Respondent in Hidalgo/McAllen, TX. Evidence of record shows that the first load arrived there on July 2, 2013 (ROI Ex. A at 3, 7). The second arrived there on July 3, 2013 (ROI Ex. A at 2, 8). The loads were inspected the same day of arrival by the USDA, Agricultural Marketing Service, Fruit and Vegetable Programs at Hidalgo Cold Storage, pursuant to the Agricultural Marketing Act, and the inspection for each load showed and certified that the load was U.S. #1 and that it met all requirements of section 8(e) of the Agricultural Marketing Agreement Act of 1937 (AMAA) as amended, based on U.S. Grade Standards for Florida Avocados per Import Requirements. (ROI Exhibit D, pgs. 4-5; Tr. 45-47.) For the loads to be certified as meeting those requirements, each load must have had, at the time of delivery and inspection at the contract destination in Hildalgo, not more than 10 %

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total defects, including not more than 1% decay (USDA, AMS, Fresh Products Branch, Florida Avocados Shipping Point and Market Instructions, November 2000 at 9; *see also* App'x II at 1). Hence, at the time of arrival at contract destination, these loads met the USDA good delivery standards (15% total defects, including not more than 3% decay) (*see* USDA AMS F.O.B. Good Arrival Guidelines table, www.ams.usda.gov), which are *less* stringent than the AMAA standards attendant to the inspections performed on July 2nd and 3rd, 2013.

The federal inspections performed on July 2nd and 3rd (ROI Ex. D at 4-5; Tr. 4547), are the only evidence in the record of the condition of the two loads upon arrival at contract destination. The federal inspections performed on July 9th and 10th, which are also contained in the record (ROI Ex. A at 11-12), do not show the condition of the produce upon arrival at contract destination, and are too remote in time from the time of arrival at contract destination to be relevant to the outcome of the case.

As already stated, the representatives of Complainant and Respondent agreed, at the time the contract was formed, that the contract destination was the cold storage facility used by Respondent in Hidalgo, TX. As also already stated, Complainant's only obligation was to ship produce that would make good delivery at that destination, which it did. The sales contract between Complainant and Respondent effectively ended at that point, as did Complainant's obligations to Respondent. That Respondent did not pick up the two loads until July 4, 2013 and July 5, 2013 (ROI Ex. G at 1-2,) and that the two loads were then sent by Respondent to Nogales, AZ and subsequent customers (ROI Ex. A at 21, ROI Ex. F at 1-6), was and is not Complainant's concern. That Complainant appeared willing to work with Respondent⁵ regarding trouble reported on the loads on July 8th and 9th (*see* Finding of Facts Nos. 10 and 11; ROI Exhibit A, pg. 19; ROI Exhibit A, pgs. 19-20, Tr. 192) did not in any way re-obligate Complainant to resolve any trouble

⁵ Juan Betancourt seemed to be merely willing to "work" with Respondent, if the facts bore out that working with them was possible, i.e., he asked for a temperature recorder on Respondent's truck to Nogales and for inspections. It appears, from the record, that Complainant might have been willing to negotiate some amicable resolution had the facts warranted it (they did not), for the purpose of preserving a future business relationship with a potentially valuable customer; however, we find that Juan Betancourt's communications post-arrival at contract destination (Hidalgo Cold Storage) were naught more than that, and did not obligate Complainant in any way.

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with the loads, though it was Complainant's option to do so (Juan Betancourt of Complainant seemed willing to listen to "Respondent's side" of what was going on, and asked for a temperature recorder record from Respondent's truck).

Complainant also asked to see inspections. (ROI Ex. A. at 19-20, Tr. 192). Respondent replied to Complainant's query by stating no temperature recorder was on Respondent's truck to Nogales that contained the two loads (ROI Ex. A, at 21), and Respondent sent the results of the July 9th and 10th inspections to Complainant. The fact that no temperature recorder was placed on the truck would, in and of itself, serve to negate those inspections. *Sharyland, LP v. Lloyd A. Miller*, 57 Agric. Dec. 762 (U.S.D.A. 1998); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (U.S.D.A. 1992); and *Monc's Consolidated Produce, Inc. v. A&J Produce Corp.*, 43 Agric. Dec. 563 (U.S.D.A. 1984).

Further, as noted *supra*, the July 9th and 10th inspections, performed seven days after each load arrived at contract destination in Hidalgo, TX, were not timely. *SEL International Corp. v. Stan C. Brown*, 52 Agric. Dec. 740 (U.S.D.A. 1993); *TransWest Fruit Co., Inc. v. Ameri-Cal Produce, Inc.*, 42 Agric. Dec. 1955, 2008 (1983). Respondent argues that the starting time from which to get a timely inspection began upon arrival at Nogales on July 6, 2013 for the first load and July 8, 2013 for the second load (Resp't's Answering Statement). Based on the evidence of record and our conclusions made above (that the agreed upon contract destination was the cold storage facility used by Respondent in Hidalgo, TX, and that the two loads made good delivery there), we find Respondent's argument meritless.⁶

In the absence of an inspection by neutral party at destination, Respondent fails to prove any breach of contract. *Gordon Tantum v. Phillip R. Weller*, 41 Agric. Dec. 2456 (U.S.D.A. 1982); *O. D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (U.S.D.A. 1962). The only

⁶ Also based on the evidence of record and our conclusions made above, we find it unnecessary to discuss in depth whether Juan Betancourt agreed to a consignment (evidence suggests he did not) and whether Respondent provided an adequate accounting of the two loads and their eventual handling, distribution, and sale by Respondent or its customers.

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usable inspections in this case are those of July 2nd and 3rd, and they show good delivery upon arrival at destination. *Supra* at 10. Complainant fulfilled the contract with Respondent, and Respondent is liable to Complainant for the full contract amount.

In hearing cases, fees and expenses may be awarded to the prevailing party to the extent that they are reasonable. *E. Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (U.S.D.A. 2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (U.S.D.A. 1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (U.S.D.A. 2003). It is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes*, 48 Agric. Dec. 707 (U.S.D.A. 1989). Complainant is the prevailing party in this case; however, no request for fees and expenses was filed, hence none shall be awarded. See *L. E. Jensen & Sons, Inc. v. Huston Produce, Inc.*, 51 Agric. Dec. 814 (1992); *Brown & Hill Tomato Shippers, Inc. v. Superior Shippers Assoc., Inc.*, 32 Agric. Dec. 503 (U.S.D.A. 1973).

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ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation \$108,800.00 with interest thereon at the rate of 0.28 of 1% per annum from March 1, 2014 until paid; plus the amount of \$500.00 filing of the reparation claim.

Copies of this Order shall be served upon the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/].

PERISHABLE AGRICULTURAL COMMODITIES ACT

**In re: GEORGE FINCH and JOHN DENNIS HONEYCUTT.
Docket Nos. 13-0068; 13-0069.
Miscellaneous Order.
Filed July 30, 2015.**

PACA-APP – Administrative procedure – Stay order.

Michael A. Hirsch, Esq. for Petitioners.
Shelton S. Smallwood, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER LIFTING STAY ORDER

I issued *Finch*, Nos. 13-0068, 13-0069, 2014 WL 4311062 (U.S.D.A. June 6, 2014), affirming the Director of the PACA Division's [Director] October 3, 2012 determinations that George Finch and John Dennis Honeycutt were responsibly connected with Third Coast Produce Company, Ltd. [Third Coast], when Third Coast violated 7 U.S.C. § 499b(4), and imposing the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b) on Mr. Finch and Mr. Honeycutt.

On August 19, 2014, the Director, Mr. Finch, and Mr. Honeycutt filed a Joint Motion for Stay Order seeking a stay of the Order in *Finch*, Nos. 13-0068, 13-0069, 2014 WL 4311062 (U.S.D.A. June 6, 2014), pending the outcome of proceedings for judicial review. On August 20, 2014, I

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granted the Joint Motion for Stay Order.¹ On July 28, 2015, the Director, Mr. Finch, and Mr. Honeycutt filed a Joint Request to Lift Stay stating proceedings for judicial review are concluded and requesting that I lift the August 20, 2014, Stay Order.

As proceedings for judicial review have concluded, the July 28, 2015, Joint Request to Lift Stay is granted and the Order in *Finch*, Nos. 13-0068, 13-0069, 2014 WL 4311062 (U.S.D.A. June 6, 2014), is effective, as follows.

ORDER

1. The Director's October 3, 2012 determination that Mr. Finch was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed. Accordingly, Mr. Finch is subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Finch.

2. The Director's October 3, 2012 determination that Mr. Honeycutt was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed. Accordingly, Mr. Honeycutt is subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Honeycutt.

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¹ *Finch*, Nos. 13-0068, 13-0069, 2014 WL 4311073 (U.S.D.A. Aug. 20, 2014) (Stay Order).

DEFAULT DECISIONS

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

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DUKE CITY PRODUCE, INC.

Docket No. D-15-0077.

Default Decision and Order.

Filed September 1, 2015.

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