

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 10-0308

In re: K & R Farms Produce, Inc.,

Respondent

**Default Decision and Order**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*, hereinafter referred to as “PACA” or the “Act”), instituted by a Complaint filed on June 2, 2010, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleged that Respondent K & R Farms Produce, Inc. willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period October 19, 2007 through July 9, 2008, by failing to make full payment promptly to 24 sellers of the agreed purchase prices in the total amount of \$357,926.42 for 304 lots of perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and foreign commerce or in contemplation of interstate or foreign commerce. Respondent ceased business operations on June 14, 2008.

The Hearing Clerk's certified mailing on June 2, 2010 of a copy of the Complaint, was sent to Respondent's attorney, Mr. Eric A. Lanigan.<sup>1</sup> In the same mailing, the Hearing Clerk included a “notice letter” (the “notice letter”) and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various

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<sup>1</sup> Because Respondent is now out of business, service on Respondent may be obtained by service upon its attorney, as provided by 7 C.F.R. 1.147(c)(3)(i).

Statutes (7 C.F.R. §§ 1.130-1.151) (the “Rules of Practice”). Respondent received this certified mailing on June 7, 2010,<sup>2</sup> but failed to file an answer to the Complaint within the 20 day time period prescribed by section 1.136 of the Rules of Practice.<sup>3</sup> However, on July 9, 2010, Mr. Lanigan sent a letter to the Hearing Clerk explaining that his office no longer represented the Respondent and argued that service of the Complaint on his office was invalid.

In response to Mr. Lanigan’s letter, Complainant’s attorney requested that the Hearing Clerk re-serve the Complaint on Respondent’s two principals, as provided by 7 C.F.R. 1.147(c) (3) (ii).<sup>4</sup> The Hearing Clerk’s certified mailing on July 23, 2010 of a copy of the Complaint, the notice letter, and a copy of the Rules of Practice, was sent to Mssrs. Ova F. Kelly and Gary S. Roberts. Mr. Kelly received this certified mailing on July 27, 2010. Mr. Roberts’s envelope was returned as “Refused” by the United States Postal Service. On August 2, 2010, the Hearing Clerk re-mailed a copy of the Complaint with the enclosures to the same address by regular mail. Under the Rules of Practice, a Complaint returned “Refused” “shall be deemed to be received by such party on the date of re-mailing by ordinary mail to the same address.” 7 C.F.R. § 1.147(c) (1).

On July 28, 2010, Mr. Eric A. Lanigan sent another letter to the Hearing Clerk. This letter stated that he had been retained by Mssrs. Ova F. Kelly and Gary S. Roberts to respond to the Complaint against Respondent. The letter mentioned that despite Mssrs. Kelly and Roberts “personal investments and their refusal to take any compensation during that last year of operation, K&R was unable to meet its financial commitments.” The letter failed to address any of the allegations of the Complaint.

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<sup>2</sup> Certified mail certificate number 7005 1160 0001 3559 9433 was signed on June 7, 2010 by “S. Collazd.”

<sup>3</sup> Complainant received notice from the Hearing Clerk on June 30, 2010 that Respondent had failed to answer the Complaint.

<sup>4</sup> Service addresses are on file with the Hearing Clerk’s Office. Ova F. Kelly was the president and 50 percent stockholder of Respondent from October 2003 through July 2008. Gary S. Roberts was the vice-president and 50 percent stockholder of Respondent from October 2003 through July 2008.

The Rules of Practice, 7 C.F.R. § 1.136(b), require that Respondent “(c)learly admit, deny or explain each of the allegations in the Complaint. A failure to “deny or otherwise respond to an allegation” is deemed to be an admission of it. 7 C.F.R. § 1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. As Respondent failed to file an answer to the Complaint within the 20 day time period prescribed by section 1.136 of the Rules of Practice, the Complainant has moved for the issuance of a Decision Without Hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

1. K & R Farms Produce, Inc. (herein “Respondent”) is a Florida corporation with a business address in Sanford, Florida. Respondent ceased business operations on June 14, 2008.
2. At all times material herein, Respondent was licensed or operating subject to license under the provisions of the PACA. License number 20040002 was issued to Respondent on October 1, 2003. This license terminated on October 1, 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.
3. Respondent, during the period October 19, 2007 through July 9, 2008, on or about the dates set forth in Appendix A incorporated herein by reference, failed to make full payment promptly to 24 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$357,926.42 for 304 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate or foreign commerce.
4. On June 12, 2008, a civil trust action was filed in the United States District Court, Middle District of Florida, Orlando Division. This action was designated Case No. cv-00956. The 24 sellers listed in Appendix A submitted proof of claims. On February 11, 2009, an Order of Judgment was issued in favor of the sellers. Judgment was awarded for amounts greater than the

amounts listed in Appendix A for 23 of the 24 sellers. Appendix B, attached and incorporated herein by reference, compares the amounts alleged to be due in the Complaint in this proceeding to the amounts awarded to the sellers in the PACA civil trust case.

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly with respect to the 304 lots of perishable agricultural commodities set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of 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 of the Act (7 U.S.C. § 499b (4)), and the facts and circumstances of the violations shall be published.
2. Pursuant to the Rules of Practice, this Order will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

January 7, 2011

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Peter M. Davenport  
Chief Administrative Law Judge