AGRICULTURE DECISIONS

Volume 71

July – December 2012
Part Three (PACA)
Pages 1185 - 1268

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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2012

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISION

DEPARTMENTAL DISCIPLINARY DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISIONS

PERFECTLY FRESH FARMS, INC., PERFECTLY FRESH CONSOLIDATION, INC., PERFECTLY FRESH SPECIALTIES, INC., AND JEFFREY LON DUNCAN v. USDA.
Nos. 09-72434, 09-72535.
Court Decision.
Filed August 28, 2012.

PACA—Responsibly connected.

[Cite as: 692 F.3d 960].

United States Court of Appeals,
Ninth Circuit.

Before: HARRY PREGERSON, RAYMOND C. FISHER, and MARSHA S. BERZON, Circuit Judges.

OPINION

BERZON, Circuit Judge:

In 2001, two entrepreneurs founded Perfectly Fresh Marketing, Inc., a wholesale produce company, and soon thereafter founded three subsidiary companies to handle different aspects of the business. Although things started out well, before long the firms found themselves in financial straits, and declared bankruptcy before the legal proceedings that are the subject of this appeal began.

Those proceedings involve a complex, rarely litigated federal statute, the Perishable Agricultural Commodities Act ("PACA" or "the Act"), 7 U.S.C. § 499a *et seq.*, designed in part to assure that farmers are paid for their produce. In 2009, the Judicial Officer ("JO") of the U.S. Department of Agriculture determined that Perfectly Fresh Farms, Inc.,

Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc. had violated the PACA by failing to make prompt payment for produce purchases. *See id.* § 499b(4); *see generally In re Perfectly Fresh Farms, Inc.*, 68 Agric. Dec. 507 (U.S.D.A. 2009) ("JO Order"). All three of these entities—like their parent company Perfectly Fresh Marketing, Inc.[1]—had failed by the time the Department of Agriculture commenced administrative proceedings against them, each having filed for bankruptcy in February, 2003 and ceased doing business thereafter.

The penalty assessed against the three entities—publication of the facts and circumstances of their violations—caused them no harm, given that they were no longer in business. But the JO also determined that the two individual petitioners in this case were "responsibly connected" to the Subsidiaries. *See* 7 U.S.C. § 499a(b)(9). The Subsidiaries have conceded that it is primarily for these individuals' benefit that they have petitioned for review. The JO found that Jeffrey Lon Duncan was responsibly connected with Consolidation, of which he was the president, a director, and a ten percent owner, and that Thomas Bennett was responsibly connected with Farms, of which he was president, a director, and a ten percent owner. As "responsibly connected" individuals, Duncan and Bennett are subject to employment and licensing bans of variable duration in the perishable agricultural commodities industry. *See id.* §§ 499d(b) & 499h(b). They, and the Subsidiaries, petitioned for review of the JO's order.

I.

A.

The Perishable Agricultural Commodities Act "was enacted ... in 1930, and has undergone numerous amendments since that time. The Act was aimed at preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry." *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991). Central here is the PACA provision making it unlawful for "any

[1] We will refer to each company by the distinguishing word in its name (e.g., "Consolidation" or "Farms") and to the three subsidiaries collectively as the "Subsidiaries."

commission merchant, dealer, or broker ... to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any [perishable agricultural] commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4). The regulations specify that "prompt[ ]" payment for "produce purchased by a buyer" is payment "within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5); *see also id.* § 46.2(aa)(11) (allowing parties to opt out of the ten-day default rule).

The Secretary of Agriculture (the "Secretary") may, upon notification of an alleged violation, commence administrative proceedings against any commission merchant, dealer, or broker. 7 U.S.C. § 499f(c)(2). At the conclusion of such proceedings, the Secretary may issue a "reparation order" requiring the respondent to pay the "person complaining" "the amount of damage ... to which such person is entitled as a result of [the] violation." *Id.* § 499g(a). The Secretary may also "publish the facts and circumstances of such violation and/or, by order, suspend the license of [the] 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." *Id.* § 499h(a).[2]

Additionally, the Act requires all persons who "carry on the business of a commission merchant, dealer, or broker" to have a valid and effective license. *Id.* § 499c(a). There are statutory bans, usually of a year or two, on the employment and licensing of, and possible surety bond requirements for, "any person, or any person who is or has been responsibly connected with any person ... (1) whose license has been revoked or is currently suspended by order of the Secretary; [or] (2) has been found ... to have committed any flagrant or repeated violation" of the Act.[3] *Id.* § 499h(b); *see id.* § 499d(b); *see also id.* § 499d(c).

The Act defines "responsibly connected" as "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a

---

[2] As we explain later, the Secretary has delegated these responsibilities to the JO. *See infra* note 5.

[3] Under the PACA, "[t]he terms 'employ' or 'employment' mean any affiliation of any person with the business operations of a licensee." 7 U.S.C. 499a(b)(10).

partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." *Id.* § 499a(b)(9). Congress amended the Act in 1995, making the foregoing definition of "responsibly connected" rebuttable:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence [(1)] that the person was not actively involved in the activities resulting in a violation of this chapter and [(2)] that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Id. (emphasis added); *see* Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104–48, § 12(a), 109 Stat. 424. The broad definition of "responsibly connected," and the difficulty of rebutting the presumption of responsible connection, accord with the House Committee on Agriculture's observation that the PACA is "admittedly and intentionally a 'tough' law," S. Rep. No. 84–2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701 (quoting H. Rep. No. 84–1196, at 2 (1955)), an observation with which the federal courts of appeals have generally agreed. *See Baiardi Food Chain v. United States*, 482 F.3d 238, 241 (3d Cir. 2007); *Golman–Hayden Co. v. Fresh Source Produce Inc.*, 217 F.3d 348, 351 (5th Cir. 2000); *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1411 (D.C. Cir. 1986).

B.

The facts underlying these petitions for review are as follows:

Gary Tice was an experienced professional in the produce industry. He sought out Jeffrey Lon Duncan to start a produce firm with him. Duncan had also worked in the produce industry for some time and had developed an expertise in selling produce to cruise lines, "a very exacting business given that ships are in port for a very short time and are more demanding than other customers." JO Order at 520. Tice was more knowledgeable than Duncan about the ins and outs of running a business,

having spent the last few years advising other companies on strategy and operations. Together Tice and Duncan founded Perfectly Fresh Marketing, Inc. ("Marketing") in June, 2001. At the outset, Tice and his wife owned fifty-one percent of Marketing and Duncan the remainder.

Later, after a new business partner made a substantial investment in Perfectly Fresh, three subsidiaries were formed: Specialties, Farms, and Consolidation. Specialties was to sell produce to supermarkets; Consolidation was to focus on selling to cruise lines; and Farms was to develop "grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride." JO Order at 516. Marketing owned ninety percent of each of the Subsidiaries. According to the paperwork filed with the Department of Agriculture, Duncan owned the remaining ten percent of Consolidation; Thomas Bennett—a forty-year veteran of the produce industry whom Tice had brought aboard—owned the same percentage of Farms.[4]

The same papers listed Duncan as president and a director of Consolidation and Bennett as president and a director of Farms. In spite of their titles, neither Duncan nor Bennett was much involved in the legal or financial affairs of their companies. Both testified to having signed the corporate paperwork fairly casually. Indeed, according to Bennett, the "title of president was [given to him] just to allow him to deal with a higher level of personnel at the companies to which he would be selling," JO Order at 521; he did not believe himself to have authority even to sign checks on behalf of Farms.

The precise relationship between Marketing and its newly formed subsidiaries is the main issue in this case. This much, taken from the JO's order, appears clear:

> The four companies were to be run as one entity, with Perfectly Fresh Marketing, Inc., essentially managing the overall operations, and Consolidation, Farms, and Specialties handling sales, each in its own sphere of

[4] The record does not indicate the ownership of the remainder of Specialties.

> specialization.... Mr. Tice, Mr. Bennett, and Mr. Duncan all considered that the three new companies were sales entities, with Perfectly Fresh Marketing, Inc., handling all the operations including the purchasing; Perfectly Fresh Marketing, Inc., would buy all the produce and transfer it to the appropriate company; Perfectly Fresh Marketing, Inc., leased all the warehouse space; and Perfectly Fresh Marketing, Inc., handled the receiving when produce arrived at the warehouse. None of the entities ever held a board meeting.
>
> It appears that customers knew of the companies as "Perfectly Fresh" and were not aware that in reality four different companies existed.... Generally, checks from customers went first into the [Subsidiaries'] bank accounts, but were then transferred into Perfectly Fresh Marketing, Inc.'s account to keep the other accounts at a virtual zero balance. According to Mr. Tice, all the purchasing was done by Perfectly Fresh Marketing, Inc., even though the accounts payable documents ... admitted into evidence generally linked each purchase to a specific company and even though the produce payables listed in the schedules filed with the bankruptcy court generally matched those accounts payable documents, in terms of which company purchased which lot of produce.

JO Order at 516–17.

Approximately five months after the Subsidiaries had been formed, Perfectly Fresh ran into financial difficulties. The companies managed to keep their accounts current through the end of November, but in December, Perfectly Fresh ceased paying its suppliers in a timely manner. The financial problems worsened, and, on February 3, 2003, Marketing and the Subsidiaries filed for bankruptcy. In October, 2004, the Department of Agriculture commenced disciplinary proceedings against the three Subsidiaries—but not Marketing—for violating the PACA's requirement that produce dealers, brokers, and commission merchants pay for produce in full and promptly. *See* 7 U.S.C. § 499b(4).

Bennett had learned about Perfectly Fresh's financial difficulties in December; in early January, concerned about his reputation in the industry, he decided to resign. Duncan became aware of the financial troubles around the same time, but Consolidation, the Subsidiary with which he was primarily involved, remained profitable throughout. The Department of Agriculture determined that both Duncan and Bennett were "responsibly connected" individuals within the meaning of the Act, Bennett with regard to Farms, and Duncan with regard to both Consolidation and Specialties. Faced with penalties affecting their future participation in the industry, Bennett and Duncan contested the "responsibly connected" determinations at a hearing before the agency's Chief Administrative Law Judge ("ALJ"), without success. In the same proceedings, the Chief ALJ adjudged each of the Subsidiaries to have violated the Act's full-payment-promptly provision. *See id.* On appeal, the JO determined that Duncan was not responsibly connected to Specialties, but otherwise affirmed. We now deny the petitions for review and affirm.

II.

We have jurisdiction to hear petitions for review of final PACA orders. 28 U.S.C. § 2342(2). The JO's decision constitutes a final order ripe for our review. "[T]he scope of our review of administrative decisions is narrow: administrative agency decisions will be upheld unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law....' " *Farley & Calfee, Inc.*, 941 F.2d at 966 (quoting 5 U.S.C. § 706(2)(A)). We will affirm the JO's factual findings if they are supported by substantial evidence. *See Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 803 (9th Cir. 1996). We review his conclusions of law de novo, *id.*, but with the appropriate level of deference to his interpretations of the statute his agency administers.

As to what that appropriate level is, two other courts of appeals have concluded that the JO's interpretations of the PACA in disciplinary proceedings are entitled to deference under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Coosemanns Specialties, Inc. v. Dep't of*

Agric., 482 F.3d 560, 564 (D.C. Cir. 2007); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86, 95–96 (2d Cir. 2006). We join them.

"[A]dministrative implementation of a particular statutory provision qualifies for Chevron deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). With respect to the first requirement, Congress has provided for PACA violations to be adjudicated "[a]fter opportunity for hearing," 7 U.S.C. § 499f(d), and directed that "the Secretary shall determine whether or not ... [the respondent] violated" the Act, language that implies a delegation of interpretative authority. *Id.* Congress has also vested the courts of appeals with jurisdiction to review the outcomes of these adjudications, 28 U.S.C. § 2342(2), another indication that Congress intended to create a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie" pronouncements entitled to *Chevron* deference. *Mead*, 533 U.S. at 230, 121 S.Ct. 2164.

As to the second requirement for application of *Chevron* deference, the JO's decision was "promulgated in the exercise" of the authority Congress delegated to the agency to make rulings carrying the force of law, *Mead*, 533 U.S. at 227, 121 S.Ct. 2164:[5] The decision was

[5] That the Judicial Officer and not the Secretary himself decides PACA unfair conduct cases does not render *Chevron* deference inappropriate. *Cf. INS v. Aguirre–Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (holding that case-by-case adjudications of the BIA are entitled to *Chevron* deference, even though Congress conferred adjudicatory authority on the Attorney General). The Secretary of Agriculture has delegated the Judicial Officer authority to act "as final deciding officer" in formal adjudications, 7 C.F.R. § 2.35(a)(1), pursuant to Congressional authorization to delegate "the whole or any part of any regulatory function which the Secretary is, now or after April 4, 1940, required or authorized to perform," 7 U.S.C. § 450d (emphasis added). Congress emphasized that "[w]henever a delegation is made ... all provisions of law shall be construed as if the regulatory function ... had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made." *Id.* § 450e; *see also id.* § 450c (defining the term "regulatory function" as including "determining whether" orders, licenses, sanctions and other regulatory actions are "authorized or required by law"); *id.* § 6912(a) (also authorizing delegations of "any ... function vested in the Secretary as of October 13, 1994").

announced, after a formal hearing, by the Judicial Officer in an opinion published in Agriculture Decisions, the agency's official reporter, *see In re Perfectly Fresh Farms, Inc.*, 68 Agric. Dec. 507 (U.S.D.A. 2009); agency practice accords precedential significance to such opinions, *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351, 362 (U.S.D.A. 2000), a practice we have characterized "as the essential factor in determining whether *Chevron* deference is appropriate." *Marmolejo–Campos v. Holder*, 558 F.3d 903, 909 (9th Cir.2009) (en banc) (quoting *Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006)) (internal quotation marks omitted). For all these reasons, we conclude that *Chevron* deference is accorded to statutory interpretations contained in JO opinions applying the PACA.

III.

As to the merits, the Subsidiaries first argue that the JO erred in determining that they failed to "make full payment promptly in respect of ... transaction[s] in" perishable agricultural commodities. 7 U.S.C. § 499b(4). Because the JO's determination that the Subsidiaries purchased produce is supported by substantial evidence, we deny the petition.

The JO's conclusion that the Subsidiaries failed to make full payment promptly was based on three independent rationales. First, the JO found that the record evidence, particularly the Subsidiaries' business records, indicated that they, and not Marketing, purchased produce from the suppliers. JO Order at 523–24. Second, the JO interpreted the Subsidiaries' bankruptcy filings as affirmative admissions that they were responsible for payments to suppliers, and even suggested that the Subsidiaries should be estopped from arguing otherwise. *Id.* at 524–27. Third, the JO concluded that Marketing served as the Subsidiaries' agent, and as such, liability for Marketing's failure to pay suppliers should "flow through" to the Subsidiaries. *Id.* at 536.

The Subsidiaries contest all of these determinations, arguing that: (1) the JO's factual determination that the Subsidiaries purchased produce is not supported by substantial evidence; (2) the bankruptcy filings do not

necessarily constitute an express admission; and (3) the JO's "flow through" conception of liability under § 499b(4) is legally erroneous. Because we hold that the JO's factual determinations are supported by substantial evidence, we need not address the Subsidiaries' challenges to the JO's other rationales.

The JO's determination that the Subsidiaries purchased produce from suppliers is supported by substantial evidence in the record. In particular, Perfectly Fresh's business records, a letter written by Tice to the agency investigator, testimony from Perfectly Fresh employees, and the bankruptcy filings of the Subsidiaries all support the conclusion that the Subsidiaries failed to make payment promptly for produce they purchased from suppliers.

The Subsidiaries' disagreement with the JO's factual findings centers on the role of Marketing in the purchasing of produce. According to the Subsidiaries, Marketing did all the purchasing of produce, which the Subsidiaries then sold. Some of the record testimony supports this view. Duncan, for instance, testified that he would put orders from Consolidation's customers into Perfectly Fresh's internal system, and then buyers from Marketing would purchase produce from suppliers to fill those orders. In other words, according to Duncan, "[b]uying was done by Perfectly Fresh Marketing."

Other testimony, however, supports the JO's conclusion that the Subsidiaries were buying produce. Bennett testified that "[Farms'] sales team, salesmen, would actually buy product that they were selling," even though "all of the invoices and everything were being paid by Perfectly Fresh Marketing." And when Duncan explained the purchasing system in more detail, it became clear that he arranged entire transactions as a unit, placing orders for produce to be purchased only after receiving orders from his customers, and calling suppliers to check availability and prices. Duncan provided an illustration of this process: First, he would receive orders from customers indicating a need for, say, leeks. Knowing his customer needed a certain quantity of leeks, Duncan would call suppliers and check their price on leeks, then call the customer back to close the deal. Duncan would then put the order into a computer system, where a Marketing employee would fill out the purchase order, on terms already ironed out by Duncan, his supplier, and his customer. Both Bennett and

Duncan also received complaints from produce sellers when they were not paid on time, suggesting that at least some suppliers believed that they were owed payments by the Subsidiaries rather than Marketing. The system, then, was one in which buying and selling were not purely separate transactions, as at a grocery store, say. While Marketing employees may have been left to fill out purchase orders, they did so at the direction of the Subsidiaries, in order to acquire particular lots of produce already destined for particular customers.

This interpretation is strongly supported by the companies' business records. The record contains numerous invoices submitted by suppliers for purchase orders of produce. Most of these invoices are addressed to Marketing, but some are addressed to "Perfectly Fresh," and some are directed to a particular Subsidiary. Each of these invoices is paired in the business records with a voucher assigning the particular order to one of the Subsidiaries. Each Subsidiary in turn maintained accounts payable files showing debts owed to particular suppliers of produce, rather than to Marketing. There was also testimony that the Subsidiaries' checks were used to pay produce suppliers.

Tice insisted that these records did not show that the Subsidiaries bought produce, arguing that a voucher was "the same thing as an invoice, if you will, from [M]arketing to [C]onsolidation, or an invoice from [M]arketing to [S]pecialities," and that Marketing did all the buying. The JO found this testimony not credible in light of a letter Tice had written to the agency investigator in which he said that Marketing "turned over all its previous business to the three [subsidiaries] and did no actual buying and selling." The JO's credibility determination is entitled to deference, and we see no basis to disturb it.

The JO also cited the Subsidiaries' bankruptcy filings as indicating that they failed to make payment promptly to their suppliers. The "Schedule F" that each of the Subsidiaries filed with the bankruptcy court lists the creditors holding unsecured claims against them and the amount of those claims. The Subsidiaries' Schedule Fs listed as creditors the same produce suppliers that were listed in the disciplinary complaints. The JO determined that the Schedule Fs therefore constituted evidence that the Subsidiaries had violated the Act's full-payment-

promptly provision, § 499b(4), as they were effectively "admissions that these debts for produce did exist at the time of the filings." JO Order at 525.

The Subsidiaries argue that the bankruptcy filings should not be interpreted as admissions that they, and not Marketing, had unpaid debts to produce suppliers. The Schedule Fs, the Subsidiaries note, contained the following disclaimer:

> CREDITORS LISTED ON THE ATTACHED SHEETS WITH AN ASTERISK (*) ARE CREDITORS WHO MAY HAVE STATUTORY TRUST INTERESTS IN THE RECEIPTS GENERATED BY THE OPERATION OF THE DEBTOR'S BUSINESS PURSUANT TO THE PERISHABLE AGRICULTURAL COMMODITIES ACT....

The Subsidiaries argue, based on this disclaimer, that they only listed debts to produce suppliers on their Schedule Fs because they believed that the proceeds from the sale of such produce might still be encumbered by a PACA trust, even if the produce itself was only directly purchased by Marketing.[6] While there appears to be no precedent for PACA trust liability "following" produce in this manner, the Subsidiaries argue that there may not be complete overlap between PACA trust liability and "full payment promptly" liability under § 499b(4), and that their decision to list debts to produce suppliers on their Schedule Fs for purposes of PACA trust liability does not necessarily constitute an admission with regards to full payment promptly liability.

Without getting into the complex statutory question of whether this argument has any merit, we note that even if it were true, it serves only

---

[6] "PACA trust" is a trust created by the statute to protect the claims of produce sellers, see 7 U.S.C. § 499e(c), that "elevate[s] the claims of unpaid perishable agricultural commodities suppliers over all other creditors of the bankrupt estate." *Middle Mountain Land & Produce, Inc. v. Sound Commodities, Inc.*, 307 F.3d 1220, 1224 (9th Cir. 2002). The PACA "requires licensed dealers to hold all perishable commodities purchased on short-term credit, as well as sales proceeds, in trust for the benefit of unpaid sellers." *Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 37 (2d Cir. 2004).

to defeat the assertion that the Schedule Fs constitute affirmative admissions of full payment promptly liability that would now estop the Subsidiaries from suggesting that they had no debts to produce suppliers at all. Even if the Schedule Fs do not necessarily, for purposes of estoppel, constitute admissions, the JO was still entitled to interpret them as evidence that the Subsidiaries did purchase produce from suppliers. This interpretation is, after all, consistent with the rest of the evidence, particularly the invoices and vouchers, which closely matched the debts to produce suppliers listed on the Schedule Fs. Furthermore, Marketing itself listed "virtually no produce creditors on its Schedule F," casting significant doubt on the Subsidiaries' claims that Marketing was responsible for purchasing produce and that the Schedule Fs were intended to reflect PACA trust liability. If the Subsidiaries' Schedule Fs were reflecting derivative PACA trust liability, then the Marketing Schedule Fs, prepared by the same individuals, should have listed the same obligations, as Marketing would have had primary PACA trust liability were it the entity that had purchased the produce. Moreover, when asked about the Schedule F listings at the hearing, Tice never mentioned PACA trust liability, explaining instead that the Subsidiaries listed debts to produce suppliers as "a way to be able to put the asset to the debt." The Schedule Fs therefore reinforce the JO's conclusion that the Subsidiaries purchased produce and failed to pay for it promptly.

There is therefore substantial evidence to support the JO's finding that the Subsidiaries purchased produce. The hearing testimony, business records, and bankruptcy filings all reinforce this conclusion, and while the record as a whole may be susceptible to different interpretations, we cannot say that the evidence marshaled by the JO was not adequate to support his conclusions.

IV.

The Subsidiaries next argue that the JO erred in determining that their violations were "willful" and "repeated." JO Order at 527. PACA imposes licensing and employment restrictions on individuals found to have committed "any flagrant or repeated violation of section 499b." 7

U.S.C. §§ 499d(b), 499h(b)(2).[7] Where the violations are " 'willful,' license revocation proceedings may be initiated without a prior written warning and opportunity to demonstrate or achieve compliance." Potato Sales, 92 F.3d at 804 (citing 5 U.S.C. § 588(c); 7 C.F.R. § 46.45(e)(5)). Violations that "did not occur simultaneously ... must be regarded as 'repeated' violations." *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972). For example, fifty-one transactions has been held to fall "plainly within the permissible definition of 'repeated.' " *Farley & Calfee*, 941 F.2d at 968. The JO was thus correct in determining that the violations committed by the Subsidiaries were "repeated" in light of the number of violations (286 for Consolidation, 142 for Farms, and 796 for Specialties) and the amount unpaid (over $373,000 for Consolidation, over $442,000 for Farms, and over $263,000 for Specialties). JO Order at 528.

PACA violations are " 'willful' if the violator: '(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.' " *Potato Sales*, 92 F.3d at 805 (quoting *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 773 (9th Cir.1985)). The Subsidiaries argue that violations premised on the JO's "flow through" theory of liability cannot be willful because, under that theory, the Subsidiaries were held responsible for the acts of Marketing and committed no violations of their own. That argument may be correct, but it has no bearing on the JO's independent determination that the Subsidiaries themselves violated PACA's full payment promptly provision, and that those violations were willful. As the JO observed, there is ample evidence that the Subsidiaries' violations were intentional or committed with careless disregard of statutory requirements. Bennett and Duncan both admitted at the hearing that the Subsidiaries continued to place orders for produce despite knowing that their suppliers were not being paid promptly.

V.

[7] Because "[t]he Act prescribes consequences for violations that are 'flagrant or repeated ... [o]ur ... finding that the violations were repeated is sufficient,' " and we need not consider whether they were "flagrant." *Farley & Calfee*, 941 F.2d at 968 n. 4; *cf. Potato Sales*, 92 F.3d at 805 (holding that the petitioner's violations were "flagrant" and thus declining to decide whether they were also "repeated").

There is also substantial evidence in the record to support the JO's conclusion that Duncan and Bennett were "responsibly connected" to the Subsidiaries.

PACA creates a presumption of responsible connection as to persons who are "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." 7 U.S.C. § 499a(b)(9). That presumption can be rebutted if a person can show:

> by a preponderance of the evidence [(1)] that the person was not actively involved in the activities resulting in a violation of this chapter and [(2)] that the person [ ] was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license.

Id. (emphasis added). There is no dispute that Duncan and Bennett are subject to PACA's presumption of responsible connection; they argue only that they have carried their burden of rebutting it.

The JO articulated in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (U.S.D.A.1999), the standard for determining when a person is "actively involved in the activities resulting in a violation." "The standard," the JO explained, "is as follows:"

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have

> been actively involved in the activities that resulted in a violation of the PACA....

Id. at 610–11.[8] Neither Duncan nor Bennett takes issue with Norinsberg's articulation of what it means to be "actively involved." The term is certainly ambiguous, and we cannot say that the JO's interpretation in *Norinsberg* is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778. We therefore accept and apply it.

This court has in one case, *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), addressed the issue of "active[ ] involve[ment]" under § 499a(b)(9). *Maldonado* overturned the JO's determination that the petitioner was actively involved in an activity resulting in failure to pay promptly. We found no active involvement even though the petitioner "r[a]n [ ] the produce department" of the company that had failed to pay for produce promptly, stressing that the relevant company had defaulted in large part because new owners "looted" it through various fraudulent activities of which Maldonado was not aware. *Id.* at 1086, 1088.

Maldonado predated *Norinsberg*, and did not set forth general criteria for what it means to be "actively involved in the activities resulting in a violation" (largely because the JO had himself yet to develop a standard). The JO explicitly referenced Maldonado in announcing the new standard in *Norinsberg*, explaining that he believed the standard was "consistent with [his] reading of Maldonado." *Norinsberg*, 58 Agric. Dec. at 612.

In any event, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). Thus,

---

[8] The JO defined this standard after the D.C. Circuit had granted a petition for review of a "responsibly connected" determination on the ground that the JO had "inadequately articulated the factors relevant in interpreting 'actively involved.' " *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1196 (D.C. Cir. 1998).

Maldonado only remains good law to the extent it is consistent with *Norinsberg*. Applying *Norinsberg*, the JO noted that "the buying and selling of produce at a time when produce sellers are not getting paid pursuant to the requirements of PACA ... constitute[s] [active] involvement." JO Order at 531 (citing *In re Janet S. Orloff*, 62 Agric. Dec. 281, 290–92 (U.S.D.A. 2003)).

There is ample evidence in the record to support the JO's determination that Duncan was actively involved in the violations committed by Consolidation. In disputing this determination, Duncan again argues that Consolidation did not purchase produce, and that he himself was merely a "salesman." As we have already held, there is substantial evidence to support the JO's conclusion that Consolidation purchased produce from suppliers.

Moreover, Duncan's personal role in Consolidation was not "limited to the performance of ministerial functions only." *Norinsberg*, 58 Agric. Dec. at 611. Duncan had personal relationships with the suppliers to whom he turned when he received an order from his customers, and those suppliers looked to Duncan when they were not getting paid. As discussed earlier, Duncan called suppliers in response to orders placed by his customers, and negotiated the terms of orders that would allow produce to flow from suppliers to Consolidation to customers. Duncan would then put the order into a computer system, where a Marketing employee would fill out the purchase order, on terms already ironed out by Duncan, his supplier, and his customer. This testimony shows that the "buyers" who worked for Marketing were the ones performing "ministerial" tasks, and that Duncan was engaged in activity involving "judgment, discretion, or control." *Id.*

Orloff, on which Duncan relies, does not help him. In that case, an individual who purchased produce but was not involved in payment decisions argued that she was therefore not actively involved in the activities resulting in a violation of the PACA. *Orloff*, 62 Agric. Dec. at 290. The JO rejected this argument, observing that the Petitioner's actions were not ministerial because she "decided whether to make purchases of frozen foods ... and chose to do so even though she knew or should have known that [the company] was not paying produce suppliers

... in accordance with the PACA." *Id*. at 29192. Duncan's argument that he was not actively involved in PACA violations because he was not responsible for sending the payments directly to suppliers and because Consolidation itself was profitable is therefore foreclosed. Like the petitioner in Orloff, Duncan continued to purchase produce despite knowing that Perfectly Fresh was unable to pay its suppliers in a timely fashion.

Substantial evidence also supports the JO's determination that Bennett was actively involved in the PACA violations of Farms. Like Duncan, Bennett was in charge of his subset of the overall business of Perfectly Fresh, and he exercised "judgment, discretion, or control" with respect to that business. *Norinsberg*, 58 Agric. Dec. at 611. In particular, Bennett supervised a cadre of employees and undertook a significant outside storage business on his own initiative. Unlike Duncan, however, Bennett "instructed the salesmen not to buy product until we got some of the receivables in" after learning that Perfectly Fresh was having trouble paying its bills, and he resigned less than a month later. Bennett's efforts to avoid committing PACA violations are admirable, but, unfortunately, no less than 21 violations occurred while he was still in charge of Farms, and he cites no authority for the suggestion that his later resignation absolves him of responsibility for those violations.

The conclusion that Duncan and Bennett were actively involved in the activities resulting in the violation precludes them from rebutting the presumption that they were "responsibly connected" to the Subsidiaries. We therefore need not consider whether they have carried their burden under the second prong.[9]

---

[9] We note, however, that we are troubled by the JO's insistence that a shareholder is automatically an "owner" for purposes of the "alter ego" defense (which allows rebuttal of the presumption of responsible connection under the second prong if a person demonstrates that he "was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners," 7 U.S.C. § 499a(b)(9)), even when he demonstrates that the violating licensee is the alter ego of a different owner. *See* JO Order at 539 n.15; *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386–88 (U.S.D.A. 2000); *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1864–65 (U.S.D.A.1997), *rev'd on other grounds*, 162 F.3d 1194 (D.C. Cir. 1998), final decision on remand, 58 Agric. Dec. 604, 609 n.4 (1999). The JO has not, in our view, adequately explained the basis for such a blanket rule. In particular, his explanation does not take account of the use of the plural "owners" with regard to the alter ego factor, or of the use elsewhere in the statute of the

CONCLUSION

The JO's determination that the Subsidiaries purchased produce and failed to make prompt payment for it as required by § 499b(4) is supported by substantial evidence. The JO's further conclusion that Duncan and Bennett were responsibly connected to Consolidation and Farms under § 499a(b)(9) is therefore also supported by substantial evidence, and free of legal error.

For the foregoing reasons, the petitions for review are REJECTED.

Parallel Citations
12 Cal. Daily Op. Serv. 9842, 2012 Daily Journal D.A.R. 11,996

____

term "shareholder" as well as "owner." *See Anthony Thomas*, 59 Agric. Dec. at 388; 7 U.S.C. § 499a(b)(9).

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DISCIPLINARY DECISIONS

In re: MEZA SIERRA ENTERPRISES, INC.
Docket No. D-10-0250.
Decision and Order.
Filed August 17, 2012.

PACA-D—"No pay."

Shelton S. Smallwood, Esq. for Complainant.
Ricardo A. Rodriguez, Esq. for Respondent.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 26, 2010. 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 pursuant to 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 November 2008 through January 2009, Meza Sierra Enterprises, Inc. [hereinafter Meza Sierra], willfully violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to two produce sellers, Grande Produce LTD, Co., and Kingdom Fresh Produce, Inc., of the agreed purchase prices, or the balances of the agreed purchase prices, in the total amount of $282,621.20 for 17 lots of perishable agricultural commodities (tomatoes) which Meza Sierra purchased, received, and accepted in

interstate and foreign commerce.[1] On May 18, 2010, Meza Sierra filed Respondent's Original Answer requesting dismissal of this proceeding based upon a lack of jurisdiction and denying the allegations of the Complaint.

On April 26, 2012, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order on the Written Record: (1) dismissing the portion of the Complaint relating to Meza Sierra's failure to pay Grande Produce LTD, Co., $49,724 for 5 lots of tomatoes in accordance with the PACA; (2) finding, during the period November 2008 through January 2009, Meza Sierra failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the amount of $215,385 for tomatoes that Meza Sierra purchased, received, and accepted in interstate commerce; (3) concluding Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); and (4) revoking Meza Sierra's PACA license or, in the alternative, ordering the publication of the facts and circumstances of Meza Sierra's PACA violations.[2]

On May 31, 2012, Meza Sierra filed an Appeal Petition. On June 25, 2012, the Deputy Administrator filed Complainant's Response to Respondent's Appeal Petition. On June 29, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's conclusion that Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and the ALJ's order revoking Meza Sierra's PACA license and dismissing the portion of the Complaint relating to Meza Sierra's failure to pay Grande Produce LTD, Co.

DECISION

---

[1] Compl. at 2-3 ¶¶ III-IV and Appendix A.

[2] ALJ's Decision and Order on the Written Record at 4, 8, 10 ¶¶ 12, 26, 31-33.

Discussion

The PACA requires produce dealers to make full payment promptly for perishable agricultural commodity purchases, usually within 10 days after the day on which the produce is accepted, unless the parties agree to different terms prior to the purchase (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11)).

The ALJ took official notice of filings in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), and *Meza Sierra Enterprises, Inc. v. Kingdom Fresh Produce, Inc.*, No. 13-11-00184-CV (Tex. App.—Corpus Christi 2011).[3] In addition, the ALJ ordered the Deputy Administrator to file the Final Summary Judgment issued in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010),[4] and on May 1, 2012, the Deputy Administrator complied with the ALJ's order.[5] These Texas state court filings establish: (1) the tomatoes which are the subject of *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), are the same tomatoes that Meza Sierra purchased from Kingdom Fresh Produce, Inc., that are the subject of the instant proceeding; (2) during the period November 2008 through January 2009, Meza Sierra, failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the amount of $215,385 for tomatoes which Meza Sierra purchased, received, and accepted in interstate commerce; and (3) Meza Sierra did not achieve full compliance with the PACA within 120 days of having been served with the Complaint filed in this proceeding.

---

[3] Specifically, the ALJ took official notice of the following: (1) Respondent's Proposed Exhibits RX 1-RX 2; (2) Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued Attach. A; and (3) Response to Ruling Attach. A.

[4] ALJ's Decision and Order on the Written Record at 7, 11 ¶¶ 22, 35.

[5] Complainant's Response to Decision and Order Attach. A.

The United States Department of Agriculture's policy in a case in which a PACA licensee has failed to make full or prompt payment for produce and failed to be in full compliance with the PACA within 120 days of having been served with a complaint is to treat the case 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, is revoked. 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 congressional intent to require a PACA violator to pay the United States while produce sellers are left unpaid. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549, 570-71 (1998).

Meza Sierra cannot show full compliance with the PACA within 120 days after having been served with the Complaint. Meza Sierra's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. Meza Sierra's violations are "repeated" because repeated means more than one. Meza Sierra's violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997). Meza Sierra's violations of the PACA are also "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)).[6] Willfulness is reflected by Meza Sierra's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and the number and dollar amount of Meza Sierra's violative transactions. Therefore, the appropriate sanction in this proceeding is the revocation of Meza Sierra's PACA license.

---

[6] A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *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); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

Meza Sierra's Request for Oral Argument

Meza Sierra's request for oral argument (Appeal Pet. at 1), which the Judicial Officer may grant, refuse, or limit,[7] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Meza Sierra's Appeal Petition

Meza Sierra raises four issues in its Appeal Petition. First, Meza Sierra contends the ALJ erroneously concluded she had jurisdiction to hear this case and to issue a decision in this case (Appeal Pet. at 1-3 ¶ I).

The Secretary of Agriculture is authorized to cause a complaint to be issued for any violation of the PACA and must afford each alleged violator an opportunity for a hearing on the complaint before the Secretary of Agriculture's duly authorized examiner (7 U.S.C. § 499f(c)(2)). The Secretary of Agriculture has designated administrative law judges within the Office of Administrative Law Judges, United States Department of Agriculture [hereinafter OALJ], to hold hearings, to perform related functions, and to issue initial decisions in proceedings subject to 5 U.S.C. §§ 556 and 557 arising under the PACA (7 C.F.R. § 2.27(a)(1)). This PACA proceeding is subject to 5 U.S.C. §§ 556 and 557, and, at all times material to this proceeding, the ALJ was an administrative law judge employed by OALJ; therefore, I reject Meza Sierra's contention that the ALJ did not have jurisdiction to hear this case and to issue an initial decision in this case.

Second, Meza Sierra contends the Rules of Practice are not applicable to this proceeding (Appeal Pet. at 1-3 ¶ I).

The Deputy Administrator instituted this disciplinary proceeding by filing the Complaint pursuant to the Secretary of Agriculture's authority in 7 U.S.C. § 499f(c)(2) to cause a complaint to be issued for any violation of the PACA. In the Complaint, the Deputy Administrator requests that, pursuant to 7 U.S.C. § 499h(a), the ALJ find Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) and

---

[7] 7 C.F.R. § 1.145(d).

order revocation of Meza Sierra's PACA license.[8] The Rules of Practice are applicable to adjudicatory proceedings instituted under statutes listed in 7 C.F.R. § 1.131. Sections 6(c) and 8(a) of the PACA (7 U.S.C. §§ 499f(c), 499h(a)) are included in the list of statutes to which the Rules of Practice are applicable (7 C.F.R. § 1.131(a)).[9] Therefore, I reject Meza Sierra's contention that the Rules of Practice are not applicable to this proceeding.

Third, Meza Sierra asserts its debt to Kingdom Fresh Produce, Inc., for the tomatoes in question is still being litigated in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010); therefore, the ALJ erroneously concluded the officially noticed Texas state court documents establish that Meza Sierra violated 7 U.S.C. § 499b(4) (Appeal Pet. at 3-4 ¶ II 1).

The Texas state court documents filed in this proceeding establish that the litigation between Kingdom Fresh Produce, Inc., and Meza Sierra regarding Meza Sierra's failure to pay Kingdom Fresh Produce, Inc., for the tomatoes in question has concluded. On April 19, 2010, the Texas District Court ordered Meza Sierra and Valdemar Meza, jointly and severally, to pay Kingdom Fresh Produce, Inc., $215,385 for the tomatoes in question.[10] Meza Sierra filed a notice of appeal of the judgment entered by the Texas District Court, which the Texas Court of Appeals dismissed for want of jurisdiction.[11] The ALJ properly

---

[8] Compl. at 4 ¶ 2.

[9] See *In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239, 1318-20 (1995) (holding the Rules of Practice are applicable to disciplinary adjudicatory proceedings instituted by a complaint that contains a request that an administrative law judge find, pursuant to 7 U.S.C. § 499h(a), a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997).

[10] *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist., Final Summary Judgment Apr. 19, 2010) (Complainant's Response to Decision and Order Attach. A).

[11] *Meza Sierra Enterprises, Inc. v. Kingdom Fresh Produce, Inc.*, No. 13-11-00184-CV (Tex. App.—Corpus Christi Memorandum Opinion Per Curiam June 16, 2011; Mandate September 8, 2011) (Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued Attach. A).

concluded Meza Sierra's appeal was dismissed and the judgment in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010), is final and effective.

Fourth, Meza Sierra contends the Secretary of Agriculture, by his failure to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra, has concluded that Meza Sierra did not violate the PACA (Appeal Pet. at 3-4 ¶ II 2-4).

As an initial matter, Meza Sierra does not cite any support for its contention that the Secretary of Agriculture failed to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra. The Deputy Administrator asserts the Secretary of Agriculture did afford Kingdom Fresh Produce, Inc., an opportunity to file a formal reparation complaint against Meza Sierra, but Kingdom Fresh Produce, Inc., abandoned its reparation complaint before the Secretary of Agriculture and, instead, pursued its claim against Meza Sierra in state court (Complainant's Response to Respondent's Appeal Petition at the fourth and fifth unnumbered pages). In support of this assertion, the Deputy Administrator cites Plaintiff's Verified Response to Defendant's Motion to Abate and Motion for Protective Order, filed September 30, 2009, in *Kingdom Fresh Produce, Inc. v. Meza Sierra Enterprises, Inc.*, No. C-1990-09-A (Dist. Ct. Hidalgo County Tex. 92nd Jud. Dist. 2010); however, I am unable to locate Kingdom Fresh Produce, Inc.'s verified response in the record before me.

Even if I were to find the Secretary of Agriculture failed to advise Kingdom Fresh Produce, Inc., to file a formal reparation complaint against Meza Sierra (which I do not so find), I would not infer that the Secretary of Agriculture must have concluded Meza Sierra did not violate the PACA. Whether the Secretary of Agriculture advises an unpaid produce seller to pursue a private cause of action against a produce dealer has no bearing on whether the Secretary of Agriculture has concluded that the produce dealer has violated the PACA. A PACA disciplinary proceeding does not deal with the relationship of a PACA violator to its produce sellers for the purpose of seeking compensation for the produce sellers but, instead, involves the relationship of the

PACA violator to the public, at least that part of the public in the business of selling and buying perishable agricultural commodities.[12]

The ALJ's Alternative Sanctions

The ALJ found Meza Sierra was a PACA licensee and ordered: (1) revocation of Meza Sierra's PACA license or (2) if Meza Sierra's PACA license was no longer in effect, publication of the facts and circumstances of Meza Sierra's PACA violations.[13] The ALJ's order is consistent with the practice of the Agricultural Marketing Service which does not generally request a suspension or revocation order when a PACA license is no longer in effect, but requests, instead, publication of the facts and circumstances of the violations. The ALJ's order is also consistent with my prior view that a PACA license no longer in effect cannot be revoked and, in lieu of revocation, the appropriate sanction would be publication of the facts and circumstances of the violations.[14]

In many PACA disciplinary proceedings, the record does not include evidence of the status of the PACA violator's PACA license at the time the administrative law judge issues a decision often leaving the administrative law judge with some doubt as to appropriate sanction. In this proceeding, the ALJ resolved that quandary by issuing an order with alternative sanctions which alternatives were dependent upon the then-current status of Meza Sierra's PACA license.[15]

I have revisited the issue of the appropriate sanction to be applied when a PACA license is in effect and when a PACA license is not in effect. While some of the legislative history of the PACA suggests suspension and revocation orders cannot be issued as to PACA licenses that are no longer in effect,[16] I find the plain language of the PACA

---

[12] *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 840 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); *In re Edward M. Hall*, 12 Agric. Dec. 725, 733 (1953); *In re James L. (Lonnie) Cecil*, 7 Agric. Dec. 1105, 1112 (1948).

[13] ALJ's Decision and Order on the Written Record at 5, 10 ¶¶ 16, 32-33.

[14] *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 621 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008).

[15] ALJ's Decision and Order on the Written Record at 10 ¶¶ 32-33.

[16] Donald A. Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, 1 Davidson, Agricultural Law § 4.19 n. 169 (1981 and 1989 Cum. Supp). *See*

authorizes publication of the facts and circumstances of a violation "and/or" suspension or revocation of a PACA license both when the PACA license is in effect and when the PACA license is not in effect:

> **§ 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, . . . 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.

7 U.S.C. § 499h(a) (emphasis added). Numerous cases support my conclusion that the Secretary of Agriculture is authorized under 7 U.S.C. § 499h(a) to issue a suspension or revocation order and (or) to publish the facts and circumstances of PACA violations whether the PACA violator's PACA license is in effect or not.[17]

---

also Marvin Tragash Co. v. U.S. Dep't of Agric., 524 F.2d 1255, 1258 (5th Cir. 1975) (indicating a revocation order is not available to the Secretary of Agriculture if the PACA violator's license has previously been terminated).

[17] *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1150-52 (1981) (stating a suspension or revocation order can be issued notwithstanding the termination of the PACA license prior to the issuance of the order); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 686 (1980) (stating the expiration of a PACA license after the violations occurred does not preclude an order of suspension of the lapsed or expired license), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976) (stating a PACA license can be suspended or revoked for a past violation even though the license terminates before the order is issued; similarly, the facts and circumstances of a firm's violation of the PACA can be published even though the firm's PACA license terminates before the order is issued), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750 (1975) (indicating a PACA license can be revoked notwithstanding the previous expiration of the license), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re*

Therefore, as the Secretary of Agriculture is authorized under the circumstance in this proceeding to revoke Meza Sierra's PACA license, and the Deputy Administrator has only requested revocation of Meza Sierra's PACA license,[18] I revoke Meza Sierra's PACA license and I do not publish the facts and circumstances of Meza Sierra's violations.

Findings of Fact

1. Meza Sierra is a corporation registered in the State of Texas.

2. Meza Sierra's mailing address is in care of its attorney, Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.

3. Meza Sierra was issued PACA license number 20070589 on March 15, 2007.

4. Meza Sierra, during the period November 2008 through January 2009, failed to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the total amount of $215,385 for perishable agricultural

---

J. Acevedo & Sons, 34 Agric. Dec. 120, 138-40 (1975) (holding there is no requirement in the PACA that a license be currently in effect at the time a suspension or revocation order is issued), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 252 (1973) (concluding the PACA authorizes the suspension of a PACA license that has lapsed or expired; stating it is irrelevant whether a PACA license expires before or after the complaint is issued and cases holding to the contrary will no longer be followed), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Reese Sales Co.*, 28 Agric. Dec. 1150, 1155 (1969) (revoking the respondent's PACA license and publishing the facts and circumstances of the respondent's violations), *aff'd*, 458 F.2d 183 (9th Cir. 1972); *In re Cloud and Hatton Brokerage*, 18 Agric. Dec. 547, 550 (1959) (holding termination of a PACA license after a disciplinary proceeding has commenced, but before a decision is issued, does not render moot the issue of revocation; the Secretary of Agriculture has authority to enter an order of revocation under these circumstances); *In re Raymond Klein*, 15 Agric. Dec. 1152, 1160 (1956) (revoking the respondent's PACA license and publishing the facts and circumstances of the respondent's violations); *In re Nate Rosenthal*, 15 Agric. Dec. 441, 442 (1956) (same); *In re John* P. Rotton, Jr., 12 Agric. Dec. 743, 745 (1953) (same).

[18] Compl. at 4 ¶ 2.

commodities that Meza Sierra purchased, received, and accepted in interstate commerce.

5. Meza Sierra was not in full compliance with the PACA within 120 days after the Hearing Clerk served Meza Sierra with the Complaint.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over Meza Sierra and the subject matter involved in this proceeding.

2. The ALJ had jurisdiction to hear this case and to issue the ALJ's April 26, 2012, Decision and Order on the Written Record (7 C.F.R. § 2.27(a)(1)).

3. The Rules of Practice are applicable to this proceeding (7 C.F.R. § 1.131(a)).

4. Meza Sierra willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period November 2008 through January 2009, by failing to make full payment promptly of the agreed purchase prices, or the balances of the agreed purchase prices, to Kingdom Fresh Produce, Inc., in the total amount of $215,385 for perishable agricultural commodities that Meza Sierra purchased, received, and accepted in interstate commerce.

For the foregoing reasons, the following Order is issued.

ORDER

1. Meza Sierra Enterprises, Inc.'s PACA license is revoked. Paragraph 1 of this Order shall become effective 60 days after service of this Order on Meza Sierra Enterprises, Inc.

2. The portion of the Complaint relating to Meza Sierra Enterprises, Inc.'s failure to pay Grande Produce LTD, Co., is dismissed.

RIGHT TO JUDICIAL REVIEW

Meza Sierra Enterprises, 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. Meza Sierra Enterprises, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order.[19] The date of entry of the Order in this Decision and Order is August 17, 2012.

———

In re: PRIME TROPICAL, INC.
Docket No. 12-0513.
Decision and Order.
Filed September 27, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Gordon S. Benson, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Prime Tropical, Inc. ("Prime"; "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 $825,808.09 to eighteen (18) sellers of the agreed purchase prices for 150 lots of perishable agricultural commodities during the period September 2010 through June 2011.

I. Procedural History

On July 5, 2012, Complainant filed a Complaint against Respondent alleging violations of the PACA. Respondent filed an Answer with the

[19] 28 U.S.C. § 2344.

Hearing Clerk for the Office of Administrative Law Judges ("OALJ") for USDA ("Hearing Clerk") on July 30, 2012. Pleadings were also filed by individuals affiliated in some way with the corporate Respondent, but the instant action names solely the corporate entity Prime Tropical, Inc. as Respondent.

On August 9, 2012, I set a schedule for pre-hearing submissions. By motions filed on September 6, 2012, Complainant requested entry of a Decision on the record without hearing, and requested that the deadlines for submissions be suspended pending a ruling on the motion for Decision. By Order issued September 7, 2012, I granted that motion. On September 19, 2012, counsel[1] for two individuals affiliated with Respondent filed a response to Complainant's motion, noting no objection to a Decision on the record with respect to the corporate Respondent Prime Tropical Inc.

On September 24, 2012, Yolanda Ramirez and Vincent P. Ramirez, Jr. filed opposition to Complainant's motions. Although these individuals may have interests in the affairs of Respondent, neither is a party to this action, and accordingly, neither has standing in this matter. I note their opposition, but find that they have presented no valid legal defense respecting the corporate Respondent Prime Tropical Inc. Accordingly, I overrule their objection to Complainant's motions. I also find it significant that Respondent's counsel has no objection to entry of Decision without Hearing, so far as the Decision affects only the named corporate Respondent.

I hereby admit to the record the attachments to Complainant's motion for Decision without hearing. 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 and Conclusions of Law

A. Discussion

[1] The Benson Law Group and Gordon S. Benson, Esq. are counsel of record for the corporate Respondent.

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 the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. § 1.139).

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).

In its Answer to the Complaint, Respondent specifically admitted Articles I and II of the Complaint. With respect to Article III, Respondent did not deny that it had failed to timely pay sellers for perishable agricultural commodities, but asserted its belief that fewer than 18 sellers were involved and that the unpaid amount was less than $825,808.00. Further, Respondent did not contend that it expects to make payment to the sellers or otherwise reach compliance with the Act. The Act requires "full payment promptly" and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a 'no-pay' case." *In re: Scamcorp, Inc*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

I find that Respondent's disagreement with the alleged number of sellers involved and total amount that it failed to pay timely does not constitute a valid defense to liability under PACA. Respondent's denial of liability addresses only the number and total sum involved in the transactions underlying the instant action, and does not constitute a material denial of engaging in practices that violate PACA. The

outstanding balance due to sellers is in excess of $5,000.00, and axiomatically represents more than a *de minimis* amount. *See In re: Fava & Co.*, 46 Agr. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (U.S.D.A. 1985). Complainant need not establish each of the transactions alleged, as the same sanction would be entered so long as the violations are not *de minimis*. *In re Moore Marketing International Inc*., 47 Agric. Dec. 1472, slip op. at 12-13 (U.S.D.A. 1988).

"[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). Ergo, I find that a hearing is not necessary in this matter. Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer…is revoked…" *In re: Scamcorp, Inc.*, 57 Agric. Dec. at 547-49; *In re: Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

A violation 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. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). 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. *Id.* at 1678. In the instant matter, pleadings from an action involving Respondent filed in United States District Court for the Central District of California demonstrate that Respondent owes produce sellers for purchases for which Respondent failed to pay. *See* Attachments to Complainant's motion. Respondent's failure to pay sellers promptly for the purchase of products covered by section 2(4) of the PACA is willful, and the violations are repeated and flagrant.

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 Prime Tropical Inc. is or was a corporation organized and existing under the laws of the state of California and at all times material herein its business address was 1601 E. Olympic Blvd., Building 500, Los Angeles, California 90021.

2. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number 20050940, issued on June 20, 2005.

3. Respondent's license was suspended on October 28, 2011 for failure to pay a reparation award pursuant to section 7(d) of the PACA, 7 U.S.C. § 499g(d).

4. During the period from September 2010 through June 2011, Respondent failed to make full payment promptly of the agreed purchase prices in the aggregate of $825,808.09 for 150 lots of perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce from 18 sellers.

5. The transactions that demonstrate violations of the PACA are described and enumerated in Appendix A of the Complaint filed in this matter, which are incorporated herein by reference.

6. The unpaid balances represent more than *de minimis* amounts, thereby obviating a need for a hearing.

C. Conclusions of Law

Respondent's failure to make full payment promptly of the agreed purchase prices in the total amount of $825,808.09 for 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 Prime Tropical Inc. willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent Prime Tropical Inc.'s PACA license is 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 proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in 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: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket Nos. 12-0221, 12-0222.
Decision and Order.
Filed July 17, 2012.

PACA.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves complaints filed by the United States Department of Agriculture ("Complainant") against Amersino Marketing Group, LLC ("Amersino") and Southeast Produce Limited USA ("Southeast")("Respondents") alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a et seq.("PACA"; "the Act"). The complaints alleged that Respondents failed to make full payment promptly to ten sellers of the agreed purchase prices for forty-three (43) lots of perishable agricultural commodities during the period December 22, 2008 through August 5, 2010. The Complainant further alleged that Respondents operated from the same building, shared the same office space, shared the same two principal officers and owners, and co-mingled business activities pertaining to the buying and selling of produce.

This Decision and Order is issued on unopposed motion of Complainant.

I. Procedural History

On February 1, 2011, Complainant filed a Complaint against Respondents alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a *et seq*. ("PACA"; 'the Act"). On March 6, 2012, Complainant filed an amended complaint against Respondents. Respondents 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 March 20, 2012.

On April 2, 2012, I set a schedule for pre-hearing submissions. By motions filed on June 6, 2012, Complainant requested an extension of time to file submissions and moved for a Decision and Order on the record by reason of partial admissions. Henry Wang, one of the principals for Respondents, acknowledged receipt of service of the motion on June 8, 2012. I deferred ruling on the motion for extension pending Respondents' response to Complainant's motion for a Decision and Order on the record. Respondent failed to file a response to either motion, or to file submissions, which were due not later than July 13, 2012.

I admit to the record the Attachments to Respondents' Answer, and Attachment 1 to Complainant's motion.

II. Findings of Fact and Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. § 1.143(d)). The Rules state that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. § 1.147(h).

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).

In their Answer to the amended Complaint, Respondents did not deny that they had failed to timely pay sellers for perishable agricultural commodities. Respondents asserted that several sellers allowed Respondents time to pay off a balance due, and contended that they were making partial payments to one other seller. In addition, they contended that they had settled and paid a balance due to Cimino Brothers Produce, Inc. Respondents failed to address Complainant's motion, in which it

was alleged that several sellers continue to be owed more than a *de minimis* amount for the purchases.

It has been established that partial payments and agreements to make payments over time, as well as settlements of amounts due for produce purchases, do not constitute full payment under PACA. *In re: Caito*, 48 Agric. Dec. 602, 609-19 (U.S.D.A. 1989); *In re: Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 618-19 (U.S.D.A. 1993). PACA requires "full payment promptly" and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case." *In re: Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

In order to reach "full compliance" with PACA, the respondent would have to have paid all produce sellers and "have no credit agreements with produce sellers for more than 30 days". *Id.* at 549. Respondents admitted that as of the date they filed their Answer, they still owed $151,883.50 out of the $176,883.50 listed as due to sellers, exclusive of a purported "settlement" with Cimino Brothers. Respondents also admitted that they owed $28,000 out of $40,088.00 due to Morris Okun Inc. Respondents owed $19,00.00 out of $21,021.00 due to Center Maraicher. It appears from Respondents' Attachments 2 and 3 that they have not made full payments to produce sellers for almost two years. Respondents did not address whether and when they intended to fully pay the sellers.

The outstanding balance due to sellers is in excess of $5,000.00, and axiomatically represents more than a *de minimis* amount. *See, In re: Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (1985). "[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (1985). Ergo, I find that a hearing is not necessary in this matter.

A violation 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. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). 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. *Id.* In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful, and the violations are repeated and flagrant.

Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer…is revoked…" *In re: Scamcorp, Inc.*, 57 Agric. Dec. at 549; *In re: Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (U.S.D.A. 1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 83.

Respondent Southeast's PACA license terminated on September 10, 2010, and Respondent Amersino's PACA license terminated on October 12, 2010, when Respondents failed to pay the annual required fees pursuant to section 4(a) of the PACA (7 U.S.C. § 499a). Therefore, publication of the facts and circumstances of Respondents' violations is an appropriate sanction.

A. Findings of Fact

1. Amersino Marketing Group, LLC is or was a corporation organized and existing under the laws of the state of New York and at all times material herein its business address was 580-45 47th Street, Maspeth, New York, 11378.

2. Respondent Amersino also used an address at 161 Gardner Avenue, Brooklyn, New York, 11237.

3. At all times material hereto, Respondent Amersino was licensed under and operated subject to the provisions of the PACA, under license number 20070047, issued on October 12, 2006.

4. Respondent Amersino's license terminated on October 12, 2010 when Respondent failed to pay the required annual fee.

5. Southeast Produce Limited USA is or was a corporation organized and existing under the laws of the state of New York and at all times material herein its business address was 580-45 47th Street, Maspeth, New York, 11378.

6. At all times material hereto, Respondent Southeast was licensed under and operated subject to the provisions of the PACA, under license number 20041226, issued on September 10, 2004.

7. Respondent Southeast's license terminated on September 10, 2010 when Respondent failed to pay the required annual fee.

8. Respondents operated from the same building, shared the same office space, and shared the same two principal officers and owners.

9. Respondents' business records and business activities, particularly with respect to the buying and selling of produce, were commingled.

10. During the period from December 22, 2008 through August 5, 2010, Respondents failed to make full payment promptly to at least four (4) sellers, as admitted by Respondents, of the agreed purchase prices in the aggregate of $429,031.50 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

11. The unpaid balances represent more than *de minimis* amounts, thereby obviating a need for a hearing.

B. Conclusions of Law

Respondents' failure to make full payment promptly to at least four (4) sellers of the agreed purchase prices in the total amount of

$429,031.50 for 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 Amersino willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances underlying Respondent's violations shall be published.

Respondent Southeast willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances underlying Respondent's violations shall be published.

This Order shall take effect on the eleventh (11^{th}) 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 proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

———

In re: AMERICE, INC., D/B/A THE PERIMETER GROUP.
Docket No. 10-0454.
Decision and Order.
Filed August 1, 2012.

PACA.

Jonathan D. Gordy, Esq. for Complainant.
Robert Golub for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151). Robert C. Keeney, the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding by filing a Complaint on September 29, 2010, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 11 sellers of the agreed purchase prices, or the balance of those prices in the total amount of $751,682.54 for 53 lots of perishable agricultural commodities which it purchased, received and accepted, and seeking that the facts and circumstance of the violation be published.

Respondent filed a timely Answer to the Complaint and the parties were directed by Order entered on December 16, 2011 to file witness and exhibit lists with the Hearing Clerk and to exchange exhibits. Only the Complainant complied with that Order and the matter was set for hearing to commence on April 24, 2012 in the United States Department of Agriculture Courtroom, Washington, DC. The Complainant was represented by Jonathan D. Gordy, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. Pursuant to its request, the Respondent's representative, Robert Golub participated by telephone. The Complainant called two witnesses and

introduced 16 exhibits. The Respondent's representative was the only witness for the Respondent and no exhibits were proffered on the Respondent's behalf.

Following the hearing, the parties were afforded the right to submit post hearing briefs. The Complainant submitted a brief; however, none was received from the Respondent. On the basis of all of the evidence presented, the following Findings of Fact, Conclusions of Law and Order will be entered.

Discussion

In its Answer, Respondent indicated unforeseen and uncontrollable circumstances precluded timely payment and that at no time was its failure to pay intentional and accordingly was not willful is without merit.

The evidence reflects that in September of 2008 after receiving several written reparation complaint and receiving information that Respondent was ending its operations, Senior Marketing Specialist Ivelisse Valentin conducted an on-site investigation of Respondent's operation.[1] T-15-16. Although Respondent's operations and computer systems were no longer operational, and much of the information previously requested by facsimile request in advance of her arrival in Georgia was no longer available, Valentin was able to collect a list of unpaid creditors from Respondent. Using the list, she contacted the sellers on the list and collected invoices reflected in Exhibits CX-4 through 15 and verified that the amounts listed in paragraph III of the Complaint were accurate. T-26. Valentin also discussed the list with the Respondent's former Comptroller, John Free. T-20. At the hearing, Robert Golub stipulated to the admissibility of the invoices and that the amounts listed in the Complaint were consistent with the list that he had provided Ms. Valentin. T-27-28. Following the filing of the Complaint in this action, Valentin called the unpaid vendors again to reconfirm that the amounts listed were still accurate. T-30-31.

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of

[1] Valentin had conducted a prior investigation of Respondent in 2007.

evil intent, or done with a careless disregard of statutory requirements. *In re: Ocean View Produce, Inc.*, 68 Agric. Dec. 594 (U.S.D.A. 2009). Accordingly, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629-30 (U.S.D.A. 1996). Willfulness is established in this action as Respondent despite having a clear statutory requirement to make full and prompt payment withheld full and prompt payment from 11 sellers from whom it purchased, received and accepted perishable agricultural commodities in the course of or in contemplation of interstate and foreign commerce.

Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of Delaware. CX-1. Respondent ceased all business operations sometime in the fall of 2008. T-19, 41. Respondent's business address and mailing address was in Roswell, Georgia.

2. Until its license was terminated for failure to pay the required annual fee, Respondent was licensed under the provisions of the PACA. License No. 19900753 was issued to Respondent on March 2, 1990. The license terminated on March 2, 2008 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee. CX-1, T-13.

3. Respondent, during the period of December 1, 2006 through December 14, 2007, on or about the dates and in the transactions set forth in paragraph III of the Complaint, incorporated herein by reference, failed to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the total amount of $751,682.54 for 53 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. T-27 &-28.

4. Respondent further sold this produce in interstate commerce to customers including Wal-Mart, Quality Food Stores, and Save-A-Lot

stores. T-38.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

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

ORDER

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

2. This decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to these proceedings within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice, 7 C.F.R. § 1.139, 1.145.

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

_____

In re: ANSHIN PRODUCE CO., INC.
Docket No. 12-0290.
Decision and Order.
Filed August 9, 2012.

PACA-D.

Charles L. Kendall, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD BY REASON OF ADMISSIONS

I. Preliminary Statement

The instant matter involves a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("PACA"; "the Act") and the regulations issued thereunder (7 C.F.R. Part 46) ("Regulations"), pursuant to a Complaint filed on March 13, 2012, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS"; "Complainant"). Complainant alleged that Respondent Anshin Produce Co., Inc. ("Respondent") had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for 75 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce from 8 sellers, in the total amount of $302,000.48.

II. Procedural History

In the Complaint, Complainant alleged that Respondent had willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). On April 27, 2012, Respondent's principal, Peggi M. Ortiz, filed an Answer ("Ortiz Answer"). On May 21, 2012, Respondent's principal Jay McWaters filed an Answer to the Complaint ("McWaters Answer"). These pleadings are identified respectively as RX-1 and RX-2.

By Order issued May 15, 2012, I set deadlines for the submission of documents and exchange of evidence. On May 22, 2012, Ms. Ortiz submitted a "mediation brief", which is hereby identified as RX-3. On June 12, 2012, Complainant filed a motion for an extension of time of those deadlines, pending ruling on Complainant's motion for a Decision and Order on the Record, also filed on June 12, 2012. By Order issued June 15, 2012, I suspended the deadlines for submissions and exchanges. Complainant's motion for a Decision and Order on the Record was served by certified mail, signed for by Peggi M. Ortiz on June 21, 2012. The motion was served by certified mail, signed for by Jay McWaters on June 30, 2012. On July 13, 2012, Ms. Ortiz filed correspondence

explaining the problems she encountered operating Anshin Produce Inc. That document is hereby identified as RX-4.

I admit to the record the above-described documents. I also admit to the record Attachments to the complaint, identified as Attachments "A" and "B". Those attachments are included as attachments to this Decision and Order, but shall be referred to as CX-1 and CX-2 for purposes of discussion herein.

III. Findings of Fact and Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. § 1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. § 1.143(d)). The Rules state that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. §1.147(h).

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).

In their Answer to the amended Complaint, Respondent did not deny that it had failed to timely pay sellers for perishable agricultural commodities. Ms. Ortiz admitted that only four (4) of the eight (8)

vendors in question had been paid in full, and stated in pertinent part: "Your records will show that we paid off four vendors and were doing our best to pay the others." *See,* Ortiz Answer, ¶ 7. In his Answer, Mr. McWaters referred to an adversary case brought by a group of produce creditors in the United States Bankruptcy Court for the Central District of California (Dkt. No. 10-02447), alleging violations of the PACA. Mr. McWaters stated, "When the facts became evident and my legal budget had exhausted the plaintiffs settled for $4,050 out of the $179,000." *See,* McWaters' Answer, last ¶.

On April 26, 2010, Respondent filed a Voluntary Petition No. 10-26068 pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq*. CX-2. In Schedule F of the Petition, Respondent listed undisputed debts owed to the eight (8) produce vendors in the aggregate sum of $289,997.54, identified by Complainant. *See,* CX-2; CX-1.

The outstanding balance due to sellers is in excess of $5,000.00, and axiomatically represents more than a *de minimis* amount. *See, In re: Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (1985). "[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). Ergo, I find that a hearing is not necessary in this matter.

A violation 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. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). 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. *Id.* In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful, and the violations are repeated and flagrant.

Where a violation of the PACA is not *de minimis*, and there is no legitimate dispute between the parties as to the amount due, "it is well-settled under the Department's sanction policy that the license of a produce dealer…is revoked…" *In re: Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).; *In re: Veg-Mix, Inc*., 44 Agric. Dec. 1583, 1590, order denying reconsideration, 44 Agric. Dec. 2060 (U.S.D.A. 1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83. There is no legitimate dispute regarding Respondents' failure to make prompt payments under the PACA, as evidenced by the admissions in Respondent Anshin's bankruptcy pleadings.

Ms. Ortiz' submissions make it clear that she was not entirely familiar with PACA rules and regulations, and that she left many business decisions to others. I find that her statements are not relevant to this action against the corporate entity, since the action has not sought any sanction against Ms. Ortiz or Mr. McWaters. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. *In re: Great American Veal, Inc.*, 48 Agric. Dec. 183, 211 (U.S.D.A. 1989). Moreover, the Secretary has concluded that a Respondent who admits to the allegations in a complaint is in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondent. *In re: Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654, 656 (U.S.D.A. 1994). The failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. *In re: Great American Veal, Inc.*, 48 Agric. Dec. at 202-03.

Respondent was issued PACA license number 19701061 on February 2, 1970. Respondent's PACA license terminated on February 2, 2010 when Respondent failed to pay the annual required fees pursuant to section 4(a) of the PACA (7 U.S.C. § 499a). Therefore, publication of the facts and circumstances of Respondent's violations is an appropriate sanction.

B. Findings of Fact

1. Anshin Produce Co., Inc. (Respondent) is a corporation organized

and existing under the laws of the State of California. Respondent's business and mailing address was 130 S. Myers Street, Los Angeles, California, 90033.

2. At all times material herein, Respondent Anshin Produce Co., Inc. was licensed under the provisions of the PACA, License number 19701061, which was issued on February 2, 1970.

3. Respondent's PACA license terminated on February 2, 2010, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

4. Respondent, during the period of January 20, 2009, through November 22, 2009, on or about the dates and in the transactions set forth in CX-1 failed to make full payment promptly of the agreed purchase prices, or balances thereof, for 75 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce from eight (8) sellers, in the total admitted amount of $289,997.54.

5. On April 26, 2010, Respondent filed a voluntary petition in Bankruptcy in the U.S. Bankruptcy Court for the Central District of California, Case No. 10-26068, pursuant to 11 U.S.C. § 101 *et seq*.

6. In the petition at Schedule F, Respondent listed undisputed debts to the eight (8) produce vendors identified by Complainant as sellers to whom Respondent failed to make full payment in the amount of $289,997.54 during the period from January 20, 2009 through November 22, 2009. CX-1; CX-2; Attachments A & B to this Decision and Order.

7. Respondents admittedly failed to make full payment promptly to eight (8) sellers for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

8. The unpaid balances due to the sellers represent more than *de minimis* amounts, thereby obviating the need for a hearing.

C. Conclusions of Law

1. Respondent has admitted, in its Answers and in its Bankruptcy petition, that it purchased, received, and accepted perishable agricultural commodities in interstate commerce from the eight (8) sellers named in the Complaint filed by USDA.

2. I take official notice of the Respondent's Bankruptcy petition and Schedule F. *In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (U.S.D.A. 1997).

3. By scheduling the produce debt in its Bankruptcy petition, Respondent has implicitly asserted that there is no prospect of full payment of that debt at any future date, because the $289,997.54 produce debt that Respondent owes to the eight (8) named sellers for perishable agricultural commodities is part of the acknowledged unsecured debt for which Respondent has sought discharge from the Bankruptcy Court.

4. Respondent also admitted that it failed to make full payment promptly, during the period from January 20, 2009, through November 22, 2009, to those eight (8) sellers of the agreed purchase prices in the total amount of $289,997.54.

5. Respondent's admissions establish that Respondent Anshin Produce Co., Inc. failed to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. §499(b)(4).

6. Respondent's violations of the PACA were willful, flagrant and repeated violations of Section 2(4) of the PACA 7 U.S.C. § 499b(4)).

7. Because Respondent does not have a valid PACA license, the appropriate sanction of revocation cannot be imposed, but rather, it is appropriate that the facts and circumstances of Respondent's violations be published.

ORDER

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 proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

———

In re: CUSTOM CUTS, INC. AND CUSTOM CUTS FRESH, LLC.
Docket Nos. 12-0443, 12-0444.
Decision and Order.
Filed September 25, 2012.

PACA-D.

Shelton Smallwood, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding against Custom Cuts, Inc. (CCI) by filing a disciplinary Complaint on May 21, 2012, alleging that Respondent CCI willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 2 sellers of

produce it purchased, received and accepted, and seeking that the facts and circumstances of the violations be published. Complainant also initiated this proceeding against Custom Cuts Fresh, LLC (CCF) alleging that Respondent CCF willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 8 sellers of produce it purchased, received and accepted, and seeking that the facts and circumstances of the violations be published. Respondents filed a timely Answer to the Complaint.

In response to Respondents' Answer, Complainant moved for a decision without hearing based on admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant made its motion based on admissions of fact that Respondents have made in their Answer to the Complaint. As Respondents' Answer admits a majority of the material allegations of the Complaint, no hearing is warranted in this matter.

The Complaint alleges that Respondent CCI willfully violated the Act by failing to make full payment promptly to 2 sellers of the agreed purchase prices, or balances thereof, in the total amount of $217,127.84 for 30 lots of perishable agricultural commodities. The two sellers were identified as Sun Coast Farms and Harvest Food Group in Appendix A of the Complaint. Respondent CCI denies it failed to make full payment promptly to Sun Coast Farms. In its Answer, Respondent CCI claims that "Sun Coast Farms was a minor vendor to CCI from 7/20/08 thru 10/10/08 and all outstanding invoices were paid. This is the first I have ever heard of any money owed to Sun Coast Farms. If they claim funds are owned, I have never seen proof of such." (Answer, p. 1.) Respondent CCI did not however, deny it failed to make full payment promptly to Harvest Food Group in the amount owed of $9,899.25 as listed in Appendix A of the Complaint. Having failed to deny this material allegation of the Complaint and having offered no defense to this material allegation of the Complaint regarding Harvest Food Group, Respondent CCI has implicitly admitted that it failed to make full payment promptly and still owes the amount stated in the Appendix A as it relates to Harvest Food Group.

The Complaint alleges that Respondent CCF willfully violated the Act by failing to make full payment promptly to 8 sellers of the agreed

purchase prices, or balances thereof, in the total amount of $976,398.92 for 144 lots of perishable agricultural commodities. Respondent CCF admits that "[t]he balance of $976,398.92 owed to the other eight suppliers to CCF is, I believe, sufficiently covered by funds held at the law firm of Beck, Cheat, Bamberger, and Polsky in Milwaukee." (Answer, p. 1.) Additionally, Respondent CCF states "[t]o the best of my knowledge there is sufficient funds to pay the outstanding claims." *(Id.)* Respondent CCF does not deny that it failed to make full payment promptly of the amount alleged in the Complaint and offers no defense to this material allegation of the Complaint. Rather, Respondent CCF merely directs Complainant as to where such admittedly owed amount may be collected.

Findings of Fact

1. Respondent CCI was a corporation organized and existing under the laws of the State of Wisconsin, with its last known business and mailing address in Milwaukee, Wisconsin. Respondent CCI is out of business.

2. At all times material herein, Respondent CCI was licensed under the provisions of the PACA. License No. 1999 0535 was issued to Respondent CCI on February 11, 1999. The license terminated on December 14, 2009, when Respondent CCI formed a new business entity.

3. Respondent CCI, during the period September 15, 2009 through September 25, 2009, on or about the dates and in the transactions set forth in Appendix A and incorporated herein by reference, failed to make full payment promptly to a seller of the agreed purchase prices, or balances thereof, in the total amount of $9,899.25 for one lot of perishable agricultural commodities, which Respondent CCI, purchased in the course of interstate and foreign commerce.[1]

4. Respondent CCF was a limited liability company organized and

[1] Although Appendix A of the Complaint identifies 2 sellers, Sun Coast Farms and Harvest Food Group, Respondent CCI denied failing to make full payment promptly only as to Sun Coast Farms. CCI's transactions with Sun Coast Farms involved 29 lots of produce in the total amount of $207,228.59.

existing under the laws of the State of Wisconsin with its last known business and mailing address in Milwaukee, Wisconsin. Respondent CCF is out of business.

5. At all times material herein, Respondent CCF was licensed under the provisions of the PACA. License No. 2010 0322 was issued to Respondent CCF on December 14, 2009. The license was suspended on October 7, 2011, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)). The license terminated on December 14, 2011, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

6. Respondent CCF, during the period November 21, 2010, through July 24, 2011, on or about the dates and in the transactions set forth in Appendix B and incorporated herein by reference, failed to make full payment promptly to 8 sellers of the agreed purchase prices, or balances thereof, in the total amount of $976,398.92 for 144 lots of perishable agricultural commodities, which Respondent CCF, purchased in the course of interstate and foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations found herein shall be published.

2. This order shall take effect on the day that this Decision becomes final.

3. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the

proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this decision shall be served upon the parties.

———

In re: OASIS CORPORATION, D/B/A ONE OF A KIND PRODUCE.
Docket No. 12-0423.
Decision and Order.
Filed October 26, 2012.

PACA-D—Bankruptcy.

Charles L. Kendall, Esq. for Complainant.
Rosendo Gonzalez, Esq. for Respondent.
Decision and Order entered 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*.) (PACA) and the regulations issued thereunder (7 C.F.R. Part 46)(Regulations), instituted by a Complaint filed on May 7, 2012, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that Respondent Oasis Corporation, d/b/a One of a Kind Produce (Respondent) committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for 255 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce from 9 sellers, in the total amount of $1,628,479.54. Complainant requested findings that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that the facts and circumstances of the alleged violations be published.

A copy of the Complaint and the Rules of Practice were sent by certified mail to the Respondent's last known address; however, the mail was returned by the US Postal Service for reasons other than "unclaimed" or "refused." Counsel for the Complainant provided a new address to the Hearing Clerk's Office and service by certified mail was made to that address on June 1, 2012. On June 26, 2012, the Hearing Clerk's Office received a letter from Michelle R. Ioino requesting an extension of time "on the filings" as her PACA attorney was on vacation out of the country.[1]

By letter to counsel for the Complainant June 28, 2012, Rosendo Gonzales, Esq., Gonzales & Associates of Los Angeles, California, indicated that Respondent had filed a petition under Chapter 7 of the Bankruptcy Code, including as an attachment a PACER docket report from Case number 11-17246 in the U.S. Bankruptcy Court for the District of Nevada. On August 15, 2012, Chief Administrative Law Judge Peter M. Davenport issued an Order directing the Hearing Clerk to enter the Gonzales's June 28, 2012 letter as the Respondent's Answer.

Complainant filed a motion with supporting memorandum, seeking a Decision Without Hearing by Reason of Admissions, based on the admissions made by Respondent in its Answer and in its bankruptcy petition. In that motion, Complainant noted that official notice may be taken of the documents that Respondent has filed in connection with its Chapter 7 bankruptcy proceeding.

Opposition to the Motion was filed by Michelle Iovino, a former officer, director, and shareholder of Respondent. In the Opposition, Iovino (without complying with the Rules of Practice which contain requirements for the contents of an Answer) asserts that the Doctrines of Due Process and Fairness dictate that she should be permitted to conduct discovery and suggests that the basis for seeking the Decision without a hearing is that Respondent filed for bankruptcy protection and that although she did not specifically deny the allegations contained in the Complaint, the Complainant has not established violations of the PACA.

---

[1] Although Iovino (identified in subsequent filings as a former officer, director, and shareholder of Respondent) filed the request for extension of time, to date, no Answer has been received.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

> 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 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; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (Emphasis added)

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

> (a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), 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.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

> (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 . . .

Discussion

Iovino's invocation of the Doctrines of Due Process and Fairness are without merit. To the extent that the Gonzalez correspondence constitutes an Answer, it does not deny any of the allegations of the Complaint, but rather points to the bankruptcy filings of Respondent and of Respondent's principal.

Even were Complainant not entitled to entry of a Decision and Order based upon Respondent's failure to file either a timely Answer or one

which specifically addresses each of the allegations of the Complaint as required by Rule 1.136(b), 7 C.F.R. § 1.136(b), in the Bankruptcy Schedule F filed by Respondent, a true and correct copy of which appears of record, Respondent listed undisputed debts to 7 of the 9 produce vendors referenced in paragraph III and in Appendix A of the Complaint, in the total amount of $776,654.87. A table comparing the past due amounts alleged in the Complaint with the amounts admitted in Respondent's Schedule F was attached to Complainant's Motion for Decision without Hearing as Appendix B.[2]

The practice of taking official notice of documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings is of long standing and well established. *In re Tanikka Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *In re KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538 (U.S.D.A. 2010), *aff'd by Judicial Officer,* 69 Agric. Dec. ____ (Aug. 3, 2011), *Pet for Reconsideration denied*, 69 Agric. Dec. _____(Oct. 21, 2011), 2011 WL 3503526, *4; (citing *In re Judith's Fine Foods Int'l, Inc*., 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *In re Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A. 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (U.S.D.A. 1995); *In re Samuel S. Napolitano Produce, Inc*., 52 Agric. Dec. 1607, 1609 (U.S.D.A. 1993); *In re Allsweet Produce Co*., 51 Agric. Dec. 1455, 1457 n.1 (U.S.D.A. 1992); *In re Magnolia Fruit & Produce Co*., 49 Agric. Dec. 1156, 1158 (U.S.D.A. 1990), *aff'd,* 930 F.2d 916 (5th Cir, 1991) (Table), *printed in* 50 Agric. Dec. 854 (U.S.D.A. 1991); *In re Caito Produce Co*., 48 Agric. Dec. 602, 627 (U.S.D.A. 1989); *In re Roman Crest Fruit, Inc*., 46 Agric. Dec. 612, 615 (U.S.D.A. 1987); *In re Anthony Tammaro, Inc*., 46 Agric. Dec. 173, 175-76 (U.S.D.A> 1987); *In re Walter Gailey & Sons, Inc*., 45 Agric. Dec. 729, 731 (U.S.D.A. 1986); *In re B.G. Dales Co*., 44 Agric. Dec. 2021, 2024 (U.S.D.A. 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (U.S.D.A. 1985); *In re Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (U.S.D.A. 1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept 29, 1986); *In re Veg-Mix, Inc*., 44 Agric. Dec. 1583, 1587 (U.S.D.A. 1985), *aff'd and remanded,* 832 F.2d 601(D.C. Cir. 1987),

[2] Motion for Decision without Hearing, Docket No. 8

remanded, 47 Agric. Dec. 1486 (U.S.D.A. 1988), *final decision,* 48 Agric. Dec. 595 (1989).

Similarly, the use of information contained in bankruptcy filings as the basis for decisions without hearing is also well established. *In re Tanikka Watford*, 69 Agric. Dec. at 1535; *In re Northern Michigan Fruit Co*., 64 Agric. Dec. 1793, 1796 (U.S.D.A. 2005); *In re Holmes,* 62 Agric. Dec. 254, 254-55 (U.S.D.A. 2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373, 374-75, 378 (U.S.D.A. 2002); *In re Scarpaci Bros*., 60 Agric. Dec. 874, 875-76 (U.S.D.A. 2001); *In re Matos Produce Corp*., 59 Agric. Dec. 904 (U.S.D.A. 2000); *In re Peter DeVito Co*., 57 Agric. Dec. 830, 831 (U.S.D.A. 1997); *In re D & D Produce, Inc*., 56 Agric. Dec. 1999, 2000 (U.S.D.A. 1997); *In re Five Star Food Distributors, Inc*, 56 Agric. Dec. at 893; *In re Billy Newsom Produce Co*., 55 Agric. Dec. 1438, 1438-40 (U.S.D.A. 1996).

According to the Department's Judicial Officer's policy, 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 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.[3]

As Respondent does not have a valid PACA license, the proper sanction for its violations is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published. Based upon a careful consideration of the pleadings and Departmental precedent cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the following Findings of Fact, Conclusions of Law and Order will be

[3] *See In re* Scamcorp, Inc., 57 Agric. Dec. 527, 562 (U.S.D.A. 1998).

entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Oasis Corporation (Respondent) is a corporation organized and existing under the laws of the State of Nevada.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20001132 was issued to Respondent on April 21, 2000. This license terminated on April 21, 2011, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. On April 26, 2010, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 101 *et seq*.) in the United States Bankruptcy Court for the District of Nevada. The petition was designated Case No. 11-17246. In the Schedule F filed by Respondent, Respondent listed undisputed debts to 7 of the 9 produce vendors referenced in paragraph III and in Appendix A of the Complaint in a total amount of $776,654.87.

4. Respondent purchased, received, and accepted perishable agricultural commodities in interstate commerce from 7 of the sellers named in the Complaint.

5. Respondent failed to make full payment promptly, during the period of April 30, 2009, through July 9, 2010, to those sellers of the agreed purchase prices in the total amount of $776,654.87.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Official notice is taken of the bankruptcy schedules filed under penalty of perjury by Respondent, listing the $776,654.87 produce debt that Respondent owed those 7 sellers for perishable agricultural commodities.

3. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. Respondent's violations are "repeated" because repeated means more than one.[4] Also, Respondent's failures to pay for its purchase obligations, which Respondent has acknowledged as liquidated, undisputed and non-contingent debts, within the time limits established by a substantive regulation – 7 C.F.R. §46.2(aa) – duly promulgated under the PACA are willful.[5]

ORDER

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

2. This Order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

---

[4] *See, e.g.,* Melvin Beene Produce Co. v. Agric. Mktg. Serv., 41 Agric. Dec. 2422 (U.S.D.A. 1982), *aff'd*., 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations involving $19,059.08 occurring over 2 ½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000); *In re* Havana Potatoes of N.Y. Corp., 55 Agric. Dec. 1234 (U.S.D.A. 1996), *aff'd.*, 136 F.3d (2d Cir. 1997) (Havana's failure to pay 66 sellers $1, 960, 958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes wilful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers $101, 577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes wilful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re* Five Star Food Distrib., 56 Agric. Dec. 880, 896-97 (U.S.D.A. 1997) (holding that 174 violations involving 14 sellers and at least $238, 374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

[5] *Id.*

Copies hereof shall be served upon the parties.

_____

In re: ACTION PRODUCE, INC.
Docket No. 12-0512.
Decision and Order.
Filed November 1, 2012.

PACA-D—Bankruptcy.

Shelton S. Smallwood, Esq. for Complainant.
Michael Martin-Johnson, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Action Produce, Inc. (Respondent) by filing a disciplinary Complaint on July 5, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 12 sellers of the agreed purchase prices, or balances thereof, in the total amount of $543,195.84 for 83 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. The Complaint alleges the violations occurred in commerce between February 27, 2010, and November 5, 2010 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference.

The Complaint requested that findings be made that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of those violations be published.

On July 25, 2012, Respondent filed a Request for Extension of Time to File an Answer to the Complaint. On July 31, 2012, I granted Respondent's request which gave Respondent until August 31, 2012 to file an answer.

Respondent failed to answer the Complaint in a timely manner and on September 7, 2012, Complainant moved for issuance of a Decision without Hearing by Reason of Default. Although Respondent indicated that the Answer was mailed on August 31, 2012, it was not received by the Hearing Clerk until September 10, 2012, ten days after the extended deadline. On September 18, 2012, Respondent filed a Response in Opposition to Complainant's Motion for Default Without Hearing. In that Response, while conceding that the Answer was untimely filed, Respondent requests that the Answer be deemed timely filed, *instanter,* or otherwise on the day of receipt by Counsel for the Complainant and the Hearing Clerk.

Discussion

Rule 1.147(g) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.147(g)) provides:

> (g) *Effective date of filing.* Any document pr paper required or authorized under the rules in this part shall be deemed to be filed at the time when it reaches the Hearing Clerk;……

The Judicial Officer has consistently held that the Rules of Practice are binding upon Administrative Law Judges and the Judicial Officer and that they possess very limited authority to modify the Rules of Practice in a proceeding. *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (U.S.D.A. 2000); *In re PMD Produce Brokerage Corp*., 59 Agric. Dec. 351, 361 (U.S.D.A. 2000); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4

(U.S.D.A. 1996); *In re Hermiston Livestock Co*., 48 Agric. Dec. 434 (U.S.D.A. 1989); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (U.S.D.A. 1982).

Similarly, neither an Administrative Law Judge nor the Judicial Officer can provide the type of equitable relief which Respondent seeks. *In re Carolyn & Julie Arends*, 70 Agric. Dec. _____ (U.S.D.A. 2011) (slip op. at 22, n.23 (citing *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (U.S.D.A. 1976).

Even were Complainant not entitled to entry of a Decision and Order based upon Respondent's failure to file a timely Answer, in the Bankruptcy Schedule F filed by Respondent, Respondent listed undisputed debts to 10 of the 12 produce vendors in Appendix A of the Complaint, in the total amount of $529,254.00. The practice of taking official notice of documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings is of long standing and well established. *In re Tanikka Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *In re KDLO Enterprises, Inc.*, 69 Agric. Dec. 1538 (U.S.D.A. 2010), *aff'd by Judicial Officer,* 69 Agric. Dec. ____ (Aug. 3, 2011), *Pet for Reconsideration denied*, 69 Agric. Dec. _____(Oct. 21, 2011), 2011 WL 3503526, *4; (citing *In re Judith's Fine Foods Int'l, Inc*., 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *In re Five Star Distributors, Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A. 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (U.S.D.A. 1995); *In re Samuel S. Napolitano Produce, Inc*., 52 Agric. Dec. 1607, 1609 (U.S.D.A. 1993); *In re Allsweet Produce Co*., 51 Agric. Dec. 1455, 1457 n.1 (U.S.D.A. 1992); *In re Magnolia Fruit & Produce Co*., 49 Agric. Dec. 1156, 1158 (U.S.D.A. 1990), *aff'd,* 930 F.2d 916 (5th Cir, 1991) (Table), *printed in* 50 Agric. Dec. 854 (U.S.D.A. 1991); *In re Caito Produce Co*., 48 Agric. Dec. 602, 627 (U.S.D.A. 1989); *In re Roman Crest Fruit, Inc*., 46 Agric. Dec. 612, 615 (U.S.D.A. 1987); *In re Anthony Tammaro, Inc*., 46 Agric. Dec. 173, 175-76 (U.S.D.A> 1987); *In re Walter Gailey & Sons, Inc*., 45 Agric. Dec. 729, 731 (U.S.D.A. 1986); *In re B.G. Dales Co*., 44 Agric. Dec. 2021, 2024 (U.S.D.A. 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (U.S.D.A. 1985); *In re Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (U.S.D.A. 1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept

29, 1986); *In re Veg-Mix, Inc*., 44 Agric. Dec. 1583, 1587 (U.S.D.A. 1985), *aff'd and remanded,* 832 F.2d 601(D.C. Cir. 1987), *remanded,* 47 Agric. Dec. 1486 (U.S.D.A. 1988), *final decision,* 48 Agric. Dec. 595 (1989).

Similarly, the use of information contained in bankruptcy filings as the basis for decisions without hearing is also well established. *In re Tanikka Watford*, 69 Agric. Dec. at 1535; *In re Northern Michigan Fruit Co*., 64 Agric. Dec. 1793, 1796 (U.S.D.A. 2005); *In re Holmes,* 62 Agric. Dec. 254, 254-55 (U.S.D.A. 2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373, 374-75, 378 (U.S.D.A. 2002); *In re Scarpaci Bros*., 60 Agric. Dec. 874, 875-76 (U.S.D.A. 2001); *In re Matos Produce Corp*., 59 Agric. Dec. 904 (U.S.D.A. 2000); *In re Peter DeVito Co*., 57 Agric. Dec. 830, 831 (U.S.D.A. 1997); *In re D & D Produce, Inc*., 56 Agric. Dec. 1999, 2000 (U.S.D.A. 1997); *In re Five Star Food Distributors, Inc*, 56 Agric. Dec. at 893; *In re Billy Newsom Produce Co*., 55 Agric. Dec. 1438, 1438-40 (U.S.D.A. 1996).

According to the Department's Judicial Officer's policy, 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 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.[1]

As Respondent no longer possesses a valid PACA license, the proper sanction for its violations is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published. Based upon a careful consideration of the pleadings and Departmental precedent cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and the

[1] See *In re* Scamcorp, 57 Agric. Dec. 527, 562 (U.S.D.A. 1998).

following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Action Produce, Inc. (Respondent) was a corporation organized and existing under the laws of the State of California. Its business and mailing address was in San Francisco, California.

2. At all times material herein, Respondent was licensed under the provisions of the PACA, License 2006-1077, issued to Respondent on July 17, 2006. This license terminated on April 28, 2011, when Respondent was discharged as a bankrupt pursuant to 4(a) of PACA (7 U.S.C. § 499d(a)).

3. Respondent, during the period of February 27, 2010, through November 5, 2010, on or about the dates and in the transactions set forth in Appendix A appended to the Complaint and incorporated herein by reference, failed to make full payment promptly to 12 sellers of the agreed purchase prices, or balances thereof, in the total amount of $543,195.56, for 83 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

4. On January 24, 2011, Respondent filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq*.) in the Northern District of California Bankruptcy Court. The petition was designated Case No. 11-30260. The Schedule F filed by Respondent under penalty of perjury indicates that 10 of the 12 sellers listed in Appendix A, hold unsecured claims for unpaid produce debt totaling $529,254.00[2].

[2] The amount of the claims listed on the Schedule F for three of the ten sellers is less than the amount listed in Appendix A to the Complaint.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

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

ORDER

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

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

Copies of this Decision shall be served upon the parties.

_____

Miscellaneous Orders
71 Agric. Dec. 1255-1266

MISCELLANEOUS ORDERS

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

LEONEL DIAZ HERNANDEZ.
Docket No. 11-0112.
Miscellaneous Order.
Filed July 31, 2012.

MARTHA A. DIAZ CHIDID, A/K/A MARTHA CHIDID.
Docket No. 12-0113.
Miscellaneous Order.
Filed July 31, 2012.

JEFF LATTIMER.
Docket No. 12-0418.
Miscellaneous Order.
Filed July 18, 2012.

THOMAS R. SALISBURY.
Docket No. 12-0472.
Miscellaneous Order.
Filed August 24, 2012.

MARY E. OLSEN.
Docket No. 12-0473.
Miscellaneous Order.
Filed August 24, 2012.

MISCELLANEOUS ORDERS

FLOYD J. "JEFF" OLSEN.
Docket No. 12-0474.
Miscellaneous Order.
Filed August 24, 2012.

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed September 13, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On September 12, 2012, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], requested that I grant a 20-day extension of time within which to respond to Respondents' appeal petition. The Deputy Administrator's motion to extend the time for responding to Respondents' appeal petition is granted. The time for filing the Deputy Administrator's response to Respondents' appeal petition is extended to, and includes, October 2, 2012.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 2, 2012.

Miscellaneous Orders
71 Agric. Dec. 1255-1266

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed October 9, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

SECOND ORDER EXTENDING TIME TO FILE A RESPONSE TO RESPONDENT'S APPEAL PETITION

On October 5, 2012, the parties, by e-mail, jointly requested that I grant the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], a 30 to 45-day extension of time within which to respond to Respondents' appeal petition.[1] For good reason shown, the parties' joint motion to extend the time for the Deputy Administrator's response to Respondents' appeal petition is granted. The time for filing the Deputy Administrator's response to Respondents' appeal petition is extended to, and includes, November 16, 2012.[2]

———

[1] See attached e-mail sent by counsel for the Deputy Administrator to the Judicial Officer on October 5, 2012.

[2] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 16, 2012.

MISCELLANEOUS ORDERS

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed October 16, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING JOINT MOTION TO STAY CASE FOR 45 DAYS

On October 10, 2012, the parties filed a Joint Motion to Stay Case for 45 Days [hereinafter Joint Motion] requesting that I grant the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], a 45-day extension of time within which to respond to Respondents' appeal petition. I deny the Joint Motion only because I find the Joint Motion is merely a reiteration of a request made by the parties by e-mail on October 5, 2012, which request I granted on October 9, 2012, in Second Order Extending Time to File a Response to Respondents' Appeal Petition. Therefore, the time for filing the Deputy Administrator's response to Respondents' appeal petition remains November 16, 2012, as set forth in the Second Order Extending Time to File a Response to Respondents' Appeal Petition.[1] If the parties intend the Joint Motion to be more than a reiteration of the October 5, 2012, e-mail request, they are, of course, free to file another motion in an effort to correct my misapprehension.

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 16, 2012.

Miscellaneous Orders
71 Agric. Dec. 1251-1266

In re: SAMUEL S. PETRO AND BRYAN HERR.
Docket No. 09-0161, 09-0162.
Miscellaneous Order.
Filed November 13, 2012.

PACA-APP.

Richard M. Kaplan, Esq. for Petitioners.
Christopher P. Young-Morales, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER DECISION AS TO BRYAN HERR

PROCEDURAL HISTORY

On February 29, 2012, Karla D. Whalen, Chief, PACA Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Division Chief], filed Respondent's Petition for Reconsideration of the Decision and Order as to Petitioner Bryan Herr [hereinafter Petition to Reconsider] requesting that I reconsider *In re Samuel S. Petro* (Decision as to Bryan Herr), __ Agric. Dec. ___ (Jan. 18, 2012). On March 20, 2012, Bryan Herr filed a response to the Division Chief's Petition to Reconsider, and on March 26, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Division Chief's Petition to Reconsider.

DISCUSSION

The Division Chief raises three issues in the Petition to Reconsider. First, the Division Chief contends I erroneously found Mr. Herr demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by Kalil Fresh Marketing, Inc., d/b/a

Houston's Finest Produce Co. [hereinafter Houston's Finest].[1] The Division Chief identifies three acts and one failure to act which purportedly resulted in Houston's Finest's violations of the PACA: (1) Mr. Herr's involvement with Houston's Finest's obtaining lines of credit; (2) Mr. Herr's July or August 2002 recommendation to John Kalil, president of Houston's Finest, of a person to install refrigeration equipment in Houston's Finest's warehouse; (3) Houston's Finest's payment for some of the produce which Houston's Finest purchased from Country Fresh, Inc.; and (4) Mr. Herr's failure to exercise control over Houston's Finest's finances. (Pet. to Reconsider at 3-13.)

The record establishes that Mr. Herr was involved with Houston's Finest's obtaining a line of credit from Southwest Bank of Texas in July 2002 and a line of credit from Amegy Bank in April 2003. Mr. Herr's involvement with these lines of credit was at the behest of his partner, Samuel S. Petro, whose cousin was Mr. Kalil. Mr. Petro arranged for Houston's Finest's lines of credit from Southwest Bank of Texas and Amegy Bank and paid the banks when Houston's Finest failed to pay. Based upon the record before me, I find Mr. Herr's involvement with Houston's Finest's lines of credit from Southwest Bank of Texas in July 2002 and from Amegy Bank in April 2003 was limited to ministerial functions only and did not constitute active involvement in activities that resulted in Houston's Finest's violations of the PACA, which occurred more than 4 years after Houston's Finest obtained the lines of credit in question. (Tr. 61-64, 73-79, 135-36, 147, 170-72, 228-30.)[2]

As for the recommendation of a person to install refrigeration equipment, Mr. Herr demonstrated that Marriott Corporation, one of Houston's Finest's customers, suggested that Houston's Finest add to its refrigeration capacity and that, in July or August 2002, Mr. Kalil asked Mr. Herr if he could recommend a person to install refrigeration equipment in Houston's Finest's warehouse. Mr. Herr recommended a

---

[1] Houston's Finest willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 55 sellers of the agreed purchase prices in the amount of $1,617,014.93 for 645 lots of perishable agricultural commodities, which Houston's Finest purchased, received, and accepted in interstate and foreign commerce, during the period October 11, 2007, through February 17, 2008. *In re Kalil Fresh Mktg., Inc.*, 69 Agric. Dec. 979 (2010).

[2] References to the transcript of the January 20-21, 2011, hearing in this proceeding are indicated as "Tr." and the page number.

person to Mr. Kalil, and Mr. Kalil subsequently decided to have the additional refrigeration equipment installed by the person recommended by Mr. Herr. (Tr. 357-58, 401-04.) I find Mr. Herr demonstrated by a preponderance of the evidence that his recommendation more than 5 years prior to Houston's Finest's PACA violations did not constitute active involvement in the activities resulting in Houston's Finest's PACA violations.

As for the payments made by Houston's Finest to Country Fresh, Inc., for produce purchases, Mr. Herr demonstrated by a preponderance of the evidence that he was not involved with Houston's Finest's purchase of, or payment for, perishable agricultural commodities from any produce seller (Tr. 167-68).

Moreover, I reject the Division Chief's contention that Mr. Herr's failure to exercise control over Houston's Finest's finances constitutes active involvement in the activities resulting in Houston's Finest's violations of the PACA. Generally, active involvement in activities resulting in a violation of the PACA requires more than a failure to act.[3] While I disagree with the Division Chief's contention that Mr. Herr's failure to act supports the conclusion that Mr. Herr was actively involved in the activities resulting in Houston's Finest's violations of the PACA, I do not hold that an act of omission can never constitute active involvement in activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Mr. Herr's failure to act does not constitute active involvement in the activities resulting in Houston's Finest's PACA violations.

Second, the Division Chief contends I erroneously failed to state clearly whether the actual, significant nexus test used to determine whether a person was only nominally a partner, officer, director, or shareholder of a violating PACA licensee was superceded by the test articulated in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011) (Pet. to Reconsider at 18-19).

---

[3] *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1356-58 (2006) (stating, generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission), *aff'd*, 314 F. App'x 10 (10th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1318-20 (2006) (same).

The Court in *Taylor* states it was not articulating a new test that would supercede the actual, significant nexus test used to determine whether a person was only nominally an officer of a violating PACA licensee. Instead, the Court emphasized that, under the actual, significant nexus test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company's operations, as follows:

> Under the "actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Veg–Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Although we have consistently applied the 'actual, significant nexus' test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.
>
> * * *
>
> As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 615, 617 (D.C. Cir. 2011).

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9)[4] wherein Congress amended the definition of the term "responsibly connected" specifically to provide partners, officers, directors, and shareholders who would otherwise fall

[4] *See Bell v. Dep't of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating a petitioner may demonstrate he was only a nominal officer, director, or shareholder by proving that he lacked "an actual, significant nexus" with the violating company); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983) (stating the finding that an individual was responsibly connected must be based upon evidence of "an actual, significant nexus" with the violating company).

within the statutory definition of "responsibly connected" a two-prong test whereby they could rebut the statutory presumption of responsible connection. Congress could have explicitly adopted the "actual, significant nexus" test; however, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to "actual, significant nexus," power to curb PACA violations, or power to direct and affect operations. Instead, Congress provides that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license" (7 U.S.C. § 499a(b)(9)).

In my view, continued application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term "responsibly connected" avoiding that status. For example, a minority shareholder, who is not merely a shareholder in name only, generally will not have the power to prevent (or even discover) the corporation's PACA violations or the power to direct and affect the corporation's operations. Similarly, a real director, who is a member of a 3-person board of directors, generally will not have the power to prevent the corporation's PACA violations or the power to direct and affect the corporation's operations. Likewise, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally will not have the power to prevent the partnership's PACA violations or the power to direct and affect the partnership's operations. If the minority shareholder, the director on the 3-person board of directors, and the partner with a 40 percent interest in the partnership demonstrates the requisite lack of power, application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), would result in each of these persons being designated "nominal."

In the *Taylor* dissent, Judge Brown points out that the United States Department of Agriculture is not forever bound to apply the "actual, significant nexus" test, as follows:

> I do not mean to suggest the Department is bound forever to apply the "actual, significant nexus" test. We have previously indicated the 1995 amendment to 7 U.S.C. § 499a(b)(9) might call for different criteria. *See Norinsberg v. USDA*, 162 F.3d 1194, 1199 (D.C. Cir. 1998). . . . But the Judicial Officer in this case explicitly employed the "actual, significant nexus" test . . . and neither the parties nor my colleagues have seen fit to challenge its applicability.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 621-22 (D.C. Cir. 2011) (footnote omitted). *Taylor* makes clear to me that I was remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual significant nexus" test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). Instead, my "nominal inquiry" will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder "in name only."[5] While power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a factor to be considered under the "nominal inquiry," it will not be the *sine qua non* of responsible connection to a PACA-violating entity.[6]

Third, the Division Chief contends I erroneously found Mr. Herr demonstrated by a preponderance of the evidence that he was only nominally a 25 percent shareholder of Houston's Finest during the period October 11, 2007, through February 17, 2008 (Pet. to Reconsider at 13-23). The Division Chief's position that Mr. Herr had authority to alter

---

[5] *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1534 (2002) (defining the noun "nominal" as "an individual that exists or is something in name or form but not in reality"); BLACK'S LAW DICTIONARY 1148 (9th ed. 2009) (defining the adjective "nominal" as "[e]xisting in name only").

[6] *See Taylor v. U.S. Dep't of Agric*., 636 F.3d 608, 618 (D.C. Cir. 2011) (Judge Brown stating, the majority makes "power and authority" the *sine qua non* of responsible connection).

the course of Houston's Finest's operations, and, therefore, was not nominal, is based in large part on the July 10, 2002, Stock Purchase Agreement executed by Messrs. Kalil, Petro, and Herr (Appeal Pet. at 28-31).[7]

On its face, the Stock Purchase Agreement gives Mr. Herr authority to curb Houston's Finest's PACA violations. However, Mr. Herr introduced ample evidence to demonstrate that the Stock Purchase Agreement did not reflect Mr. Herr's actual authority within Houston's Finest. Instead, the record establishes that Mr. Herr, based upon his relationship with his partner, Mr. Petro, merely infused Houston's Finest with capital. In exchange, Messrs. Kalil, Petro, and Herr executed the July 10, 2002, Stock Purchase Agreement, which Mr. Herr did not negotiate or draft (Tr. 159). Mr. Herr never performed any duties or exercised any authority under the Stock Purchase Agreement (Tr. 160-67), and Mr. Herr demonstrated by a preponderance of the evidence that, despite the terms of the Stock Purchase Agreement, he lacked the actual authority to curb Houston's Finest's violations of the PACA.

For the foregoing reasons, the following Order is issued.

ORDER

The Division Chief's Petition to Reconsider, filed February 29, 2012, is denied.

———

[7] Dean Klint Johnson, the Acting Assistant Regional Director for the Agricultural Marketing Service and a witness for the Division Chief, testified the sole indicator that Mr. Herr had authority within Houston's Finest is the Stock Purchase Agreement (Tr. 480-81).

MISCELLANEOUS ORDERS

In re: AMERSINO MARKETING GROUP, LLC AND SOUTHEAST PRODUCE LIMITED, USA.
Docket No. D-12-0221; D-12-0222.
Miscellaneous Order.
Filed November 13, 2012.

PACA-D.

Christopher P. Young-Morales, Esq. for Complainant.
Bruce Levinson, Esq. for Respondents.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING REQUEST TO EXTEND THE TIME TO FILE A RESPONSE TO RESPONDENTS' APPEAL PETITION

On November 8, 2012, Amersino Marketing Group, LLC, and Southeast Produce Limited, USA [hereinafter Respondents], by telephone, requested that I extend the time for filing the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture's [hereinafter the Deputy Administrator], time for filing a response to Respondents' appeal petition. On November 13, 2012, I held a telephone conference with counsel for Respondents and counsel for the Deputy Administrator to discuss the requested extension of time. During the telephone conference, counsel for the Deputy Administrator stated that the Deputy Administrator does not want an extension of time to file a response to Respondents' appeal petition; therefore, I deny Respondents' request that I extend the time for the Deputy Administrator's filing a response to Respondents' appeal petition. The time for filing the Deputy Administrator's response to Respondents' appeal petition remains November 16, 2012, as set forth in the Second Order Extending Time to File a Response to Respondents' Appeal Petition.[1]

———

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Deputy Administrator must ensure the response to Respondents' appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 16, 2012.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default 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

SANDLER BROS.
Docket No. 12-0111.
Default Decision.
Filed August 2, 2012.

BIG WAY, INC.
Docket No. 12-0236.
Default Decision.
Filed August 2, 2012.

RAR ENTERPRISES, INC.
Docket No. 12-0261.
Default Decision.
Filed August 15, 2012.

CASA DE CAMPO, INC. AND HAVANA PRODUCE, INC.
Docket No. 12-0470.
Default Decision.
Filed September 17, 2012.

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Grand Mart, Inc., Min S. Kang, & Man S. Kang, PACA-D-12-0056, 08/31/12.
Grand Mart, International Food, LLC, Min S. Kang, & Man S. Kang, PACA-D-12-0059, 08/31/12.
Lucky World Gaithersburg, Inc., Min S. Kang, & Man S. Kang, PACA-D-12-0062, 08/31/12.
Man Min, Inc., Min S. Kang, & Man S. Kang, PACA-D-12-0065, 08/31/12.
Grand Mart 7, Min S. Kang, & Man S. Kang, PACA-D-12-0069, 08/31/12.
Bacchus Fresh International, Inc., PACA-D-12-0424, 08/15/12.
The Chuck Olsen Co., Inc., PACA-D-11-0415, 09/14/12.
Manuel R. Pinon, PACA-D-12-0496, 11/07/12.
Pellegrino's Fruit & Produce, Inc., PACA-D-12-0621, 11/07/12.
Top Tomato Company, PACA-D-13-0049, 11/08/12.
Paul O. Rangel, PACA-APP-12-0162, 11/19/12.
Randall E. Lintz, PACA-APP-12-0163, 11/19/12.