AGRICULTURE DECISIONS

Volume 73

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Part Three (PACA)

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

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DEPARTMENTAL DECISIONS

In re: AGRI-SALES, INC.
Docket No. D-13-0195.
Decision and Order.
Filed August 4, 2014.

PACA-D – Administrative procedure – Extension of time – Filing, effective date of – Full payment promptly – Revocation of license – Mailbox rule – Rules of Practice – Summary judgment – Unfair conduct – Willful.

Christopher Young, Esq. for Complainant.
Mary E. Gardner, Esq. for Respondent.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Bruce W. Summers, Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this proceeding by filing a Complaint on March 21, 2013. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period April 2010 through February 2012, Agri-Sales, Inc. failed to make full payment promptly of the agreed purchase prices, or balances of the agreed purchase prices, to seven produce sellers in the total amount of $403,741.90 for 62 lots of perishable agricultural commodities, which

Agri-Sales, Inc., purchased, received, and accepted in the course of interstate and foreign commerce, in violation of 7 U.S.C. § 499b(4).[1] Specifically, the Deputy Administrator alleges Agri-Sales, Inc. failed to make full payment promptly to: (1) Eddy Produce, LLC, Uvalde, Texas, the amount of $64,238 for seven lots of mixed vegetables; (2) Skyline Produce, LLC, Hatch, New Mexico, the amount of $154,172.40 for 20 lots of onions; (3) Double D Farms, Fresno, California, the amount of $35,612 for seven lots of onions; (4) Nokota Packers, Inc., Buxton, Idaho, the amount of $52,602.50 for eight lots of potatoes; (5) Natures Finest Produce, Pain Court, Ontario, Canada, the amount of $47,880 for 10 lots of carrots; (6) CR-Farms, Shelley, Idaho, the amount of $39,470.50 for eight lots of mixed vegetables; and (7) Eastern Oregon Produce, Inc., Vale, Oregon, the amount of $9,766.50 for two lots of onions.[2]

On May 29, 2013, Agri-Sales, Inc. filed an Answer. Agri-Sales, Inc. admits it failed to make full payment promptly to six of the seven produce sellers identified in Appendix A attached to the Complaint, but denies it owes these six produce sellers the amounts alleged in the Complaint. Specifically, Agri-Sales, Inc.: (1) denies it owes Eddy Produce, LLC $64,238, as alleged in the Complaint; (2) admits it owes Skyline Produce, LLC but states the amount owed Skyline Produce, LLC, is $142,895, rather than $154,172.40, as alleged in the Complaint; and (3) admits it owes Double D Farms, Nokota Packers, Inc., Natures Finest Produce, CR-Farms, and Eastern Oregon Produce, Inc. but denies it owes the amounts alleged in the Complaint.[3]

On June 11, 2013, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] ordered the parties to exchange exhibits and to file with the Hearing Clerk exhibit lists and witness lists.[4] On January 10, 2014, the Chief ALJ, citing Agri-Sales, Inc.'s admissions and Agri-Sales, Inc.'s failure to comply with the Chief ALJ's Order requiring the exchange of exhibits and the filing of exhibit and witness lists, ordered the parties to submit cross motions for summary judgment. On January 30, 2014, pursuant to 7 C.F.R. § 1.139 and the Chief ALJ's

[1] Compl. ¶¶ III-IV at 2-3, App. A.
[2] Compl. App. A.
[3] Answer ¶ III at 1-4.
[4] Chief ALJ's Order filed June 11, 2013.

January 10, 2014, Order, the Deputy Administrator filed Complainant's Motion for Decision Without Hearing and Memorandum in Support Thereof [hereinafter Motion for Decision Without Hearing]. Agri-Sales, Inc. failed to file a motion for summary judgment or a response to the Deputy Administrator's Motion for Decision Without Hearing.

On March 12, 2014, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) found, during the period April 2010 through February 2012, Agri-Sales, Inc. failed to make full payment promptly to seven produce sellers of the agreed purchase prices in the total amount of $403,741.90 for 62 lots of perishable agricultural commodities, which Agri-Sales, Inc. purchased, received, and accepted in interstate and foreign commerce; (2) concluded Agri-Sales, Inc. willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); (3) ordered publication of the facts and circumstances of Agri-Sales, Inc.'s violations of 7 U.S.C. § 499b(4); and (4) ordered revocation of Agri-Sales, Inc.'s PACA license (PACA license number 20110806), unless Agri-Sales, Inc.'s PACA license had been previously terminated for failing to pay the PACA license renewal fee.[5]

On April 22, 2014, Agri-Sales, Inc. filed a Petition for Appeal to Judicial Officer and Memorandum in Support [hereinafter Appeal Petition]. On May 13, 2014, the Deputy Administrator filed Complainant's Response to Respondent's Appeal. On June 3, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Decision

Statutory and Regulatory Framework

The PACA makes unlawful the failure of any commission merchant, dealer, or broker to make full payment promptly for any perishable agricultural commodity, as follows:

> **§ 499b. Unfair conduct**

[5] Chief ALJ's Decision and Order at 7.

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
> . . . .
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .
> . . . .

7 U.S.C. § 499b(4). The Regulations define the term "full payment promptly," as follows:

> **§ 46.2 Definitions.**
>
> The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:
> . . . .
> (aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
> . . . .
> (5) Payment for produce purchased by a buyer, within

> 10 days after the day on which the produce is accepted;
> . . . .
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

The PACA authorizes the Secretary of Agriculture to impose sanctions on any commission merchant, dealer, or broker who has violated 7 U.S.C. § 499b(4), as follows:

> **§ 499h Grounds for suspension or revocation of license**
>
> **(a) Authority of Secretary**
>
> Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.
> . . . .
>
> **(e) Alternative civil penalties**

> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(a), (e).

PACA requires full payment promptly, and commission merchants, dealers, and brokers are required to be in compliance with the payment provision of the PACA at all times. In any PACA disciplinary proceeding in which: (1) a respondent is alleged to have failed to pay in accordance with the PACA, (2) the respondent admits the material allegations in the complaint, and (3) the respondent makes no assertion that the respondent has achieved or will achieve full compliance[6] with the PACA within 120 days after the complaint is served on the respondent, or the date of the hearing, whichever comes first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant[7] or repeated,[8] the license of the PACA

[6] "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. 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).

[7] 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, 895 (U.S.D.A. 1997).

[8] "Repeated" means more than once. *See* Allred's Produce v. U.S. Dep't of Agric., 178 F.3d 743, 748 (5th Cir.) (stating violations are "repeated" under the PACA if they are not done simultaneously), *cert. denied*, 528 U.S. 1021 (1999); Magnolia Fruit & Produce

licensee, shown to have violated the payment provision of the PACA will be revoked and/or the facts and circumstances of the respondent's violations of 7 U.S.C. § 499b(4) will be published.

Agri-Sales, Inc.'s Appeal Petition

Agri-Sales, Inc., raises five issues in its Appeal Petition. First, Agri-Sales, Inc., asserts it timely filed Respondent's Witness and Exhibit List on December 16, 2013, and contends the Chief ALJ's finding that Agri-Sales, Inc., did not file Respondent's Witness and Exhibit List until January 6, 2014, is error (Appeal Pet. ¶¶ 2-4 at 1-2).

On June 11, 2013, the Chief ALJ filed an Order requiring Agri-Sales, Inc. to file with the Hearing Clerk Agri-Sales, Inc.'s exhibit and witness lists. On July 1, 2013, the Chief ALJ, pursuant to a joint request filed by the Deputy Administrator and Agri-Sales, Inc. extended the time for filing Agri-Sales, Inc.'s exhibit and witness lists to October 1, 2013.[9] Agri-Sales, Inc. requested and the Chief ALJ granted three additional extensions of time to file Agri-Sales, Inc.'s exhibit and witness lists resulting in a due date of December 23, 2013, for filing Agri-Sales, Inc.'s exhibit and witness lists.[10] Agri-Sales, Inc., contends, according to the mailbox rule, the Chief ALJ should have considered Respondent's Witness and Exhibit List filed on December 16, 2013, the date Agri-Sales, Inc. mailed Respondent's Witness and Exhibit List, rather than on January 6, 2014, the date the Hearing Clerk received Respondent's Witness and Exhibit List. Mary E. Gardner, attorney of record for Agri-Sales, Inc.[11] in an affidavit attached to Agri-Sales, Inc.'s Appeal Petition, states Agri-Sales, Inc., mailed Respondent's Witness and Exhibit List on December 16, 2013, as follows:

Co. v. U.S. Dep't of Agric., No. 90-4643, slip op. at 6 (5th Cir. 1991) (stating courts have interpreted "repeated" as used in the PACA strictly; so interpreted, it requires little, if anything, beyond more than once, regardless of whether the purchases are part of a related group of transactions), *printed in* 50 Agric. Dec. 854 (U.S.D.A. 1991); Reese Sales Co. v. Hardin, 458 F.2d 183, 187 (9th Cir. 1972) (stating, since the violations of the PACA did not occur simultaneously, they must be regarded as "repeated" violations); Zwick v. Freeman, 373 F.2d 110, 115 (2d Cir.) (same), *cert. denied*, 389 U.S. 835 (1967).

[9] Chief ALJ's Order dated July 1, 2013.

[10] Complainant's Resp. to Resp't's Appeal at 2-3.

[11] Appearance filed April 17, 2013; Appeal Pet. Aff. of Mary E. Gardner ¶ 2 at 1.

> 8. By letter dated December 15, 2013, I personally mailed to the USDA Respondent's Witness and Exhibit List for filing, which was due a week later on December 23rd. I attached proper postage to the envelope and properly addressed it to:
>
> USDA - PACA Branch
> Room 1510-S
> 1400 Independence Avenue SW
> Washington, D.C. 20250
>
> This is the same address to which I have previously sent correspondence and filings for the above-referenced case, and the USDA has never objected to untimely receipt of any of those mailings.
>
> 9. I distinctly recall personally placing the envelope into the United States Post Office mail drop located at 611 South 8th Street, West Dundee, Illinois 60118, on the afternoon of December 16, 2013. I naively believed that a letter posted on December 16 would surely reach the USDA by December 23rd.

Appeal Pet. Aff. of Mary E. Gardner ¶¶ 8-9 at 2-3.

As an initial matter, reliance on the "mailbox rule" is dependent upon a properly addressed mailing. The Hearing Clerk's March 25, 2013, service letter accompanying the Complaint served on Agri-Sales, Inc. informed Agri-Sales, Inc. that all filings should be submitted to the Hearing Clerk, as follows:

> . . . . Your Answer, as well as any other pleadings or requests regarding this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1031, South Building, United States Department of Agriculture, Washington, DC 20250-9200.

Agri-Sales, Inc. failed to mail Respondent's Witness and Exhibit List

to the address provided by the Hearing Clerk.[12] Thus, even if the mailbox rule were applicable to this proceeding, which it is not, Agri-Sales, Inc. may have been precluded from reliance on the mailbox rule because Agri-Sales, Inc. did not properly address the envelope containing Respondent's Witness and Exhibit List.

Moreover, I reject Agri-Sales, Inc.'s contention that the mailbox rule applies to this proceeding. The Rules of Practice provide that a document is deemed to be filed when it reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
> (g) *Effective date of filing*. Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk[.]

7 C.F.R. § 1.147(g). Moreover, the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings conducted under the Rules of Practice.[13]

The Hearing Clerk's date stamp establishes that the Hearing Clerk received Respondent's Witness and Exhibit List on January 6, 2014. Therefore, I reject Agri-Sales, Inc.'s contention that it timely filed Respondent's Witness and Exhibit List on December 16, 2013, and I reject Agri-Sales, Inc.'s contention that the Chief ALJ's finding that Agri-Sales, Inc. did not file Respondent's Witness and Exhibit List until

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[12] Appeal Pet. Aff. of Mary E. Gardner ¶ 8 at 2-3.

[13] Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 86 (U.S.D.A. 2009) (stating the argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer); Knapp, 64 Agric. Dec. 253, 302 (U.S.D.A. 2005) (stating the mailbox rule does not apply in proceedings under the Rules of Practice); Reinhart, 59 Agric. Dec. 721, 742 (U.S.D.A. 2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

January 6, 2014, is error.

Second, Agri-Sales, Inc., asserts on February 20, 2014, it filed a request for an extension of time to file a response to the Deputy Administrator's Motion for Decision Without Hearing. Agri-Sales, Inc., contends the Chief ALJ ignored Agri-Sales, Inc.'s motion for an extension of time and issued the Chief ALJ's Decision and Order prior to the expiration of the time Agri-Sales, Inc., requested in its motion to extend the time for filing a response to the Deputy Administrator's Motion for Decision Without Hearing. (Appeal Pet. ¶¶ 9-10 at 3, Aff. of Mary E. Gardner ¶ 28 at 6).

The Rules of Practice require administrative law judges to rule on all motions filed prior to the filing of an appeal of the administrative law judge's decision, as follows:

> **§ 1.143 Motions and requests.**
>
> (a) *General*. . . . . The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a). I find nothing in the record indicating that the Chief ALJ ruled on Agri-Sales, Inc.'s February 20, 2014 motion to enlarge the time to respond to the Deputy Administrator's Motion for Decision Without Hearing. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Agri-Sales, Inc.'s February 20, 2014 motion. Instead, I find the Chief ALJ's issuance of the Chief ALJ's March 12, 2014 Decision and Order and failure to rule on Agri-Sales, Inc.'s February 20, 2014 motion operate as an implicit denial of Agri-Sales, Inc.'s motion to enlarge the time to respond to the Deputy Administrator's Motion for Decision Without Hearing.[14]

[14] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d

Third, Agri-Sales, Inc. contends the Chief ALJ improperly denied Agri-Sales, Inc. a hearing and issued summary judgment (Appeal Pet. at 6-7).

Agri-Sales, Inc. admits in its Answer that it failed to make full payment promptly of the agreed purchase prices, or balances of the agreed purchase prices, to six of the seven produce sellers identified in Appendix A attached to the Complaint, for perishable agricultural commodities, which Agri-Sales, Inc. purchased, received, and accepted in the course of interstate and foreign commerce.[15] Moreover, Michael Hughes, the president and owner of Agri-Sales, Inc.[16] in an affidavit attached to Agri-Sales, Inc.'s Appeal Petition reiterates the admissions in Agri-Sales, Inc.'s Answer, as follows:

> **SKYLINE PRODUCE, LLC**
>
> 45. Skyline Produce, LLC and Agri-Sales have agreed upon a payment schedule for this produce debt. Attached as Exhibit 1 is a copy of Skyline's letter to the USDA, withdrawing its claim against Agri-Sales, including an Award issued May 31, 2013 and any disputed sums not resolved with the Award.
>
> 46. Agri-Sales has met its obligations to Skyline

50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than 3 years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Greenly, 72 Agric. Dec. 586, 5965-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *appeal docketed*, No. 13-2882 (8th Cir. Aug. 23, 2013).

[15] Answer ¶ III at 1-4.

[16] Appeal Pet. Aff. of Michael Hughes ¶ 2 at 1.

pursuant to the agreed-upon payment schedule. Payments are being made and the produce debt is being reduced pursuant to terms agreeable to Skyline.

CR-FARMS

47. CR-Farms and Agri-Sales have agreed upon a payment schedule for this produce debt. Attached as Exhibit 2 is a copy of CR-Farms' letter to the USDA, urging the USDA to not sanction Agri-Sales and Mike Hughes because any sanction would likely hinder Mr. Hughes' ability to pay Agri-Sales' produce debt to CR-Farms.

48. Agri-Sales admits that it owed CR-Farms $30,775.50 on January 24, 2014.

49. Since then, however, I have made six payments, each in the amount of $250. Those payments were made on February 1, February 10, March 3, March 10, March 17 and March 27, 2014, lowering the amount owed to $29,448.50.

EASTERN OREGON PRODUCE, INC.

50. Eastern Oregon Produce, Inc. and Agri-Sales have agreed upon a payment schedule for this produce debt. Attached as Exhibit 3 is a copy of Eastern Oregon's letter to the USDA, urging the USDA to not sanction Agri-Sales and Mike Hughes because any sanction would likely hinder Mr. Hughes' ability to pay Agri-Sales' produce debt to Eastern Oregon.

51. Agri-Sales admits that on January 24, 2014, it owed Eastern Oregon $6,766.50.

52. However, since then, Agri-Sales has made six payments of $500 each against this debt, lowering the total owed as of the date hereof to $3,266.50.

NATURE'S FINEST PRODUCE

53. Agri-Sales admits that it owes Nature's Finest $47,880. I have been unable to make any payments on this debt because Nature's Finest is out of business.

DOUBLE D FARMS

54. Agri-Sales admits that on January 24, 2014 it owed Double D Farms $31,930.

55. I have been paying Double D as I have been able, although Double D has not insisted on a set payment plan.

. . . .

NOKOTA

90. The principal owed to Nokota is not the largest of these Produce debts.

91. If Nokota told Mr. Hudson that Agri-Sales owed it $52,602.50 in January 2014, then Nokota lied. While Agri-Sales has admitted, and has never denied, that it owes Nokota, the amount owed has been in dispute in Nokota's lawsuit against Agri-Sales in the district court for the Northern District of Illinois.

92. Agri-Sales has attempted on many occasions to resolve its dispute with Nokota, but Nokota has failed and refused to acknowledge credits against invoices and has failed to properly account for payments that Agri-Sales made to it.

93. Despite Nokota's refusal to settle its lawsuit against Agri-Sales, Agri-Sales has made periodic payments to Nokota to reduce this debt. However, *bona fide* disputes

> existed regarding most of the invoices that Nokota claims are unpaid.
>
> 94. Once Nokota filed its lawsuit against Agri-Sales, it relinquished any rights to have the USDA enforce its PACA trust rights. This is a debt that is subject to current, ongoing litigation.

Appeal Pet. Aff. of Michael Hughes ¶¶ 45-55, 90-94 at 7-9, 13-14.

The PACA requires commission merchants, dealers, and brokers to make full payment promptly to produce sellers for perishable agricultural commodities. Agri-Sales, Inc. admits that it violated the prompt payment requirement of the PACA. Based upon the number of Agri-Sales, Inc.'s violations, the amount of money involved, and the time period during which Agri-Sales, Inc. violated the PACA, Agri-Sales, Inc.'s violations are flagrant and repeated as a matter of law. Moreover, as I discuss, *infra*, I conclude Agri-Sales, Inc.'s violations of the PACA are willful. Therefore, there are no genuine issues of material fact to be heard.

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, I have consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[17] Therefore, I reject Agri-Sales, Inc.'s contentions that the Chief ALJ's failure to conduct a hearing and entry of summary judgment, are error.

Fourth, Agri-Sales, Inc. contends the Chief ALJ's conclusion that Agri-Sales, Inc.'s violations of 7 U.S.C. § 499b(4) are willful is error (Appeal Pet. at 4-5).

A violation is willful under the Administrative Procedure Act if a

[17] *See* Kollman, 73 Agric. Dec. ___, slip op. at 5 (U.S.D.A. July 23, 2014); Knaust, 73 Agric. Dec. 92, 98 (U.S.D.A. 2014); Pine Lake Enters., Inc., 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); Bauck, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Animals of Mont., Inc., 68 Agric. Dec. 92, 104 (U.S.D.A. 2009). *See also* Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[18] The record supports the Chief ALJ's conclusion that Agri-Sales, Inc.'s violations of the PACA are "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)). Willfulness is reflected by Agri-Sales, Inc.'s violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the number and dollar amount of Agri-Sales, Inc.'s violative transactions.

Moreover, Mr. Hughes admits in an affidavit attached to Agri-Sales, Inc.'s Appeal Petition that Agri-Sales, Inc. knew it did not have sufficient funds to comply with the prompt payment provision of the PACA and intentionally violated the PACA, as follows:

> **INABILITY TO PAY SUPPLIERS BECAUSE OF FAILURE OF AGRI-SALES' CUSTOMERS TO PAY**
>
> 107. Because of the history of various slow-paying customers, who eventually would pay their bills, Agri-Sales continued to purchase and sell produce, paying as it was able. Most companies in the produce business do not pay within PACA's ten-day terms; they pay as they are paid. That's exactly what Agri-Sales was forced to do in 2010 and 2011.
>
> 108. As a direct result of Agri-Sales' customers' slow-pay and failure to pay Agri-Sales, Agri-Sales found itself in increasingly desperate financial condition.
>
> 109. The unpaid Agri-Sales' invoices to its customers outlined above are greater than the sums that Agri-Sales is alleged herein to have left unpaid to its suppliers.

[18] *See, e.g.*, Allred's Produce v. U.S. Dep't of Agric., 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); Toney v. Glickman, 101 F.3d 1236, 1241 (8th Cir. 1996); Cox v. U.S. Dep't of Agric., 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); Finer Foods Sales Co. v. Block, 708 F.2d 774, 777-78 (D.C. Cir. 1983); Am. Fruit Purveyors, Inc. v. United States, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); E. Produce Co. v. Benson, 278 F.2d 606, 609 (3d Cir. 1960).

> 110. Except for Eddy Produce, Agri-Sales has never denied that it owes money to Skyline Produce, Double D, Nokota (although in a lower amount than claimed), Natures Finest, CR-Farms and Eastern Oregon.

Appeal Pet. Aff. of Michael Hughes ¶¶ 107-110 at 16. Therefore, I reject Agri-Sales, Inc.'s contention that the Chief ALJ's conclusion that Agri-Sales, Inc. willfully violated 7 U.S.C. § 499b(4), is error.

Fifth, Agri-Sales, Inc. contends the Chief ALJ's finding that Agri-Sales, Inc., failed to make full payment promptly to Eddy Produce, LLC, is error (Appeal Pet. at 5-6).

As an initial matter, even if I were to find that Agri-Sales, Inc. paid Eddy Produce, LLC in accordance with the PACA, that finding would not affect the disposition of this proceeding. Agri-Sales, Inc. has admitted it failed to make full payment promptly to six produce sellers of the agreed purchase prices for produce, which Agri-Sales, Inc. purchased, received, and accepted in the course of interstate and foreign commerce. As Agri-Sales, Inc. owed these six produce sellers more than a *de minimis* amount more than 120 days after the Complaint was served on Agri-Sales, Inc., this PACA case would be treated as a "no-pay" case, even if I were to find Agri-Sales, Inc. paid Eddy Produce, LLC in accordance with the PACA. In any "no-pay" case in which the violations are flagrant or repeated, the license of the PACA licensee shown to have violated the payment provision of the PACA is revoked and/or the facts and circumstances of the respondent's violations of 7 U.S.C. § 499b(4) are published.

On January 10, 2014, the Chief ALJ ordered the parties to submit cross motions for summary judgment. On January 30, 2014, the Deputy Administrator filed a Motion for Decision Without Hearing in which the Deputy Administrator asserts Agri-Sales, Inc. failed to make full payment promptly to Eddy Produce, LLC, the amount of $64,238 for seven lots of mixed vegetables. The Deputy Administrator supports this assertion with a declaration executed by Mark Hudson, senior marketing specialist, Agricultural Marketing Service, United States Department of

Agriculture.[19]

If the moving party supports its motion for summary judgment, the burden shifts to the non-moving party who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial.[20] In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials.[21]

Agri-Sales, Inc. failed to file a response to the Deputy Administrator's Motion for Decision Without Hearing or provide any evidence rebutting Mr. Hudson's declaration accompanying the Deputy Administrator's Motion for Decision Without Hearing. Instead, Agri-Sales, Inc. rested on the denial in its Answer of the allegation that it failed to make full payment promptly to Eddy Produce, LLC. Therefore, I reject Agri-Sales, Inc.'s contention that the Chief ALJ erroneously granted the Deputy Administrator's Motion for Decision Without Hearing as it relates to Agri-Sales, Inc.'s failure to make full payment promptly to Eddy Produce, LLC.

Based upon a careful consideration of the record, I find no change or modification of the Chief ALJ's March 12, 2014, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (i) *Decision of the judicial officer on appeal*. . . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the

[19] Deputy Administrator's Mot. for Decision Without Hearing Attach. 3 ¶ 4 at 1.
[20] Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994); Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993); T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).
[21] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

> Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The Chief ALJ's March 12, 2014, Decision and Order is adopted as the final order in this proceeding.

RIGHT TO JUDICIAL REVIEW

Agri-Sales, Inc., has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.[22] The date of entry of the Order in this Decision and Order is August 4, 2014.

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[22] 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: MID-SOUTH PRODUCE CO., INC.
Docket No. 14-0054.
Decision and Order.
Filed November 21, 2014.

PACA.

Christopher Young, Esq. for Complainant.
Judy H. White, President, Mid-South Produce Co., Inc., for Respondent.
Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (the Act or PACA), instituted by a Complaint filed on December 30, 2013 by Bruce W. Summers, the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA). The Complaint alleges that Respondent, during the period of December 2010 through May 2013, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of $346,880.15 for 80 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Complaint and a copy of the Rules of Practice were served upon Respondent at two (2) addresses via certified mail on January 2, 2014. On January 23, 2014, the Hearing Clerk's Office received a letter written on Respondent's letterhead signed by Judy H. White erroneously indicating that it had contacted PACA's "designated attorney of record Mr. Jamaal Clayburn"[1] and been given a 30-day extension and stating that it "disagree[d] with the monetary amounts and customers [in the Complaint]." On May 8, 2014, there having been no objection from the Complainant, Respondent was given until June 9, 2014 in which to file

[1] Mr. Clayburn is a Legal Assistant in the Hearing Clerk's Office; the Complainant is represented in this action by Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC.

an Answer.

Respondent's Answer filed on June 9, 2014 denied failing to pay produce suppliers or being in violation of the PACA, and on July 3, 2014, Complainant filed a Motion for Hearing. Respondent filed its objection to the Motion for Hearing, expressing the thought that a hearing would be a waste of time and money for all parties involved.

On September 5, 2014, after reviewing the record and being of the opinion that the matter could be decided on the record without the need for a hearing, I directed the parties to file cross motions for summary judgment. Upon discovering that the September 5, 2014 Order was not properly served on the parties, I supplemented it with an Order dated September 25, 2014 that extended the dates for filing the cross motions. On October 23, 2014, Complainant filed a Motion for Decision Without Hearing and Memorandum in support thereof. Respondent failed to respond to the Motion, and the matter is now before me for disposition.

The Summary Judgment Standard

In moving for a Decision Without Hearing,[2] Complainant relies upon Respondent's Answer, the filings in Bankruptcy initiated by Respondent, and information obtained during a compliance check conducted by PACA. Taken together, Complainant met its burden of proving a *prima facie* case that the violations alleged were in fact committed by Respondent.

While the Department's Rules of Practice do not specifically provide for the use or exclusion of summary judgment, its Judicial Officer has consistently ruled that hearings are futile and that summary judgment is appropriate where there is no factual dispute of substance. *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 607 (D.C.Cir. 1987); *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*,[3] 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009).

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[2] Although not denominated a Motion for Summary Judgment, as it the Motion filed by Complainant is supported by appropriate supporting documentation, I will consider it to be such.

[3] *See* Bauck, 68 Agric. Dec. 853, 858-59 nn.6 & 7 (U.S.D.A. 2009) (discussing use of summary judgment in a variety of cases).

While not an exact match, "no factual dispute of substance" may be equated with the "no genuine issue as to any material fact" language found in the Supreme Court's decision construing FED. R. CIV. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment, because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

If a moving party supports its motion for summary judgment,[4] the burden then shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In providing such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. FED. R. CIV. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler*, 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts or on speculation or suspicions, and the non-moving party may not avoid summary judgment on a hope that some issue may surface at trial. *Conaway v. Smith*, 853 F2d. 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment, all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor. *Anderson*, 477 U.S. at 254; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In the

[4] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

instant case, after filing an Answer, Respondent failed to file any response to Complainant's Motion for Decision Without Hearing, leaving Complainant's *prima facie* case untouched and unrebutted.

As discussed in *Anderson*, the judge's function is not to himself weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. The standard to be used mirrors that for a directed verdict under FED. R. CIV. P. 50(a): "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250; *see also Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250-52; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Discussion

Initially, it will be observed that the Answer filed in this action denies only not paying sellers but falls short of indicating that "full payment promptly" was made in a timely manner as is required by the PACA. While the Answer does allude to accounts being in "good standing" and a "satisfactory agreement [being] in place," the Answer fails to identify the seller(s) with whom agreements might have been negotiated, and in any event none were produced.

Despite Respondent's denial that produce suppliers had not been paid,[5] the evidence reflects that Respondent filed a Voluntary Petition (Case No. 14-13699) pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101, *et seq.*) in the United States Bankruptcy Court for the Northern District of Mississippi. Respondent's Bankruptcy initial filings include a schedule of the twenty largest unsecured creditors, which lists two (2) of the sellers identified on Schedule A to the Complaint herein as being owed significant produce debt.[6] A third seller is included as a

[5] The Answer indicates in polysemous fashion that Respondent was unable to find any evidence that four (4) of the seven (7) produce providers ever "had involvement with PACA," listing Proffer Wholesale Produce, Inc., General Produce, McCartney Produce and Kontos Brokerage Company, LLC. Docket Entry No. 5.

[6] Proffer Wholesale Produce, Inc. was listed as being owed $41,341.50, and First Fruit Farms, Inc. was listed as being owed $7,531.40. Ex. B at 1-2, Docket Entry No. 12.

creditor; however, the amount is not included.[7] The other four (4) sellers identified as not being timely paid in the Complaint were not mentioned in the Bankruptcy documents.[8]

The practice of taking official notice of documents filed in Bankruptcy proceedings that have a direct relationship to matters in PACA disciplinary cases is well established. *Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538, 2010 WL 5584369 (U.S.D.A. 2010); *Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A. 1997); *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609, 1613-14 (U.S.D.A. 1993); *see Caito Produce Co.*, 48 Agric. Dec. 602, 625-26 (U.S.D.A. 1989).

"Section 1.141(g)(6) of the Rules of Practice (7 CFR § 1.141(g)(6)) provides that official notice shall be taken of such matters as are judicially noticed by federal courts." *S W F Produce Co.*, 54 Agric. Dec. 693, 1995 WL 122034 at *5 (U.S.D.A. 1995). Federal courts take judicial notice of official court records, including Bankruptcy proceedings and other cases[9] involving "the same subject matter or questions of a related nature between the same parties." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (citing *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C.Cir. 1942), *cert. denied*, 319 U.S. 755 (1943)); *see also Magnolia Fruit & Produce Co., Inc. v. U.S. Department of Agriculture*, 50 Agric. Dec. 854, 860 (U.S.D.A. 1991) ("The law appears to be settled that a court may take judicial notice of other cases including the same subject matter or questions of a related nature.") (internal citations omitted). Moreover,

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[7] GM Brokerage was listed without any amount specified. Ex. B at 4, Docket Entry No. 12.

[8] As noted by Complainant in the Memorandum accompanying the Motion for Decision Without Hearing, Respondent was directed to file all of its schedules on or before October 27, 2014 at which time the full amount of past-due and unpaid produce debt would have been disclosed. Ex. C at 1, Docket Entry No. 12.

[9] Federal courts also "may 'take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'" Lion Raisins, Inc. v. U.S. Dep't of Agric., 67 Agric. Dec. 1212, 1218 (U.S.D.A. 2008) (citing United States *ex rel.* Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (quoting St. Louis Baptiste Temple, Inc. v. Fed. Deposit Ins. Corp., 605 F.2d 1169, 1172 (10th Cir. 1979)).

"[j]udicially noticed facts often consist of matters of public record, *such as prior court proceedings*; administrative materials; city ordinances; or other court documents." *Lion Raisins, Inc. v. U.S. Department of Agriculture*, 67 Agric. Dec. 1212, 1218 (U.S.D.A. 2008) (emphasis added).

Even were the Bankruptcy filings not sufficient admissions of PACA violations, Complainant's position is supported by the Declaration (executed under penalty of perjury) of Sharlene Evans, a Senior Marketing Specialist in the Washington, DC Office of PACA. Ms. Evans conducted a compliance investigation during the period October 15 through October 30, 2014 and, in the course of the investigation, contacted each of the seven (7) sellers identified in Exhibit A to the Complaint in this action to discuss the amounts listed in the exhibit[10] and to determine the current balance of any debt owed as past due. Of the seven (7) sellers, three (3) (Proffer Wholesale Produce, Inc.; McCartney Produce; and Kontos Brokerage Company, LLC) indicated that they had been paid in full. One (1) seller, Bama Tomato Company, Inc., stated that a settlement had been reached with Respondent but that new debt was currently owed.[11] The remaining three (3) sellers (General Produce; GM Brokerage; and First Fruit Farms, Inc.) each indicated that all or portions of the debt alleged to be due in the Complaint were still owed.[12]

"Full payment promptly" in accordance with the PACA requires full payment by the buyer within ten (10) days after the day on which produce is accepted unless: (1) the parties agree to different terms and (2) the different payment terms are reduced to writing prior to entering into the transaction. 7 C.F.R. §§ 46.2(aa)(5) and 46.2(aa)(11). The burden of proof is on the party claiming existence of such an agreement. *See*

[10] Ideally, the Declaration could have confirmed both that as of the date of the filing of the Complaint that the amounts listed on Exhibit A to the Complaint were accurate and that there was no written agreement between the parties altering the settlement period set forth in the Regulations. Significantly, the discussion did not result in corrections being made to Exhibit A.

[11] Bama Tomato Company, Inc. advised Ms. Evans that Respondent had $17,500.00 in unpaid and past-due debt. Ex. A at 2, Docket Entry No. 12.

[12] General Produce indicated that $1,745 was remained unpaid, with the last payment having been received on September 19, 2014; GM Brokerage indicated that the entire $118,177.00 contained on Exhibit A to the Complaint was still owed; and First Fruit Farms, Inc. indicated that it was still owed $7,531.40.

Scamcorp, Inc., 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

Consistent with prior decisions, it is abundantly clear that no hearing need be held in this case as the amounts admitted to be owed are obviously more than *de minimis*. *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) ("there is no need for complainant to prevail as to each of the transactions, since the same order [revoking the license] would be entered in any event, as long as the violations are not *de minimis*."); *Moore Marketing Int'l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984). The admitted outstanding balance owed to produce sellers well exceeds $5,000 and axiomatically represents more than the *de minimis* threshold. *See Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1987); 44 Agric. Dec. 879 (U.S.D.A. 1985).

On the basis of the entire record, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

1. Respondent Mid-South Produce Co., Inc. is a corporation organized and existing under the laws of the state of Mississippi with a last-known business address in Grenada, Mississippi.

2. At all times material herein, Respondent was licensed under the provisions of the PACA or operated subject to those provisions. License No. 19173233 was issued to Respondent on October 15, 1957.

3. Respondent, during the period of December 2010 through May 2013, failed to make full payment promptly to seven (7) sellers of the agreed purchase prices in the total amount of $346,880.15 for 80 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

4. On October 1, 2014, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the United States Bankruptcy Court for the Northern District of Mississippi. The Petition was designated as Case No. 14-13699.

5. Respondent's Bankruptcy initial filings included a schedule of the twenty (20) largest unsecured creditors, including two (2) of the seven (7) sellers identified on Schedule A to the Complaint herein, as being owed significant produce debt. A third seller is included as a creditor; however, the amount of debt was not included.

6. A compliance investigation conducted during the period of October 15 through October 30, 2014 documented the fact that although full payment had been received by three (3) of the sellers listed on Exhibit A to the Complaint herein and a settlement had been reached with one (1) seller (but new debt was currently owed), three (3) sellers still had all or at least portions of the debt alleged in the Complaint still owed.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

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

ORDER

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

2. Respondent's PACA License No. 19173233 is revoked.

3. This Order shall take effect on the date that this Decision becomes final.

4. Pursuant to the Rules of Practice Governing Procedures Under the Act, this Decision will 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).

   Copies of this Decision and Order shall be served upon the parties by

the Hearing Clerk.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS DECISION

COLIMAN PACIFIC CORP., D/B/A COLIMAN FRUITS AND VEGETABLES v. SUN PRODUCE SPECIALTIES LLC.
PACA Docket No. W-R-2013-424.
Decision and Order.
Filed October 23, 2014.

PACA-R.

Invoices - Complainant's invoices received by Respondent's authorized agent

Receipt of Complainant's invoices by Respondent's authorized agent's constituted Respondent's receipt of Complainant's invoices.

Interest - Pre-judgment interest rate stated in Complainant's invoices

Complainant requested pre-judgment interest on the unpaid produce shipments listed in the Complaint at the rate of twenty-one percent (21%) per annum (1.75% per month). Complainant's claim was based on its invoices issued to Respondent, which expressly states: "A FINANCE CHARGE of 1 3/4% PER MONTH 21% PER ANNUM will be charged on all past due accounts." There was nothing in the record to indicate that Respondent objected to the interest provisions in Complainant's invoices. In the absence of a timely objection by Respondent, the interest provisions in Complainant's invoices were incorporated into the sales contract(s). *See Johnston v. AG Grower Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010). Accordingly, pre-judgment interest was awarded to Complainant at the rate of twenty-one percent (21%) per annum (1.75% per month).

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Rynn & Janowsky LLP, Counsel for Complainant.
Freeborn & Peters LLP, Counsel for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DECISION AND ORDER

Preliminary Statement

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) ("PACA"), and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) ("Rules of Practice") by filing a timely Complaint. Complainant seeks a reparation award against Respondent in the amount of $10,075.20 in connection with eight (8) truckloads of mixed fruits and vegetables (produce) sold and delivered in the course of interstate commerce.

A Civil Action, CV-13-01904-PHX-SRB, filed by Respondent against Complainant in the United States District Court of Arizona was dismissed on June 4, 2014, without any award to Respondent. The instant Complaint will be heard on its merits. A copy of the Complaint was served upon Respondent, which filed an Answer thereto, denying liability to Complainant and asserting an affirmative defense.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice under the PACA (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the ROI if one was prepared. No ROI was prepared, as Respondent did not respond in writing during the Department's informal handling of the case. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to submit briefs. Complainant filed an Opening Statement and a brief. Respondent did not submit additional evidence or a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 4151 West Lindbergh Way, Chandler, AZ 85226. At the time of the transactions involved herein, Complainant was licensed under the PACA.

2. Respondent is a limited liability company whose post office address is 811 East Jackson Street, Phoenix, AZ 85034. At the time of the

transactions involved herein, Respondent was licensed under the PACA.

3. On or about May 15, 2013 through July 16, 2013, Complainant, through Samuel J. Tercero, Respondent's broker, negotiated Complainant's sale and delivery of the following eight (8) truckloads of produce to Respondent, resulting in an unpaid balance of $10,075.20 after certain credits were applied by Complainant (Compl. Ex. unnumbered in sequence; Answer at 4-5; Opening Statement ¶¶ 3-5).

Date	Invoice #	P.O. #	Description	Quantity	Rate	Amount	Total
5/15/13	**109635**	0	MX Avocado 40's	20	$21.00	$420.00	**$420.00**
5/18/13	**109712**	0	MX Avocado 60's	352	$10.00	$3,520.00	**$3,520.00**
6/19/13	**110287**	Sam	US Avocado 60's	264	$19.00	$5,016.00	**$5,016.00**
6/28/13	**110497**	Sam	MX Jalapeno Pepper	21.82	$14.00	$305.48	
			MX Pasilla Pepper	58	$12.00	$696.00	
			MX Avocado 60's #2	131	$13.00	$1,703.00	
			US Avocado 60's	10	$13.00	$130.00	
			MX Key Lime	24	$8.00	$192.00	
			MX Key Lime	21	$8.00	$168.00	
							$3,194.48
7/6/13	**110675**	Sam	US Avocado 70's	40	$14.00	$560.00	
			MX Lime 40#	270	$5.00	$1,350.00	
			MX Key Lime	40.27	$4.00	$161.08	
			MX Serrano Pepper	1	$11.00	$11.00	
			MX Pasilla Pepper 10#	15	$5.00	$75.00	
			MX Serrano Pepper 10#	16	$6.00	$96.00	
			MX/US Avocado 70's #2	4	$14.00	$56.00	
							$2,309.08

7/12/13	**110822**	Sam	MX Key Lime 350	17	$6.00	$102.00	
			MX Key Lime 400's	22	$6.00	$132.00	
			MX Key Lime 500's	84.7	$6.00	$508.20	
			MX Lime 40#	27	$6.00	$162.00	
			MX Avocado 32's	88	$8.00	$704.00	
			MX Jalapeno Pepper #2	13	$10.00	$130.00	
			MX Pasilla Pepper 24#	20	$10.00	$200.00	
			MX Serrano Pepper 10#	35	$4.00	$140.00	
			MX Pasilla Pepper 10#	8	$12.00	$96.00	
			MX Lime 40#	50	$4.00	$200.00	
			MX Lime Organic 10/1#	50	$7.00	$350.00	
							$2,724.20
7/13/13	**110835**	0	MX Pineapple 25#	30	$12.50	$375.00	
			Banana 40#	3	$16.00	$48.00	
							$423.00
7/16/13	**110892**	0	Banana 40#	10	$16.00	$160.00	**$160.00**
						Grand Total - 8 Invoices	**$17,766.76**
						Less Credits	($810.00)
							($3,976.00)
							($2,547.48)
							($358.08)
						Balance Due	**$10,075.20**

4. Complainant's invoices state "A FINANCE CHARGE of 1 3/4% PER MONTH 21% PER ANNUM will be charged on all past due accounts." (Compl. Ex. unnumbered in sequence). Complainant and Respondent's broker negotiated payment terms of thirty (30) to forty-five (45) days for Respondent (Opening Statement ¶¶ 3-5).

5. Respondent has not paid Complainant for the produce.

6. The informal Complaint was filed on September 19, 2013, which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant's brings this action to recover the unpaid balance of the agreed price for eight truckloads of produce sold and delivered to Respondent in the course of interstate commerce. Complainant states that the sales and agreed prices were negotiated through Samuel J. Tercero, Respondent's broker. Complainant states that Respondent accepted the agreed kind, size, quantity, and quality of produce called for in the sales contracts and in the manner agreed upon, resulting in a balance due of $10,075.20, plus twenty-one percent (21%) per annum contractual interest on the unpaid balance (Compl. ¶¶ 4-8; Opening Statement ¶¶ 3-5).

As evidence to substantiate its claim, Complainant submitted copies of the order forms it prepared and its invoices to Respondent (Complainant's Exs. unnumbered in sequence). The record does not contain any broker's confirmations of sale.

Respondent submitted an Answer, signed by its attorney, in which Respondent generally denies the Complainant, asserting an affirmative defense (Answer at 1-6). Pleadings or statements signed by an attorney lack evidentiary value. *See C. H. Robinson Co. v. ARC Fresh Food System, Inc.*, 50 Agric. Dec. 950, 952 (U.S.D.A. 1991); *see also Royal Valley Fruit Grower's Ass'n v. Hamady Bros. Food Mkts., Inc.*, 37 Agric. Dec. 1925, 1927 (U.S.D.A. 1978); *Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (U.S.D.A. 1960). Such Answer only serves to frame the issues between the parties. *See Chapman Fruit Co. v. Tri-State Sales Agency*, 44 Agric. Dec. 1366, 1367 (U.S.D.A. 1985); *see also J. R. Norton Co. v. Corgan & Son, Inc.*, 44 Agric. Dec. 2130, 2132 (U.S.D.A. 1985).

Respondent's affirmative defense is that its broker caused Respondent not to receive Complainant's invoices and thereby approve the terms. Respondent has the burden of proving its affirmative defense by a preponderance of the evidence. *See Jules Produce Co. v. Quality Melon Sales, Inc.*, 40 Agric. Dec. 152, 154 (U.S.D.A. 1981); *see also Walker &*

Hagen Packing House v. Amato, 27 Agric. Dec. 1543, 1545 (U.S.D.A. 1968). Respondent states the following as its affirmative defense:

> Specifically, Samuel J. Tercero a/k/a/ Samuel T. Jimenez d/b/a Tercero Freight Services, Inc., d/b/a/ Tercero Freight & Transport, d/b/a Tercero Transport & Freight Company, and d/b/a/ Tercero Produce (hereinafter collectively "Tercero") acted as a buying and selling broker for Sun Produce [Respondent] at all times relevant to the Complaint. Tercero routinely ordered distressed produce, on Sun Produce's [Respondent's] account, from certain third party produce suppliers, including the Complainant. . . . , Tercero caused Sun Produce not to receive any of the invoices associated with the distressed produce transactions he brokered, including the invoices that are the subject of the Complaint. Tercero intercepted, or caused to be intercepted, all of the invoices related to the distressed produce he purchased from Complainant on Sun Produce's account. Tercero was able to intercept all of the invoices and related paperwork for the distressed produce he purchased on Sun Produce's account because those documents were delivered with the distressed produce itself . . . . Tercero's interception of the invoices related to Tercero's purchase of distressed produce on Sun Produce's account caused Sun Produce not to receive any of the invoices related to Tercero's purchase of distressed produce. Accordingly, Sun Produce did not accept, approve, or otherwise agree to the terms of any of the produce transactions Tercero brokered with Complainant.

(Answer at 4-5).

Respondent admits above that Mr. Tercero had the authority to act as its broker or agent at the time of the transactions in question and that Complainant's invoices were delivered to the contract destination along with the produce in question but were allegedly intercepted by Mr. Tercero. Although Respondent may not have been pleased by Mr.

Tercero's business practices, Respondent's failure to withdraw the authority it granted to its broker allowed the broker to retain the authority to act on Respondent's behalf. *See Tanimura v. Albertson's, Inc.*, 45 Agric. Dec. 2507, 2509 (U.S.D.A. 1986); *see also Jacobsen Produce, Inc. v. Burnette*, 37 Agric. Dec. 1743, 1745 (U.S.D.A. 1978); *George Arakelian Farms, Inc. v. O'Day*, 31 Agric. Dec. 1395, 1401 (U.S.D.A. 1972). We conclude therefore that Mr. Tercero had the necessary authority to negotiate the transactions at issue with Complainant on Respondent's behalf. As Respondent does not deny accepting the produce, we conclude that Respondent accepted all of the produce in question.

Complainant's Sales Manager, Victor Heredia, clarifies the contract terms and the furnishing of the invoices to Respondent in the following sworn and uncontroverted Opening Statement:

> The invoices for these produce purchases were delivered with the shipments and faxed to Sun Produce's office [as directed by Sun Produce and its agent Tercero]. . . . a portion of this product was left on an open basis to Tercero. 30-45 days after said the sales [sic], Tercero [broker] reported the total amount to be paid to Coliman [Complainant] and Coliman then issued credits and adjustments accordingly as requested by Tercero. At that time both Sun Produce [Respondent] and its agent Tercero were well aware that a portion of this produce purchased was distressed product and for this reason credits were issued. So, in fact, Sun Produce's agent Tercero set the final price for the produce purchased from Coliman by Sun Produce. Certainly, we believed that the price quoted by Tercero was fair, as it was in line with other similar sales that we made of distressed produce. . . .

(Opening Statement ¶ 5).

A sworn statement that has not been controverted must be taken as true in the absence of other persuasive evidence. *See Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 808 (U.S.D.A.

1992); *see also Sun World Int'l, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982).

In summary, Complainant has proven by a preponderance of the evidence that it sold eight (8) shipments of produce to Respondent, through Respondent's broker, and that Respondent received eight (8) invoices along with the produce shipments and also by fax. Based upon the evidence in the record and the statements of the parties, we find Respondent liable to Complainant for the unpaid balance of $10,075.20 for the eight (8) shipments of produce it purchased through its broker and accepted. Complainant also seeks pre-judgment interest on the unpaid produce shipments listed in the Complaint at the rate of twenty-one percent (21%) per annum (1.75% per month). Complainant's claim is based on its invoices issued to Respondent, which expressly state: "A FINANCE CHARGE of 1 3/4% PER MONTH 21% PER ANNUM will be charged on all past due accounts." (Compl. Exs. unnumbered in sequence). There is nothing in the record to indicate that Respondent objected to the interest provisions in Complainant's invoices. In the absence of a timely objection by Respondent, the interest provisions in Complainant's invoices were incorporated into the sales contract(s). *See Johnston v. AG Grower Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010). Moreover, courts have held that "[b]ecause this provision was presumably a bargained term of the contract, the Court will enforce it." *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F.Supp 346, 351 (S.D.N.Y. 1993). The Department will not deviate from the clear guidance set by the federal judiciary and will likewise enforce the interest provision of the contract(s). In addition, the courts have broad discretion to award pre-judgment interest to PACA claimants. *See Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1071-72 (2d Cir. 1995); *Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613-14 (2d Cir. 1994); *see also E. Armata, Inc. v. Platinum Funding Corp.*, 887 F. Supp 590, 595 (S.D.N.Y. 1995) ("It is within the court's discretion to award pre-judgment interest on a PACA claim, and courts in this jurisdiction have done so "based on congressional intent to protect agricultural suppliers."). Finally, there is no indication that the application of pre-judgment interest at the rate of twenty-one percent (21%) per annum is outside the accepted range of trade practices within the produce industry. Accordingly, pre-judgment interest will be

awarded to Complainant at the rate of twenty-one percent (21%) per annum (1.75% per month). Attorney fees, however, are only awarded in connection with oral hearings. *See Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715-16 (U.S.D.A. 1989).

Respondent's failure to pay Complainant $10,075.20 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). Post-judgment interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); *Notice of Change in Interest Rate Awarded in Reparation Proceedings under the Perishable Agricultural Commodities Act* (PACA), 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice under the PACA (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the PACA (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $10,075.20, with interest thereon at the

rate of twenty-one percent (21%) per annum (1.75% per month) from October 1, 2013, until the date of this Order, plus interest at the rate of 0.10 of one percent (1%) per annum from the date of this Order, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders & Dismissals] with the sparse case citation but without the body of the order. Miscellaneous Orders & Dismissals (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: ANTHONY J. SPINALE & MR. SPROUT, INC.
Docket No. D-09-0189.
Miscellaneous Order.
Filed August 5, 2014.

PACA-APP – Appeal to Judicial Officer – Decision, definition of – Interlocutory appeal.

Linda Strumpf, Esq. for Petitioner.
Charles L. Kendall, Esq. and Leah C. Battaglioli, Esq. for Respondent.
Initial Order entered by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DISMISSING INTERLOCUTORY APPEAL

On April 8, 2014, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued an Order Setting Time and Situs for Hearing, in which the ALJ scheduled a hearing in this proceeding to commence September 3, 2014, in New York City, New York. On May 15, 2014, Anthony J. Spinale and Mr. Sprout, Inc. filed a request to postpone the hearing until such time as Mr. Spinale's medical condition improves and Mr. Spinale's doctor permits him to attend the hearing. On June 5, 2014, the Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture, filed Complainant's Opposition to Respondents' Request for Postponement.

On June 10, 2014, the ALJ issued an Order Denying Request for Continuance of Hearing stating the hearing shall commence as scheduled in the Order Setting Time and Situs for Hearing. On July 10, 2014,

Mr. Spinale and Mr. Sprout, Inc. filed an Appeal Petition requesting that the Judicial Officer overturn the ALJ's Order Denying Request for Continuance of Hearing. On July 30, 2014, Mr. Spinale and Mr. Sprout, Inc. requested expedited consideration of their Appeal Petition. On July 30, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

The rules of practice applicable to this proceeding[1] provide only for appeal of an administrative law judge's decision to the Judicial Officer and limit the time during which a party may file an appeal to a 30-day period after receiving service of an administrative law judge's written decision and to a 30-day period after issuance of an administrative law judge's oral decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a). The Rules of Practice define the word "decision," as follows:

> **1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

[1] The rules of practice applicable to this proceeding are the "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes" (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

> . . . .
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The ALJ's Order Denying Request for Continuance of Hearing is not a "decision" as that word is defined in the Rules of Practice. Moreover, the ALJ has not issued an initial decision in the instant proceeding in accordance with 5 U.S.C. §§ 556 and 557, and the Rules of Practice do not permit interlocutory appeals.[2] Therefore, the ALJ's June 10, 2014 Order Denying Request for Continuance of Hearing cannot be appealed to the Judicial Officer, and Mr. Spinale and Mr. Sprout, Inc.'s July 10, 2014 Appeal Petition must be rejected as premature.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Spinale and Mr. Sprout, Inc.'s interlocutory appeal filed July 10, 2014, is dismissed.

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[2] Lion Raisins, Inc., 63 Agric. Dec. 830, 834 (U.S.D.A. 2004) (Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion); Velasam Veal Connection, 55 Agric. Dec. 300, 304 (U.S.D.A. 1996) (Order Dismissing Appeal); Feuerstein, 48 Agric. Dec. 896 (U.S.D.A. 1989) (Order Dismissing Appeal); Landmark Beef Processors, Inc., 43 Agric. Dec. 1541 (U.S.D.A. 1984) (Order Dismissing Appeal); LeaVell, 40 Agric. Dec. 783 (U.S.D.A. 1980) (Order Dismissing Appeal by Resp't Spencer Livestock, Inc.).

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: GEORGE FINCH & JOHN DENNIS HONEYCUTT.
Docket Nos. 13-0068, 13-0069.
Miscellaneous Order.
Filed August 20, 2014.

PACA-APP – Stay.

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

STAY ORDER

I issued *Finch*, 73 Agric. Dec. 302 (U.S.D.A. 2014), affirming the Director of the PACA Division's October 3, 2012 determinations that George Finch and John Dennis Honeycutt were responsibly connected with Third Coast Produce Company, Ltd., when Third Coast Produce, Ltd. 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, effective 60 days after service of *Finch*, 73 Agric. Dec. 302 (U.S.D.A. 2014), on Mr. Finch and Mr. Honeycutt.

On August 19, 2014, the Director of the PACA Division, Mr. Finch, and Mr. Honeycutt filed a Joint Motion for Stay Order seeking a stay of the Order in *Finch*, 73 Agric. Dec. 302 (U.S.D.A. 2014), pending the outcome of proceedings for judicial review. The Director of the PACA Division, Mr. Finch, and Mr. Honeycutt's joint motion for a stay pending judicial review is granted pursuant to 5 U.S.C. § 705.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *Finch*, 73 Agric. Dec. 302, (U.S.D.A. 2014), is stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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VINCENT MINEO.
Docket No. 10-0138.
Order of Dismissal.
Filed August 27, 2014.

DAVID ESTERLINE.
Docket No. 13-0013.
Order of Dismissal.
Filed September 2, 2014.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEL CAMPO FRESH, INC.
Docket No. 14-0079.
Default Decision and Order.
Filed July 1, 2014.

MAXSUN PRODUCE CORP.
Docket No. 14-0040.
Default Decision and Order.
Filed August 4, 2014.

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CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Progreso Produce Limited 1, L.P.
Docket No. D-14-0154.
Filed July 25, 2014.

George Finch.
Docket No. 13-0068.
Filed August 20, 2014.

Al Harrison Company.
Docket No. 14-0050.
Filed August 21, 2014.

Anthony J. Spinale & Mister Sprout, Inc.
Docket No. D-09-0189.
Filed August 26, 2014.

George Finch.
Docket No. 13-0068.
Filed August 20, 2014.