AGRICULTURE DECISIONS

Volume 79

Book One

Part Three (PACA Decisions)

Pages 312–470

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

JANUARY – JUNE 2020

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

--

ERRATA

[REPARATION DECISION]

--

ERRATA

[MISCELLANEOUS ORDER]

--

MISCELLANEOUS ORDERS & DISMISSALS

--

DEFAULT DECISIONS

--

CONSENT DECISIONS

--

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: JONATHAN DYER; DREW JOHNSON, a/k/a DREW R. JOHNSON; and MICHAEL S. RAWLINGS.
Docket Nos. 14-0166, 14-0168, 14-0169.
Final Decision and Order.
Filed January 9, 2020.

PACA-APP – Alter ego – Corporate assets, diversion of for personal use – Fraud – Owner – Ownership - Responsibly connected.

Stephen P. McCarron, Esq., for Petitioners.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order issued by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by Judge Bobbie J. McCartney, Judicial Officer.

ORDER AFFIRMING INITIAL DECISION AND ORDER IN DOCKET NOS. 14-0166, 14-0168, AND 14-0169

Preliminary Statement

This is a "responsibly connected" proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499(a) *et seq.)* ("PACA"), which is conducted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) ("Rules" or "Rules of Practice").

Summary of Procedural History and Preliminary Findings

On June 28, 2013, a disciplinary complaint ("Complaint") was filed against Adams Produce Company LLC ("Adams") for failing to make full payment promptly in the amount of $10,735,186.81 to fifty-one produce sellers for 9,314 lots of perishable agricultural commodities that the company purchased, received, and accepted during the period of August 8, 2011 through May 18, 2012. As of the filing of the Complaint, $1,928,417.72 remained unpaid and is currently still unpaid.

On November 22, 2013, a Default Decision and Order was entered

against Adams, finding that Adams willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly as alleged in the Complaint. The Default Decision and Order became final and effective on January 8, 2014.

Petitioners Jonathan Dyer, Steven C. Finberg, Drew Johnson, and Michael S. Rawlings each filed a petition for review of the determination of the Director of the PACA Division, Specialty Crops Program, Agricultural Marketing Service ("Respondent") determining that each Petitioner was "responsibly connected" with Adams, as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), during the period of time Adams violated section 2 of the PACA. These four "responsibly connected" cases were consolidated for hearing in accordance with 7 C.F.R. § 1.137 of the Rules of Practice by direction of Rulings and Preliminary Instructions filed on September 4, 2014. The hearings in these proceedings took place on March 22, 2016 in Dallas, Texas and on August 23, 2016 in Washington, D.C., before Administrative Law Judge ("ALJ") Jill S. Clifton ("Judge Clifton").[1] Although the four petitions for review of the Director's responsibly connected determinations were consolidated for hearing, Judge Clifton issued a separate decision regarding Steven Finberg's responsibly connected status.[2]

---

[1] The parties' Updated Stipulation as to Proceedings filed on June 11, 2015 provided, among other things: "All evidence in the consolidated hearing will be available to be considered in each case."

[2] On July 25, 2017, Judge Clifton issued her Decision and Order as to Docket 14-0167 only, affirming the determination of the Agency and finding that Petitioner Finberg was "responsibly connected" to Adams, within the meaning of the PACA, pursuant to 7 C.F.R. §499a(b)(9).

On August 21, 2017, Petitioner Finberg timely filed an appeal to the Judicial Officer asserting that he was not "actively involved" in the activities resulting in the violations, that Adams was the alter ego of Mr. Grinstead, and, therefore, that he had successfully rebutted the presumption that he was "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA.

On December 28, 2017, the Judicial Officer remanded the instant proceeding in order to put to rest any Appointments Clause claim that may arise in this proceeding in light of the Solicitor General's position in *Lucia v. SEC*, 138 S. Ct.

On May 19, 2017 Judge Clifton issued a Decision and Order ("Initial Decision" or "ID") in Dockets 14-0166, 14-0168, and 14-0169, finding that Petitioners Dyer, Johnson, and Rawlings were not "responsibly connected" with Adams during the period that Adams violated section 2(4) of the PACA.

On June 21, 2017, Respondent timely filed an appeal of Judge Clifton's Initial Decision seeking to establish that Petitioners Dyer, Johnson, and Rawlings have each failed to rebut the presumption that they were "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA and requesting that the determination by the Director of the PACA Division that Petitioners were "responsibly connected" with Adams during the period of its repeated and flagrant violations of the PACA be affirmed.

Specifically, Respondent requests that the Judicial Officer reverse the ALJ's holdings in the Initial Decision that: (1) Petitioners Dyer, Johnson, and Rawlings were not owners of Adams when Adams violated the PACA; and (2) Adams was the *alter ego* of Scott Grinstead when Adams violated the PACA. Also, Respondent asserts that if the Judicial Officer agrees that one or both of these conclusions are in error, the determinations by the Director of the PACA Division that Petitioners Dyer, Johnson, and Rawlings were each "responsibly connected" with Adams during the period that Adams willfully, repeatedly, and flagrantly violated section 2(4) of the PACA should be affirmed.

On February 7, 2019, I issued a Procedural Order Affirming Appeal

---

2044 (2018)) ("*Lucia*"). On February 1, 2018, the Judicial Officer denied the Petitioner's request for reconsideration of the Remand Order in that case.

Because the hearing conducted by Judge Clifton in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., and the ensuing Decision and Orders issued on July 25, 2017 predate the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements, Petitioner Finberg's request for a hearing before an ALJ other than Judge Clifton has been granted, and the proceedings in Docket No. 14-0167 have been remanded for further proceedings to be conducted in accordance with *Lucia*.

Status Regarding Docket Nos. 14-0166, 14-0168, and 14-0169 and Remand Order Regarding Docket 14-0167. That Order confirmed that Docket Nos. 14-0166, 14-0168, and 14-0169 remain consolidated and are properly and currently before the Judicial Officer and that Docket 14-0167 is taking a different procedural path.[3]

Pertinent Statutory, Regulatory, and Adjudicatory Analytical Framework

The Department's interpretation of PACA and policy in cases arising under the Act were set out in the Judicial Officer's decision, *Baltimore Tomato Company* ("*Baltimore Tomato*"),[4] reaffirmed by the Judicial Officer in *Caito Produce Co.* ("*Caito Produce*")[5] and more recently in *Allen*,[6] where the current Judicial Officer has discussed and adopted the prior findings in *Baltimore Tomato* and *Caito Produce*.

The reasons underlying the Department's policy are set forth at length in *Caito Produce* as well as *Allen*. Together, the jurisprudence of these and prior cases has created a substantial body of settled law. As noted by the Judicial Officer, the conclusions in *Caito Produce* are largely taken verbatim from prior decisions (including *Melvin Beene Produce Co.*[7]), issued for many years in similar cases (many affirmed on judicial review), each of which merely updates the citations previously used.[8] Likewise, this Decision and Order quotes extensively from *Caito Produce*[9] and prior decisions to provide context to the analysis under PACA applicable to this proceeding.

---

[3] *See supra* note 2.

[4] 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

[5] 48 Agric. Dec. 602 (U.S.D.A. 1989).

[6] 78 Agric. Dec. 387 (U.S.D.A. 2019).

[7] 41 Agric. Dec. 2422 (U.S.D.A. 1982), *aff'd*, 728 F.3d 347 (6th Cir. 1984)).

[8] *See The Caito Produce Co.*, 48 Agric. Dec. 602, 604 (U.S.D.A. 1989).

[9] Due to the length of the *Caito Produce* decision, only pertinent parts will be reproduced here to provide context to the analysis under PACA in this proceeding, but the full decision is hereby adopted and incorporated herein by reference for all purposes.

As discussed in pertinent part in *Caito Produce*:

> The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dept. of Agr.*[524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:
>
> > The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).
> >
> > * * *
> >
> > If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from

> respondent's undercapitalization or bad debt experience.

The Caito Produce Co., 48 Agric. Dec. 602, 619-20 (U.S.D.A. 1989).

Statutory Definition and Requirements Pertaining to "Responsibly Connected"

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides:

> (9) The term "responsibly connected" means 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. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act ***and*** 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.

7 U.S.C. § 499a(b)(9) (emphases added).

The express language of the statute makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)). Failure to do so will result in a finding that he or she is "responsibly connected" within the meaning of the statue and is therefore subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

Here, however, Petitioners have successfully rebutted the presumption of "responsibly connected," based on the unusual circumstances of this

case. For the reasons discussed more fully herein below, Judge Clifton's finding that Petitioners were not "responsibly connected" to Adams based on the fraudulent and pervasive interference in the operations of the business by Scott Grinstead is affirmed.

Petitioners Dyer, Johnson, and Rawlings Were Not Owners of Adams

Respondent contends[10] Judge Clifton erred in ruling that Petitioners were not owners of Adams during the time of the PACA violations, arguing that such a ruling results in Petitioners being "spared the consequences of the responsibly connected determination."[11]

As explained below, and for the reasons stated in Petitioners' Brief and the Reply Brief, incorporated herein by reference, Judge Clifton did not err in finding that Petitioners Dyer, Johnson, and Rawlings were not owners of the company when it violated the PACA. The record reflects that the PACA license records of Adams establishes there were two owners of the company: API Holdings, LLC (55.30%) and Scott Grinstead (44.7%), which together held 100% of the stock of Adams (Finberg; RX-1, pp. 1-7). Thus, the Agency's licensing records show that Petitioners Dyer, Johnson, and Rawlings were not owners of Adams.[12]

Respondent maintains Petitioners were owners because they had some unknown amount of money invested in CIC Partners and/or API Holdings, LLC.[13] But any such unknown investment in these companies by Petitioners does not show Petitioners had any ownership in Adams according to the Agency's license records. Respondent cites *Norinsberg*[14] as support for the proposition that a 2.97914% holder of stock in a company results in a petitioner being an owner. But in this case, there is no evidence that Petitioners held any stock of Adams. Accordingly, based on the evidence

[10] Appeal Petition at 8.

[11] *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011) (citing *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 692 n.8 (D.C. Cir. 2007)).

[12] RX-1 and RX-2 (Agency records for Dyer, Johnson, and Rawlings).

[13] Appeal Petition at 6.

[14] 56 Agric. Dec. 1840, 1864-65 (U.S.D.A. 1997).

of record in this proceeding, Judge Clifton did not err in finding that "[e]ach of these 3 Petitioners was not an owner of Adams Produce Company, LLC."[15]

Scott Grinstead Was the Alter Ego of Adams

Assuming *arguendo* that Petitioners Dyer, Johnson, and Rawlings were "owners" of Adams based on their investment in CIC Partners and/or API Holdings, LLC, as argued by Respondent,[16] the evidence of record supports Judge Clifton's determination that only Scott Grinstead, and *not* Petitioners Dyer, Johnson, and Rawlings, was the alter ego of Adams during the time of the subject PACA violations. This issue has been fully and persuasively addressed in Petitioners' Brief and the Reply Brief as summarized herein below.

There is no dispute that Grinstead engaged in extensive fraudulent activity against the federal government and the Petitioners to illegally enrich himself as CEO during his tenure at Adams.[17] Respondent claims Grinstead was able to conduct his fraudulent activities solely as a result of his position as a director of Adams. But Respondent ignores the crucial fact that Grinstead was the Chief Executive Officer of Adams, who ran Adams's day-to-day operations. In that capacity, Grinstead defrauded the U.S. Government, falsified the company's financial information to Petitioners and auditors, treated corporate funds as his own, and used his office for personal gain. These extensive illegal activities demonstrate he was the alter ego of Adams, as discussed by Judge Clifton.[18]

After Petitioners were notified Adams was being investigated for fraud by the Department of Justice ("DOJ"), when Grinstead was the CEO, Petitioners paid legal fees to Fulbright & Jaworski of over $2,000,000 to assist the DOJ in the investigation of any fraudulent activities. During this investigation, Petitioners learned of Grinstead's extensive fraud and deception towards Petitioners regarding the financial records of Adams

[15] Initial Decision at 30.

[16] Appeal Petition at 6.

[17] *See* PX-1 through PX-25.

[18] Initial Decision at 7-14.

and promptly removed Grinstead.

While domination and control of a corporation by an individual in and of itself is enough to find the company is the alter ego of the individual, another hallmark of an alter ego is evidence of diversion of corporate assets for personal use.[19] Judge Clifton found such evidence existed, as Grinstead siphoned off between $200,000 to $400,000 in corporate funds in 2011 and early 2012 for his personal use to pay for clothing, jewelry, personal travel for himself and his family, casino debts, strip clubs, lawn care at his home, and items related to his vacation home.[20] In addition, Grinstead's undisputed and extensive fraudulent alterations of Adams's financial records to enrich himself is another clear sign that Grinstead was the alter ego of Adams.[21]

Respondent also argues Grinstead was not an alter ego of Adams after he was removed in late February and early March 2012. But Grinstead's extensive criminal activities as the CEO and alter ego of Adams continued to disrupt and ultimately destroy the company after his removal.

In a further effort to save the company, Petitioners Dyer and Johnson hired a Chief Restructuring Officer to ascertain Adams's true financial position. They also secured and invested an additional $2,000,000 into the company to provide liquidity.[22] Petitioners also instructed Adams's secured lender not to sweep accounts because the funds were PACA trust assets to be paid to creditors. However, the secured lender ignored Petitioners, swept the accounts for the lender's benefit, and Adams was forced to file for bankruptcy on April 25, 2017, at which time Petitioners were no longer in control of the company.[23]

In her decision, Judge Clifton provided rationale for her finding,

---

[19] *Labadie Coal Co. v. Black*, 672 F.2d 92, 98 (D.C. Cir. 1982).

[20] Initial Decision at 8-9 (citing PX-1; PX-2; PX-3) (the U.S. Attorney's indictment and Sentencing Memo explaining Grinstead's criminal conduct)).

[21] Initial Decision at 6-11.

[22] The additional $2,000,000 provided would have paid in full the PACA creditors of Adams.

[23] Tr. at 126.

explaining that the investment company (CIC Partners) owned by the three Petitioners had no way of knowing about the fraudulent alterations made by Scott Grimstead to the financial statements of the Adams Produce Company, which made the company look more profitable than it actually was, thereby inducing CIC Partners to invest.[24] ALJ Clifton noted that the fraudulent activities were hidden prior to CIC's investment, and the 2009 audit they relied on was not reliable, containing alterations of accounts, reclassifying them from payables to receivables.[25]

Further, Judge Clifton found that Scott Grimstead's fraudulent and pervasive actions as to Adams rose to the level of "alter ego." She explained: "The profligate spending by CEO Scott Grinstead, using the money of Adams Produce Company LLC as if that money were his personal funds, is strong evidence that Adams Produce Company LLC was the alter ego of . . . Scott David Grinstead."[26] The fraudulent activity supports the "alter ago" finding, because Petitioners had no meaningful control of the company.

Judge Clifton's rationale is based on *Taylor v. USDA*,[27]and also in large part upon the fact that Grinstead committed numerous crimes involving fraud,[28] and is fully supported by the evidence of record. Judge Clifton also found that Petitioners did not know of the fraudulent activity because it was known to no one but Grimstead and his associates. The fraudulent entries were hidden and did not come to light until investigations uncovered them.[29]

Judge Clifton also made favorable findings as to the actions of the Petitioners in uncovering the fraud, and in their attempts to mitigate the damage. Not only did Petitioners Johnson and Dyer form a "Special Committee" to look into the wrongdoing, and fully cooperated with the

---

[24] Initial Decision at 7.

[25] *Id.* at 10-11.

[26] *Id.* at 8.

[27] 636 F.3d 608 (D.C. Cir. 2011)

[28] Initial Decision at 2.

[29] *Id.* at 19 (citing Tr. at 107).

investigation by the United States Department of Justice,[30] they saw to it that the PACA debts were repaid in large part. Suppliers of produce were owed $10,735,186.81, and Petitioners saw to it that they were paid all but $1,928,417.74.[31] Further, Petitioners paid over $2,000,000 to the investigators who were hired to assist the DOJ. Petitioners set aside an additional $2,000,000 to cover the remaining payments to the suppliers, but, through no fault of their own, PNC Bank garnished the funds, even after being told the money was reserved for the purpose of settling the remaining PACA debt.[32] Judge Clifton quoted a portion of testimony as follows:

> In contrast, CIC Partners invested $8.2 million and lost nearly all of it. A settlement with the auditor (see Dyer RX 8) returned some money, but then the $2 million plus paid to Fulbright & Jaworski to assist DOJ used that. Petitioner Drew Johnson testified credibly: "We didn't take a dime. Once the DOJ gave any indication there was a problem, we never took a dime out of this company. All we did is put money in, and that money went to the banks or it went to pay PACA bills. So all the money we put in, none of it went to us." Tr. 116-18.

ID at 9.

Judge Clifton's analysis centers on the "alter ego" provision of the second prong of the statute, at 7 U.S.C. § 499a(b)(9). Using the standard set forth in *Taylor v. USDA*, Judge Clifton found that Adams Produce Company LLC "was the alter ego of its owner Scott Grinstead" based on facts adduced in this proceeding, including findings set forth in the United States Sentencing Memorandum as well as on testimony taken at the hearings.[33] Based on this analysis, founded in the specific facts of this case, Judge Clifton determined that Petitioners Dyer, Johnson, and Rawlins were not "responsibly connected" as that term is defined in 7 U.S.C. §

---

[30] *Id.* at 11.

[31] *Id.* at 7-8 (citing Tr. at 112, 117, and 118).

[32] *Id.* at 8 (citing Tr. at 118).

[33] *Id.* at 2, 3.

499a(b)(9). Judge Clifton's determination is fully supported by the evidence of record in this proceeding.

DECISION AND ORDER

For the foregoing reasons, Judge Clifton's May 19, 2017 Initial Decision and Order in Dockets 14-0166, 14-0168, and 14-0169, finding that Petitioners Dyer, Johnson, and Rawlings were not "responsibly connected" with Adams during the period of August 8, 2011 through May 18, 2012 when Adams violated section 2(4) of the PACA is hereby **AFFIRMED** and **ADOPTED** as the final order in this proceeding for all purposes, including judicial review.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in each of the dockets identified herein above.

___

In re: STEVEN C. FINBERG.
Docket No. 14-0167.
Final Decision and Order.
Filed May 8, 2020.

PACA-APP – Active involvement – Evidence, preponderance of – Fraud – Nominal – Responsibly connected – Statutory presumption, rebuttal of – Two-prong analysis.

Stephen P. McCarron, Esq., and Mary Jean Fassett, Esq., for Petitioner.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order issued by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by Judge Bobbie J. McCartney, Judicial Officer.

ORDER AFFIRMING DECISION AND ORDER ON REMAND IN DOCKET NO. 14-0167

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (hereinafter "PACA" or "Act"), which is conducted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) (hereinafter "Rules" or "Rules of Practice").

The issue to be decided on appeal is whether Chief Administrative Law Judge Channing Strother properly found that Petitioner Steven C. Finberg was "responsibly connected," as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Adams Produce Company, LLC ("Adams"), a company that was determined to have violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) ("PACA").[34]

Based upon careful consideration of the record, as well as applicable statutory, regulatory and adjudicatory precedents, and for the reasons set

[34] *See Adams Produce Company LLC*, Docket No. 13-0284, 2013 WL 6702587 (U.S.D.A. Nov. 25, 2013) (Default Decision and Order), *available at* https://oalj.oha.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%2013-0284.pdf (last visited Aug. 18, 2021).

forth herein below, it is my determination that, based on a *de novo* review after remand, the Chief Judge properly found that Petitioner Steven C. Finberg failed to rebut the presumption that he was "responsibly connected" to Adams as an officer, director, and shareholder of the firm when Adams committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for produce purchases. The evidence of record supports a finding that Petitioner's actions were willful and facilitated the accomplishment of the violations of section 2(4) of the PACA by Adams.[35] By virtue of being "responsibly connected" with Adams during the period when Adams violated section 2(4) of the PACA (7 U.S.C. § 499b), Petitioner is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

Summary of Procedural History and Preliminary Findings

This case has a long procedural history. On June 28, 2013, a disciplinary complaint ("Complaint") was filed against Adams Produce Company LLC ("Adams"), for failing to make full payment promptly in the amount of $10,735,186.81 to fifty-one produce sellers for 9,314 lots of perishable agricultural commodities that the company purchased, received, and accepted during the period of August 8, 2011 through May 18, 2012. As of the filing of the Complaint, $1,928,417.72 remained unpaid.

On November 22, 2013, a Default Decision and Order was entered against Adams, finding that Adams willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly as alleged in the Complaint. The Default Decision and Order became final and effective on January 8, 2014.

[35] Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Haltmier v. Commodity Futures Trading Comm'n*, 554 F.2d 556, 562 (2d Cir. 1977); *Am. Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980). *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Petitioners Jonathan Dyer, Steven C. Finberg, Drew Johnson, and Michael S. Rawlings each filed a petition for review of the determination of the Director of the PACA Division, Specialty Crops Program, Agricultural Marketing Service ("AMS"; "Respondent") determining that each Petitioner was "responsibly connected: with Adams, as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), during the period of time Adams violated section 2 of the PACA. These four "responsibly connected" cases were consolidated for hearing in accordance with 7 C.F.R. § 1.137 of the Rules of Practice by direction of Rulings and Preliminary Instructions filed on September 4, 2014. The hearings in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., before Administrative Law Judge ("ALJ") Jill S. Clifton ("Judge Clifton").

On May 19, 2017 Judge Clifton issued a Decision and Order ("Initial Decision" or "ID") in Dockets 14-0166, 14-0168, and 14-0169, finding that Petitioners Dyer, Johnson, and Rawlings were not "responsibly connected" with Adams during the period that Adams violated section 2(4) of the PACA. Although the four petitions for review of the Director's responsibly connected determinations were consolidated for hearing, Judge Clifton issued a separate decision regarding Steven Finberg's responsibly connected status; on July 25, 2017, Judge Clifton issued her Decision and Order as to Docket 14-0167 (Finberg) only, affirming the determination of the Agency and finding that Petitioner Finberg was "responsibly connected" to Adams, within the meaning of the PACA, pursuant to 7 C.F.R. §499a(b)(9).

On August 21, 2017, Petitioner Finberg timely filed an appeal to the Judicial Officer asserting that he was not "actively involved" in the activities resulting in the violations, that Adams was the alter ego of Mr. Grinstead, and, therefore, that he had successfully rebutted the presumption that he was "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA.

On December 28, 2017, then- Judicial Officer William G. Jenson granted remand (first remand) in order to put to rest any Appointments Clause claim that may arise in this proceeding in light of the Solicitor

General's position in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) ("*Lucia*").[36] On February 1, 2018, the Judicial Officer denied Petitioner's request for reconsideration of the Remand Order in that case.

A year later, on February 7, 2019, current Judicial Officer McCartney issued a "Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168, and 14-0169 and Remand Order Regarding Docket 14-0167" ("Second Remand Order"), which remanded Petitioner Finberg's case to Chief Administrative Law Judge ("Chief Judge") Channing D. Strother, and vacated the July 25, 2017 Decision and Order issued by Judge Clifton. The Judicial Officer ordered that the written record, which had already been made by the parties in this proceeding, shall be reviewed *de novo* to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any new testimony or other evidence.[37]

After a new round of briefing by the parties, and a *de novo* review of the record, Chief Judge Strother issued a Decision on Remand ("DOR") on February 6, 2020, in which he found that Petitioner Finberg

> failed to rebut the presumption, stemming from the fact that he was an officer of Adams, that he was responsibly connected with Adams during the period it committed violations of Section 2(4) of PACA. Petitioner Finberg was actively involved in the activities resulting in the violations of section 2(4) of PACA by Adams and was not merely a nominal officer of Adams.

---

[36] Because the hearing conducted by Judge Clifton in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., and the ensuing Decision and Orders issued on July 25, 2017 predate the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements; Petitioner Finberg's request for a hearing before an ALJ other than Judge Clifton was granted, and the proceedings in Docket No. 14-0167 were remanded for further proceedings to be conducted in accordance with *Lucia*.

[37] Second Remand Order at 7-8.

DOR at 2-3.

On March 12, 2020, Petitioner Finberg timely filed his Appeal Petition, appealing the Decision on Remand of Chief Judge Strother. On appeal, he raised the following two questions:

1. Did the ALJ err in deciding Steve Finberg participated and was actively involved in the activities causing Adams' violations of PACA?

2. Did the ALJ err in deciding he did not have to reach any issues regarding whether Adams was the alter ego of Scott Grinstead in determining whether Steve Finberg was responsibly connected?

DECISION

Pertinent Statutory, Regulatory, and Adjudicatory Analytical Framework

The Department's interpretation of PACA and policy in cases arising under the Act were succinctly set out in the Judicial Officer's decision, *Baltimore Tomato Company, Inc.*[38] and reaffirmed by the Judicial Officer in *The Caito Produce Co.* ("*Caito Produce*"),[39] which sets forth at length the reasons underlying the Department's policy. As noted by the Judicial Officer, the conclusions in *Caito Produce* are largely taken verbatim from prior decisions (including *Melvin Beene Produce Co.*[40]), issued for many years in similar cases (many affirmed on judicial review), each of which updates the citations previously relied upon.[41]

Since that time, this long-settled precedent has been reiterated by succeeding Judicial Officers in more recent cases. In 2012, the Judicial Officer restated the two-prong test found in 1(b)(9) of the PACA as follows:

---

[38] 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

[39] 48 Agric. Dec. 602 (U.S.D.A. 1989).

[40] 41 Agric. Dec. 2422 (U.S.D.A. 1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984).

[41] *See The Caito Produce Co.*, 48 Agric. Dec. 602, 604 (U.S.D.A. 1989).

> [T]he first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners [.] *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488 (1998). Thus, an officer of a violating corporation is presumed to be responsibly connected with that corporation unless the officer can demonstrate by a preponderance of the evidence that he or she (1) was not actively involved in the activities resulting in a PACA violation and (2) was either a nominal officer of the violating corporation or a non-owner of the corporation that was the alter ego of its owners.

Taylor, 71 Agric. Dec. 612, 615 (U.S.D.A. 2012).

And, even more recently in *Allen*,[42] the current Judicial Officer has discussed and adopted the prior findings in *Balt. Tomato* and *Caito*, setting forth at length the reasons underlying the Department's policy. Together, the jurisprudence of these and prior cases has created a substantial body of settled law.

Statutory Definition and Requirements Pertaining to "Responsibly Connected"

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides:

[42] 78 Agric. Dec. 387 (U.S.D.A. 2019).

> The term "responsibly connected" means 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. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act ***and*** 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.

7 U.S.C. § 499a(b)(9) (emphasis added).

The express language of the statute makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

The standard for determining whether a person was actively involved in the activities resulting in a violation under PACA – the first prong of the "responsibly connected" test – 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 and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 611-12 (U.S.D.A. 1999).

The standard for analyzing the "nominal" prong – the second prong of the two-prong "responsibly connected" test – has been explained by the Judicial Officer as follows:

> *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." 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.

Again, the express language of the statute makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)). Failure to do so will result in a finding that he or she is "responsibly connected" within the meaning of the statue and is therefore subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

The *Lucia* Issue

The Chief Judge noted that Judge Clifton issued her decision as to the responsibly connected status of the three other petitioners originally consolidated with Petitioner Finberg (Jonathan Dyer, Docket No. 14-0166; Drew Johnson a/ka/ Drew R. Johnson, Docket No. 14-0168; and Michael S. Rawlings, Docket No. 14-0169), separately from that of Petitioner Finberg. Although Petitioners Dyer, Johnson, and Rawlings, and Respondent AMS filed appeals of Judge Clifton's May 19, 2017 Decision to the Judicial Officer ("JO"), unlike Petitioner Finberg, none of those petitioners challenged Judge Clifton's authority under *Lucia* to hear and decide those three dockets. Therefore, these appeals went before the JO, and were decided in her January 9, 2020 Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, and 14-0169. In that Decision, the JO affirmed Judge Clifton's determinations that petitioners Dyer, Johnson, and Rawlings, although directors of Adams during the period of Adams's PACA violations, had demonstrated by a preponderance of the evidence that they were not responsibly connected with Adams during the period of the Adams PACA violations because they overcame the presumption of responsibly connected by meeting the criteria set forth in PACA, 7 U.S.C. § 499a(b)(9).[43] Judge Clifton, as affirmed by the JO, found that petitioners Dyer, Johnson, and Rawlings had shown by a preponderance of the evidence that they were not actively involved in the activities resulting in Adams' PACA violations; that they did not have ownership interest in Adams; and that Adams was the alter ego of Scott Grinstead.

Discussion

The Two-Prong Analysis

Petitioner's two questions on appeal track the two-prong analysis of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), detailed above. The

[43] *See Dyer*, 79 Agric. Dec. ___, Docket Nos. 14-0166, 14-0168, 14-0169, 2020 WL 8174373 (U.S.D.A. Jan. 9, 2020) (Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169), *available at* https://oalj.oha.usda.gov/sites/default/files/JODO%20-%20Dyer_Redacted.pdf (last visited Aug. 18, 2021).

Chief Judge focused on Prong One as the dispositive issue, although he did also address the facts surrounding Prong Two.

I. Prong-One Analysis

The Chief Judge used the following standard as to the first prong of the "responsibly connected test," to determine whether a person was actively involved in the activities resulting in a violation under PACA:[44]

> 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 and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 611-12 (U.S.D.A. 1999).

The Chief Judge found that Petitioner failed to rebut the statutory presumption that he was "responsibly connected" to Adams Produce Company LLC, as an officer of the firm during the period Adams violated PACA, because he failed to meet the first prong of the statutory test.[45] He explained:

> While the record indicates Mr. Grinstead was the master-mind behind the fraudulent schemes and misused company funds for his own benefit, Petitioner Finberg has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities causing the

[44] Decision on Remand at 20.

[45] *Id.* at 25.

> PACA violations. Indeed, the record demonstrates by a preponderance of the evidence that Petitioner Finberg's activities helped bring about the downfall of Adams, which resulted in Adams' violation of the PACA. A preponderance of the evidence shows that Petitioner Finberg was actively involved in the activities causing the PACA violations.

Decision on Remand at 24.

The Chief Judge analyzed the evidence of record pertaining to the Petitioner's contention that he was not actively involved in the fraudulent activities leading to the PACA violations. Among other things, the Chief Judge highlighted Petitioner's admission that he was present at the luncheon which took place on October 26, 2011 "during which he learned of two buyers for Adams who admitted to inflating pricing on sales to the government, heard Adams' then-Chief Financial Officer ("CFO") Steven Alexander instruct the buyers to stop the fraudulent scheme and to "'bring it in for a soft landing' to avoid detection," and that Finberg stayed silent during the luncheon. Moreover, Finberg failed to report what he learned to the Department of Justice ("DOJ")."[46]

As in *Kaplan*,[47] Petitioner here adduced no evidence except his self-serving testimony to support his contention that he somehow did not commit the acts to which he pled guilty. As noted by Respondent, "[b]ut for Petitioner Finberg's activities, the fraud would have been detected and could not have continued."[48] It is my determination that the evidence of record fully supports the Chief Judge's finding that Petitioner failed to rebut the presumption that he was actively involved in the criminal activities leading to the downfall of Adams; accordingly, Petitioner failed to satisfy Prong One.

II. Prong-Two Analysis

---

[46] *Id.* at 19 (citing Petitioner's Brief at 18) (citing Tr. at 263-64, 267)).

[47] 55 Agric. Dec. 556, 558 (U.S.D.A. 1988).

[48] Respondent's Opposition at 7.

> If a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

Norinsberg, 58 Agric. Dec. 604, 609 (U.S.D.A. 1999).

Here, however, the Chief Judge found Petitioner to be neither a nominal officer nor an owner of Adams,[49] obviating the necessity to proceed to an analysis of the alter ego issue. He explained that since the first prong was not met, he did not have to reach the second prong. However, anticipating an argument by Petitioner Finberg on appeal that because Dyer, Johnson and Rawlings successfully rebutted the presumption of "responsibility connected in the related proceedings, that he too should be found to have done so; however, the evidence of record differs significantly as to Petitioner Finberg's actions. The Chief Judge peremptorily defused that argument.[50] He explained: "Nevertheless, because the record is before me, in the potential aid of proceedings on appeal, I address certain other elements of the statutory test, which do not have to be reached in this Decision as a result of Petitioner Finberg failing the first prong."[51] He then addressed the evidence of record which factually distinguishes Finberg's actions from those of Dyer, Johnson, and Rawlings, finding him not to be similarly situated.[52]

Among other things, the findings as to Dyer, Johnson, and Rawlings reflect that the investment company (CIC Partners) owned by those three Petitioners had no way of knowing about the fraudulent alterations made by Scott Grimstead to the financial statements of the Adams Produce Company which made the company look more profitable than it actually

---

[49] Initial Decision at 24.

[50] Decision on Remand at 25-27, 29-30.

[51] *Id.* at 25.

[52] *Id.* at 30.

was, thereby inducing CIC Partners to invest.[53] The record reflects that the fraudulent activities were hidden prior to CIC's investment, and the 2009 audit they relied on was not reliable, containing alterations of accounts, reclassifying them from payables to receivables.[54]

These findings are in sharp contrast as to Petitioner Finberg. The Chief Judge found that not only did Petitioner Finberg not join the other petitioners (Dyer, Rawlings, and Johnson) in their effort to mitigate the subject violations, Finberg had actual knowledge of fraudulent activities, yet stayed silent and failed to report what he learned to the Department of Justice.[55]

Moreover, the Chief Judge concluded:

> Petitioner Finberg does not claim to have participated in any of these activities to root out wrongdoing and to get the suppliers paid, and the record is bereft of any evidence that he did. Instead, Petitioner by his own testimony continued to draw his salary as COO until the company became insolvent. The evidence shows that he is not similarly situated to the Petitioners the JO found in Dyer to have met the burden of demonstrating that they were not responsibly connected.

Decision on Remand at 30 (citing JO Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168,14-0169 at 8-9).

It is interesting to note that both Respondent and Petitioner seemed to believe that the Chief Judge declined to reach the alter ego issue. As explained above, however, this is not so. The Chief Judge presciently anticipated the Prong Two argument. He correctly observed that a contra determination on appeal as to Prong One would require a further analysis and finding as to Prong Two to avoid an unnecessary remand.

---

[53] Initial Decision at 7.

[54] *Id.* at 10-11.

[55] Decision on Remand at 19.

Accordingly, he provided rationale, fully supported by factual references to the record, to support his finding that, even if Petitioner had met Prong One, he would not have satisfied Prong Two. Therefore, Petitioner must still be held to be "responsibly connected" pursuant to section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

CONCLUSIONS

1. The Secretary of Agriculture has jurisdiction in this matter.

2. The Chief Judge did not err in his *de novo* factual findings, nor in his application of the law in finding Petitioner Steven C. Finberg has failed to rebut the presumption that he was "responsibly connected" to Adams Produce Company, LLC, as an officer, director, and shareholder of the firm when Adams committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for produce purchases.

3. By virtue of being responsibly connected with Adams Produce Company, LLC during the period when Adams violated section 2(4) of the PACA (7 U.S.C. § 499b), Petitioner Steven C. Finberg is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

ORDER

1. The Chief Judge's ruling that Petitioner Steven C. Finberg was "responsibly connected" within the meaning of section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), is fully supported by the record and is hereby AFFIRMED.

2. Petitioner Steven C. Finberg is accordingly subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

RIGHT TO SEEK JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within sixty (60) days after entry of the Order in this Decision and Order.[56]

Copies of this Decision and Order shall be served by the Hearing Clerk upon each party, with courtesy copies provided via email where available.

___

In re: STEVEN C. FINBERG.
Docket No. 14-0167.
Decision and Order on Remand.
Filed February 6, 2020.

PACA-APP.

Stephen P. McCarron, Esq., and Mary Jean Fassett, Esq., for Petitioner.
Charles L. Kendall, Esq., for AMS.
Decision and Order by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER ON REMAND

The principal issue for consideration and resolution in this Decision is whether Petitioner Steven C. Finberg is "responsibly connected" to Adams Produce Company, LLC ("Adams"), a company that was determined to have violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq*.) ("PACA").[57] This matter was initiated by a Petition for Review filed by Petitioner Finberg on August 13, 2014, pursuant to 7 C.F.R. §§ 133(b)(2) and 1.135(b), requesting review of the PACA Division Director's determination that he was responsibly connected to Adams during the period Adams violated PACA by failing to pay for produce.

Based on a *de novo* review of the record up to, but excluding, the

---

[56] 28 U.S.C. § 2344.

[57] *See Adams Produce Co.*, Docket No. 13-0284, 2013 WL 6702587 (U.S.D.A. Nov. 25, 2013) (Default Decision and Order), *available at* https://oalj.oha.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%2013-0284.pdf (last visited Nov. 8, 2019).

vacated July 25, 2017 Decision and Order, I find Petitioner Finberg failed to rebut the presumption, stemming from the fact that he was an officer of Adams, that he was responsibly connected with Adams during the period it committed violations of Section 2(4) of PACA.[58] Petitioner Finberg was actively involved in the activities resulting in the violations of section 2(4) of PACA[59] by Adams and was not merely a nominal officer of Adams. Therefore, the determination by the Director of the PACA Division that Petitioner Finberg was responsibly connected with Adams during the period of its violations of PACA is AFFIRMED as further set out herein.

BACKGROUND

A two-part, in-person hearing was held on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C. The instant proceeding was consolidated with and heard together at hearing by Administrative Law Judge Jill S. Clifton ("Judge Clifton") with three other dockets involving petitioners Respondent AMS determined were responsibly connected with Adams during the period of PACA violations: Jonathan Dyer, Docket No. 14-0166; Drew Johnson a/ka/ Drew R. Johnson, Docket No. 14-0168; and Michael S. Rawlings, Docket No. 14-0169. The record through the end of the hearings is the same in each of the four dockets. However, Judge Clifton issued the July 25, 2017 Decision and Order, now vacated, in the current docket concerning Petitioner Finberg's responsibly connected status separate from her May 19, 2017 Decision and Order as to the responsibly connected status of the other three petitioners.

On August 21, 2017, Petitioner Finberg filed an Appeal Petition with the Judicial Officer ("JO") and on August 23, 2017 Respondent AMS filed a "Respondent's Appeal Petition of the Decision and Order as to Steven C. Finberg (PACA Docket No. 14-0167)"[60] with the JO. Petitioner Finberg

---

[58] 7 U.S.C. § 499b(4).

[59] *Id.*

[60] Respondent AMS's Appeal Petition was limited to one conclusion from Judge Clifton's July 25, 2017 Decision and Order, the conclusion that Petitioner Finberg was "never an owner" of Adams. *See* Respondent's Appeal Petition at 1 (citing initial Decision and Order at 7). Respondent AMS requested that the Judicial

filed "Petitioner's Opposition to Respondent's Appeal Petition" on August 29, 2017, and on September 8, 2017, Respondent AMS filed "Respondent's Opposition to Appeal Petition of Steven C. Finberg (PACA Docket No. 14-0167)." On September 13, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

IMPACT OF *LUCIA* ON THE INSTANT CASE

On November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) ("*Lucia*"), pending in the United States Supreme Court at that time, in which the Solicitor General took the position that administrative law judges ("ALJs") of the Securities and Exchange Commission are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2.

On January 10, 2018, then-USDA JO, William G. Jenson,[61] acknowledged the Appointments Clause issue raised in *Lucia*, of whether ALJs are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and, "[t]o put to rest any Appointments Clause claim that may arise in this proceeding,"[62] remanded this proceeding to Judge Clifton, directing her, *id.*, to:

1) issue an order providing AMS and Mr. Finberg an opportunity to submit new evidence; (2) consider the record, including any newly submitted evidence and all her previous substantive and procedural actions; (3) determine whether to ratify or revise in any respect all her prior actions; and (4) issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

After accepting a response from each party to the Remand Order, Judge Clifton issued a "Notice of Completion of Judge's Tasks on Remand" on November 30, 2018, stating at pg. 3, para. 7, that "Petitioner Steven C.

Officer find that Petitioner Finberg was an owner of Adams during the period Adams violated PACA. *Id.*

[61] Judicial Officer William G. Jenson retired from federal service effective August 31, 2018.

[62] Jan. 10, 2018 Judicial Officer Remand at 2.

Finberg's respectful request for a new hearing before a properly appointed official ends my involvement; my tasks on Remand are completed; and Docket Nos. **14-0166, 14-0167, 14-0168 & 14-0169** are ready for return to the Judicial Officer."

The Supreme Court issued its decision in *Lucia* on June 21, 2018, holding that Administrative Law Judges ("ALJs") are Officers of the United States within the meaning of Article II of the United States Constitution and are subject to the Appointments Clause.[63] The Court also held that, where a case was heard and decided by an ALJ who was not constitutionally appointed and where the issue of improper appointment is timely raised, appropriate relief is a new hearing before a different, properly appointed official, and a new disposition. [64]

In a ceremony on July 24, 2017, almost a year before the Supreme Court's June 21, 2018 decision in *Lucia*, the Secretary of the United States Department of Agriculture, Sonny Perdue, personally ratified the prior appointments of USDA's ALJs and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that action.

On February 7, 2019, Judicial Officer Bobbie J. McCartney issued a "Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168, and 14-0169 and Remand Order Regarding Docket 14-0167" ("Second Remand Order"). In this Second Remand Order at 5-6, the Judicial Officer finds:

> in light of the fact that Petitioner Finberg has requested that a new hearing be conducted in accordance with *Lucia*, while the other three petitioners have declined to request such relief, the dockets have become procedurally distinguishable. Accordingly, Docket Nos. **14-0166, 14-0168 & 14-0169** pertaining to Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings will remain consolidated and will remain in appeal status before the Judicial Officer, while Docket No. **14-0167** pertaining to

[63] *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

[64] *See id.* (citing *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)).

> Petitioner Steven C. Finberg will be Remanded for further proceedings to be conducted in accordance with *Lucia*.

Docket No. 14-0167 pertaining to Petitioner Finberg was therein remanded to the undersigned, Chief ALJ Channing D. Strother, and the July 25, 2017 Decision and Order issued by Judge Clifton was vacated.[65] I then issued an Order Setting Filing Deadlines for Briefs on Remand. On May 1, 2019, Petitioner Finberg filed "Petitioner's Brief on Remand" and Respondent AMS filed "Respondent's Response to Order Setting Filing Deadlines for Briefs on Remand" ("Respondent's Brief on Remand").

***The hearing process on remand under* Lucia**

The USDA Judicial Officer McCartney held in her February 19, 2019 "Order Remanding to the Chief Judge for Further Proceedings" in

---

[65] As previously noted, Judge Clifton issued her decision as to the responsibly connected status of the three other petitioners originally consolidated with Petitioner Finberg (Jonathan Dyer, Docket No. 14-0166; Drew Johnson a/ka/ Drew R. Johnson, Docket No. 14-0168; and Michael S. Rawlings, Docket No. 14-0169), separately from that of Petitioner Finberg. Although Petitioners Dyer, Johnson, and Rawlings, and Respondent AMS filed appeals of Judge Clifton's May 19, 2017 Decision to the Judicial Officer ("JO"), unlike Petitioner Finberg, none of those petitioners challenged Judge Clifton's authority under *Lucia* to hear and decide those three dockets. Therefore, these appeals went before the JO, and were decided in her January 9, 2020 Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, and 14-0169. In that Decision, the JO affirmed Judge Clifton's determinations that petitioners Dyer, Johnson, and Rawlings, although directors of Adams during the period of Adams' PACA violations, had demonstrated by a preponderance of the evidence that they were not responsibly connected with Adams during the period of the Adams PACA violations because they overcame the presumption of responsibly connected by meeting the criteria set forth in PACA, 7 U.S.C. § 499a(b)(9). *See Dyer*, Docket Nos. 14-0166, 14-0168, 14-0169, 2020 WL 8174373, at *4 (U.S.D.A. Jan. 9, 2020) (Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169), *available at* https://oalj.oha.usda.gov/sites/default/files/JODO%20-%20Dyer_Redacted.pdf (last visited Feb. 4, 2020). Judge Clifton, as affirmed by the JO, found that petitioners Dyer, Johnson, and Rawlings had shown by a preponderance of the evidence that they were not actively involved in the activities resulting in Adams' PACA violations; that they did not have ownership interest in Adams; and that Adams was the alter ego of Scott Grinstead.

Trimble, Docket No. 15-0097, that as a result of the Secretary's actions to ratify the appointments of USDA ALJs, as of July 24, 2017, USDA ALJs were duly appointed by a "head of the department" as required by Article II and the Supreme Court's ruling in *Lucia*.[66] Furthermore, Secretary Perdue appointed me, Channing D. Strother, USDA Chief ALJ on October 17, 2018.

As mentioned, under *Lucia*, where a timely challenge to the "validity of the appointment of an officer who adjudicates his case" is made, the remedy for a respondent is the opportunity to seek a new hearing and a new decision by a new presiding judge.[67] Appointments Clause challenges may also be waived.[68]

As previously noted, in the instant case, a hearing on the record was held on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., and a Decision and Order pertaining to Petitioner Finberg was entered on July 25, 2017. The Hearing was presided over, and the initial Decision and Order entered by, Judge Clifton prior to the Secretary's July 24, 2017 ratification of USDA ALJ appointments. Therefore, a remedy of a new hearing and new disposition by a new presiding ALJ is warranted in this case under *Lucia*.

The USDA Judicial Officer provided guidance on the procedure for

---

[66] *Trimble*, 78 Agric. Dec. 145, 146-47 (U.S.D.A. 2019) (Order Remanding to Chief Judge for Further Proceedings) (affirming USDA ALJ authority as of July 24, 2017), *also available at* https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20OJO%20Remand_Redacted_0.pdf (last visited Aug. 12, 2019).

[67] *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. 182-83 (internal quotations omitted)).

[68] *See* Second Remand Order (where three respondents waived the raising of Appointments Clause challenges and a new hearing, while the instant respondent raised such challenge and was granted a remand for new hearing in accordance with *Lucia*), *available at* https://oalj.oha.usda.gov/sites/default/files/14-0167%20-%20JO%20PROCEDURAL%20STATUS_Redacted.pdf (last visited Aug. 12, 2019). *See also, e.g.*, *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009).

new hearing granted under *Lucia* in this case as follows:[69]

> The parties are advised that the newly appointed ALJ shall exercise the full powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued on July 25, 2017 by Judge Clifton in Docket No. 14-0167 is hereby **VACATED** and the written record which has already been made by the parties in this proceeding shall be reviewed ***de novo*** to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any ***new*** testimony or other evidence.

Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any ***new*** evidence not previously submitted in the prior proceeding.

Thus, in the April 1, 2019 Order Setting Filing Deadlines for Briefs on Remand ("April 1, 2019 Order"), at 4-5, I provided the parties with the opportunity to file briefs raising any specific challenges to substantive or procedural actions taken by ALJ Clifton up to but excluding the issuance of the July 25, 2017 initial Decision and Order, which, as noted, was previously vacated by the Judicial Officer; and any specific challenges to the admission, exclusions, or weighing of evidence prior to, during, or after the Hearing held on March 22 and August 23, 2016; and/or to show good cause why the written record should be supplemented with any new testimony or other evidence not previously submitted in this proceeding.

---

[69] *Id.* at 7-8.

The parties were invited to file briefs

> raising 1) any specific challenges to substantive or procedural actions taken by Administrative Law Judge Clifton up to and excluding the issuance of the July 25, 2017 initial Decision and Order; and 2) any specific challenges to the admission, exclusions, or weighing of evidence prior to, during, or after the Hearing held on March 22 and August 23, 2016; and/or **including a showing of good cause** why the written record should be supplemented with any *new* testimony or other evidence not previously submitted in this proceeding.

April 2, 2019 Order at 5 (emphasis added).

Party Briefs on Remand

Petitioner Finberg filed his Brief on Remand on May 1, 2019, which generally challenged Judge Clifton's vacated July 25, 2017 Decision and Order. In large part, Petitioner Finberg's Brief on Remand includes background and contentions almost verbatim to those contained in Petitioner Finberg's post-hearing Brief (filed April 10, 2017) ("Petitioner's Brief"). In his Brief on Remand at 2, Petitioner Finberg states "that a proper weighing of the evidence results in a finding that he [Finberg] was not actively involved in the activities that resulted in Adams' PACA violations, which are limited to a failure to pay produce suppliers." Petitioner Finberg states that a *de novo* review of the evidence from the consolidated hearing is needed but does not request to enter any new evidence and does not specifically challenge the admission or exclusion of any evidence.[70]

Respondent AMS filed its Brief on Remand on May 1, 2019, stating that Respondent has no challenges to substantive or procedural actions taken by Judge Clifton and affirming that the record is complete and ready for a decision based upon it. Respondent AMS filed a Reply to Petitioner's

[70] Petitioner Finberg did not submit a reply brief to Respondent's Brief on Remand.

Brief on Remand on May 24, 2019, pointing out that the April 1, 2019 Order directed the parties to provide challenges to any procedural actions taken up to and excluding the issuance of the July 25, 2019 Decision and Order, and contending, at 4, that Petitioner's Brief on Remand "spends more than 24 pages of a 25-page Brief challenging the July 25, 2017 initial Decision and Order itself," is "unresponsive to CALJ Strother's April 1, 2019 Order," and is an "attempt to color the de novo review of 'the written record which has already been made by the parties in this proceeding.'" As the JO determined in *Trimble*, the Supreme Court in *Lucia* did not specify the matter in which a "new hearing" must be conducted to remedy an Appointments Clause issue.[71] Under the Judicial Officer precedent in *Trimble* and as ordered in her Second Remand Order, a hearing on the record is sufficient in the instant case and will be completed as a *de novo* review of the record up to but not including the vacated July 25, 2017 Decision and Order.

Although the parties were specifically given the opportunity to challenge on brief any of Judge Clifton's rulings (excluding her vacated Decision and Order) and instructed that failure to raise any such challenge would be a waiver of such in the April 1, 2019 Order Setting Filing Deadlines for Briefs on Remand, aside from Petitioner's request for new hearing under *Lucia*, neither Petitioner Finberg nor Respondent AMS challenged any of Judge Clifton's rulings (again, excluding her vacated Decision and Order). As, neither party requested to submit new briefs or new evidence to be considered as a part of my *de novo* review of the record, my review consisted only of the briefs and evidence already part of the record, and they are the basis for this Decision. No weight has been given to the July 25, 2017 Decision and Order nor has any factual finding or legal conclusion determined by Judge Clifton during the instant proceeding been treated as presumptively correct. Indeed, the vacated July 25, 2017 Decision and Order has not been referred to for any purpose in the preparation of this Decision.

SUMMARY OF RECORD

As stated, no factual finding nor legal conclusions determined by Judge Clifton during the instant proceeding has been treated as presumptively

---

[71] *Trimble*, 78 Agric. Dec. at 147.

correct. Orders and rulings of an administrative nature[72] are hereby deemed non-substantive for the purposes of my *de novo* review of the Record. The Record consists of the following substantive pleadings, filings, and orders: [73]

- August 13, 2014 Petitioner's Petition for Review
- August 26, 2014 Respondent's Agency Record
- October 31, 2014 Respondent's Statement
- October 31, 2014 Statement of Petitioners RE Procedural Issues
- January 20, 2015 Respondent's Proposed Witness List and Proposed Exhibits
- June 11, 2015 [Jointly Filed] Updated Stipulation as to Proceedings
- March 22, 2016 Hearing Transcript (Dallas, Texas)
- April 11, 2016 Petitioner's Exhibits
- August 23, 2016 Hearing Transcript (Washington, D.C.)
- January 13, 2017 Brief of Petitioners

---

[72] The following orders and rulings issued by Judge Clifton are determined by me to be non-substantive for *de novo* review of the Record: September 4, 2014 "Rulings & Preliminary Instructions" (granting Respondent AMS's request to consolidate four "responsibly connected" cases for hearing and for extension of time; and updating the case caption); November 18, 2014 Rulings re: Parties' Statements; November 24, 2014 Hearing Notice; November 24, 2014 Rulings Modification; February 3, 2015 Rescheduled Hearing Notice; February 3, 2015 Disclosure Deadline Extended; February 4, 2015 Hearing Notice; March 11, 2015 Additional Day of Hearing [Notice]; June 19, 2015 Hearing Location Designation; June 23, 2015 Hearing Cancellation; December 21, 2015 Notice of Hearing; February 1, 2016 Designation of Hearing Location; February 10, 2019 "Sept 1 Hearing Notice"; October 24, 2016 Post-Hearing Deadlines; November 22, 2016 Order-First Amended Post-Hearing Deadlines; and February 9, 2017 Second Amended Post-Hearing Deadlines.

[73] The following filing has been deemed non-substantive for purposes of *de novo* review of the Record: Respondent AMS's August 26, 2014 Motion to Consolidate and Request for Leave to File Certified Copies of Records Out of Time.

- March 10, 2017 Respondent's Opposition to Brief of Petitioners
- April 10, 2017 Reply Brief of Petitioners
- May 18, 2017 Transcript Corrections

The following exhibits were admitted to the record:

- **As part of August 26, 2014 Agency Record**:

Finberg RX 1 Adams Produce Company LLC PACA License Record

Finberg RX 2 Initial Responsibly Connected Notice

Finberg RX 3 Freedom of Information Act Request

Finberg RX 4 Reply to Initial Responsibly Connected Notice

Finberg RX 5 Adams Produce Company LLC Limited Liability Company Agreement

Finberg RX 6 API Holdings LLC v. Frost Cummings Tidwell Group LLC

Finberg RX 7 Adams Produce Company LLC v. Frost Cummings Tidwell Group LLC

Finberg RX 8 Interview Memo

Finberg RX 9 The Birmingham News Article

Finberg RX 10 The Packer News Article

- **During the March 22, 2016 Hearing**:[74]

PX 1 U.S. Attorney Information, filed Jan 29, 2013, charging Scott Grinstead with Wire Fraud, Misprision of Felony and Failure to File Tax Return

PX 2 Plea Agreement between Scott Grinstead and U.S.A.

PX 3 U.S.A. Sentencing Memorandum re Scott Grinstead

[74] An exhibits table of contents is included in Tr. at 4-6.

PX 4 Criminal Docket for Scott Grinstead criminal case

PX 5 Scott Grinstead September 14, 2009 email to Tommy Sundy re "Strategy to increase margin" for CIC deal

PX 6 Scott Grinstead November 2, 2009 email to Steve Alexander to create a "safety net" re CIC deal

PX 7 CIC Term Sheet for Adams deal dated February 18, 2010

PX 8 Frost/Cummings (auditors) engagement letter to audit financial statements of Adams Produce Co. dated March 1, 2010

PX 9 March 11-16, 2010 emails between Steve Alexander and Scott Grinstead to fraudulently increase income for CIC purchase

PX 10 March 11-12, 2010 emails between Grinstead and Alexander re increasing net income

PX 11 David Barker of Frost/Cummings (auditor) April 10, 2010 email to Alexander with questions on income entries

PX 12 July 29, 2010, emails between Steve Alexander, Scott Grinstead and David Barker (Frost Cummings auditor) re missing documentation for fraudulent Kontos A/R

PX 13 July-August 2010 emails between David Barker and Scott Grinstead re proof of an A/R from Kontos

PX 14 Steve Alexander August 11, 2010, emails to Scott Grinstead re fraudulent Kontos A/R

PX 15 Letter from employee Mike Alise to Alexander dated August 17, 2010, to falsely reclassify salary as payment on a note to increase the income portion of the income statement for the CIC deal with back up

PX 16 Amendment to Mike Alise contract to falsely reclassify salary for 2009

PX 17 November 3, 2010 letter from attorney for Mike Alise about reclassified 2009 income

PX 18 November 30, 2010 email to cover-up false reclassification of Mike Alise salary

PX 19 August 2010 letter from Tommy Sundy to Alexander agreeing

to falsely reclassify salary as payment on the note to increase income statement for CIC deal, with backup documentation

PX 20 April 4, 2010 email from Tommy Sundy re changes to his 2009 W-2

PX 21 March 18, 2011 forged Kontos letter

PX 22 March 20, 2011 forged Kontos Letter

PX 23 Deposition of John Kontos on December 11, 2013 confirming forgery of his signature

PX 24 Audit Procedure Letter from Frost/Cummings - March 1, 2010

PX 25 Adams letter to Frost/Cummings, dated September 24, 2010, confirming no fraud or misrepresentation, signed by Grinstead and Alexander

PX 26 Formal resignation of Michael Rawlings as Director/Manager of Adams Produce

- **During the August 23, 2016 Hearing:**[75]

Finberg RX 11 Finberg Plea Agreement

Finberg RX 12 Finberg Indictment

JURISDICTION AND BURDEN OF PROOF

The purpose of PACA was stated in *Zwick v. Freeman*[76] as follows: The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2

[75] An exhibits table of contents is included in Tr. at 173; pages of the Aug. 23, 2016 Tr. start at page 169, continuing from the Mar. 22, 2016 Tr.

[76] 373 F.2d 110, 116 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967).

(1955).

Congress provided for the enforcement of PACA by the Secretary of Agriculture, USDA.[77] The JO includes extensive discussion of PACA and how PACA is applied by USDA to accomplish its statutory goals in *Baltimore Tomato Company, Inc.*,[78] reaffirmed in *The Caito Produce Co.*,[79] and most recently in *Allen*[80] and *Dyer*.[81] As quoted in *Allen*: "The goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act."[82]

In a PACA "responsibly connected" proceeding, where a Petitioner is an "officer, director, or holder of more than 10 per centum" of a licensee found to have violated PACA, the Petitioner bears the burden of proof as to the statutory criteria to escape responsibly connected status.[83] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[84] such as this one, is the preponderance of

---

[77] 7 U.S.C. § 499m.

[78] *Baltimore Tomato Co.*, 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

[79] *The Caito Produce Co.*, 48 Agric. Dec. 602, 626 (U.S.D.A. 1989).

[80] *Allen*, 78 Agric. Dec. 387, 391-96 (U.S.D.A. 2019), *also available at* https://oalj.oha.usda.gov/sites/default/files/JODO%20-%2015-0085_Redacted.pdf (last visited Jan. 13, 2020).

[81] *Dyer*, PACA-APP Docket Nos. 14-0166, 14-0168, 14-0169, 2020 WL 8174373, at *2-3 (U.S.D.A. Jan. 9, 2020) (Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169), *also available at* https://oalj.oha.usda.gov/sites/default/files/JODO%20-%20Dyer_Redacted.pdf (last visited Feb. 4, 2020).

[82] *Allen*, 2019 WL 3928843, at *4 (citing *Caito Produce*, 48 Agric. Dec. at 619-20) (internal citations and quotations omitted).

[83] *See* 7 U.S.C. § 499a(9). *See also Perfectly Fresh Farms, Inc*., 68 Agric. Dec. 507, 519 (U.S.D.A. 2009) ("petitioner carries the burden of proof in a responsibly connected proceeding"); *Rodgers*., 56 Agric. Dec. 1919, 1949 (U.S.D.A. 1997) ("Petitioner bears the burden of proof in this proceeding to avoid responsibly connected status.").

[84] 5 U.S.C. §§ 551 *et seq*.

the evidence.[85]

RELEVANT STATUTORY AND REGULATORY AUTHORITY

PACA Section 1(b)(9)[86] sets out the statutory test of whether a person is "responsibly connected" to an entity that has violated PACA:

> The term "responsibly connected" means 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. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and 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.

Under PACA Section 4(b)[87] the Secretary may refuse a PACA license to individuals determined to be responsibly connected to an entity that has violated PACA, and PACA Section 8(b)[88] sets out employment limitations applied to individuals determined to be responsibly connected to an entity that has violated PACA:

> UNLAWFUL EMPLOYMENT OF CERTAIN PERSONS; BOND ASSURING COMPLIANCE; APPROVAL OF EMPLOYMENT WITHOUT BOND; CHANGE IN AMOUNT OF BOND; PAYMENT OF INCREASED AMOUNT; PENALTIES. Except with the

---

[85] *See Herman & Maclean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

[86] 7 U.S.C. § 499a(b)(9).

[87] 7 U.S.C. § 499d(b).

[88] 7 U.S.C. § 499h(b).

> approval of the Secretary, no licensee shall employ 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; (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 7(c). The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 2, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act and that the licensee will pay all reparation awards, subject to its right of appeal under section 7(c), which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

DISCUSSION

In a PACA "responsibly connected" proceeding, where a Petitioner is an "officer, director, or holder of more than 10 per centum" of a licensee found to have violated PACA, to escape responsibly connected status, the Petitioner bears the burden of "demonstrat[ing] by a preponderance of the evidence" both that: (1) Petitioner was not *actively involved* in the activities causing the violation, and (2)(a) Petitioner was only *nominally an officer* (or director, ten-percent or more shareholder, or partner) of the violating licensee *or* (b) was not an owner of a violating licensee or entity

subject to license which was the alter ego of its owners.[89]

If a person seeking to prove themselves not "responsibly connected" to a licensee that has violated PACA fails to demonstrate by a preponderance of the evidence both prongs of the PACA Section 1(b)(9)[90] responsibly connected test, he or she will be found to be "responsibly connected" within the meaning of the statute; and will be subject to the licensing and employment restrictions in Sections 4(b) and 8(b) of the PACA.[91]

Here, it has been resolved through final administrative action not subject to appeal and there is otherwise no dispute that during the period of August 8, 2011 through May 18, 2012, on or about the dates and the transactions set forth in Appendix A of the Complaint in *Adams Produce Company LLC*, USDA Docket No. 13-0284, Adams "willfully, repeatedly, and flagrantly" violated section 2(4) of the PACA[92] by failing to make full payment promptly to fifty-one (51) sellers of the agreed purchase prices, or balances thereof, for 9,314 lots of perishable agricultural commodities which Adams purchased, received, and accepted in the course of interstate commerce, in the total amount of $10,735,186.81.[93] There is also no dispute that Petitioner Finberg was the Chief Operations Officer of Adams during the period of Adams' violations of the PACA. Because Petitioner Finberg was an officer of Adams during that period, he meets the first sentence of the definition of the term *responsibly connected* in PACA Section 1(b)(9)[94] and has the burden to demonstrate by a preponderance of the evidence that he meets the statutory criteria to be determined not responsibly connected with Adams during the violations period.

---

[89] *See* 7 U.S.C. § 499a(b)(9).

[90] 7 U.S.C. § 499a(b)(9).

[91] 7 U.S.C. §§ 499d(b), 499h(b).

[92] 7 U.S.C. § 499b(4).

[93] *See Adams Produce Co.*, Docket No. 13-0284, 2013 WL 6702587, at *1 (U.S.D.A. Nov. 25, 2013) (Default Decision and Order), *available at* https://oalj.oha.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%2013-0284.pdf (last visited Nov. 8, 2019).

[94] 7 U.S.C. § 499a(b)(9).

I. Responsibly Connected Test

In general, Petitioner Finberg contends that he was not responsibly connected to Adams during the time of Adams' PACA violations because he was "not actively involved in the activities resulting in the violation; and he was not an owner of Adams; and Scott Grinstead was an owner of Adams Produce and the alter ego of Adams Produce."[95] Petitioner Finberg testifies he started working at Adams in 2008 as an "executive vice president to work on special projects" and his duties were in sales and marketing for the first two years.[96] He testifies that in 2009 his role started to involve operations and personnel, working with general managers[97] and he was responsible for overseeing and coordinating "logistics between the company's chain customers and its eight (8) distribution centers," but he was never involved with invoicing customers "on any level."[98]

Petitioner Finberg explains that CIC, an investment company,[99] signed a Letter of Intent with the former owners of Adams as well as Mr. Grinstead to "invest $7.8 million in Adams in exchange for an ownership interest in a new company to be formed."[100] In July 2010 Adams became a limited liability corporation ("LLC") in preparation for the CIC investment, and on September 29, 2010, a Second Amended and Restated LLC agreement was executed, solidifying the CIC investment and new ownership of the company by "API Holdings ('APIH') (the vehicle that held the investment from CIC [TR 36:1-5]), Grinstead and Associates, LLC, and Grinstead Corp."[101] Petitioner Finberg avers that, although Scott Grinstead, then-Chief Executive Officer ("CEO") of Adams, changed Petitioner Finberg's title from Executive Vice President to Chief Operations Officer ("COO") in 2009, his "role and compensation did not

---

[95] Petitioner's Brief at 13. *See also id.* at 2 (citing *Norinsberg*, 58 Agric. Dec. 604 (U.S.D.A. 1999); *Quinn v. Butz*, 510 F.2d 743, 757-758 (D.C. Cir. 1975)).

[96] *Id.* at 22 (citing Tr. 223:5-13, 223:15-16).

[97] Tr. 227:7-10.

[98] Petitioner's Brief at 22 (citing Tr. 228:22-29, 260-61).

[99] I note that CIC is the name of the company and is not an acronym.

[100] *Id.* at 3-4.

[101] *Id.*

change during 2007-2012" aside from Finberg being named "Employee Member" and being required to attend quarterly board meetings after the CIC investment.[102]

Petitioner Finberg states that Mr. Grinstead was hired in 2003 as the CEO of Adams and by 2011 "destroyed the company by engaging in extensive fraudulent activity to enrich himself."[103] Petitioner Finberg avers that, although he was one of two designated "Employee Members," he was "never granted any units or ownership interest of any type, or any voting rights in Adams LLC" as 100% of the units were owned by CIC (55% ownership) and Scott Grinstead entities (45% ownership).[104] Petitioner Finberg contends that from about September 29, 2010 until about October 2011, he attended four to five board meetings and was unaware of Adams having any financial problems but that "Grinstead's number of fraudulent activities began to come to light in October 2011."[105]

Adams was notified that Mr. Grinstead was charged with defrauding the Department of Defense in October 2011, to which he pled guilty in January 2013.[106] Petitioner Finberg also recounts that Mr. Grinstead defrauded Adams, including the directors and officers, as well as the majority unit holder CIC by "misrepresenting numerous company financial records and forging documents prior to the closing of the deal with CIC to increase the income of the company prior to CIC's investment" with the goal of enriching himself;[107] abused the corporate form, using company funds to pay for personal expenditures;[108] and was ultimately criminally charged by the Northern District of Alabama on multiple counts such as wire fraud, misprision of felony, and failure to file

---

[102] *Id.* at 23 (citing Tr. 237:15-25; Tr. 229:21-230:15).

[103] *Id*. at 2 (citing *Dyer* RX-11, p. 2, ¶ 5).

[104] *Id.* at 4 (citing *Finberg* RX-4, p. 62, 89, 91). *See also id.* at 23 (citing *Finberg* RX-4 at 61, 89, 91; Tr. 274:20-276:13).

[105] *Id.* at 5 (citing Tr. 39:1-4, 7-24).

[106] *See Id*. at 5 (citing PX-3, U.S. Sentencing Memo, 7-8; PX-1, Information, 3; PX-2, Plea Agreement, 5-6; Tr. 38:18-39:24).

[107] *Id.* at 6-8. *See also* PX-9, 11-19, 21-23, 25; Tr. 42:2-44:18, 112:14-17.

[108] *Id.* at 8-9 (citing PX-1-3).

tax returns.[109]

Petitioner Finberg avers that he "only became aware of Scott Grinstead's fraudulent activity in March 2012, when Grinstead was suspended" and that Finberg never participated in any of Grinstead's criminal activity.[110]

However, Petitioner Finberg admits that he was present at a luncheon on October 26, 2011 during which he learned of two buyers for Adams who admitted to inflating pricing on sales to the government, heard Adams' then-Chief Financial Officer ("CFO") Steven Alexander instruct the buyers to stop the fraudulent scheme and to "'bring it in for a soft landing' to avoid detection," and that Finberg stayed silent during the luncheon and also failed to report what he learned to the Department of Justice ("DOJ").[111] Petitioner Finberg contends that his silence and failure to inform the DOJ of his knowledge of the fraudulent scheme "does not constitute 'active involvement' " and that there is no evidence that Finberg was aware of Grinstead's fraudulent activity until March 2012, thus he could not have been "responsibly connected" to Adams.[112]

Generally, Respondent AMS contends that even "[a]ccepting as true Petitioners' assertion that Grinstead's fraudulent activities led to the violations by Adams, Petitioner Finberg was actively involved in the activities that resulted in the violations of the PACA" because "[b]ut for Petitioner Finberg's participation in the fraudulent scheme, and his overt actions in furtherance of the conspiracy with Grinstead and others, the fraudulent activities could not have continued after July of 2011." Respondent AMS also argues that Petitioner Finberg did not contend that he was an officer in name only and, even if he had, he "was a part of the executive team of Adams, and participated fully and actively in the

---

[109] *Id.* at 9-10 (citing PX 1, 3).

[110] *Id.* at 23 (citing 253:18-23, 261:19- 23, 263:5-23).

[111] *Id.* (citing Tr. 263-264, 267).

[112] *Id.* at 24 (citing Tr. 253:18-23, 261:19-23; 7 U.S.C. 499a(b)(9); *Quinn v. Butz*, 510 F.2d at 757-758; *Norinsberg*, 58 Agric. Dec. 604 (U.S.D.A. 1999); *Maldonado v. Dep't of Agric*., 154 F.3d 1086, 1087 (9th Cir. 1998).

company's management" so "was not an officer in name only." [113] Respondent AMS contends, therefore, that Petitioner Finberg failed to rebut by a preponderance of the evidence the statutory presumption that he was "responsibly connected" to Adams during the period that Adams violated the PACA.[114]

a. First Prong: Petitioner Finberg was actively involved in the activities causing the violation

As to the first prong of the "responsibly connected test," the standard for determining whether a person was actively involved in the activities resulting in a violation under PACA is:

> 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 and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. 604, 611-12 (U.S.D.A. 1999) (emphasis added).

Petitioner Finberg contends that he was not involved "at all, much less actively involved" in Scott Grinstead's fraudulent activities that "led to the non-payment of produce vendors by Adams in violation of 7 U.S.C.

---

[113] *Id.* at 27.

[114] *Id.* at 26-31.

499b(4)."[115] In particular, Petitioner Finberg contends that after he was made aware of the illegal upcharging of produce to the Department of Defense, he reported such to Grinstead unaware that Grinstead knew of and had approved the fraudulent scheme.[116] Thus, Petitioner Finberg argues, "there is no evidence that Finberg was 'actively involved' in the violations, and Finberg did not participate in any activities resulting in a violation of PACA."[117]

Respondent AMS contends that Petitioner Finberg did participate and that, "due to Petitioner Finberg's participation," the fraudulent activities continued "and resulted in the PACA violations by Adams from August 8, 2011 through May 18, 2012."[118] Respondent AMS points out that Petitioner Finberg was the Chief Operations Officer of Adams; was an "Employee Member" of Adams and therefore directly or indirectly held units of Adams; that he held interest in the company of "slightly more than 4 percent[;]" and that Adams held a "key man" insurance policy in the amount of $3,000,000 on the life of Petitioner Finberg.[119]

Further, as evidence of Petitioner Finberg's participation in the fraudulent scheme that resulted in Adams' violation of the PACA, Respondent AMS provides an indictment, *Finberg* RX-12, filed against Petitioner Finberg in the United States District Court for the Northern District of Alabama on May 29, 2014, charging that Finberg "knowingly and willfully conspired, combined, and agreed with Scott David Grinstead, John Steven Alexander, David Andrew Kirkland, Michael John O'Brien,

---

[115] Petitioner's Brief at 13 (citing *Norinsberg*, 58 Agric. Dec. 604, 610 (U.S.D.A. 1999); *Maldonado v. Dep't of Agric*., 154 F.3d 1086, 1087 (9th Cir. 1998).

[116] Petitioner's Reply Brief at 6 (citing Tr. 262-66).

[117] *Id.* (citing *Norinsberg*, 58 Agric. Dec. at 610-611).

I also note that Petitioner Finberg testified that he first became aware of problems in the company during the holiday season of 2011 because management was "getting more calls that before to the general managers or to the home office asking about payment." Tr. 238:7-24.

[118] Respondent's Brief at 26.

[119] Respondent's Brief at 15 (citing Tr. 259:8-18; *Finberg* RX-6 at 6; *Finberg* RX-7 at 2; *Finberg* RX-8 at 1; *Finberg* RX-9 at 1; *Finberg* RX-10 at 1; *Finberg* RX-5 at 10, 26, 48; Tr. 275:13-20; 276:4-9).

Stanley Joel Butler, and Christopher Alan Pfahl to defraud the United States and DLA."[120] Respondent AMS explains that the indictment charged the following overt acts in furtherance of conspiracy: [121]

> 9. In or about July 2011, defendant **STEVEN CRAIG FINBERG** and other officers and employees of Adams Produce participated in a meeting during which they discussed ways to increase Adams Produce's profit margins on the government contracts, including conducting transactions designed to create fraudulent purchase orders reflecting a higher cost to Adams Produce of purchasing fruits and vegetables.
>
> 10. On or about August 1, 2011, defendant **STEVEN CRAIG FINBERG** was included in an email exchange with other officers and employees of Adams Produce, including David Andrew Kirkland, regarding the naming of the company being created within Adams Produce to keep track of the fraudulent transactions. Michael John O'Brien suggested naming the new company "dsf (Dave's slush fund)... gbm (guaranteed bonus maker)."
>
> 11. On or about August 22, 2011, defendant **STEVEN CRAIG FINBERG** met with Chief Executive Officer Scott David Grinstead and Chief Financial Officer John Steven Alexander at the Marriott hotel on Highway 280 in Birmingham, Alabama. The agenda for the meeting listed items related to DLA, including "Company 53 and margin." Following the meeting, defendant **STEVEN CRAIG FINBERG** prepared items for a follow-up meeting, including "Review with Dave the paper work with Lange and compare the normal paperwork."

Respondent AMS provides the plea agreement, *Finberg* CX-11,

---

[120] Respondent's Brief at 16 (citing *Finberg* RX-[12] at 3 (internal quotations omitted)).

[121] *Id.* (citing *Finberg* RX-[12] at 4-5 (internal quotations omitted)).

Petitioner Finberg entered on April 22, 2015, which stated: [122]
Between in or about July 2011 and November 2011, Adams Produce conducted at least 82 transactions with T.L.C. designed to create false purchase orders and invoices. As a result of this scheme to defraud, Adams Produce received approximately $481,000.00 from the government to which it was not entitled.

From at least mid-September 2011 and thereafter, defendant **STEVEN CRAIG FINBERG**, having knowledge of the actual commission of a felony cognizable by a court of the United States, to wit, the wire fraud scheme described in this Factual Basis and in paragraphs 5 through 8 of the Information, did conceal the same and did not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.

On or about October 26, 2011, defendant **STEVEN CRAIG FINBERG** agreed with John Stephen Alexander, David Andrew Kirkland, and Michael John O'Brien to gradually end the scheme to defraud-to bring it in for a soft landing - rather than end it immediately so as to avoid raising red flags and better avoid detection by DLA.

In neither his post Hearing Brief nor his Reply Brief does Petitioner Finberg address having pled guilty to participating in a fraudulent scheme or deny that his participation in the wire fraud scheme contributed to Adams' violations of PACA.

As stated in *Norinsberg*, *supra*, "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."[123] *Norinsberg* goes on to explain that a determination of "whether an individual was actively involved in activities resulting in a violation of the PACA requires a fact-specific determination

[122] *Id.* (citing *Finberg* RX-11 at 5 (internal quotations omitted)).

[123] *Norinsberg*, 58 Agric. Dec. at 604.

and consideration of the totality of the circumstances."[124]

"Personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved."[125] Here, the activities resulting in Adams' violation of PACA were directly related to misuse of company funds and fraudulent schemes against the company and the U.S. government. The evidence demonstrates that Petitioner Finberg pled guilty to being involved in a wire fraud scheme from at least mid-September 2011 by concealing his actual knowledge of the scheme and agreeing[126] on October 26, 2011 to gradually end the scheme to avoid detection of fraud against the government amounting to $481,000.00.[127] As previously mentioned, during the period of August 8, 2011 through May 18, 2012, Adams "willfully, repeatedly, and flagrantly" violated section 2(4) of the PACA.[128] Therefore, contrary to Petitioner Finberg's claims that he was not actively involved in Grinstead's fraud by that led to Adams' violations of the PACA,[129] the record demonstrates that he actively participated in a wire fraud scheme, which demonstrates that he

---

[124] *Id.* at 610 (citing *United States v. Vertac Chem. Corp*., 46 F.3d 803, 808 (8th Cir. 1995) (indicating that actual or substantial control requires at a minimum active involvement in activities and stating that determining whether an entity has exerted actual or substantial control requires a fact-intensive inquiry and consideration of the totality of the circumstances), *cert. denied sub nom*. *Hercules, Inc. v. United States*, 515 U.S. 1158 (1995); *FMC Corp. v. U.S. Dep't of Com.*, 29 F.3d 833, 843-45 (3rd Cir. 1994) (same)).

[125] *Caito*, 57 Agric. Dec. at 582 (U.S.D.A. 1998) ("Given that Anthony A. Caito performed both acts of commission and omission, he was actively involved in the Caito & Mascari, Inc.'s violations of the Act.").

[126] I acknowledge that Petitioner Finberg does not agree that he "agreed" to gradually end the scheme to avoid detection but admits that he did not act to stop the proposed action or state anything during the October 26, 2011 discussion to indicate that he disagreed with the discussion. *See* Tr. 267:19-268:5.

[127] RX-12 at 5.

[128] (7 U.S.C. § 499b(4). *See Adams Produce Co.*, Docket No. 13-0284, 2013 WL 6702587, at *2 (U.S.D.A. Nov. 25, 2013) (Default Decision and Order), *available at* https://oalj.oha.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%2013-0284.pdf (last visited Nov. 8, 2019).

[129] *See* Petitioner's Reply Brief at 6.

exercised judgment or discretion in activities that contributed to the PACA violations; in particular he chose not to bring the fraudulent scheme to an immediate end or express any desire to do so, with respect to activities that resulted in Adams' violation of the PACA during the period of violation.[130] While the record indicates Mr. Grinstead was the master-mind behind the fraudulent schemes and misused company funds for his own benefit, Petitioner Finberg has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities causing the PACA violations. Indeed, the record demonstrates by a preponderance of the evidence that Petitioner Finberg's activities helped bring about the downfall of Adams, which resulted in Adams' violation of the PACA. A preponderance of the evidence shows that Petitioner Finberg was actively involved in the activities causing the PACA violations.

Therefore, I find that Petitioner Steven C. Finberg has failed to rebut the statutory presumption that he was "responsibly connected" to Adams Produce Company LLC, as an officer of the firm during the period Adams violated PACA, because he failed to meet the first prong of the statutory test.

b. Second Prong: Petitioner Finberg was not a nominal officer of Adams; Petitioner Finberg was not an owner of Adams

The second prong of the responsibly connected test has been explained, as follows:[131]

> if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

---

[130] I note that, despite Petitioner's attempts to separate his guilty plea to misprision of felony from Grinstead's fraudulent activity, this action is identical to one of the charges to which Grinstead also plead guilty. *See* PX-1 at 6, PX-2 at 7, and PX-3 at 4.

[131] *Norinsberg*, 58 Agric. Dec. at 609.

As noted in *Norinsberg*, *supra*, "a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong." Here Petitioner Finberg has failed to rebut the statutory presumption that he is responsibly connected, because he failed to meet the first prong of the statutory test. Nevertheless, because the record is before me, in the potential aid of proceedings on appeal, I address certain other elements of the statutory test, which do not have to be reached in this Decision as a result of Petitioner Finberg failing the first prong.

The standard for "nominal partner" was further explained by the USDA Judicial Officer as follows:

> *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. US. 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." 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.

Taylor, 71 Agric. Dec. 612, 621 (U.S.D.A. 2012).

Petitioner Finberg contends "persons designated as officers or directors, who are not owners of a licensee, may show that the company was so dominated and exclusively controlled by one person to demonstrate

that it was in reality conducted as s sole proprietorship."[132] He also states that, if a person demonstrates such domination and exclusive control, the corporate form should be disregarded to avoid an injustice.[133] Petitioner Finberg contends that Mr. Grinstead, as CEO and an owner of Adams, "dominated and exclusively controlled Adams as a his sole proprietorship"[134] and that Grinstead's abuse of the corporate form, especially his treatment of the corporation as his personal bank account, "are hallmarks of an alter ego."[135] Petitioner Finberg also contends that Mr. Grinstead consistently mixed his personal interests with Adams' business interests, another significate feature of a corporate alter ego.[136]

Respondent AMS contends that Petitioner Finberg failed to advance an argument that he was "a nominal officer of Adams Produce LLC when Adams violated the PACA" but that, even if he had, "the record shows that Petitioner Finberg was a part of the executive team of Adams, and participated fully and actively in the company's management" and that he was not "an officer in name only."[137] Petitioner Finberg admits that he

---

[132] Petitioner's Brief at 14 (citing *Quinn v. Butz,* 510 F.2d 743, 759 (D.C. Cir. 1975)).

[133] *Id.* (citing *Bell v. Dep't of Agric.*, 39 F.3d 1199, 1205 (D.C. Cir. 1994)). *See also* Petitioner's Reply Brief at 6 (stating that a "two-prong test is used in determining if a company is the alter ego of a dominant individual: (1) is there such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) if the acts are treated as those of the corporation alone, will an inequitable result follow?" and citing *Labadie Coal Co. v. Black,* 672 F.2d 92 (D.C. Cir. 1982)).

[134] *Id.* at 15. *See also* Tr. at 231:23-232:1 (Petitioner Finberg stating that Grinstead "was solely responsible for making any major decisions within the organization").

[135] *Id.* at 9 (citing *Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975)).

[136] *Id.* at 15 (citing *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Cir. 1982); PX-1 at 4-5; PX-2 at 4-5; PX-3 at 6).

[137] Respondent's Brief at 27. *See also id.* at 15, ¶¶ 44-48, noting that Finberg was the Chief Operating Officer, designated as an Employee Member of Adams, held interest in Adams, and held a "key man" insurance policy (citing Tr. 259:8-18; *Finberg* RX-6 at 6; *Finberg* RX-7 at 2; *Finberg* RX-8 at 1; *Finberg* RX-9 at 1; *Finberg* RX-10 at 1; *Finberg* RX-5 at 10, 26, 48; Tr. 275:13-20; 276:4-9).

does not claim to have held a nominal position.[138] Thus, I find that Petitioner Finberg did not demonstrate by a preponderance of the evidence that he was nominally an officer. Petitioner Finberg thus failed the first part of the second prong of the statutory responsibly connected test.

Respondent AMS avers that Petitioner Finberg seeks to "establish the second prong of the responsibly connected test through the '*alter ego*' alternative"[139] and that Adams could not have been the alter ego of Mr. Grinstead because Mr. Grinstead, or Scott Grinstead Associates, "represented a minority share in Adams Produce LLC (44.7%)" and Adams operated under the direction of its Board of Directors, removing Grinstead "midway through the violation period (the violations continued in his absence)."[140] Respondent AMS avers that Petitioner's argument, that Adams was the alter ego of Grinstead, defies logic as the Board "could and did remove" him.[141] Respondent AMS also argues that, even if Adams was the alter ego of Grinstead, "the alter ego alternative for showing the second prong of the responsible connection test is not available to Petitioner Finberg because he was an owner of Adams Produce LLC."[142] Respondent AMS contends that even an "ownership interest as small as 4%, such as that owned by Petitioner Finberg, is sufficient to combat that alter ego argument" and that the issue to be considered is the Petitioner's relationship to the company during the period when the company violated the PACA as opposed to his relationship only to the fraudulent activity.[143]

---

[138] Petitioner's Reply Brief at 1.

[139] *Id.* at 23.

[140] *Id.* at 25.

[141] *Id. See also id.* at 15, ¶ 47 (citing Tr. 275:13-20; 276:4-9).

[142] Respondent's Brief at 28, 23-24 (citing *Norinsberg*, 56 Agric. Dec. 1840, 1864-65 (U.S.D.A. 1997); *Thames v. U.S. Dep't of Agric.*, 195 F. App'x 850, 854 (11th Cir. 2006)).

[143] *Id.* at 25 (citing *Finch*, 73 Agric. Dec. 302, 318 (U.S.D.A. 2014); *Margiola*, 65 Agric. Dec. 622, 644-46 (U.S.D.A. 2006) (concluding the petitioner failed to prove he was only a nominal officer of the violating PACA licensee, even though the petitioner proved that no other employee of the PACA licensee committed the PACA violations and the petitioner did not authorize, or even know of, the violations)).

In response, Petitioner Finberg contends that he "was not an owner of Adams in any respect" and that although he expected to receive four percent (4%) interest in the company as an "Employee Member," "the undisputed evidence establishes he never received any units, ownership interests, or voting rights."[144] Petitioner Finberg avers that his title of "Employee Member" was only fictional and that the true owners were APIH and Grinstead.[145] Petitioner Finberg states that it would be "fundamentally unfair, and contrary to the statute" to find that Petitioner, a victim of Mr. Grinstead, was responsibly connected to Adams.[146]

To meet the second part of the second prong of the "responsibly connected" test, the Petitioner must prove that a) he was not an owner of Adams, and b) that Adams was the alter ego of one or more of its actual owners.[147] Respondent AMS contends that the alter ego exception from responsibly connected is unavailable to Petitioner Finberg because he is an owner with at least four percent (4%) interest in Adams.[148] In support of this contention, Respondent AMS 1) cites to transcripts where Petitioner Finberg notes that he expected to receive slightly more than four percent (4%) interest, and 2) provides *Finberg* RX-5, p. 26, the Second Amended and Restated Limited Liability Company Agreement, which states that Adams held a "key man" insurance policy in the amount of $3,000,000 on the life of Petitioner.

During the hearing, Petitioner Finberg explained that:[149]

> [I]t was explained to me at the time of the CIC transaction that I would be given some level of stock ownership in the entity. And I believe -- I never saw the documents after, but I believed the initial operating agreement showed me

---

[144] Petitioner's Reply Brief at 8 (citing Tr. 375 [sic]:18-20; RX-4 at 61, 91).

[145] *Id.* (citing Tr. 275-76).

[146] *Id.* at 9.

[147] *See Norinsberg*, 58 Agric. Dec. at 609.

[148] *See* Respondent's Brief at 15, ¶¶ 47-48 (citing Tr. 275:13-20; 276:4-9; *Finberg* RX-5, at 26.); *id.* at 28, 23-24.

[149] Tr. 275:16-20.

> at like slightly more than 4 percent.

However, Respondent AMS does not provide any evidence, including any documentation, showing that Petitioner Finberg was actually vested with an ownership interest in Adams.[150] Further, Petitioner Finberg points out that API Holdings and Grinstead entities together held a 100 percent interest in Adams[151] and the agency's licensing records, *Finberg* RX-1, show that Petitioner Finberg was not an owner of Adams. Thus, I conclude that Petitioner Finberg is not excluded by any ownership interest in Adams from making an alter ego contention.

In *Dyer*[152] the JO affirmed Judge Clifton's determination that Adams was the alter ego of Mr. Grinstead. As explained previously, because Petitioner Finberg has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in PACA violations, I do not have to reach any issues of whether Adams was the alter ego of Mr. Grinstead in order to find that Petitioner Finberg is responsibly connected, and I do not.

I note that, as the JO in *Dyer* pointed out:[153]

> Not only did Petitioners Johnson and Dyer form a "Special Committee" to look into the wrongdoing, and fully co-operated with the investigation by the United States Department of Justice (ID at 11), they saw to it that

---

[150] In fact, Respondent's own proposed statement of facts provides: "Of these four members, tow held ownership interests: API Holdings LLC 55.30%, and Scott Grinstead 44.70%." Respondent's Brief at 4-5, ¶ 3 (citing *Finberg* RX-1 at 1, 3; *Finberg* RX-5 at 47, 48, 50, 51).

[151] Petitioner's Reply Brief at 8 (citing RX-4 at 61, 91); Petitioner's Brief at 4 (citing RX-4 at 87). *See also* RX-4 at 91. *See also Finberg* RX-1 at 1-3, 6; *Finberg* RX-5 at 52.

[152] *Dyer*, PACA-APP Docket Nos. 14-0166, 14-0168, 14-0169, 2020 WL 8174373 (U.S.D.A. Jan. 9, 2020) (Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169), *also available at* https://oalj.oha.usda.gov/sites/default/files/JODO%20-%20Dyer_Redacted.pdf (last visited Feb. 4, 2020).

[153] *See id.* at *6.

> the PACA debts were repaid in large part. Suppliers of produce were owed $10,735,186.81, and Petitioners saw to it that they were paid all but $1,928,417.74 (ID at 7-8, citing Tr. 112, 117, 18). Further, Petitioners paid over $2 million to the investigators who were hired to assist the DOJ. Petitioners set aside an additional $2 million to cover the remaining payments to the suppliers, but, through no fault of their own, PNC Bank garnished the funds, even after being told the money was reserved for the purpose of settling the remaining PACA debt (ID at 8, citing Tr. 118). Judge Clifton quoted a portion of testimony as follows:
>
> > In contrast, CIC Partners invested $8.2 million and lost nearly all of it. A settlement with the auditor (see Dyer RX 8) returned some money, but then the $2 million plus paid to Fulbright & Jaworski to assist DOJ used that. Petitioner Drew Johnson testified credibly: "We didn't take a dime. Once the DOJ gave any indication there was a problem, we never took a dime out of this company. All we did is put money in, and that money went to the banks or it went to pay PACA bills. So all the money we put in, none of it went to us." Tr. 116-18.
>
> ID at 9.

Dyer, PACA-APP Docket Nos. 14-0166, 14-0168, 14-0169, 2020 WL 8174373 (U.S.D.A. Jan. 9, 2020) (Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169).

Petitioner Finberg does not claim to have participated in any of these activities to root out wrongdoing and to get the suppliers paid, and the record is bereft of any evidence that he did. Instead, Petitioner by his own testimony continued to draw his salary as COO until the company became insolvent.[154] The evidence shows that he is not similarly situated to the

[154] Tr. 228: 23-24.

Petitioners the JO found in *Dyer* to have met the burden of demonstrating that they were not responsibly connected.

FINDINGS OF FACT

Adams Produce Company, LLC

1. Adams Produce Company LLC ("Adams") is a limited liability company organized and existing under the laws of the state of Delaware, formed on July 8, 2010. *Finberg* RX-1 at 10. Its last known business address was 302 Finley Avenue West, Birmingham, Alabama, 35204-1050. *Finberg* RX-1 at 1.

2. At all times material to the underlying PACA Complaint in this case, Adams was licensed under and operating subject to the provisions of the PACA. *Finberg* RX-1 at 1, 3. License number 2010 1293 was issued to Adams on September 23, 2010. *Finberg* RX-1 at 3. This license terminated on September 23, 2012, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Adams failed to pay the required annual fee. *Adams Produce Company, LLC*, PACA Docket No. 13-0284 at 2.

3. At all times material to these proceedings, the members of Adams Produce Company LLC were Steve Finberg, API Holdings, Scott Grinstead, and Steve Alexander. *Finberg* RX-1 at 1, 3; *Finberg* RX-5 at 47, 48. Of these four members, two held ownership interests: API Holdings LLC 55.30%, and Scott Grinstead 44.70%. *Finberg* RX-1 at 1, 3; *Finberg* RX-5 at 47, 48, 50, 51.

4. An ALJ found that Adams, during the period August 8, 2011, through May 18, 2012, failed to make full payment promptly to 51 sellers of the agreed purchase prices, or balances thereof, for 9,314 lots of perishable agricultural commodities, which Adams purchased in the course of interstate and foreign commerce, in the total amount of $10,735,186.81. A total amount of $1,928,417.74 remained unpaid when the disciplinary Complaint was filed against Adams on June 28, 2012. *Adams Produce Company, LLC*, PACA Docket No. 13-0284 at 2. The ALJ ordered the facts and circumstances of Adams' violations be published.

5. CIC is a private equity investing firm whose basic function is to take

investors' money and go find investments to go acquire or invest in companies. Tr. 33:7-11.

6. In preparation for purchasing Adams Produce Company LLC, CIC generated a wholly-owned company, API Holdings LLC ("APIH"). *Dyer* RX-1 at 6. APIH was an entity that was created by CIC Partners to house the investments from CIC and was the vehicle where the cash and the capital came into the company to buy out the sellers. Tr. 36:1-5. These preparations culminated in APIH "acquiring and taking the reins of the produce company." *Dyer* RX-8 at 6.

7. The acquisition was finalized by a Second Amended and Restated LLC Agreement, made and entered into on September 29, 2010. *Finberg* RX-4 at 45; Tr. 37:5-8. The Agreement listed as Members: APIH, Grinstead and Associates LLC, and Grinstead Corporation, and Employee Members Steve Alexander and Steve Finberg. *Finberg* RX-4 at 87.

8. Following the sale, Adams continued to employ Scott Grinstead as its Chief Executive Officer. Steve Finberg served as the Chief Operating Officer and Steve Alexander served as the Chief Financial Officer. *Finberg* RX-6 at 6.

Petitioner Finberg (Officer)

1. Steven Finberg has been a senior manager and executive in the produce industry for approximately 25 years. Tr. 222:23-24.

2. The PACA license record shows that Steven Finberg was a member of Adams Produce LLC from its formation until the company went out of business. *Finberg* RX-1 at 1, 3.

3. At all times material to these proceedings, Steven Finberg was the Chief Operating Officer of Adams Produce Company LLC. Tr. 259:8-18; *Finberg* RX-6 at 6; *Finberg* RX-7 at 2; *Finberg* RX-8 at 1; *Finberg* RX-9 at 1; *Finberg* RX-10 at 1.

4. Steven Finberg signed the Second Amended and Restated LLC Agreement as an "Employee Member" of Adams. *Finberg* RX-5 at 48.

5. The Second Amended and Restated LLC Agreement defines Employee Member as follows: "'Employee Member' means each employee of the Company or any subsidiary of the Company that directly or indirectly holds Units. For the avoidance of doubt, as of the Effective Date, Steve Alexander, Steve Finberg, and Scott Grinstead are each an Employee Member." *Finberg* RX-5 at 10.

6. By an indictment filed in the United States District Court for the Northern District of Alabama on May 29, 2014, a grand jury charged Steven Finberg as follows:

> 2. Defendant **STEVEN CRAIG FINBERG** was the Chief Operating Officer of Adams Produce from 2007 until the company closed in April 2012. As the Chief Operating Officer, defendant **STEVEN CRAIG FINBERG** was involved in the management of the company.

Finberg RX 11, pg. 2.

> 5. From in or about July 2011, and continuing until in or about November 2011, the exact dates being unknown, within Jefferson County in the Northern District of Alabama, and elsewhere, defendant **STEVEN CRAIG FINBERG** knowingly and willfully conspired, combined, and agreed with Scott David Grinstead, John Steven Alexander, David Andrew Kirkland, Michael John O'Brien, Stanley Joel Butler, and Christopher Alan Pfahl to defraud the United States and DLA.

Finberg RX-11 at 3.

The indictment charged the following overt acts in furtherance of the conspiracy:

> 9. In or about July 2011, defendant **STEVEN CRAIG FINBERG** and other officers and employees of Adams Produce participated in a meeting during which they discussed ways to increase Adams Produce's profit

> margins on the government contracts, including conducting transactions designed to create fraudulent purchase orders reflecting a higher cost to Adams Produce of purchasing fruits and vegetables.

Finberg RX 11, pg. 4.

> 10. On or about August 1, 2011, defendant **STEVEN CRAIG FINBERG** was included in an email exchange with other officers and employees of Adams Produce, including David Andrew Kirkland, regarding the naming of the company being created within Adams Produce to keep track of the fraudulent transactions. Michael John O'Brien suggested naming the new company "dsf (Dave's slush fund) . . . gbm (guaranteed bonus maker).

Finberg RX 11 at 4.

> 11. On or about August 22, 2011, defendant **STEVEN CRAIG FINBERG** met with Chief Executive Officer Scott David Grinstead and Chief Financial Officer John Steven Alexander at the Marriott hotel on Highway 280 in Birmingham, Alabama. The agenda for the meeting listed items related to DLA, including 'Company 53 and margin.' Following the meeting, defendant **STEVEN CRAIG FINBERG** prepared items for a follow-up meeting, including 'Review with Dave the paper work with Lange and compare the normal paperwork.'

Finberg RX-11 at 5.

7. On April 22, 2015, Steven Finberg entered a plea agreement, Finberg RX-12 at 5, which stated:

> Between in or about July 2011 and November 2011, Adams Produce conducted at least 82 transactions with T.L.C. designed to create false purchase orders and invoices. As a result of this scheme to defraud, Adams which it was not entitled.

> From at least mid-September 2011 and thereafter, defendant **STEVEN CRAIG FINBERG**, having knowledge of the actual commission of a felony cognizable by a court of the United States, to wit, the wire fraud scheme described in this Factual Basis and in paragraphs 5 through 8 of the Information, did conceal the same and did not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.
>
> On or about October 26, 2011, defendant **STEVEN CRAIG FINBERG** agreed with John Stephen Alexander, David Andrew Kirkland, and Michael John O'Brien to gradually end the scheme to defraud-to bring it in for a soft landing - rather than end it immediately so as to avoid raising red flags and better avoid detection by DLA.

LEGAL CONLUSIONS

1. The Secretary has jurisdiction of this matter.

2. Petitioner Finberg has failed to rebut the presumption that he was responsibly connected with Adams at the time it committed violations of section 2 of the PACA. Petitioner Finberg was actively involved in the activities resulting in the violations of Section 2 of the PACA by Adams and was not a nominal director and shareholder of Adams. Therefore, the determination by the Director of the PACA Division that Petitioner Finberg was responsibly connected with Adams during the period of its repeated and flagrant violations of the PACA is affirmed.

ORDER

It is therefore ordered that, because Petitioner Finberg has failed to rebut the presumption that he was responsibly connected to Adams Produce, LLC as an officer of the firm when Adams committed willful, flagrant and repeated violations of Section 2(4) of the PACA by failing to make full payment promptly for produce purchases, the determination by

the Director of the PACA Division that Petitioner Finberg was responsibly connected with Adams at the time of its violations is **AFFIRMED**.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

–

In re: CRUISIN' ON, INC., d/b/a THE PRODUCE NETWORK; and DIAMOND PRODUCE WHOLESALERS & PACKERS, INC.
Docket Nos. 20-J-0020, 20-J-0021.
Initial Decision and Order.
Filed March 4, 2020.

PACA-D.

Christopher P. Young, Esq., and Shelton S. Smallwood, Esq., for AMS.
Joseph M. Thornton, Esq., for Respondents.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER WITHOUT HEARING BY REASON OF ADMISSIONS

Preliminary Statement

1. This is a disciplinary proceeding under 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).

Procedural History

2. The Associate Deputy Administrator, Fair Trade Practices Program, PACA Division, Agricultural Marketing Service, United States

Department of Agriculture ("AMS") initiated this proceeding against the Respondent Cruisin' On, Inc., doing business as The Produce Network ("Cruisin' On"); and against the Respondent Diamond Produce Wholesalers & Packers, Inc., ("Diamond Produce"), by filing a Complaint on November 29, 2019, alleging that the Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2016 and 2017 to five (5) sellers, for produce the Respondents purchased, received and accepted in interstate and foreign commerce.

3. AMS seeks a finding that the Respondents willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and AMS requests an order that the facts and circumstances of the Respondents' violations be published, pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

4. The Respondents filed their Answer to the Complaint both on December 29, 2019, and on December 30, 2019.

5. AMS filed a Motion for Decision Without Hearing by Reason of Admissions on January 17, 2020 ("AMS's Motion") pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). AMS relies on admissions by each Respondent in Voluntary Petitions pursuant to Chapter 7 of the Bankruptcy Code filed on December 15, 2017 in the United States Bankruptcy Court, Southern District of Florida; on admissions by each Respondent in their Answer to the Complaint filed on December 29, 2019 and December 30, 2019; and on the Compliance Investigation conducted on January 13-15, 2020.

6. The Respondents did not file a response to AMS's Motion.

Discussion

7. Each Respondent admitted in their Answer that they violated the PACA by failing to pay produce sellers fully and promptly. The Answer is thoughtful and sorrowful for the losses caused by the Respondents' failures to pay. The Answer explained that there had been nearly 28 years of successful business; and that the opening of a Packing Facility for packing Potatoes and Onions in 2015 became a financial drain from which

the Respondents did not recover. The Answer explained that personal monies and borrowed money to keep operating were not enough. The Answer explained that the attempt to obtain a small business loan, with a projected closing date in November 2017, ultimately failed; and that Cruisin' On, Inc. which had opened in 1992, had to close its doors on November 14, 2017. The Answer identifies November 14, 2017 as the day all papers for each Respondent were presented to the lawyer for filing bankruptcy and acknowledges that attempts to complete paying PACA vendors had failed. The Answer agrees with the Complaint that the bankruptcy filings were on December 15, 2017 and explains that the Respondents' assets were lost during bankruptcy proceedings to lenders with blanket liens.

8. The Respondents acknowledge owing monies to the five produce sellers listed on Appendix A to the Complaint. A compliance investigation conducted by AMS on January 13-15, 2020, determined that the current balance owed to 4 of the 5 produce sellers listed on the Appendix A to the Complaint totaled **$1,135,650.91**. The fifth produce seller is out of business, and the owner was reported to be deceased in 2018. *See* Attachment C to AMS's Motion filed January 17, 2020.

Authority

9. The amount verified during January 2020 as monies currently owed **($1,135,650.91**) is more than a *de minimis* amount. *See* the USDA Judicial Officer's Ruling on Certified Question filed December 4, 1984 in *Fava & Company, Inc*. (reported in the 1987 volume of Agriculture Decisions).[1]

10. The Respondents' violations were flagrant and repeated.[2]

---

[1] *Fava & Co.*, 46 Agric. Dec. 79, 81, 1984 WL 55518 (U.S.D.A. 1984) (Ruling on Certified Question) (". . . so that the amount presently due and unpaid would be *de minimis*, e.g., less than $5,000."), *final decision*, 44 Agric. Dec. 870, 1985 WL 63176 (U.S.D.A. 1985).

[2] *See D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994) (a finding of repeated violations is appropriate whenever there is more than one violation of

11. The Respondents' violations were willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. §558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with a careless disregard of statutory requirements.[3] violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.[4] Here, the Respondents knew or should have known that they could not make prompt payment for the large amounts of perishables they ordered, yet they continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.

Findings of Fact

12. The Respondent Cruisin' On, Inc., doing business as The Produce Network, is or was a corporation organized and existing under the laws of the State of Florida. The Respondent Cruisin' On's business and mailing address was 16421 NW 84th Court, Miami, Florida 33016.

13. At all times material herein, the Respondent Cruisin' On was licensed and/or operating subject to the provisions of the PACA. On April 26, 2012, license number 2012 0926 was issued to the Respondent Cruisin' On. The license was terminated due to bankruptcy.

14. The Respondent Diamond Produce Wholesalers & Packers, Inc. is or was a corporation organized and existing under the laws of the State of Florida. The Respondent Diamond Produce's business and mailing address was 2260 NW 13th Avenue, Miami, Florida 33142.

15. At all times material herein, the Respondent Diamond Produce was licensed and/or operating subject to the provisions of the PACA. License number 2015 0202 was issued to the Respondent Diamond Produce on December 15, 2014. The license was terminated due to bankruptcy.

---

the Act, and a finding of flagrant violations of the Act is appropriate whenever the total amount due and owing exceeds $5,000.00).

[3] *Ocean View Produce, Inc.*, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

[4] *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (U.S.D.A. 1996).

16. The Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2016 and 2017 for produce the Respondents purchased, received and accepted in interstate and foreign commerce. The Respondents, during the period May 2016 through September 2017, on or about the dates and in the transactions set forth in Appendix A to the Complaint and incorporated by reference, failed to make full payment promptly to at least four of the five sellers listed in Appendix A to the Complaint for 146 lots of perishable agricultural commodities which Respondents purchased, received, and accepted in interstate and foreign commerce, in the total amount of **$1,135,650.91**.

17. On December 15, 2017, the Respondent Cruisin' On filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq*.) in the United States Bankruptcy Court, Southern District of Florida. The petition was designated Case No. 17-24938. The Respondent Cruisin' On admits in its Schedule E/F that all five of the PACA creditors listed in Appendix A to the Complaint hold unsecured produce debt claims against the Respondent Cruisin' On in the amount of $1,243,525.481.[5]

18. On December 15, 2017, the Respondent Diamond Produce filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq*.) in the United States Bankruptcy Court, Southern District of Florida. The petition was designated Case No. 17-24940. The Respondent Diamond Produce admits in its Schedule E/F that all five of the PACA creditors listed in Appendix A to this Complaint hold unsecured produce debt claims against the Respondent Diamond Produce in the amount of $1,243,525.482.[6]

---

[5] The amounts admitted in the Respondent Cruisin' On's Schedule E/F for PACA creditor Frank M. Minardo, LLC ($92,408.75) and PACA creditor Bushman's Inc. ($1,022,771.38) are larger than the amounts listed in Appendix A to the Complaint ($59,235.50) and ($1,005,438.06) respectively.

[6] The amounts admitted in the Respondent Diamond Produce's Schedule E/F for PACA creditor Frank M. Minardo, LLC ($92,408.75) and PACA creditor Bushman's Inc. ($1,022,771.38) are larger than the amounts listed in Appendix A to the Complaint ($59,235.50) and ($1,005,438.06) respectively.

Conclusions

19. The Secretary of Agriculture has jurisdiction over the parties and the subject matter.

20. The failure of the Respondents, Cruisin' On, Inc., doing business as The Produce Network; and Diamond Produce Wholesalers & Packers, Inc., to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that they 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)) as described in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)).

21. The Respondent Cruisin' On, Inc., doing business as The Produce Network; and the Respondent Diamond Produce Wholesalers & Packers, Inc., have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

22. AMS's Motion for Decision Without Hearing by Reason of Admissions is GRANTED.

23. A finding is made that the Respondent Cruisin' On, Inc., doing business as The Produce Network; and the Respondent Diamond Produce Wholesalers & Packers, Inc., have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

24. The facts and circumstances of these violations shall be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Finality

This Decision and Order shall be final and effective thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145; *see* Appendix A).

Copies of this Decision and Order Without Hearing by Reason of Admissions shall be served by the Hearing Clerk on each of the parties.

___

In re: CKF PRODUCE CORP.
Docket No. 19-0017.
Initial Decision and Order.
Filed March 30, 2020.

PACA-D.

Christopher Young, Esq., for AMS.
Roger Mark Newyear, Esq., for Respondent.
Decision and Order entered by Channing D. Strother, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) ("PACA"); the regulations promulgated thereunder by the Secretary of Agriculture (7 C.F.R. §§ 46.1 through 46.45) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice").

The Associate Deputy Administrator, Fair Trade Practices Program, PACA Division, Agricultural Marketing Service, United States Department of Agriculture ("Complainant"), initiated this proceeding on February 13, 2019 by filing a complaint and notice to show cause ("Complaint")[1] why CKF Produce Corp. ("Respondent") should not be denied a license pursuant PACA section 4(d) (7 U.S.C. § 499d(d)). The Complaint alleges that, during the period March 2017 through November

[1] *See* 7 C.F.R. § 1.132 ("*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.").

2018, Respondent willfully, flagrantly, and repeatedly violated PACA section 2(4) by failing to make full payment promptly in the amount of $916,442.81 to twenty-two sellers for 102 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce.[2] The Complaint requests, *inter alia*, "a finding be made that 1) Respondent has willfully, flagrantly, and repeatedly violated the PACA; and 2) Respondent is unfit to be licensed under the PACA."[3] On March 8, 2019, Respondent filed an answer admitting the jurisdictional allegations of the Complaint, denying the remaining allegations, setting forth affirmative defenses, and requesting an oral hearing.

Respondent was previously licensed under the PACA; however, Respondent's license terminated on August 2, 2018, pursuant to PACA section 4(a) (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.[4] On September 5, 2018, following the filing of a PACA reparation complaint against Respondent, Complainant began investigating Respondent for failing to pay promptly for produce in violation of PACA section 2(4).[5] On November 12, 2018, Complainant conducted an on-site investigation at Respondent's place of business and documented that Respondent failed to pay produce sellers promptly for produce in accordance with PACA.[6] On January 16, 2019 – approximately six months after Respondent's license was terminated and two months after Complainant's on-site investigation – Respondent submitted a completed license application to Complainant.[7] Thus, at the time Respondent's application was submitted, Complainant had already begun

---

[2] Complaint at 3.

[3] *Id.* at 4. Complainant also requests "that the Administrative Law Judge order that the facts and circumstances of Respondent's violations be published." *Id.*

[4] Respondent's PACA license, number 2016-1004, was issued on August 2, 2016. *See* Respondent's Brief at 1; Complainant's Brief at 1.

[5] Complainant's Brief at 1; Tr. I at 23; Tr. II at 17-18; CX2; *see* CX19; CX20; CX21.

[6] Complainant's Brief at 1-2; Tr. I at 23, 35, 41, 56, 100, 104, 106; CX2; CX4; CX5; CX13; *see* CX19; CX21.

[7] Complainant's Brief at 2; Complaint at 2-3.

an investigation of Respondent that revealed Respondent was failing to pay promptly in accordance with PACA. Complainant subsequently filed the aforementioned Complaint, which contends that Respondent's license application should be refused.

For the reasons discussed herein, I find that Complainant properly determined Respondent is unfit to engage in the business of a commission merchant, dealer, or broker and that Complainant properly withheld issuance of a PACA license to Respondent pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)).

Jurisdiction and Burden of Proof

As noted above, AMS filed its Complaint pursuant to the Rules of Practice, which apply to PACA and the Regulations. On March 8, 2019, Respondent filed a timely answer that requested an oral hearing. The case was reassigned to the undersigned on March 28, 2019 and is properly before me for resolution.

In addition to being a disciplinary proceeding, this is a Notice to Show Cause proceeding to determine why Respondent's pending license application should not be denied. In such a proceeding, the burden of proof initially falls on the complainant, who must demonstrate why the license application is being challenged (*i.e.*, why the respondent is not fit to receive a license).[8] Once the complainant has provided such good reason, the burden of proof shifts to the applicant (or respondent) to show cause

[8] *See Brand*, 53 Agric. Dec. 1628, 1635-36 (U.S.D.A. 1994); *Williamsport Purveyors, Inc.*, 48 Agric. Dec. 1092, 1099 (U.S.D.A. 1989), *aff'd sub nom. Williamsport Purveyors, Inc. v. U.S. Dep't of Agric.*, 916 F.2d 82 (3d Cir. 1990); *H & J Brokerage, Inc.*, 45 Agric. Dec. 1154, 1196 (U.S.D.A. 1986) ("[O]nce complainant established that Mr. Scharf engaged in a practice of character prohibited by the Act, the burden of proof was on respondent to show that it is, nonetheless, fit to receive a license."); *Produce, Inc.*, 36 Agric. Dec. 684, 692 (U.S.D.A. 1977).

why its application should be granted (*i.e.*, why it is fit to receive a license).[9]

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[10] such as this one, ins the preponderance of the evidence.[11] A preponderance of the evidence here supports findings that, in most but not all instances, Respondent violated the Act and Regulations as alleged in the Complaint, and Respondent's license application should therefore be denied.[12]

Procedural History

Complainant initiated this proceeding on February 13, 2019 by filing a complaint and notice to show cause ("Complaint")[13] why Respondent should not be denied a license pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)). On March 8, 2019, Respondent filed an answer admitting the jurisdictional allegations of the Complaint, denying the remaining allegations, setting forth affirmative defenses, and requesting an oral hearing.

---

[9] *See H & J Brokerage, Inc.*, 45 Agric. Dec. at 1196; *Pappas Produce, Inc.*, 36 Agric. Dec. 684, 692 (U.S.D.A. 1977).

[10] 5 U.S.C. §§ 551 *et seq.*

[11] *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding that the standard of proof in administrative proceedings is a preponderance of the evidence); *Havana Potatoes of N.Y. Corp.*, 56 Agric. Dec. 1017, 1021 (U.S.D.A. 1997) (Order Den. Pet. for Recons.) ("The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.").

[12] *See Havana Potatoes of N.Y. Corp.*, 56 Agric. Dec. at 1020-21 ("Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case. The burden of proof does not, however, require Complainant to disprove each of Respondent's assertions or theories of the case.").

[13] *See* 7 C.F.R. § 1.132 ("*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.").

Following a telephone conference with counsel for the parties on March 14, 2019, I issued an Order Setting Deadlines for Submissions and Order Scheduling Hearing for April 9-11, 2019. On March 20, 2019, I assigned the case to Administrative Law Judge Jill S. Clifton ("Judge Clifton"); however, the case was subsequently reassigned to the undersigned.[14]

On March 26, 2019, Complainant filed its proposed Witness and Exhibit List. Respondent filed its proposed Witness and Exhibit List on April 2, 2019.

An in-person hearing was held on the record, before the undersigned, on April 9 and 10, 2019 in New York, New York. Christopher Young, Esq., of the Office of the General Counsel, United States Department of Agriculture, represented Complainant, and Roger M. Newyear, Esq., represented Respondent. Pursuant to Respondent's request, a Spanish language interpreter was made available for and used by Respondent's witnesses.[15] Complainant introduced the testimony of Marketing Specialist Steve Seo[16] and Senior Marketing Specialist Sharlene Evans.[17] Respondent introduced the testimony of Koji Ueno,[18] Respondent's owner, and Victor Fontana,[19] Respondent's accountant. Admitted to the

[14] *See* Docket Control Sheet filed March 28, 2019.

[15] *See* Respondent's Request, filed April 5, 2019, at 1 ("The reason for this request is that all of the Respondent's proposed witnesses are Spanish speaking individuals."); Tr. I at 4.

[16] Tr. I at 21-76 (direct), 77-174 (cross), 175-90 (redirect), 191-96 (recross); Tr. II at 7-8.

[17] Tr. II at 146-70 (direct), 171-77 (cross), 178-203 (recross), 204-218 (recross), 219-21 (redirect).

[18] Tr. II at 10-84 (direct), 85-119 (cross), 120-136 (redirect), 137-142 (recross), 143-45 (redirect).

[19] Tr. I at 200-218 (direct), 219-36 (cross), 237-41 (redirect), 242-44 (recross).

record were Complainant's exhibits, identified as CX 1 through 43,[20] and Respondent's exhibits, identified as RX 1 through 6. A transcript of the hearing was prepared (hereinafter cited as "Tr. (volume number) at (page number)").

On May 21, 2019, Complainant filed proposed corrections to the transcript. On the same date, Respondent filed a notice that it did "not have any corrections to the transcript to be made" and did "not have any objections to the corrections propounded by the Complainant."[21] On May 29, 2019, I entered an order approving Complainant's proposed corrections to the transcript, stating that "the hearing transcript is considered amended to incorporate them."[22]

On July 12, 2019, I issued an Order Approving Party Stipulations as to Exhibits and Filing Dates. Pursuant to that order, Complainant filed its additional exhibits, CX 23 through 43, on July 17, 2019, which were admitted to the record.

Complainant filed its "Proposed Findings of Fact, Conclusions, and Order" ("Complainant's Brief") on August 5, 2019. Appended to Complainant's Brief was an additional exhibit, CX44. Respondent stipulated to the introduction of CX44 into evidence, and it is hereby admitted to the record. On the same date, Respondent filed "Brief for Respondent" ("Respondent's Brief"). On September 6, 2019, Complainant and Respondent filed their respective Reply Briefs.

The record in Docket No. 19-0017 is closed.

Statutory Background

[20] *See also* Order Approving Party Stipulations as to Exhibits and Filing Dates at 1-2.

[21] Respondent's Transcript Corrections at 1.

[22] Order Approving Proposed Transcript Corrections at 1.

Congress enacted PACA in 1930 to regulate the sale of produce and promote fair dealing in the sale of perishable agricultural commodities.[23] PACA is an intentionally "tough law"[24] that was created "for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsibly business conduct, and unfair methods are numerous."[25]

Under PACA, those who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce are required to have a license issued by the Secretary of Agriculture.[26] PACA "makes it unlawful for a licensee to engage in certain types of unfair conduct"[27] and requires regulated merchants, dealers, and brokers to "truly and correctly . . . account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had."[28] For purposes of PACA, "full payment promptly" means payment made within ten days after the date the produce is accepted, unless the parties have agreed otherwise, in writing, prior to the sale.[29] It is well established that, where there is more than one failure to make prompt payment for the purchase of produce and the amount owed is more than *de minimis*, there is a violation of PACA and the violation is

---

[23] *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 413 (5th Cir. 2003) (citing *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1066 (2d Cir. 1995)).

[24] *Hawkins v. U.S. Dep't of Agric.*, 10 F.3d 1125, 1130 (5th Cir. 1993).

[25] H.R. REP. NO. 84-1196, at 2 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

[26] 7 U.S.C. §§ 499a(b)(5)–(7), 499c(a), and 499d(a).

[27] *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007).

[28] *See* 7 U.S.C. § 499h(a).

[29] 7 C.F.R. § 46.2(aa)(5), (11).

considered repeated and flagrant regardless of the reason for non-payment.[30]

Further, if the Secretary determines after an administrative proceeding that a commission merchant, dealer, or broker has violated any provision of PACA section 2(4), the Secretary may publish the facts and circumstances of the violation or suspend the violator's license for up to ninety days.[31] Where the Secretary determines that the violations were repeated or flagrant, the Secretary may order the violator's PACA license revoked.[32] Where a respondent has committed flagrant and repeated violations of PACA section 2(4) by failing to pay promptly for produce by the time of the hearing, or 120 days following service of the Complaint (whichever comes first), revocation of the respondent's PACA license is the appropriate sanction.[33] Failure to pay for produce is a severe violation under PACA for which revocation is the appropriate sanction; where a license application is pending and failures to pay have been established, denial of a PACA license is warranted.[34]

Moreover, the Secretary may deny the license application of a corporation if he finds that the applicant, prior to the date of filing the application, has "engaged in any practice of the character prohibited by the Act."[35] Failure to make full payment promptly for produce in interstate

---

[30] *The Caito Produce Co.*, 48 Agric. Dec. 602, 611, 629 (U.S.D.A. 1998); *see Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1211 (U.S.D.A. 1996).

[31] *See* 7 U.S.C. § 499h(a).

[32] *See H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 757, 762-63 (U.S.D.A. 2001).

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

[34] *See Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1209 (U.S.D.A. 1996), *pet. for review denied*, 151 F.3d 735 (7th Cir. 1998); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 992-93 (2d Cir. 1974).

[35] 7 U.S.C. § 499d(d); *see Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 746 (U.S.D.A. 1992); *Williamsport Purveyors, Inc.*, 48 Agric. Dec. 1092, 1099 (U.S.D.A. 1989) ("The issuance of a PACA license is the Department's attestation to the industry that the licensee will conduct its business in compliance with the Act and applicable regulations."), *aff'd sub nom. aff'd sub nom. Williamsport Purveyors, Inc. v. U.S. Dep't of Agric.*, 916 F.2d 82 (3d Cir. 1990); *Pappas Produce, Inc.*, 36 Agric. Dec. 684 (U.S.D.A. 1977).

and foreign commerce is unlawful under PACA and is therefore a practice of the character prohibited by the Act.[36] In transactions in interstate or foreign commerce, "failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act."[37] The prompt-payment provisions of PACA are meant to ensure that produce shipped cross-country or great distances – transactions that are subject to "opportunities for sharp practices and irresponsible business conduct" – are paid for expeditiously.[38] PACA's requirement of expeditious payment is necessary to prevent a domino effect where the failure to pay one seller leads to that seller's inability to pay its suppliers, with the potential to cause great harm to the produce industry as a whole.[39]

Authorities

This proceeding involves alleged violations of PACA section 2(4) (7 U.S.C. § 499b(4)). Section 2(4) requires merchants and dealers to make "full payment promptly" for perishable agricultural commodities, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase.[40] Specifically, section 2(4) makes it unlawful "[f]or any 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 such commodity to the person with whom such transaction is had."[41]

---

[36] *See Davila*, 36 Agric. Dec. 696, 703 (U.S.D.A. 1997).

[37] *Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 123 (U.S.D.A. 1984).

[38] S. REP. NO. 84-2506 at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; *see Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987).

[39] *See, e.g.*, *In re Magic Restaurants, Inc.*, 205 F.3d 108, 111 (3d Cir. 2000); *The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1628-29 (U.S.D.A. 1993).

[40] 7 C.F.R. § 46.2(aa)(5); *see* 7 C.F.R. § 46.2(aa)(11) ("Parties who elect to use different times of payment . . . must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.").

[41] 7 C.F.R. § 499b(4).

With regard to the issuance of a license, PACA section 4(d) (7 U.S.C. § 499d) provides in pertinent part:

> The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 8(b) or is a person who, or is was responsibly connected with a person who:
>
> (A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension.

7 U.S.C. § 499d(b)(A). Section 4(d) (7 U.S.C. § 449d) also provides:

> The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . . If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . the Secretary may refuse to issue a license to the applicant.

7 U.S.C. § 499d(d).

PACA section 8 (7 U.S.C. § 499h), which governs grounds for license suspension of revocation of a license, states in relevant part:

> **(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 provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.
>
> **(b) UNLAWFUL EMPLOYMENT OF CERTAIN PERSONS . . .**
>
> Except with the approval of the Secretary, no licensee shall employ any person, or any person who has been responsibly connected with any person–
>
> (1) Whose license has been revoked or is currently suspended by order of the Secretary . . . .

7 U.S.C. § 499h(a), (b). Pursuant to PACA section 1 (7 U.S.C. § 499a), "[t]he terms 'employ' and 'employment' mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment."[42]

Further, "PACA also includes a *respondeat superior* provision, which deems the acts of a licensee's agents that fall within the scope of their

[42] 7 U.S.C. § 499a(b)(10); *see also* 7 C.F.R. § 46.2(ee)(5) ("*Employ* and *employment* mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.").

employment to be the acts of the licensee."[43] Section 16 (7 U.S.C. § 499p) provides:

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

Discussion

Failure to pay timely and failure to pay for perishable agricultural commodities is a very serious violation of section 2(4) of the Act, for which license denial is appropriate.[44] Where payment for produce purchases is concerned, it has been long held that "the Act calls for payment – not excuses."[45]

In this case, Respondent has not made full payment promptly to the twenty-one sellers in accordance with PACA; rather, Respondent has set forth defenses "excusing" its failures to pay. Respondent claims that only ten of the twenty-one sellers are "known" to Respondent; that Respondent did business with the "known" sellers *only*; and that at the time the Answer was filed, these ten sellers "ha[d] been paid" or were in the "process of being paid" per "arrangements" made between the sellers and

---

[43] *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 685 (D.C. Cir. 2007).

[44] *See Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1208 (U.S.D.A. 1996); *Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 745-46 (U.S.D.A. 1992).

[45] *The Caito Produce Co.*, 48 Agric. Dec. 602, 615 (U.S.D.A. 1989); *see, e.g.*, *Finer Food Sales Co. v. Block*, 708 F.2d 774, 781 (D.C. Cir. 1983); *Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1591-92 (U.S.D.A. 1985).

Respondent.[46] Respondent argues that the remaining twelve sellers are *not* known to Respondent; that Respondent never purchased produce from these twelve sellers; and that any produce that was purchased from these twelve sellers was purchased by the fraud of a third party.[47]

I. Respondent's "Approved" Sellers

During the hearing, Respondent referred to the following ten entities as the "approved" sellers: Fruitco Corporation; Circus Fruits Wholesale Corp.; Northeast Banana Corp.; Banana Distributors of NY, Inc.; US Fresh; Dr. Produce; Gaetan Bono; Lawrence J. Lapide, Inc.; Exp. Group, LLC; and Exclusive Produce, Inc. Respondent argues that these ten sellers have been paid, are in the process of being paid, or that arrangements have been made for payment.[48] However, the evidence in this case shows that Respondent failed to pay promptly all but one of these sellers in accordance with PACA and, as of the date of the hearing, failed to make full payment to six of these ten sellers.[49]

Fruitco Corporation

As of the time of hearing, Respondent had paid only one of the sellers – Fruitco Corporation ("Fruitco") – in accordance with PACA.[50] Janet Gonzalez, an employee of Fruitco, was interviewed at Fruitco Corporation's place of business by PACA Marketing Specialist Steve Seo on April 24, 2019.[51] Ms. Gonzalez stated that when doing business with Respondent, Fruitco always dealt with Koji Ueno.[52] At hearing, Respondent provided a letter from Wilma Banda, Controller of Fruitco,

---

[46] Answer ¶ 3 at 1-2.

[47] *Id.* ¶ 4 at 2-3, 5.

[48] *See* Respondent's Post-Hearing Brief at 7.

[49] *See* CX23-CX43; *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

[50] *See* CX23 ¶ 9; CX26.

[51] CX23 ¶ 9

[52] *Id.*

stating that Respondent "had never been delinquent on payments" to Fruitco.[53] During her in-person interview, Ms. Gonzalez had stated that the letter was written because Respondent was in good standing in terms of payment and there was no history of payment issues.[54] Ms. Gonzalez also provided a cancelled check showing that the invoices listed in the Complaint were paid.[55] Furthermore, Complainant acknowledges Respondent's full and timely payment.[56]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent did not fail to make full payment promptly to Fruitco Corporation, as alleged in the Complaint.[57]

Circus Fruits Wholesale Corp.

Respondent paid its debt to Circus Fruits Wholesale Corp. ("Circus Fruits") in full; however, payment was made five to ten days past the fourteen-day payment terms the parties had agreed upon.[58] Silvestro LoVerde, President of Circus Fruits, was interviewed by PACA Marketing Specialist Steve Seo at his place of business on April 23, 2019.[59] Mr. LoVerde stated that when doing business with Respondent, he always dealt with Koji and "Chino,"[60] Koji's brother.[61] At hearing, Respondent provided a letter from Mr. LoVerde stating that Respondent had "never been delinquent on payments" to Circus Fruits.[62] During the in-person interview, however, Mr. LoVerde stated that he wrote the letter for

[53] RX2 at 6; *see* Tr. II at 55.

[54] CX23 ¶ 9.

[55] CX26.

[56] *See* Complainant's Brief at 17.

[57] *See* Complaint ¶ III at 3, Attachment A at 2.

[58] *See* CX23 ¶ 5; RX1 at 13.

[59] CX 23 ¶ 5.

[60] *Id.*

[61] Tr. I at 26; Tr. II at 13.

[62] RX2 at 2; *see* Tr. II at 53.

Respondent because while Respondent "doesn't always pay Circus for produce on time," Respondent "eventually" pays Circus Fruits.[63] Mr. LoVerde stated that there are or were no written credit agreements extending payment terms for produce purchased by Respondent beyond the fourteen-day terms stated on the Circus Fruits's invoices.[64]

Pursuant to the Regulations, parties "may elect to use different times of payment than" the default ten days called for by the Act; however, in order to constitute "full payment promptly," payment must be made "within the agreed upon time."[65] Here, Respondent made payment after the agreed upon fourteen days. Therefore, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Circus Fruits in violation of PACA.

Northeast Banana Corp.

Respondent paid Northeast Banana Corp. ("Northeast Banana") the debt listed in the Notice to Showr Cause and Complaint in full; however, payment was made ten to twenty days past the thirty-day payment terms agreed to by the parties.[66] James Balducci, owner of Northeast Banana, was interviewed at Northeast Banana Corp.'s place of business on April 23, 2019 by PACA Marketing Specialist Steve Seo.[67] Mr. Balducci stated that the payment terms for all produce sold to Respondent were thirty days at maximum.[68] Mr. Balducci provided evidence of all payments made for the debt listed in the Notice to Show Cause and Complaint in this case; the evidence shows that all payments have been made for the debt listed, but after the thirty-day payment terms.[69]

---

[63] CX23 ¶ 5.

[64] *Id,*

[65] 7 C.F.R. § 46.22(a)(11).

[66] CX23 ¶ 8; RX1 at 40.

[67] CX23 ¶ 8.

[68] *Id.*

[69] *Id.*; *see* CX13 at 116-31.

For these reasons, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Northeast Banana in violation of PACA.

Banana Distributors of NY, Inc.

Respondent paid its debt to Banana Distributors of NY, Inc. ("Banana Distributors") in full; however, payment was made approximately thirty days past the fourteen-day payment terms agreed to by the parties.[70] Quiana Laguerre, accountant of Banana Distributors, was interviewed at the company's place of business on April 24, 2019 by PACA Marketing Specialist Steve Seo.[71] Ms. Laguerre stated that when doing business with Respondent, the company always dealt with Koji Ueno or "Chino," Mr. Ueno's brother.[72] Ms. Laguerre stated that there are or were no written credit agreements extending payment terms for produce purchased by Respondent beyond the fourteen-day terms stated on Banana Distributors' invoices.[73] Ms. Laguerre stated Respondent made payments timely when it began to do business with Banana Distributors but that Respondent subsequently started to fall behind.[74] Ms. Laguerre provided copies of three CFK Produce Corp. checks for sale/order invoices 120015, 120058, 120183, and 120234 (all invoices for debt listed in the Notice to Show Cause and Complaint in this case), signed by Katherine De La Rosa.[75] These orders/invoices were paid past the fourteen-day period, according to Ms. Laguerre, but were paid in full.[76]

Pursuant to the Regulations, parties "may elect to use different times of payment than" the default ten days called for by the Act; however, in order to constitute "full payment promptly," payment must be made

[70] *See* CX23 ¶ 10; CX27; RX1 at 6.

[71] CX23 ¶ 10.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*; *see* CX27.

"within the agreed upon time."[77] Further, the parties "must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records."[78] Respondent's payment was made after the agreed upon fourteen days, and there were no written agreements extending the payment terms. Therefore, I find that the preponderance of the evidence demonstrates that Respondent failed to make full payment promptly to Banana Distributors in violation of PACA.

US Fresh

As of at least April 24, 2019, Respondent failed to pay US Fresh $11,020.00 of the original $30,787.50 in produce debt owed to US Fresh as listed in Appendix A to the Complaint.[79] Although US Fresh was partially paid, the partial payments were made past the twenty-one-day payment terms as stated on the US Fresh invoices in evidence.[80] Also, as of at least April 24, 2019, additional produce debt owed to US Fresh by Respondent (not listed in Appendix A to the Complaint in this case), in the amount of $7,641.50, was thirty-one to forty-five days past due.[81]

Autumn Persaud, accounts receivable manager of US Fresh, and Mike Scicchitano, controller of US Fresh, were interviewed at the company's place of business on April 24, 2019 by PACA Marketing Specialist Steve Seo.[82] Both Ms. Persaud and Mr. Scicchitano stated that when doing business with Respondent, they dealt with Koji Ueno or "Chino," Mr. Ueno's brother.[83] Both also stated that at least $11,020.00 of the produce debt listed in the Complaint in this case remained unpaid and past due and indicated which invoices listed in the Complaint remained unpaid as of the

[77] 7 C.F.R. § 46.22(a)(11).

[78] *Id.*

[79] *See* CX13 at 105-11; CX23 ¶ 11.

[80] CX13 at 96-104, 112-14; CX23 ¶ 11.

[81] CX23 ¶ 11; CX28.

[82] CX23 ¶ 11.

[83] *Id.*; *see* Tr. I at 70-71.

time of the interview.[84] They also stated that approximately $7,000.00 in additional debt (not listed in the Complaint) was currently unpaid and thirty-one to forty-five days past due.[85] In addition, Ms. Persaud and Mr. Scicchitano stated that there were no written agreements to pay for produce past the twenty-one days listed on US Fresh invoices and indicated which invoices listed in the Complaint were paid but were paid late.[86] Ms. Persaud provided a statement showing that as of April 24, 2019, Respondent owed $20,372.00 in total produce debt and that $7,641.50 was thirty-one to forty-five days past due.[87]

Pursuant to the Regulations, parties "may elect to use different times of payment than" the default ten days called for by the Act; however, in order to constitute "full payment promptly," payment must be made "within the agreed upon time."[88] Further, the parties "must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records."[89] Respondent's payment was made after the agreed upon fourteen days, and there were no written agreements extending the payment terms. Therefore, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to US Fresh in violation of PACA.

Dr. Produce

As of at least April 24, 2019, Respondent failed to pay Dr. Produce the entire produce debt of $1,600.00 listed in Appendix A to the Complaint.[90] Janelis De Los Santos, an accounts-receivable employee of Dr. Produce, was interviewed at the company's place of business on April 24, 2019 by

[84] CX13 at 105-11.

[85] CX23 ¶ 11.

[86] *Id.*; *see* CX23 at 96-104, 112-14.

[87] CX23 ¶ 11; *see* CX28.

[88] 7 C.F.R. § 46.22(a)(11).

[89] *Id.*

[90] CX23 ¶ 12; *see* CX29.

PACA Marketing Specialist Steve Seo.[91] Ms. De Los Santos stated that the debt listed on the Complaint in this case was still past due and owed to Dr. Produce[92] and provided invoices unpaid by Respondent at the time of the interview.[93]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Dr. Produce in violation of PACA.

Gaetan Bono

As of the time it filed its initial posthearing Brief, Respondent failed to pay Gaetan Bono the entire produce debt of $16,091.00 listed in Appendix A to the Complaint.[94] At hearing, Respondent introduced checks purportedly paid to Gaetan Bono for produce purchases; however, not one of these checks was for the produce listed in Appendix A to the Complaint.[95]

During the hearing, Respondent offered the explanation that these checks for produce *other than* that listed in Appendix A to the Complaint somehow shows that the payments for the actual debt listed in Appendix A were, in fact, made:

> If we're showing current payments made, it stands to reason that the old invoices were paid as well . . . It would have been extremely burdensome . . . for us to produce all the checks paid to any of these [sellers] based on the history of the payments. All of these show the current payment and show they're up to date.

---

[91] CX23 ¶ 12.

[92] *Id.*

[93] *See* CX29.

[94] *See* CX4 at 3; CX5; CX13 at 26-29; Tr. II at 196.

[95] RX1 at 30-35; *See* Tr. II at 110-11, 196.

Tr. II at 43. As I noted during the hearing, Respondent's logic is faulty—a payment made later on a *different* invoice does not show that a payment for an earlier invoice was made.[96] Moreover, Respondent provided these invoices to Marketing Specialist Steve Seo at the time of the investigation, when Mr. Seo specifically asked for all of Respondent's unpaid invoices.[97] If these invoices *were* paid, Responded needed only to show that by producing the checks or other evidence of payment of the invoices. As of the date of hearing and to date, Respondent has not shown that any payments for the $16,091.00 listed in Appendix A to the Complaint were made. The money is still past due and owed by Respondent.

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Gaetan Bono in violation of PACA.

Lawrence J. Lapide, Inc.

As of at least April 23, 2019, Respondent failed to pay Lawrence J. Lapide, Inc. ("Lapide") the entire produce debt of $8,120.00 listed in Appendix A to the Complaint.[98] Yasha Persad, accountant of M1 Packing (a newly formed entity organized by affiliates of Lapide) was interviewed at the Lapide place of business on April 23, 2019 by PACA Marketing Specialist Steve Seo.[99] Ms. Persad provided copies of three CKF Produce Corp. Checks totaling $15,920.00 and signed by Katherine De La Rosa, which were in payment of other loads of produce purchased around the time of the debt incurred as listed in the Complaint in this case.[100] Ms. Persaud also provided an accounts receivable report that shows that as of April 23, 2019, an open balance of $8,120.00 remained unpaid and stated in an accompanying email that the $8,120.00 debt listed in the Complaint was still owed.[101] The due date for this open balance appears as August

[96] *See* Tr. II at 43-45.

[97] *See* Tr. I at 35, 106.

[98] CX13 at 25; CX23 ¶ 7; CX25.

[99] CX23 ¶ 7.

[100] CX25.

[101] *See id.*

11, 2017 on the accounts receivable report.[102]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Lawrence J. Lapide, Inc. in violation of PACA.

Exp. Group, LLC

As of at least April 24, 2019, Respondent failed to pay Exp. Group LLC ("Exp. Group") $191,226.25 of the original $255,945.75 owed in produce debt, as listed in Appendix A to the Complaint.[103] Complainant states it "has determined that partial payments of the $255,945.75 were made," but Respondent has not provided any evidence of payments of invoices or debt at issue.[104] Instead, Respondent has provided checks for purported payment of other invoices and debt owed to Exp. Group.[105]

Emil Serafino, CEO of Exp. Group, was interviewed at the company's place of business on April 24, 2019 by PACA Marketing Specialist Steve Seo.[106] Mr. Serafino stated that when doing business with Respondent, he dealt with Koji Ueno or "Chino," Mr. Koji Ueno's brother.[107] Mr. Serafino stated that $121,226.25 of the produce debt listed in the Complaint remained unpaid and past due.[108] Mr. Serafino also stated there were no written agreements to pay for produce past the ten days listed on Exp. Group invoices.[109] Mr. Serafino provided a "customer statement inquiry" showing the amounts and invoices that were unpaid and paste due as of

---

[102] *Id.*; CX23 ¶ 7.

[103] *See* CX4 at 3; CX5; CX13 at 7-24; CX22 ¶ 6(a); Tr. I at 30.

[104] Complainant's Brief at 23.

[105] *See* RX1 at 16-21.

[106] CX23 ¶ 13; CX13 at 11-24; CX30; Tr. I at 109-11.

[107] CX23 ¶ 13.

[108] CX22 ¶ 6(a).

[109] CX23 ¶ 13.

the date of the interview[110] and further confirmed which invoices were paid as of the date of the interview.[111]

Pursuant to the Regulations, parties "may elect to use different times of payment than" the default ten days called for by the Act; however, in order to constitute "full payment promptly," payment must be made "within the agreed upon time."[112] Respondent's payment was made after the agreed upon ten days, and there were no written agreements extending the payment terms. Therefore, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Exp. Group in violation of PACA.

Exclusive Produce, Inc.

Complainant argues that Respondent failed to pay Exclusive Produce, Inc. ("Exclusive Produce") the entire $10,225.00 of produce debt listed in Appendix A to the Complaint.[113] Respondent has provided no paid checks for this vendor but did provide a letter at hearing stating that Respondent "had never been delinquent on payments for any commodities delivered to [Exclusive Produce]."[114] No company title for the signatory is provided in the letter along with this signature.[115] The letter is not credible evidence that Exclusive Produce has been paid any of the $10,225.00 in produce debt listed in the Complaint; no checks for payment have been provided.

Moreover, each Exclusive Produce invoice provided as evidence by Complainant clearly states on its face: "Not paid."[116] These invoices were provided to Marketing Specialist Steve Seo by Respondent at the time of the investigation, when Mr. Seo specifically asked for all of Respondent's

---

[110] *See* CX30.

[111] *See* CX13 at 11-24.

[112] 7 C.F.R. § 46.22(a)(11).

[113] Complainant's Brief at 23.

[114] CX2 at 5. The letter is dated March 18, 2019 and is signed by Farid Isakov. *Id.*

[115] *See id.*

[116] *See* CX13 at 1-6; Tr. I at 33-35.

unpaid invoices.[117] Exclusive Produce is listed on Respondent's accounts payables list as an overdue seller to which $10,225.00 is owed, and the debt is listed as more than ninety-days past due as of November 12, 2018.[118] Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Exclusive Produce, Inc. in violation of PACA.

Based on the foregoing, I find that the preponderance of the evidence shows that: (1) only one of Respondent's "approved" vendors was paid timely and in full; (2) payment was made in full to three of Respondent's "approved" vendors, but those vendors were paid between five and thirty days past the terms agreed to by the parties; and (3) six of Respondent's "approved" vendors were not paid in full, for more than *de minimis* amounts,[119] well after the hearing in this case was held. In sum, payment breakdown of the ten "approved" sellers is as follows:

Fruitco Corporation:	Paid timely and in accordance with the Act;
Circus Fruits Wholesale Corp.:	Paid in full, five to ten days late;
Northeast Banana Corp.:	Paid in full, ten to twenty days late;
Banana Distributors of NY:	Paid in full, approximately thirty days late;
US Fresh:	Owed $11,020.00 as of April 24, 2019;
Dr. Produce:	Owed $1,600.00 as of April 24, 2019;
Gaetan Bono:	Owed $16,091.00;
Lawrence J. Lapide, Inc.:	Owed $8,120.00 as of April 23, 2019;
Exp. Group LLC:	Owed $191,226.25 as of April 24, 2019; and
Exclusive Produce, Inc.:	Owed $10,225.00.

Further, after the hearing, Respondent still owed a total of $238,282.25 to six of the "approved" sellers. As the Judicial Officer ruled in *Scamcorp*,[120] a seminal case regarding failure to pay for produce:

---

[117] *See* Tr. I at 31-32.

[118] *See* CX5.

[119] *See The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

[120] *Scamcorp, Inc.*, 57 Agric. Dec. 527 (U.S.D.A. 1998).

> In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. . . . 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.
>
> In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. . . [I]n any "slow-pay" case in which the PACA Licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

The Secretary's policy of imposing severe sanctions for failures to pay is designed not only to deter produce purchasers from failing to make payment promptly; it is also designed to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of PACA.[121] The admittedly

---

[121] *See Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007); *Baiardi Food Chain v. United* States, 482 F.3d 238, 240 (3d Cir. 2007); *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 588 (6th Cir. 2003) ("PACA was 'designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility.'") (quoting *Kanowitz Fruit & Produce Co. v. U.S. Dep't of Agric.*, No. 97-4224, 1998 WL 863340, at *1 (2d Cir. Oct. 29, 1998)); *The Caito Produce Co.*, 48 Agric. Dec. 602, 616-17 (U.S.D.A. 1989).

"tough" policy has been consistently upheld by the federal courts.[122]

Respondent argues that, with regard to the ten "known" sellers, Respondent's conduct "cannot be construed as being a willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4))."[123] In support of its assertion, Respondent claims it "has been completely up to date with . . . payments for commodities ordered and delivered by these sellers and or was up to date with their installment payment agreements with those sellers with whom they had such installment payment agreements."[124] This argument has no merit. As demonstrated by the record and detailed above, Respondent owed a total of $238,282.25 to six of the "approved" sellers at the time of hearing. And of the ten "approved" sellers, only one was paid timely. Three sellers were paid in full but paid late—between five to thirty days after the terms agreed to by the parties—and six were not paid more than *de minimis* amounts well after the hearing was held.

As for the "installment payment agreements," the record shows that Respondent had no credit agreements with any "approved" seller past thirty days.[125] Complainant correctly notes that "the party claiming

---

[122] *See, e.g.*, *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 690-91 (D.C. Cir. 2007); *Baiardi Food Chain v. United States*, 482 F.3d 238, 241, 244 (3d Cir. 2007); *Hawkins v. Dep't of Agric.*, 10 F.3d 1125, 1133-35 (5th Cir. 1993).

[123] Respondent's Brief at 18.

[124] *Id.*

[125] Respondent appears to confuse the payment terms required by PACA and the requirements for a valid credit agreement under PACA. *See* Respondent's Brief at 9-10. Contrary to Respondent's apparent impression, Complainant has not held Respondent to fourteen-day payment terms for every produce seller. Under PACA, "full payment promptly" is payment "within 10 days after the day on which the produce is accepted" or, if the parties elect to use different terms of payment, "payment within the agreed upon time" so long as the agreement is reduced to writing prior to entering into the transaction and the parties "maintain a copy of the agreement in their records." 7 C.F.R. § 46.2(aa)(5), (11).

existence of such an agreement shall have the burden of proving it"[126] – which Respondent has failed to do here. Although Koji Ueno testified that such agreements existed, he gave no details regarding with whom, for how long, or when the agreements were entered into.[127] Neither Koji Ueno nor Respondent produced any evidence—written or otherwise—to support his vague testimony on the issue.

Furthermore, I find that Respondent's violations of PACA section 2(4) were flagrant, repeated, and willful. A violation is "flagrant" where there is knowing conduct or a large number of transactions committed over a period of time.[128] As the total amount due exceeds $200,000.00 for a number of knowing transactions made with nine sellers, Respondent's violations are flagrant. Violations are "repeated" where there is more than one violation of PACA.[129] As the violations in this case occurred over a period of time and involve at least nine sellers, Respondent's violations are repeated. Furthermore, the Judicial Officer has long held that where – as in the present case – there is more than one failure to make prompt payment for produce and the amount involved is more than *de minimis*, a repeated and flagrant violation of PACA exists, regardless of the reason for non-payment.[130] Finally, a violation is "willful" where "the violator:

---

[126] Complainant's Reply Brief at 3-4 (citing 7 C.F.R. § 46.2(aa)(11)); *see* 7 C.F.R. § 46.2(aa)(11) ("[T]he party claiming the existence of such an agreement for time of payment shall have the burden of proving it.").

[127] *See* Tr. II at 111-13, 173-74 (testimony of Sharlene Evans).

[128] *See Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996) (citing, *inter alia*, 10 Harl, *Agricultural Law* § 72.09[3], p. 72–35 (1995) ("'Flagrant' violations have been stated to be those which are committed with knowledge of their occurrence, involve a large number of transactions, are committed over a period of time, and involve a substantial sum of money."); *see also H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 757 (U.S.D.A. 2001), *aff'd sub nom. H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003).

[129] *See Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric.*, 692 F.3d 960, 970 (9th Cir. 2012) ("Violations that 'did not occur simultaneously . . . must be regarded as 'repeated' violations.") (quoting *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972)).

[130] *See The Caito Produce Co.*, 48 Agric. Dec. 602, 611, 629 (U.S.D.A. 1989); *see also Andershock Fruitland*, 55 Agric. Dec. 1204, 1208 (U.S.D.A. 1996).

'(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.'"[131] Here, Respondent knew or should have known it could not make prompt payment for the large amount of perishables it ordered, yet Respondent continued to make purchases over a lengthy period of time and did not pay its produce suppliers. Therefore, Respondent's actions in this case were willful.

Given the evidence regarding the ten "approved" sellers alone,[132] the appropriate sanction for Respondent's flagrant and repeated violations of PACA is revocation of Respondent's PACA license, or publication in lieu of revocation under PACA section 8(a) (7 U.S.C. § 499h(a)) (since Respondent does not currently hold a valid active PACA license),[133] and denial of Respondent's license application under PACA section 4(d) (7 U.S.C. § 499d(d)). Respondent has shown, through its many failures to pay produce sellers promptly, that it is unfit to receive a new PACA license.

II. Respondent's "Unapproved" Sellers

With regard to the remaining twelve "unapproved" sellers, Respondent contends that they were not known to Respondent, that Respondent never purchased produce from them, and that any produce that was purchased from them was done by fraud of a third party.[134] These twelve sellers are: Agri-Mondo; Produce Connection; Leonard's Express; Ryeco, LLC; B&M Avocados, LLC; Trufresh; Ag Grower Sales, LLC; Paulmex International, Ltd; OTC Produce, LLC; Roland Marketing; Higueral

---

[131] *See Perfectly Fresh Farms, Inc.*, 692 F.3d at 970 (quoting *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d, 800, 804 (9th Cir. 1996)).

[132] *See supra* Discussion, Part I.

[133] *See Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

[134] *See* Answer ¶ 4 at 2-3, 5; Respondent's Brief at 5; Tr. II at 30.

Produce, Inc.; and Ergo Produce, Inc. According to Respondent, these produce purchases were made primarily by Eran "Ryan" Evanaim and Elpidio "Chino" Ueno, neither of whom were Respondent's employees.[135] The aggregate of the evidence shows otherwise.

Although it makes numerous factual assertions, Respondent never once cites any portion of the record in purported support of these assertions. There is no citation to any portion of the transcript, nor to any exhibit. There is not even any citation to any portion of Complainant's initial brief, or any other filing made by Complainant, as might be done if Respondent was contending that Complainant admitted to some factual matter. A mere assertion by a litigant of a fact on brief does nothing to prove that fact.

Given Respondent's failure to provide citations to the record in support of its factual contentions, it would be proper in this Decision to ignore or to reject out of hand as unsupported each of those contentions. However, because the record is before me, in the potential aid of proceedings on appeal, I will address those arguments herein to some extent.

First, Respondent claims that the purchases of produce from the twelve "unapproved" sellers were made primarily by Elpidio "Chino" Ueno, (Koji Ueno's brother) and Eran "Ryan" Evanaim.[136] Respondent argues:

> Further and moreover, it is submitted that the Respondent cannot be held to be liable for the actions of Elpedio "Chino" Ueno, Eran "Ryan" Evanaim or any of the other individuals who were involved with the transactions with the twelve (12) unknown vendors under Section 16 of the PACA or under the common law doctrine of respondeat superior because they were not operating within the scope of their employment with, the Respondent as it is legally defined.

Respondent's Reply Brief at 11.

Although Respondent denies that Chino and Ryan were employees of

---

[135] *See* Respondent's Brief at 6, 12, 15, 17; Respondent's Reply Brief at 6.

[136] *See* Respondent's Brief at 6, 12-13; Respondent's Reply Brief at 8.

Respondent, the evidence shows that both individuals were employed by Respondent under PACA's definition of employment.[137] PACA section 1(b)(10) (7 U.S.C. § 499a(b)(10)) and section 46.2(ee) of the Regulations (7 C.F.R. § 46.2(ee)) both state that the terms "employ" and "employment" mean "any affiliation of any person with the business operations of a licensee, with or without compensation."[138]

Here, the record demonstrates that Elpidio "Chino" Ueno was an employee of Respondent by these definitions.[139] Elpidio "Chino" Ueno held himself out to all twelve "unapproved" sellers to be at least an employee—and even in charge at times—of Respondent.[140] He also held himself out to be an employee and produce salesman of Respondent to at

---

[137] *See* Respondent's Reply Brief at 5-10.

[138] 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee).

[139] *See Bama Tomato Co. v. U.S. Dep't of Agric.*, 112 F.3d 1542, 1545-46 (11th Cir. 1997); *see, e.g.*, *County Produce, Inc.*, 55 Agric. Dec. 596, 610-11 (U.S.D.A. 1996) (holding that "[t]he fact that [an employee] received no payment, no profit, and no promise of future employment . . . is legally irrelevant, because the statute plainly states . . . 'employment' means any affiliation, with or without compensation, ownership, or self-employment[.]") ("USDA has held that '[t]he word 'any' is a broad and comprehensive terms that includes all kinds of affiliation – whether minimum or maximum; whether deliberate or not.'") (quoting *Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 (U.S.D.A. 1986), *aff'd per curiam*, 82 F.2d 162 (D.C. Cir. 1987)); *DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1701-02 (U.S.D.A. 1994); *ABL Produce, Inc.*, 52 Agric. Dec. 1578, 1590-92 (U.S.D.A. 1993).

[140] *See* CX23-24; CX33-35; CX37; *see also* CX23 ¶ 3 at 1 (declaring that Michael Visconti, Secretary and Treasurer of the Brooklyn Terminal Marketing Cooperative, stated he "was aware of CKF and stated to his knowledge 'it was run' by Koji and 'Chino'"), ¶ 6 at 1 (declaring that Will Aquino, owner of T&C Tropical Products, Inc., whose place of business is also located in Brooklyn Terminal Market, "stated that to his knowledge, Koji Ueno owns CKF and that Elpidio Ueno either also owns, or helps 'run' the business").

least four of the "approved" vendors.[141]

During an on-site investigation, Koji Ueno asked his brother to talk to and assist the PACA investigators,[142] and Chino assisted investigators as Respondent's "controller" or manager during the entire on-site investigation.[143] The evidence demonstrates that Elpidio "Chino" Ueno specifically indicated to PACA investigators that he was "in charge" and stated that he "ran the show."[144] During that time, employees came to Elpidio "Chino" Ueno "throughout the day" and asked him how to handle various items of business.[145] He also received calls from produce sellers.[146]

Furthermore, Koji Ueno's testimony about his brother further demonstrates that Elpidio "Chino" Ueno was employed by Respondent. Although Koji Ueno denied that Chino worked for the company, he also admitted that Chino "comes occasionally and gives me assistance because he has a lot of business experience. And he is . . . very experience[d] in marketing and helps me with ideas when I need new ideas for the business."[147] That Chino purportedly did not receive compensation from the company is not germane to whether or not he was an "employee" under PACA.[148] Further, Koji Ueno testified at hearing that at least one "approved" seller purchased produce from "Chino"[149] and indicated that several others either purchased produce from "Chino" (or at least believed they were purchasing produce from "Chino").[150] As noted, both PACA

---

[141] *See* CX23. Elpidio "Chino" Ueno held himself out as Respondent's employee and produce salesman to Circus Fruits Wholesale Corp.; Banana Distributors of New York, Inc.; US Fresh; and EXP. Group, LLC. *See id.*

[142] Tr. II at 21.

[143] *Id.* at 180-83.

[144] *See* Tr. I at 24-26, 29, 89, 98, 174, 179, 186.

[145] *Id.* at 98.

[146] *Id.*

[147] Tr. II at 13-14.

[148] *See* 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee).

[149] *See* Tr. II at 92; CX13 at 1.

[150] *See* Tr. II at 92-94.

itself and the implementing Regulations are explicit that "employment" is "any affiliation of any person with the business operations of a licensee, with or without compensation."[151] Based on the aggregate of evidence demonstrating his affiliation with the business operations of Respondent, I find that Elpidio "Chino" Ueno was an employee of Respondent.

Similarly, the record establishes that Eran "Ryan" Evanaim was an employee of Respondent under PACA and the Regulations. The evidence shows that each of the twelve "unapproved" vendors communicated with "Ryan" about the produce purchased in this case and the debt owed for the purchases of that produce.[152] On April 25, 2019, Marketing Specialist Steve Seo conducted a telephone interview with "Eran Evanaim."[153] During the call, Mr. Evanaim acknowledged that he was involved with Respondent and stated he "helped out" with "marketing" and purchasing produce in 2017 and 2018.[154] Mr. Evanaim stated that all produce he purchased during that period was authorized by Respondent.[155] This aggregate of evidence demonstrates that "Ryan" was an employee of Respondent in this case.[156]

Respondent's testimony also suggests "Ryan" was an employee of Respondent and renders the "fraud by Ryan" claim contrary to the preponderance of the evidence. At one point during the hearing, Koji Ueno testified that he told sellers "he did not know Ryan" at all,[157] but Koji Ueno then also testified that he indeed knew Ryan and that Ryan had worked for

---

[151] 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee).

[152] *See* CX23; CX24.

[153] CX23 ¶ 14. The call was received from the phone number (917) 670-4848. Mr. Seo performed a trace of the call using software available to him and determined that the number was registered to and associated with Eran Evanaim. CX31.

[154] CX23 ¶ 14.

[155] *Id.*

[156] *See* 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee); *Bama Tomato Co. v. U.S. Dep't of Agric.*, 112 F.3d 1542, 1544-45, 1549 (11th Cir. 1997).

[157] Tr. II at 69.

Respondent "a few years ago, in 2016" as a middle man for Respondent to buy produce.[158] For this reason, and based on the evidence regarding the twelve "unapproved" sellers discussed below, I find that Koji Ueno's testimony regarding Ryan's non-employment is not credible. The record shows that Ryan was affiliated with Respondent's business operations and therefore an employee under the Act and Regulations.[159]

Second, Respondent raises an argument in its Reply Brief that it never previously—but could have—raised: that the named individuals were not acting within the scope of their employment for Respondent because they were working for "CKF II," a "completely separate corporate entity."[160] Respondent contends:

> They were operating under the name of a completely separate corporate entity CKF II, which is a corporation organized and registered in the State of New York. Kathrine De La Rosa is listed as the President and sole shareholder of CKF II. The Respondent is not and was never an officer, shareholder, or never had any administrative or financial connection to CKF II.

Respondent's Reply Brief at 6. By neglecting to raise this argument until its Reply Brief, Respondent sandbagged Complainant on this contention and thereby denied Complainant the opportunity to respond thereto.

Nonetheless, Respondent's argument—for which absolutely no

---

[158] *See id.* at 19, 12-27, 86-87, 108-09, 125-26. *See also* RX6 (Respondent's Police Report Statement) ("On a couple of occasions in 2016, our company, upon the recommendation of my brother Elpidio, used [Ryan] as a middleman to procure some bargain commodities for us from vendors that he was familiar with.").

[159] *See* 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee); *Bama Tomato Co. v. U.S. Dep't of Agric.*, 112 F.3d 1542, 1544-45, 1549 (11th Cir. 1997).

[160] Respondent's Reply Brief at 7. Respondents state that CKF II "is a corporation organized and registered in the State of New York." *Id.* However, official notice is taken that a "PACA License Search" of the AMS ePACA Portal reveals no PACA license has been issued to the business. *See* 7 C.F.R. § 1.141(h)(6); *ePACA*, USDA.GOV, https://apps.mrp.usda.gov/public_search (last visited March 25, 2020).

support has been offered—fails. Respondent gives no explanation as to how Chino's and Ryan's alleged business with CKF II would negate their affiliation with Respondent. It would be illogical to accept that Respondent CKF Produce and CKF II were acting as separate entities where, as the record has established here: (1) all of the disputed transactions involved either Chino or Ryan, who were each employees of CKF Produce;[161] (2) copies of all the challenged invoices were supplied by CKF Produce, from the company's own records;[162] (3) in cases where inspections took place, those inspections were ordered and paid for by CKF Produce;[163] (4) in some instances, partial payments were made by CKF Produce;[164] (5) the produce in question was shipped to CKF Produce's address at Brooklyn Terminal Market;[165] and (6) the president and sole shareholder of CKF II, Katherine De La Rosa, was also the highest paid employee of CKF Produce.[166]

Third, Respondent argues that Koji Ueno, Respondent's principal and 100% owner, did not authorize, was not aware of, and was not involved in the purchase of commodities from the twelve "unknown" sellers.[167] According to Respondent, "all of these sellers corroborated Mr. Ueno's assertions that he was not the person with whom they had dealt with in negotiating these transactions. In fact, none of these sellers had even heard of Koji Ueno."[168] However, Respondent cites no record evidence to support its contention, and—as delineated below—the record shows that Koji Ueno personally knew of and was involved in transactions with several of the twelve "unapproved" sellers. Given that Respondent CKF

---

[161] *See supra* pages 29 through 32.

[162] *See* CX4 at 3; CX13 at 64; Tr. I at 35, 79, 88, 98, 106, 174, 179, 186.

[163] *See, e.g.*, CX13 at 35, 36, 48, 50, 55, 59; CX40 at 147-48, 155-58; CX40 at 181, 185; CX44 at 1-3, 4, 6, 8.

[164] *See* CX13 at 38-63; CX33; CX39; Complainant's Brief, Attachment 2.

[165] *See* Tr. I at 122-25, 141-42, 191-92; CX1; CX4 at 3**;** CX13 at 31-33.

[166] *See* Respondent's Reply Brief at 6; RX3.

[167] *See* Respondent's Brief at 12.

[168] Respondent's Brief at 12.

Produce ordered inspections related to the disputed transactions, made partial payments from its own bank account, and received shipments of the produce at its company address, it defies logic that Koji Ueno would not have been involved in, or at least aware of, these transactions.[169] Moreover, Respondent specifically admits that "these transactions appear to have taken place on [Mr. Ueno's] watch, and apparently involved individuals who are or were employees of his company, and who were under his direct supervision."[170]

Further, Respondent contends that its conduct, as it relates to the twelve "unknown" sellers, cannot constitute a willful violation of PACA because Respondent's principal, Mr. Koji Ueno, did not have actual knowledge of what those employees were doing. Respondent asserts that a PACA violation requires more than a principal/agent relationship between a PACA licensee and an employee and that, "as a matter of practicality and common sense, one cannot possibly formulate the intention to carry out an act that he is not aware of."[171]

Respondent cites the Judicial Officer's decision in *Post & Taback, Inc*.,[172] contending that the Judicial Officer's reasoning was faulty when the Judicial Officer concluded "[t]he knowledge that can be attributed to a corporate PACA licensee, such as the Respondent is not limited to that which is known by its officers, owners and directors."[173] But, as a presiding administrative law judge, I am bound by that Judicial Officer's reasoning and determination in that decision.[174] Moreover, I agree with that reasoning and determination. Here, as in *Post & Taback*, the PACA respondent licensee is a corporation. The knowledge and actions of its employees and agents are attributed to the licensee/PACA violator,

---

[169] *See supra* notes 163 through 165 and accompanying text.

[170] Respondent's Brief at 14.

[171] *Id.* at 3.

[172] 62 Agric. Dec. 802 (U.S.D.A. 2003).

[173] *Post & Taback, Inc.*, 62 Agric. Dec. 802, 820 (U.S.D.A. 2003).

[174] In addition, the Judicial Officer's decision was affirmed by the Court of Appeals for the D.C. Circuit. *See Post & Taback, Inc. v. Dep't of Agric.*, 123 F. App'x 406 (D.C. Cir. 2005).

regardless of what its officers, directors, and owners actually knew or did not know.[175] Many other binding USDA precedents come to the same conclusion as *Post & Taback*.[176] In the current circumstances, the test of willfulness is met as demonstrated by the record.

Agri-Mondo

Complainant asserts that Respondent failed to pay Agri-Mondo the

---

[175] *See B.T. Produce Co.*, PACA-D Docket No. 02-0023, 2007, WL 1378157, at **33-34 (U.S.D.A. May 4, 2007) ("Liability under section 16 of the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees.").

[176] *See, e.g.*, *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 688-89 (D.C. Cir. 2007) (holding that the knowing and willful bribes of an employee were deemed to be the knowing and willful bribes by that employee's company) ("As we held in *Post & Taback*, 'the plain language of [7 U.S.C. § 499p] provides no escape hatch for merchants who allege ignorance of their employee's misconduct'') (quoting *Post & Taback, Inc. v. U.S. Dep't of Agric.*, 123 F. App'x 406, 408 (D.C. Cir. 2005)); *Koam Produce, Inc. v. United States*, 269 F. App'x 35, 36-37 (D.C. Cir. 2005) (rejecting argument that the Secretary lacked "the authority to impute [the respondent's] intentional misconduct to the corporation under § 499p of PACA") ("This Court has already specifically held that '[an employee's] acts – bribing USDA inspectors – are deemed the acts of [the corporation] under PACA.") (quoting *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 130 (2d Cir. 2003)); *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003) (holding that where employees knowingly and willfully violate PACA, those knowing and willful violations "are deemed to be knowing and willful violations" by the corporation); *ABL Produce, Inc. v. U.S. Dep't of Agric.*, 25 F.3d 641, 644 (8th Cir. 1994) ("ABL cannot claim to be innocent and unaware of Lombardo's actions because, at a minimum, it (through its agents) knew or should have known that Lombardo was conducting business dealings on its behalf with both suppliers and customers."); *B.T. Produce Co.*, 66 Agric. Dec. 774, 809 (U.S.D.A. 2007) ("Therefore, I conclude section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees and [the employee's] willful violations of the PACA are B.T. Produce's willful violations of the PACA.").

entire produce debt of $8,816.25 listed in Appendix A to the Complaint.[177] The evidence shows that Respondent failed to pay this seller for produce purchased between December 7, 2017 and February 7, 2018.[178] As of at least May 3, 2019, the entire produce debt of $8,816.25 owed to Agri-Mondo remained unpaid by Respondent.[179]

On April 29, 2019, Marketing Specialist Steve Seo conducted a telephone interview with Kurt Sochacki of Agri-Mondo.[180] Mr. Sochacki stated that when doing business with Respondent, he dealt with "Ryan" or "Chino."[181] On May 3, 2019, Mr. Sochacki provided Mr. Seo an email exchange Mr. Sochacki had with Respondent in September and October 2018 at the email address elpidioueno@gmail.com.[182] Mr. Sochacki also provided a copy of a bounced check in the amount of $8,000.00 written to Agri-Mondo from a CKF Produce II Corp. account—but that check was not in payment for the debts listed in the Complaint.[183] The check was signed by Katherine De La Rosa, who is uncontestedly Respondent CKF's employee.[184]

Several items of evidence in the record render Respondent's claims that it "never purchased produce" from Agri-Mondo, has never "done business" with Agri-Mondo, and has never even *heard* of Agri-Mondo, incredible. The Agri-Mondo invoices were provided to Mr. Seo by Respondent from its own records at the time of the on-site investigation,

---

[177] Complaint; Complainant's Brief at 29.

[178] *See* CX4 at 3; CX22 ¶ 6(b); CX13 at 30-33. *See Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). "Appendix A" to the Complaint deems "date of purchase" the date of acceptance of the produce and not necessarily the date printed on the invoice.

[179] *See* CX13 at 30-33; CX23 ¶ 17; CX34; Tr. I at 66.

[180] CX23 ¶ *17.*

[181] *Id.*

[182] *Id.; CX34.*

[183] *See* CX34.

[184] *Id.*

after Respondent was specifically asked for unpaid invoices.[185] The invoices themselves state that the produce was shipped to Respondent at 29-31 Brooklyn Terminal (Respondent's license address).[186]

The email correspondence between Agri-Mondo and Respondent was sent to Respondent at elipidioueno@gmail.com, and the phone number provided under that email's signature line was (347) 440-9946, which is registered to "Ueno."[187] Also provided on the email correspondence is Respondent's official office phone and fax numbers.[188] Finally, Agri-Mondo provided a bounced check dated September 25, 2018, several months after the violation period (December 2017 through February 2018) related to Agri-Mondo in this case (for produce other than that listed in the Complaint in this case).[189] The check was written for the amount of $8,000.00 on a "CKF Produce II Corp."[190] JP Morgan Chase check (account ending in 7921), in purported payment of invoices 71012, 74050, and 75041 (all noted on the check),[191] and signed by Katherine De La Rosa, Respondent's highest paid employee (as reported on the tax returns Responded provided at hearing).[192] This check appears in evidence despite the fact that Koji Ueno specifically testified that neither he, nor Respondent, *ever* made any payments to *any* of the twelve "unapproved" sellers.[193] Ms. De La Rosa also signed numerous CKF checks on the account ending in 3191 to several of the ten "approved" sellers.[194]

---

[185] *See* Tr. I at 31-32.

[186] *See* CX13 at 33; CX1 at 4; Tr. I at 123.

[187] *See* CX34; Tr. II at 7-8. Respondent's owner, Koji Ueno, testified that the number was "generated" for Respondent. Tr. II at 80.

[188] *See* CX34; Tr. II at 82-83.

[189] CX34 at 4.

[190] *Id.*

[191] *Id.*

[192] RX3.

[193] Tr. II at 103.

[194] *See* RX1; Tr I. at 229.

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Agri-Mondo in violation of PACA.

Produce Connection

Complainant acknowledges that Produce Connection is not currently owed any produce debt, and the amount listed in Appendix A to the Complaint has been paid.[195] On May 31, 2019, a representative of Produce Connection provided a document entitled "Sales Report, Outstanding and Paid Invoices," which indicated that the $37,674.00 invoice listed as owed in this case was adjusted to an amount of $5,670.00 and paid by Respondent via wire transfer on March 8, 2018.[196] This payment was made thirty-four days after Respondent accepted the produce from Produce Connection, however, and was not made timely; the original invoice states ten-day payment terms.[197]

Several items of evidence regarding Produce Connection render Respondent's claims that it has "never purchased produce" from Produce Connection, never "done business" with Produce Connection, and never even *heard* of Produce Connection incredible. A post-hearing investigation by Complainant has revealed that Respondent has not only done business with Produce Connection but also *paid* Respondent for the produce it allegedly never purchased (albeit late under the Act).[198] This discredits Respondent's defense as to Produce Connection. Moreover, Respondent also paid Produce Connection for produce other than what is listed in the Complaint.[199]

On May 8, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Jacquie Hidden, accounts

---

[195] *See* Complainant's Brief at 30-31; CX4 at 3; CX13 at 34; CX41.

[196] CX41 at 6-10.

[197] CX13 at 34.

[198] *See* CX23 ¶ *25; CX41.*

[199] *See* CX23 ¶ *25; CX41.*

manager of Spring Valley Produce, Inc., d/b/a Produce Connection, and with Charlie Cervantes, salesperson of Produce Connection, d/b/a Spring Valley Produce.[200] Both Ms. Hedden and Mr. Cervantes stated that when doing business with Respondent they dealt with Elpidio Ueno, whom they also knew as "Chino."[201] Both Ms. Hedden and Mr. Cervantes discussed the debt listed as owed in the Complaint with Elpidio via telephone, and Elpidio said Respondent would pay the invoice.[202]

On May 31, 2019, Ms. Hedden provided Mr. Seo a document entitled "Sales Report, Outstanding and Paid Invoices," which indicates that the invoice listed as owed in the Complaint was adjusted to $5,670.00 (from the original invoice #CC0050 in the amount of $37,674.00) and paid by Respondent via wire transfer on March 8, 2018.[203] Also on May 31, 2019, Ms. Hedden provided copies of two checks presented for payment of produce by Respondent for produce not listed in the Complaint in this case:

(1) Check dated November 17, 2017 (approximately three months after the violation period for Produce Connection as listed in the Complaint, which was February 4, 2018, invoice # C00050), signed by Koji Ueno, Respondent's owner,[204] on a CKF Produce Corp. "JP Morgan Chase" account ending in 3191. This check was for invoice number C00017 (noted on the check) in the amount of $19,345.24;[205] and

(2) Check dated November 20, 2017, signed by Katherine De La Rosa, Respondent's highest paid employee,[206] on a "CKF Produce

[200] CX23 ¶ 25.

[201] *See id.*

[202] *Id.*

[203] *See* CX41.

[204] CX1; Tr. II at 10-12.

[205] CX41 at 12.

[206] RX3.

> II Corp." "JP Morgan Chase" account ending in 7921. This check was for invoice number C00020 (noted on the check) in the amount of $12,230.00.[207]

These checks appear in evidence despite the fact that Koji Ueno specifically testified that neither he nor Respondent ever made any payments to any of the twelve "unapproved" produce sellers.

In addition, there are numerous – at least fifty-two – inspections in evidence that were ordered and paid for by Respondent regarding produce purchased from Produce Connection, beginning on January 13, 2017 and ending on August 1, 2018[208] (this despite the fact that Koji Ueno, Respondent's owner, claimed that Respondent never called for or ordered inspections).[209] These include an inspection request and inspection for the unpaid invoice in this case.[210]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Produce Connection in violation of PACA.

Leonard's Express

Complainant asserts that Respondent failed to pay Leonard's Express the entire produce debt of $22,338.00 listed in Appendix A to the Complaint.[211] The evidence shows that Respondent failed to pay for produce purchased on February 20, 2018,[212] and as of at least April 29,

---

[207] CX23 ¶ *25.*

[208] CX40 at 181, 185; CX44 at 1-3. Respondent has stipulated (1) to the introduction of CX44 into evidence and (2) that the inspection requests are but a sample and that there is a similar corresponding inspection request for every inspection in CX40. Complainant's Post-Hearing Brief at 32 n.7.

[209] Tr. II at 98-100.

[210] CX13 at 34; CX40 at 184; CX44 at 2.

[211] Complaint; CX4 at 3; CX13 at 35; CX16; CX22 ¶ 6; Tr. I at 51-55.

[212] Complaint; CX4 at 3; CX13 at 35; CX16; CX22 ¶ 6; Tr. I at 51-55. *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

2019, the entire debt remained unpaid by Respondent. [213]

On April 29, 2019, Marketing Specialist Cathy Hance conducted a telephone interview with Juan Santos, manager of Leonard's Express. Mr. Santos stated that no portion of the debt owed to Leonard's Express had been paid as of the time of the interview. Mr. Santos also stated that when doing business with Respondent, he dealt with "Ryan" and Elpidio Ueno, whom Mr. Santos knew as "Chino." He stated that he had spoken with Elpidio and Ryan on two different phone numbers: 347-440-9946 and 347-587-6400. Mr. Santos stated that, after a point, attempts to call both Elpidio and Ryan were to no avail; they were not answering his calls.[214]

Furthermore, Respondent's claim that it has "never purchased produce" from Leonard's Express, "never done business" with Leonard's Express, and never even *heard* of Leonard's Express is not credible. After being specifically asked for unpaid invoices, Respondent provided from its own records the Leonard's Express invoice to Marketing Specialist Steve Seo.[215] These invoices show initials or markings that also appear on paperwork from one of Respondent's "approved" sellers.[216] The record also contains emails between Respondent and Leonard's Express that are purportedly signed electronically by Respondent's owner, Koji Ueno. The company communicated with Respondent at the email address listed on Respondent's license application.[217] Moreover, there are four inspections in the record that were ordered on February 28, 2018 for the produce on the unpaid invoice at issue in this case, which were paid for by Respondent (despite the fact that Koji Ueno, Respondent's owner, claimed that

[213] CX13 at 35; CX24.

[214] CX24.

[215] CX4 at 3; Tr. I at 35, 106.

[216] *See* CX16 at 5 (Leonard Express paperwork) and CX13 at 29 (Gaetan Bono paperwork).

[217] Tr. I at 52-55, 94-96; CX16 at 6-8.

Respondent never called for or ordered inspections)[218].[219]

Finally, Mr. Santos stated in his telephone interview that he had spoken with both "Chino" and "Ryan," both of whom held themselves out to be representatives of Respondent. Mr. Santos stated that he spoke with the men at two phone numbers: (1) 347-440-9947, which is registered to "Ueno";[220] and (2) 347-587-6400, which is Respondent's official office phone number.[221]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Leonard's Express in violation of PACA.

Ryeco, LLC

Complainant asserts that Respondent failed to pay Ryeco, LLC ("Ryeco") the entire produce debt of $1,284.00 listed in Appendix A to the Complaint. The record shows that Respondent failed to pay this seller for produce purchased on February 28, 2018, and as of at least July 31, 2019, the entire produce debt remained unpaid by Respondent.[222]

Further, Respondent's claim that it has "never purchased produce" from Ryeco, never "done business" with Ryeco, and never even *heard* of Ryeco is not credible. After being specifically asked for unpaid invoices, Respondent provided Marketing Specialist Steve Seo the Ryeco invoice from its own records at the time of the on-site investigation.[223] The invoice

---

[218] Tr. II at 98-100.

[219] CX13 at 35; CX40 at 155-58; CX44 at 4.

[220] Koji Ueno, Respondent's owner, testified that the number was "generated for Respondent." Tr. II at 80.

[221] *Id.* at 82-83.

[222] Marketing Specialist Steve Seo conducted a telephone interview with Philindo Colis, Vice President of Ryeco, on July 31, 2019. Mr. Colis stated that, as of the date of the interview, Respondent still owed Ryeco the entire produce debt of $1,284.00. *See* Complainant's Brief, Attachment 1.

[223] CX4 at 3; Tr. I at 35, 106.

itself states that the produce was shipped to Respondent's address at 29-31 Brooklyn Terminal.[224]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Ryeco, LLC in violation of PACA.

B&M Avocados, LLC

Complainant contends that Respondent failed to pay B&M Avocados, LLC ("B&M Avocados") $23,115.00 of the original $39,715.00 in produce listed on Appendix A to the Complaint.[225] The record reflects that Respondent failed to pay this seller $23,115.00 for produce purchased on March 2, 2018 and that Respondent failed to pay *promptly* $15,000.00 for produce purchased on March 2, 2018.[226]

On May 10, 2019 and May 14, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Maribel Garza, office manager and salesperson of B&M Avocados.[227] Ms. Garza provided a "customer quick report" showing a $15,000.00 payment made by Respondent on July 3, 2018.[228] The payment terms for this debt were "net 28 days," and this partial payment was made late.[229] Ms. Garza stated that, at the time of the telephone interview, Respondent owed B&M Avocados $23,115.00 of the unpaid and past-due produce debt listed as owed in the Complaint.[230]

---

[224] CX1; CX13 at 31-33.

[225] Complainant's Post-Hearing Brief at 35.

[226] *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49; CX4 at 3; CX13 at 36; CX22 ¶ *6.*

[227] CX 23 ¶ *23.*

[228] *See* CX39.

[229] CX13 at 37.

[230] CX23 ¶ *23.*

Further, several items of evidence in the record call directly contradict Respondent's claims that it has "never purchased produce" from B&M Avocados, never "done business" with B&M Avocados, and never even *heard* of B&M Avocados. First, at the time of the on-site investigation of Respondent, Elpidio "Chino" Ueno – who held himself out to be a representative of Respondent and provided all requested information during the investigation – admitted that the debt for the produce at issue in this case was owed by Respondent.[231] Second, the B&M Avocados invoice itself reflects that the produce was shipped to Respondent at 29-31 Brooklyn Terminal (Respondent's license address).[232] Complainant produced evidence of an inspection for the produce on this invoice on March 6, 2018, which was paid for by Respondent[233] despite the fact that Koji Ueno, Respondent's owner, claimed Respondent never called for or ordered inspections.[234] Third, the record reflects that on July 3, 2018, a $15,000.00 payment was made to B&M Avocados for a portion of the invoice and produce amount owed to B&M Avocados.[235] This payment appears in evidence despite the fact that Koji Ueno specifically testified that neither he, nor Respondent, *ever* made any payments to *any* of the twelve "unapproved" sellers.[236]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to B&M Avocados in violation of PACA.

Trufresh

Complainant asserts that Respondent failed to pay Trufresh $54,824.76 of the original $91,764.75 in produce debt listed in Appendix A to the Complaint.[237] The record shows that Respondent failed to pay this seller

[231] Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

[232] CX1; CX13 at 31-33.

[233] CX13 ta 36; CX40 at 147-48; CX44 at 6.

[234] Tr. II at 98-100.

[235] CX13 at 31-33.

[236] Tr. II at 103.

[237] Complainant's Brief at 37.

$54,824.76 for produce purchased between March 17, 2018 and April 10, 2018.[238] Respondent appears to have made two payments for the original $91,764.75 timely[239] and made a third payment late, past the thirty-day "PACA terms" listed on the Trufresh invoices in this case.[240]

On April 4, 2019 and June 10, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Vanessa Garlant, accountant of Trufresh.[241] Mr. Garlant stated that partial payments for the $91,764.75 in produce debt originally owed by Respondent were made and, on July 12, 2019, provided evidence of "wire credit payments."[242] During each of the telephone interviews, Ms. Garlant stated that over $54,000.00 was still owed[243] and, as of July 12, 2019, $54,824.76 was still unpaid by Respondent.[244] On June 4, 2019, a default reparation order in the amount of $54,824.76 was issued against Respondent for this produce;[245] the order was not appealed and is therefore a final order of the Secretary of Agriculture.[246]

Further, several items of evidence in the record render incredible Respondent's claims that it has "never purchased produce" from Trufresh, never "done business" with Trufresh, and never even *heard* of Trufresh. First, the Trufresh invoices were provided to Mr. Seo by Respondent from its own records at the time of the on-site investigation, after Respondent

---

[238] *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49; CX4 at 3; CX22 ¶ 6; CX13 at 38-61; CX15; Tr. I at 37-42, 47-51.

[239] *See* Complainant's Brief, Attachment 2.

[240] CX13 at 38-63; *see* Complainant's Brief, Attachment 2.

[241] CX22 ¶ 6; CX23 ¶ 27.

[242] *See* CX22 ¶ *6(f);* CX23 ¶ *27.*

[243] CX22 ¶ *6; CX23 ¶ 27.*

[244] Complainant's Brief, Attachment 3.

[245] *Id.*, Attachment 2.

[246] 7 U.S.C. § 499g.

was specifically asked for unpaid invoices.[247] There are approximately sixteen inspections in evidence, several of which were ordered for the produce on the invoices at issue in this case; every inspection was paid for by Respondent[248] – despite that Koji Ueno, Respondent's owner, claimed that Respondent never called for or ordered inspections.[249]

Second, there were two apparently timely, partial payments made by Respondent toward the total $91,764.75 in produce debt listed in the Complaint: one on March 28, 2018 in the amount of $14,452.70; the other on April 10, 2018 in the amount of $7,607.89.[250] A third payment was made on June 22, 2018 in the amount of $26,389.50.[251] It is not clear from the evidence the exact invoices that these three payments (or what portion of them) went to; however, according to Ms. Garlant, $36,939.99 of the three payments did go to the total $91,764.75 of produce debt owed to Trufresh.[252] These payments appear in evidence despite Koji Ueno's testimony that neither he nor Respondent ever made any payments to any of the twelve "unapproved" sellers.[253]

Third, emails provided to Mr. Seo by Ms. Garlant indicate that Trufresh's contacts were both "Chino" and "Ryan."[254] There were two phone numbers listed in the emails: (1) 307-440-9946, which is registered to "Ueno";[255] and (2) 347-587-6400, which is Respondent's official office phone number.[256]

---

[247] CX4 at 3; Tr. I at 35, 106.

[248] CX13 at 48, 55, 59; CX40; CX44 at 8.

[249] Tr. II at 98-100.

[250] CX22 ¶ *6(f)*.

[251] Complainant's Brief, Attachment 2.

[252] CX22 ¶ 6; CX23 ¶ 7; Complainant's Brief, Attachment 2; Complainant's Brief, Attachment 3.

[253] Tr. II at 103.

[254] CX15.

[255] Tr. II at 7-8. Koji Ueno, Respondent's owner, testified that the number was "generated" for Respondent. Tr. II at 80.

[256] CX1; Tr. II at 82-83.

Fourth, the Trufresh invoices and paperwork also contain two different "Tomato Suspension Agreement Accountings" (which must be provided with import of Mexican Tomatoes)[257] purportedly signed by Koji Ueno.[258]

Finally, several items found on the Trufresh invoices also appear on some of the "approved" vendor invoices. There are initials or makings written on the Trufresh paperwork that are also found on Exclusive, Inc. paperwork, Gaetan Bono paperwork, and Northeast Banana paperwork.[259]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Trufresh in violation of PACA.

Ag Grower Sales, LLC

Complainant asserts that Respondent failed to pay Ag Grower Sales, LLC ("Ag Grower") $10,231.48 of the original $88,704.00 in produce debt listed in Appendix A to the Complaint.[260] The evidence shows that, at some point, the invoice for $88,704.00 (#1736) was revised and adjusted by Ag Grower down to $30,694.48, and Respondent made partial payments (albeit several months after the ten-day payment terms listed on the invoice), leaving an unpaid balance of $10,231.48.[261] As of at least

[257] Tomatoes imported from Mexico are subject to the terms of a 2013 Tomato Suspension Agreement ("TSA") pursuant to section 734(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1673(c)) and section 351.208 of the U.S. Department of Commerce Regulations (19 C.F.R. § 351.701).

[258] CX13 at 51-52, 60-61.

[259] *See* CX13 at 47 and 49 (Trufresh paperwork) and CX13 at 6 (Exclusive, Inc. paperwork), CX13 at 27 (Gaetan Bono paperwork); CX13 at 58 (Trufresh paperwork) and CX13 at 3 (Exclusive, Inc. paperwork), CX13 at 118, 125 (Northeast Banana paperwork). *See also* Tr. II at 138-42.

[260] Complainant's Post-Hearing Brief at 39.

[261] CX33 at 8-11. This adjustment was not known to Respondent until after a post-hearing investigation was conducted.

April 30, 2019, this balance owed to Ag Grower remained unpaid by Respondent;[262] therefore, Respondent failed to pay this seller for produce purchased on June 18, 2018 (and also failed to pay promptly on the partial amounts paid).[263]

On April 30, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Gerald Castro, Managing Member of Ag Grower. Mr. Castro stated that when doing business with Respondent, he dealt with "Ryan" or "Chino."[264] Mr. Castro stated that he called and spoke with Ryan and Chino at the following phone numbers: 347-587-6400 and 347-836-1890.[265] Both of these numbers were shown to be associated with Respondent.[266]

Although Mr. Castro testified that the entirety of the produce debt to Ag Grower ($88,704.00) remained unpaid and past due as of April 30, 2019, the documentary evidence shows the outstanding amount to be $10,231.00.[267] On June 5, 2019, a default reparation order for the debt described above, along with other produce Respondent purchased from Ag Grower,[268] in the total amount of $79,755.28.[269] This order was not appealed and is therefore a final order of the Secretary.[270] As of the time Complainant filed its posthearing Brief, the default reparation order had not been paid.[271] The additional reparation debt owed is roll-over debt that contributes to Respondent's failure-to-pay violation under PACA section

---

[262] CX23 ¶ 16; CX33.

[263] *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

[264] CX23 ¶ *16.*

[265] *Id.*

[266] *See* CX1; CX23 ¶ 28; CX43; Tr. II at 82-83.

[267] *See* CX23 ¶ 16; CX33.

[268] On June 28, 2018 for $69,523.80. Complainant's Brief, Attachment 4.

[269] *See id.*

[270] 7 U.S.C. § 499g; *see* Complainant's Brief, Attachment 4.

[271] *See* Complainant's Brief at 12.

2(4).[272]

Further, the evidence suggests that Respondent's claim that it "has never purchased produce" from Ag Grower, never "done business" with Ag Grower, and never even *heard* of Ag Grower is false.

First, during the April 30, 2019 investigation of Respondent, Mr. Castro provided instant message communications between Ag Grower and an instant-message address of "Ryan@CKF" regarding sales of produce and debt owed by Respondent.[273] Mr. Castro also provided three checks written from Respondent to Ag Grower, which were made out and signed during the violation period. Two of these checks were in partial payment for the debt listed in the Complaint, and one was for additional debt incurred prior to the debt at issue.[274] They are written on a "CKF Produce Corp." check (JP Morgan Chase check/account ending in 3191) signed by Koji Ueno and on "CKF Produce II Corp." checks (JP Morgan Chase check/account ending in 7921) signed by Katherine De La Rosa,[275] Respondent's highest paid employee.[276] These checks appear in evidence despite that Koji Ueno specifically testified that neither he, nor Respondent, ever made any payments to any of the twelve "unapproved" sellers.[277]

Second, Respondent provided Mr. Seo with the Ag Grower invoices from its own records at the time of the on-site investigation, after Respondent was specifically asked for unpaid invoices.[278] The invoices themselves state that produce was shipped to Respondent at 29-31

---

[272] *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

[273] *See* CX33.

[274] *See* CX23 ¶ 16.

[275] *See* Complainant's Brief at 41-42; Complainant's Reply Brief at 18; CX23 ¶ 16; CX33 at 8-11.

[276] *See* RX3.

[277] Tr. II at 103.

[278] CX4 at 3; Tr. I at 35, 106.

Brooklyn Terminal, Respondent's license address.[279]

Third, there are initials or markings written on Ag Grower's paperwork that are also found on paperwork from Exclusive Produce, Inc., and Gaetan Bono—two of Respondent's "approved" sellers.[280]

Fourth, Mr. Castro (Manager of Ag Grower) specifically stated that he spoke with Elpidio "Chino" Ueno and "Ryan" on the numbers 347-836-1890 (associated with Katherine De La Rosa and Elpidio Ueno)[281] and 347-587-6400 (CKF Produce's official office phone number).[282] Similarly, notes from Vicki Sutherland (Sales Assistant of Ag Grower) indicate that she called Respondent on the same numbers.[283]

Finally, Complainant produced evidence of two inspections that were ordered and paid for by Respondent; one such inspection is for the produce on the invoice at issue in this case,[284] notwithstanding that Koji Ueno, Respondent's owner, claimed Respondent never called for or ordered inspections.[285]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Ag Grower Sales, LLC in violation of PACA.

Paulmex International, Ltd.

Complainant contends that Respondent failed to pay Paulmex International, Ltd. ("Paulmex") the entire produce debt of $41,041.00

---

[279] CX 1; CX13 at 64.

[280] *See* Attachment 4 at 7 (Ag Grower paperwork); CX13 at 6 (Exclusive Produce, Inc. paperwork); CX13 at 27 (Gaetan Bono paperwork).

[281] CX23 ¶ 28; CX43.

[282] CX1; Tr. II at 82-83.

[283] *See* CX33 at 4-7.

[284] CX13 at 64; CX40 at 24-28; CX44 at 5.

[285] Tr. II at 98-100.

listed in Appendix A to the Complaint.[286] The evidence shows that Respondent failed to pay this seller for produce purchased between June 8, 2018 and July 24, 2018.[287] On March 19, 2019, a default reparation order for this produce in the amount of $41,041.00 was issued against Respondent;[288] this order was not appealed and is therefore a final order of the Secretary of Agriculture.[289] I find that as of at least May 9, 2019, the entire produce debt of $41,041.00 owed to Paulmex remained unpaid by Respondent.[290] And the default reparation had not been paid as of the date Complainant filed its posthearing Brief.[291]

Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Alejandro (Alex) Villarreal, owner of Paulmex, on May 9, 2019. Mr. Villarreal stated that when doing business with Respondent, he dealt with "Ryan" and Elpidio Ueno – whom he also knew as Chino – and that he spoke with them at the phone number 347-587-6400.[292] Mr. Villarreal provided copies of the unpaid produce invoices owed by Respondent, as well as copies of emails between Paulmex and Respondent regarding the debt listed as owed in the Complaint.[293] Mr. Villarreal stated that at the time of the telephone interview, the entire debt to Paulmex, as listed in the Complaint, was still owed.[294]

Further, Complainant has submitted evidence to render Respondent's claim that it "never purchased produce" from Paulmex, had never "done business" with Paulmex, and never even *heard* of Paulmex incredible.

---

[286] *See* Complainant's Brief at 44; CX33 at 8-11.

[287] *See* CX4 at 3; CX13 at 65-73; *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

[288] CX19 at 66-69.

[289] 7 U.S.C. § 499g.

[290] CX19; CX23 ¶ 21; CX37.

[291] CX19.

[292] *Id.*

[293] *Id.*; CX27.

[294] CX23 ¶ 21.

First, during the on-site investigation of Respondent, Elpidio "Chino" Ueno—who held himself out to be the representative of Respondent and provided all requested information during the investigation—admitted that Respondent owed $41,041.00 in produce debt to Paulmex.[295] Second, the email correspondence between Paulmex and Respondent that Mr. Villarreal provided was sent to Respondent at the email elpidioueno@gmail.com; the phone number provided under elpidioueno@gmail.com is 347-440-9946, which is registered to "Ueno."[296] Also on the email correspondence is Respondent's office phone and fax number.[297] Third, there are initials or markings found on Paulmex's invoices that also appear on several of the "approved" sellers' invoices.[298]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Paulmex in violation of PACA.

OTC Produce, LLC

Complainant asserts that Respondent failed to pay OTC Produce, LLC ("OTC Produce") the entire produce debt of $74,000.00 listed in Appendix A to the Complaint.[299] The record establishes that Respondent failed to pay this seller for produce purchased between July 6, 2018 and July 13, 2018.[300] As of at least May 9, 2019, the entire produce debt of $74,000.00

[295] *See* Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

[296] CX15. Koji Ueno, Respondent's owner, testified that the number was "generated" for Respondent. Tr. II at 80.

[297] *See* CX15; Tr. II at 82-83.

[298] *See* CX13 at 68, 17 (Paulmex paperwork); CX19 at 24 (Paulmex paperwork); CX13 at 6 (Exclusive Produce, Inc. paperwork); CX13 at 27 (Gaetan Bono paperwork). In addition, the words "100-13 Foster Ave" – which is the address for CKF Produce II Corp. – appears on the Paulmex paperwork. *See* CX13 at 71; CX19 at 24; CX43 at 8-10.

[299] Complainant's Brief at 45.

[300] *See* CX4 at 3; CX36; Tr. I at 187; *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

to OTC Produce remained unpaid by Respondent.[301]

On May 9, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Jorge Mardones, owner of OTC Produce.[302] Mr. Mardones stated that when doing business with Respondent, he dealt with "Chino" and spoke with him at the phone number [redacted]1890.[303] Mr. Mardones provided copies of the unpaid produce invoices owed by Respondent, as well as copies of wire transfers made from a "CKF II" account to OTC during the violation period for produce other than what is listed in the Complaint.[304] Mr. Mardones stated that at the time of the telephone interview, the entire $74,000.00 in debt to OTC was still owed.[305]

Further, Complainant submitted several items of evidence that contradict Respondent's claim that it has "never purchased produce" from OTC Produce, never "done business" with OTC Produce, and never even *heard* of OTC Produce. First, at the time of Respondent's on-site investigation, Elpidio "Chino" Ueno (brother of Koji Ueno, Respondent's 100-percent owner—who held himself out to be the representative of Respondent and provided all requested information during the investigation—admitted that Respondent owed the $74,000.00 produce debt to OTC Produce.[306] Second, Mr. Mardones stated that when doing business with Respondent he dealt with "Chino" and spoke with him at the phone number [redacted]1890.[307] Mr. Seo used certain software to trace this number and discovered that it is associated with Katherine De La Rosa (Respondent's highest paid employee) and Elpidio "Chino" Ueno.[308]

---

[301] CX23 ¶ 20; CX36.

[302] CX23 ¶ *20.*

[303] *Id.*

[304] *See* CX36 at 22-23 (leaving a balance of $74,000.00).

[305] CX23 ¶ *20.*

[306] Tr. I at 78-79, 88, 98, 174, 178-79, 186-87; *see* CX4 at 3.

[307] CX23 ¶ *20.*

[308] CX23 ¶ 28; CX43; Tr. II at 13.

Third, there is evidence of five inspections that were ordered for and paid by Respondent for the produce on the invoice at issue.[309] This is despite the fact that Koji Ueno, Respondent's owner, claimed Respondent never called for or ordered inspections.[310] Finally, the evidence shows that Respondent made several payments to OTC Produce on a CKF II Corp. JP Morgan Chase account ending in 7921.[311]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to OTC Produce in violation of PACA.

Roland Marketing

Complainant asserts that Respondent failed to pay Roland Marketing the entire produce debt of $7,523.50 listed in Appendix A to the Complaint.[312] The evidence shows that Respondent failed to pay this seller for produce purchased on July 30, 2018.[313] As of at least July 15, 2019, the entire produce debt of $7,523.50 owed to Roland Marketing remained unpaid by Respondent.[314]

---

[309] CX13 ¶ 64; CX36 at 7-9, 11; CX40 at 16-19, 42; CX44 at 5.

[310] Tr. II at 98-100.

[311] *See* CX36 at 20 (May 25, 2018 check of $10,4000.00 for produce not at issue in this case); CX36 at 19 (June 12, 2018 check of $22,000.00 for produce not at issue in this case); CX36 at 18 (June 21, 2018 check of $21,960.00 for produce not at issue in this case); CX36 at 17 (July 3, 2018 check of $15,000.00 for produce not at issue in this case); CX36 at 16 (July 11, 2018 check for $22,000.00 for produce not at issue in this case); CX36 at 16 (July 19, 2018 check of $15,000.00 for produce not at issue in this case); CX36 at 15 (July 26, 2018 check of $15,000.00 for produce not at issue in this case); CX36 at 14 (July 26, 2018 check of $15,000.00 for produce not at issue in this case); CX36 at 21 (September 27, 2018 check of $18,000.00 for a portion of the produce at issue in this case, which was made late). This left a total due of $74,000 for invoice numbers 39 and 40. CX36; *see Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

[312] Complainant's Brief at 48.

[313] CX4 at 3; CX13 at 74; CX22 ¶ 6(g); CX38.

[314] *See* Complainant's Brief, Attachment 5.

On May 8, 2019 and May 10, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Daniel Meuers, President and Chief Operating Officer of Roland Marketing.[315] On July 15, 2019, Mr. Meuers confirmed that as of that date Respondent had failed to pay the entire $7,523.50 in produce debt owed to Roland Marketing.[316]

Further, the evidence of record contradicts Respondent's claim that it has "never purchased produce from" Roland Marketing, never "done business" with Roland Marketing, and never even *heard* of Roland Marketing. First, Respondent provided Mr. Seo with the Roland Marketing invoices, from its own records, during the on-site investigation.[317] Second, Mr. Meuers provided a credit application he had received from Respondent when Roland Marketing began doing business with Respondent.[318] The application contains the following information: Respondent's name (listed as CKF Produce); Respondent's mailing address (29 Brooklyn Terminal Market); Respondent's phone and fax numbers, as listed on Respondent's license application;[319] Respondent's federal tax ID number;[320] Respondent's PACA license number;[321] Respondent's president and owner, listed as Koji Ueno with a phone number of [redacted]9235;[322] Respondent's "sales manager," listed as Elpidio Ueno with a phone number of [redacted]6400 (Respondent's official office phone number); "bank information" that indicates the applicant's bank is Chase Bank, with an account number ending in 7921

---

[315] CX23 ¶ *22.*

[316] *Id.*

[317] CX4 at 3; Tr. I at 35, 106.

[318] CX38.

[319] *See* CX1.

[320] *See* RX3.

[321] *See* CX1.

[322] This phone number is registered to Koji Ueno. *See* CX23 ¶ 28; CX43.

(CKF Produce II Corp.'s bank account);[323] and an application signature by Koji Ueno, Respondent's president, with a witness name of "Ryan" printed under Koji Ueno's name.[324]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Roland Marketing in violation of PACA.

Higueral Produce, Inc.

Complainant contends that Respondent failed to pay Higueral Produce, Inc. ("Higueral Produce") the entire produce debt of $109,898.07 listed in Appendix A to the Complaint.[325] The record indicates that Respondent failed to pay this seller for produce purchased between July 31, 2018 and September 1, 2018.[326] As of at least May 6, 2019, the entire produce debt of $109,898.07 owed to Higueral Produce remained unpaid by Respondent.[327]

On May 6, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Erika Gallego, an employee in the accounts receivable section of Higerual Produce.[328] Ms. Gallego stated that when doing business with Respondent, she dealt with "Ryan" or Chino" and that she spoke with both of them about the produce debt owed to Higueral Produce at the following phone numbers: [redacted] 6400; [redacted] 1890; and [redacted] 4848 (registered to Eran Evaniam).[329] Ms. Gallego stated that at the time of the telephone interview, the entire debt to Higueral Produce listed in Appendix A to the Complaint was still

[323] *See supra* regarding several of the payments made to the twelve "non-approved" vendors.

[324] CX38 at 5-8.

[325] Complainant's Brief at 49.

[326] CX4 at 3; CX13 at 79-95; CX35; *see Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

[327] CX23 ¶ 18.

[328] *Id.*

[329] *See* CX23 ¶ 28; CX43.

owed.[330]

Also on May 6, 2019, Mr. Seo conducted a telephone interview with Carlos "Ed" Duarte, a produce salesperson for Higueral Produce.[331] Mr. Duarte stated that Chino "put him in touch with Ryan" for loads arriving outside the CKF Brooklyn Terminal Market warehouse (when that warehouse was full) so that Higueral Produce could ship "outside the market where Ryan is."[332] Mr. Duarte also stated that Chino told him that "Ryan works for him" (Chino).[333] Mr. Duarte stated that when he did business with Respondent, he spoke with both Ryan and Chino at the phone numbers [redacted]6400 and [redacted]1890 and also with Ryan at the phone number [redacted]4848.[334]

Further, several items of evidence render Respondent's claim that it has "never purchased produce" from Higueral Produce, never "done business" with Higueral Produce, and never even *heard* of Higueral Produce incredible. First, during Respondent's on-site investigation, Elpidio "Chino" Ueno (brother of Koji Ueno, Respondent's 100-percent owner) – who held himself out to be the representative of Respondent and provided all requested information during the investigation – admitted that the $109,898.07 in produce debt to Higueral Produce was owed by Respondent.[335] Second, Ms. Gallego and Mr. Duarte specifically spoke with both Elpidio "Chino" Ueno and "Ryan" on three different phone numbers about ordering produce and about the debt owed by Respondent for that produce: one number, [redacted]6400, is Respondent's official office phone number;[336] another number, [redacted]1890, is associated with

---

[330] CX23 ¶ *19.*

[331] *Id.*

[332] *Id.*

[333] *Id.*

[334] *Id.*

[335] Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

[336] CX1; Tr. II at 82-83.

Katherine De La Rosa, Respondent's highest employee;[337] and the third number, [redacted]4848, is associated with Eran "Ryan" Evanaim.[338] Finally, several initials or markings that appear on the Higueral Produce paperwork are also found on paperwork from a few of Respondent's "approved" sellers.[339]

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Higueral Produce in violation of PACA.

Ergo Produce, Inc.

Complainant asserts that Respondent failed to pay Ergo Produce, Inc. ("Ergo Produce") $4,999.99 of the original $16,163.99 in produce debt listed in Appendix A to the Complaint.[340] The record shows that Respondent failed to pay this seller for produce purchased on August 9, 2018.[341] On March 27, 2019, a default reparation order for this produce was issued against Respondent in the amount of $4,999.99; this order was not appealed and is therefore a final order of the Secretary of Agriculture.[342] As of at least June 11, 2019, $4,999.99 of the original $16,163.99 in produce debt owed to Ergo Produce remained unpaid by Respondent.[343] And as of the date of Complainant's posthearing Brief, the default reparation order had not been paid.[344]

---

[337] *See* RX3.

[338] CX23 ¶ *28; CX43.*

[339] *See* CX13 at 81, 83 (Higueral Produce paperwork), CX13 at 6 (Exclusive Produce, Inc. paperwork), and CX13 at 27 (Gaetan Bono paperwork); CX 13 at 91 (Higueral Produce paperwork) and CX13 at 29 (Gaetan Bono paperwork).

[340] Complainant's Brief at 51.

[341] *See* CX4 at 3; CX13 at 75-78; CX23 ¶ *26; CX42; see Scamcorp, Inc., 57 Agric. Dec. at 547-49.*

[342] 7 U.S.C. § 499g; CX21 at 4-43.

[343] CX23 ¶ 26; CX42.

[344] CX22 ¶ *5.*

On May 3, 2019 and June 11, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with Claudia Carter, a salesperson with Ergo Produce. Ms. Carter stated that when doing business with Respondent, she dealt with "Ryan" and "Chino."[345] Ms. Carter also stated that Respondent had made two payments toward the $16,163.99 produce debt owed: on September 25, 2018, "CKF Produce II Corp." (on a JP Morgan Chase account) made a $6,164.00 wire transfer to Ergo Produce; and on October 17, 2018, "CKF Produce II Corp." made a $5,000.00 wire transfer to Ergo Produce.[346] Both of these wire transfers were made in partial payment of the debt listed as owed in Appendix A to the Complaint—paid late, past the twenty-one-day payment terms[347]—leaving a balance of $4,999.99.[348]

Further, Complainant produced evidence that renders Respondent's claim that it has "never purchased produce" from Ergo Produce, never "done business" with Ergo Produce, and never even *heard* of Ergo Produce incredible. First, during the on-site investigation of Respondent, Elpidio "Chino" Ueno (brother of Koji Ueno, Respondent's 100-percent owner)—who held himself out to be a representative of Respondent and provided all requested information during the investigation—admitted that Respondent owed the produce debt to Ergo Produce.[349] Second, Respondent made two payments toward the $16,163.99 to Ergo Produce via wire transfer from a "CKF Produce II" JP Morgan Chase account.[350] Finally, there are initials or markings written on the Ergo Produce paperwork that also appear on paperwork from Respondent's "approved" vendors.[351] Accordingly, I find that the preponderance of the evidence

---

[345] CX23 ¶ *26.*

[346] *Id.*

[347] *See* CX13 at 75-58.

[348] CX23 ¶ 26; CX42.

[349] Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

[350] CX23 ¶ *26* (made in the amounts of $6,164.00 and $5,000.00); *see* CX42.

[351] *See* CX13 at 77 (Ergo Produce paperwork); CX13 at 6 (Exclusive Produce, Inc. paperwork); CX13 at 27 (Gaetan Bono paperwork).

demonstrates Respondent failed to make full payment promptly to Ergo Produce in violation of PACA.

Complainant has met its burden of proving that Respondent's conduct constitutes willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)).

As previously discussed, Respondent paid one of the ten "approved" sellers timely, paid three of the ten "approved" sellers late (between five to thirty days past the terms agreed to by the parties), and, as of well after the hearing in this case, failed to pay a total of $238,282.25 to six of the ten "approved" sellers. Respondent paid *none* of the twelve "unapproved" sellers timely, paid one of the twelve "unapproved" sellers late (past the ten-day payment terms agree to by the parties),[352] and, as of well after the hearing in this case, failed to pay a total of $358,072.05 to eleven of the twelve "unapproved" sellers. In sum, payment breakdown of the twelve "unapproved" sellers is as follows:

Agri-Mondo:	Owed $8,816.25 as of May 3, 2019;
Produce Connection:	Paid in full, approximately twenty days late;
Leonard's Express:	Owed $22,338.00 as of April 29, 2019;
Ryeco LLC:	Owed $1,284.00 as of May 3, 2019;
B&M Avocados, LLC:	Late partial payment of $15,000.00; still owed $23,115.00 as of May 14, 2019;
Trufresh:	Partial payment of approximately $40,000.00; still owed $54,824.76 as of July 12, 2019;
Ag Grower Sales, LLC:	Late partial payment of approximately $20,000.00; still owed $10,231.48 as of April 30, 2019;
Paulmex International, Ltd:	Owed $41,041.00 as of May 9, 2019;
OTC Produce, LLC:	Owed $74,000.00 as of May 9, 2019;
Roland Marketing:	Owed $7,523.50 as of July 15, 2019;
Higueral Produce, Inc.:	Owed $109,898.07 as of May 6, 2019; and
Ergo Produce, Inc.:	Late partial payment of approximately $11,000.00; still owed $4,999.99 as of June 11, 2019.

Further, after the hearing, Respondent still owed a total of $358,072.05

[352] CX13 at 34; CX41.

to eleven of the twelve "unapproved" sellers. There also exists additional past due and unpaid roll-over debt that is not part of the amounts originally listed in the Complaint in this case but nonetheless contributes to Respondent's failure to pay violation under PACA section 2(4): $7,641.50 owed to US Fresh; and $69,523.80 owed to Ag Grower Sales, LLC. Therefore, Respondent is in violation of the payment provisions of PACA.

As more than *de minimis* amounts[353] are still owed well after hearing, this is a "no-pay" case; Respondent has violated PACA section 2(4).[354] 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 PACA will be revoked.[355] "Full compliance" with the payment provisions of PACA requires "not only that a respondent have paid all produce sellers in accordance with the PACA, but also that a respondent have no credit agreements with produce sellers for more than 30 days."[356] In this case, not one of the twenty-two sellers had credit agreements beyond what was indicated on the invoices for produce.[357] Respondent's violations of section 2(4) are willful, flagrant, and repeated.[358]

Participation and licensing in the perishable agricultural commodities industry is strictly limited to financially responsible persons; this is one of the primary goals of PACA.[359] A harsh sanction policy has been

---

[353] *See The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

[354] *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998); 7 U.S.C. § 499b(4).

[355] *Scamcorp, Inc.*, 57 Agric. Dec. at 549.

[356] *Id.*

[357] CX13; CX23; Tr. II at 113. Koji Ueno testified that payment terms for all of Respondent's sellers were a maximum of two weeks to a month. Tr. II at 65.

[358] *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

[359] *See Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007); *Baiardi Food Chain v. United* States, 482 F.3d 238, 240 (3d Cir.

consistently upheld by the courts.[360] Given the evidence regarding Respondent's failure to pay many of ten "approved" sellers and virtually all of the twelve "unapproved" sellers in this case, the only appropriate sanction is revocation of Respondent's PACA license, or publication in lieu of revocation under PACA section 8(a) (since Respondent does not currently hold a valid PACA license).[361]

Where failure to pay violations of PACA section 2(4) are committed, denial of a respondent's PACA license application under PACA section 4(d) is the appropriate sanction.[362] Cases regarding license denial do not specifically state a length of time for which a license application is to be denied – the cases simply state that it is so denied, based on Respondent's violations.[363] PACA section 4 dictates the length of time for a denial of a license or license application; here, the license must be refused under 7 U.S.C. § 499d(b) for at least a two-year period (with a possibility of posting a license bond upon application to the PACA Division) and a three-year period without bond under 7 U.S.C. § 499d(c).

2007); *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 588 (6th Cir. 2003) ("PACA was 'designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility.'") (quoting *Kanowitz Fruit & Produce Co. v. U.S. Dep't of Agric.*, No. 97-4224, 1998 WL 863340, at *1 (2d Cir. Oct. 29, 1998)); *The Caito Produce Co.*, 48 Agric. Dec. 602, 616-17 (U.S.D.A. 1989).

[360] *See, e.g.*, *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 690-91 (D.C. Cir. 2007); *Baiardi Food Chain v. United States*, 482 F.3d 238, 241, 244 (3d Cir. 2007); *Hawkins v. Dep't of Agric.*, 10 F.3d 1125, 1133-35 (5th Cir. 1993).

[361] *See Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review* denied, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

[362] *See Andershock Fruitland*, 55 Agric. Dec. 1204, 1208 (U.S.D.A. 1996), *aff'd sub nom. Andershock's Fruitland, Inc. v. U.S. Dep't of Agric.*, 151 F.3d 735 (7th Cir. 1998).

[363] *See Andershock's Fruitland, Inc. v. U.S. Dep't of Agric.*, 151 F.3d 735, 738-39 (7th Cir. 1998); *Williamsport Purveyors, Inc. v. U.S. Dep't of Agric.*, 916 F.2d 82, 84-85 (3d Cir. 1990); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 992-93 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

Moreover, regarding sanction and length of license denial, Respondent has to date failed to pay four reparation awards involving the unpaid produce at issue in this case, totaling $111,097.23. Respondent has failed to timely appeal these reparation awards, and they have therefore become final orders of the Secretary.[364] The sanction for these default reparations, apart from the sanction warranted and appropriate for the other failures to pay at issue in this case, is suspension of any PACA license (or refusal to issue a license, in the case of an application) until each default reparation award is paid in full.[365] Under PACA section 8, any persons responsibly connected to a default reparation award is under employment sanctions until that award is paid.[366] Here, Koji Ueno, as a 100-percent shareholder of Respondent, has been determined to be responsibly connected to Respondent when it failed to pay all four reparation awards.[367] Koji Ueno did not contest this determination.[368] Therefore, Koji Ueno is currently under both licensing and employment sanctions until all four default reparation awards are paid in full.[369] On that basis alone, pursuant to PACA section 4, Respondent's application for a PACA license must be denied and cannot be considered until the default reparation awards are paid in full.[370]

Findings of Fact

1. Respondent CKF Produce, Inc. is a New York corporation with a business address of 29-31 Brooklyn Terminal Market, Brooklyn, New

---

[364] CX15-21, Complainant's Brief, Attachment 1; *see* 7 U.S.C. **§** 499g; *Shreiner v. Farmers Trust Co.*, 91 F.2d 606, 607 (3d Cir. 1937), *cert. denied*, 302 U.S. 686 (1937); A*m. Fruit Growers v. Lewis D. Goldstein Fruit & Produce Corp.*, 78 F. Supp. 309, 311 (E.D. Pa. 1948).

[365] 7 U.S.C. § 499d(b)(D); 7 U.S.C. § 499h.

[366] 7 U.S.C**.** § 499h(b).

[367] *See* CX19-21.

[368] *See id.*; *see also* Complainant's Brief, Attachments 2 and 4.

[369] 7 U.S.C. § 499h.

[370] *Id.*; 7 U.S.C. § 499d(b)(D).

York, 11236-1511. (CX1-CX3).

2. Pursuant to the licensing provisions and requirements of PACA, license number 2016-1004 was issued to Respondent on August 2, 2016. This license terminated on August 2, 2018, pursuant to PACA section 4(a) (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee. Therefore, Respondent is not currently licensed under PACA but is subject to its licensing provisions and requirements. (CX1-CX3).

3. Subsequent to the termination of Respondent's PACA license, Respondent submitted a completed license application to Complainant on January 16, 2019. (CX1).

4. On February 13, 2019, Complainant filed a disciplinary Notice to Show Cause and Complaint ("Complaint") against Respondent alleging that Respondent willfully, flagrantly, and repeatedly violated PACA section 2(4) (7 U.S.C. § 499b(4)) and that, pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)), Respondent is unfit to be licensed under PACA and the refusal to issue a PACA license to Respondent is proper. (Complaint at 3).

5. Respondent failed to make full payment promptly to the seller Exclusive Produce, Inc. for produce purchased between March 7, 2017 and July 13, 2017, in the total amount of $10,225.00. (CX4 at 3; CX5; CX13 at 1-6; Tr. I at 28-30, 33-35). To date, Respondent has failed to pay the entire produce debt of $10,225.00 owed to Exclusive Produce, Inc. (*See* CX4 at 3; CX5; CX13 at 1-6; Tr. I at 29-30, 33-35).

6. Respondent failed to make full payment promptly to the seller Exp. Group LLC for produce purchased between May 29, 2017 and June 16, 2017, in the total amount of $255,945.75. (CX4 at 3; CX5; CX13 at 7-24; CX 22 ¶ 6(a); Tr. I at 30). As of at least April 24, 2019, Respondent failed to pay $191,226.25 of the original $255,945.75 produce debt owed to Exp Group LLC. (CX13 at 11-24; CX 22 ¶ 6(a); CX23 ¶ 13; CX30; Tr. I at 30, 109-11).

7. Respondent failed to make full payment promptly to the seller

Lawrence J. Lapide, Inc. for produce purchased on July 27, 2017, in the total amount of $8,120.00. (CX4 at 3; CX5; CX13 at 25; CX23 ¶ 7; CX25; Tr. I at 30-31). As of at least April 23, 2019, Respondent failed to pay the entire produce debt of $8,120.00 owed to Lawrence J. Lapide, Inc. (CX13 at 25; CX23 ¶ 7; CX25; Tr. I at 30-31).

8. Respondent failed to make full payment promptly to the seller Gaetan Bono for produce purchased between November 23, 2017 and December 13, 2017, in the total amount of $16,091.00. (CX4 at 3; CX5; CX13 at 26-29; *see* Tr. II at 196). To date, Respondent has failed to pay the entire produce debt of $16,091.00 owed to Gaeten Bono. (*See* Discussion, *supra*, at 19-20).

9. Respondent failed to make full payment promptly to the seller Dr. Produce for produce purchased on or between April 12, 2018 and April 15, 2018, in the total amount of $1,600.00. (CX4 at 3; CX5; CX13 at 62-63; CX23 ¶ 12; CX29). As of at least April 24, 2019, Respondent failed to pay the entire produce debt of $1,600.00 owed to Dr. Produce. (CX23 ¶ 12; CX29).

10. Respondent failed to make full payment promptly to the seller US Fresh for produce purchased between September 17, 2018 and October 21, 2018, in the total amount of $30,787.50. (CX4 at 3; CX5; CX13 at 96-115). As of at least April 24, 2019, Respondent failed to pay $11,020.00 of the original $30,787.50 produce debt owed to US Fresh (*see* CX13 at 105-11; CX23 ¶ 11), and the portion of the debt that has been paid was paid past due the twenty-one-day payment terms. (CX13 at 96-104, 112-14; CX23 ¶ 11; CX28). Also, as of at least April 24, 2019, additional produce debt owed to US Fresh by Respondent (not listed in Appendix A to the Complaint in this case), in the amount of $7,641.50, was thirty-one to forty-five days past due. (CX23 ¶ 11; CX28).

11. Respondent failed to make full payment promptly to the seller Banana Distributors of NY, Inc. for produce purchased between October 4, 2018 and October 9, 2018, in the total amount of $13,032.00. (CX4 at 4; CX5; CX13 at 133-36). As of November 26, 2018, the entirety of

the $13,032.00 produce debt listed as owed to Banana Distributors of NY, Inc. in Appendix A to the Complaint in this case was paid in full; however, it was paid late: approximately thirty days past the fourteen-day payment terms set out by Banana Distributors of NY, Inc. (CX23 ¶ 10; CX27; *see* RX1 at 6).

12. Respondent failed to make full payment promptly to the seller Northeast Banana Corp. for produce purchased between October 9, 2018 and November 1, 2018, in the total amount of $36,679.00. (CX4 at 4; CX5; CX13 at 116-31). As of December 19, 2018, the entirety of the $36,679.00 produce debt listed as owed to Northeast Banana Corp. in Appendix A to the Complaint in this case was paid in full; however, it was paid late: approximately ten to twenty days past the thirty-day payment terms set out by Northeast Banana Corp. (CX23 ¶ 8; *see* CX13 at 116-31; RX1 at 40).

13. Respondent failed to make full payment promptly to the seller Circus Fruits Wholesale Corp. for produce purchased between October 19, 2018 and October 24, 2018, in the total amount of $2,040.00. (CX4 at 4; CX5; CX13 at 137-41; *see* CX23 ¶ 5). As of November 14, 2018, the entirety of the $2,040.00 in produce debt listed as owed to Circus Fruits Wholesale Corp. in Appendix A to the Complaint in this case was paid in full; however, it was paid approximately five to ten days past the fourteen-day payment terms set out by Circus Fruits Wholesale Corp. (*See* CX23 ¶ 5; RX1 at 13).

14. Respondent made full payment promptly to the seller Fruitco Corporation for produce purchased on November 1, 2018. (CX13 at 132-45; CX23 ¶ 9; CX26; *see* Tr. II at 55). Respondent paid timely and in full for this produce on November 14, 2018, two days following the disciplinary investigation in this case. (CX26). Complainant was provided with evidence of this payment by Fruitco Corporation on November 24, 2016. (CX23 ¶ 9; CX26).

15. Respondent failed to make full payment promptly to the seller Agri-Mondo for produce purchased between December 7, 2017 and February 7, 2018, in the total amount of $8,816.25. (CX4 at 3; CX22 ¶ 6(b); CX13 at 30-33). As of at least May 3, 2019, Respondent failed to pay the entire produce debt of $8,816.25 owed to Agri-Mondo.

(CX13 at 30-33; CX23 ¶ 17; CX34).

16. Respondent failed to make full payment promptly to the seller Produce Connection for produced purchased on February 4, 2018, in the total amount of $5,670.00 (the original invoice was for $37,674.00, but the amount was later adjusted). (CX4 at 3; CX13 at 34; CX23 ¶ 25; CX41). On May 31, 2016, a representative of Produce Connection provided a document entitled "Sales Report, Outstanding and Paid Invoices" that indicated the $37,674.00 invoice listed as owed in this case was adjusted to the amount of $5,670.00 and paid by Respondent by wire transfer on March 8, 2018. (CX41; *see* Discussion, *supra*, at 39-41). This payment was made thirty-four days after Respondent accepted the produce from Produce Connection and was not made timely; the original invoices states ten-day payment terms. (*See* CX13 at 34).

17. Respondent failed to make full payment promptly to seller Leonard's Express for produce purchased on February 20, 2018, in the total amount of $22,338.00. (CX4 at 3; CX13 at 35; CX16; CX22 ¶ 6(c); Tr. I at 51-55). As of at least April 29, 2019, Respondent failed to pay the entire produce debt of $22,338.00 owed to Leonard's Express. (*See* CX13 at 35; CX24).

18. Respondent failed to make full payment promptly to the seller Ryeco, LLC for produce purchased on February 28, 218, in the total amount of $1,284.00. (CX4 at 3; CX13 at 37; CX22 ¶ 6(d)). As of at least July 31, 2019, Respondent failed to pay the entire produce debt of $1,284.00 owed to Ryeco LLC. (CX13 at 37; Complainant's Brief, Attachment 1 at 1).

19. Respondent failed to make full payment promptly to the seller B&M Avocados, LLC for produce purchased on March 2, 2018, in the total amount of $39,715.00. (CX 4 at 3; CX13 at 36; CX22 ¶ 6(e)). On May 14, 2019, a representative of B&M Avocados provided a "customer quick report" showing a payment made by Respondent in the amount of $15,000.00, made on July 3, 2018. (CX39). According to the representative, as of at least May 14, 2019, Respondent failed to pay $23,115.00 of the original $39,715.00 in produce debt owed to B&M

Avocados. (CX23 ¶ 23).

20. Respondent failed to make full payment promptly to the seller Trufresh for produce purchased between March 17, 2019 and April 10, 2018, in the total amount of $91,764.75. (CX4 at 3; CX22 ¶ 6(f); CX13 at 38-61; CX15; Tr. I at 37-42, 47-51). On June 4, 2019, a default reparation Order for this produce in the amount of $54,824.76 was issued against Respondent, and this Order was not appealed. (*See* Complainant's Brief, Attachment 2; Tr. II at 184-85). As of at least July 12, 2019, Respondent failed to pay $54,824.76 of the original $91,764.75 in produce debt owed to Trufresh. (CX23 ¶ 27; *see* Complainant's Brief, Attachments 2 and 3).

21. Respondent failed to make full payment promptly to the seller Ag Grower Sales, LLC for produce purchased on June 18, 2018, in the total amount of $88,704.00. (CX4 at 3; CX13 at 64). According to telephone interviews of Ag Grower Sales, LLC representatives conducted by Complainant (and information gathered during the interviews), as of at least April 30, 2019, Respondent failed to pay $10,231.48 of the original produce debt of $88,704.00 owed to Ag Grower Sales, LLC. (CX23 ¶ 16; CX33 at 8-11; *see* CX4 at 3; CX13 at 64; CX20; Complainant's Brief, Attachment 4). On June 5, 2019, a default reparation Order in the amount of $79,755.28 was issued against Respondent. (*See* Complainant's Brief, Attachment 4). This award was for non-payment of a portion of the produce at issue in this case (an outstanding remaining amount of $10,231.48 for invoice #1736, which originally totaled $88,704.00) and for other produce purchased by Respondent from Ag Grower Sales on June 28, 2018, invoice #1774 (not originally at issue in this case), in the total amount of $69,523.80. (*See* Complainant's Brief at 40-42; Complainant's Reply Brief at 18; CX23 ¶ 16; CX33 at 8-11). The Order containing the award for $79,755.28 was not appealed. (*See* Complainant's Brief, Attachment 4). This default was reparation Order was not paid as of the date of hearing. (*See* Tr. II at 185). As of a least April 30, 2019, Respondent still owed $10,231.48 to Ag Grower Sales, LLC. (CX23 ¶ 16; CX33; *see* CX4 at 3; CX13 at 64; CX20; Complainant's Brief, Attachment 4).

22. Respondent failed to make full payment promptly to the seller Paulmex

International, Ltd. for produce purchased between June 8, 2018 and July 24, 2018, in the total amount of $41,041.00. (CX4 at 3; CX13 at 65-73). On March 19, 2019, a default reparation Order for this produce in the amount of $41,041.00 was issued against Respondent, and this Order was not appealed. (CX19). According to telephone interviews of Paulmex International Ltd. representatives conducted by Complainant, as of at least May 9, 2019, Respondent failed to pay the entire produce debt of $41,041.00 owed to Paulmex International Ltd. (CX23 ¶ 21; CX37). The default reparation Order was not paid as of the date of hearing. (*See* Tr. II at 185).

23. Respondent failed to make full payment promptly to the seller OTC Produce, LLC for produce purchased between July 6, 2018 and July 13, 2018, in the total amount of $74,000.00. (CX4 at 3; CX36). As of at least May 9, 2019, Respondent failed to pay the entire produce debt of $74,000.00 owed to OTC Produce, LLC. (CX23 ¶ 20; CX36).

24. Respondent failed to make full payment promptly to the seller Roland Marketing for produce purchased on July 30, 2018, in the total amount of $7,523.50. (CX4 at 3; CX13 at 74; CX22 ¶ 6(g)). As of at least July 15, 2019, Respondent failed to pay the entire produce debt of $7,523.50 owed to Roland Marketing. (*See* Complainant's Brief, Attachment 5; CX22 ¶ 6(g)).

25. Respondent failed to make full payment promptly to the seller Higueral Produce, Inc. for produce purchased between July 31, 2018 and September 1, 2018, in the total amount of $109,898.07. (CX4 at 3; CX13 at 79-97). As of at least May 6, 2019, Respondent failed to pay the entire produce debt of $109,898.07 owed to Higueral Produce, Inc. remained unpaid by Respondent. (CX23 ¶ 18).

26. Respondent failed to make full payment promptly to the seller Ergo Produce, Inc. for produce purchased on August 9, 2018, in the total amount of $16,163.99. (CX4 at 3; CX13 at 75-78; CX23 ¶ 26; CX42;). On May 3, 2019 and June 11, 2019, a representative of Ergo Produce, Inc. stated that Respondent has made two payments towards this $16,163.99 debt: on September 25, 2018, "CKF Produce II Corp." made a wire transfer to Ergo Produce, Inc. in the amount of $6,164.00;

and on October 17, 2018, "CK Produce II Corp." made a wire transfer to Ergo Produce, Inc. in the amount of $5,000.00. (CX23 ¶ 26; CX42). Both of these payments were in partial payment of the debt listed as owed in Appendix A to the Complaint in this case, leaving a balance of $4,999.99. (CX23 ¶ 26; CX42). On March 27, 2019, a default reparation Order for this produce in the amount of $4,999.99 was issued against Respondent, and this Order was not appealed (it is therefore a final Order of the Secretary of Agriculture). (CX21 at 4-43). As of at least June 11, 2019, Respondent failed to pay $4,999.99 to Ergo Produce, Inc. (CX13 at 75-78; CX23 ¶ 26; CX42).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent has failed to pay promptly twenty-one of the twenty-two sellers listed in Appendix A to the Complaint and Notice to Show Cause in this case. As of the dates occurring after hearing held on April 9, 2019 and April 10, 2019, Respondent has failed to pay seventeen of the sellers listed in Appendix A to the Complaint in this case, a total of $596,354.30.
3. Respondent willfully, flagrantly, and repeatedly violated PACA section 2(4) (7 U.S.C. § 499b), and under PACA section 8(a) (7 U.S.C. § 499h(a)), the facts and circumstances of Respondent's violations shall be published (in lieu of revocation of Respondent's PACA license).[371] Pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)), Respondent is unfit to be licensed under PACA, and Complainant's refusal to issue a PACA license to Respondent is proper and shall be upheld.

ORDER

1. A finding is made that Respondent CKF Produce, Inc. committed willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b).

---

[371] *See Baiardi Chain Food Corp.,*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

2. The facts and circumstances of Respondent's PACA violations shall be published pursuant to PACA section 8(a) (7 U.S.C. § 499h(a)).

3. Respondent's application for PACA license is DENIED pursuant to PACA section 4 (7 U.S.C. § 499d). Pursuant to that section, Respondent shall be refused a PACA license for a period of at least two years. After the expiration of the two-year-period, Respondent may apply for a PACA license with a PACA license bond. Granting of a license under these circumstances shall be in the discretion of Complainant. After three years, Respondent may apply for a PACA license with no license bond.

4. Potentially interested or affected parties are alerted that any licensing and/or employment sanctions attendant to this Decision and Order pursuant to PACA sections 4(b) and 8(b) will take effect on the eleventh day after this Decision and Order becomes final. Persons "responsibly connected" to Respondent during the period of Respondent's violations are hereby alerted that they will be subject to the licensing restrictions under PACA section 4(b) and the employment restrictions under PACA section 8(b). Provisions allowing licensing after a finding of responsible connection are found in 7 U.S.C. § 499d. Provisions allowing employment after a finding of responsible connection are found in 7 U.S.C. § 499h.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service upon Respondent unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

___

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: GENARO PRODUCE INCOPORATED.
Docket No. 19-J-0153.
Decision and Order.
Filed June 26, 2020.

PACA-D.

Christopher Young, Esq., for AMS.
Genaro Aragon, *pro se* representative of Respondent.
Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER GRANTING AMS'S MOTION FOR DECISION WITHOUT HEARING BY REASON OF ADMISSIONS

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) ("PACA"); the regulations promulgated thereunder by the Secretary of Agriculture (7 C.F.R. §§ 46.1 through 46.45) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice").

The Associate Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service, United States Department of Agriculture ("AMS" or "Complainant"), initiated this proceeding by filing a complaint alleging that Genaro Produce Incorporated ("Respondent") willfully violated the PACA. On May 4, 2020, AMS 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) and in accordance with the policy set forth by the Judicial Officer in *Scamcorp, Inc.*, 57 Agric. Dec. 527 (U.S.D.A. 1998).[1]

For the reasons discussed herein, I find that no hearing is warranted in this matter and a decision on the written record is appropriate.

---

[1] *See* Motion at 1-2.

Procedural History

On September 26, 2019, AMS filed a disciplinary complaint against Respondent. The Complaint alleged that, during the period of September 2016 through October 2018, Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to ten sellers for 104 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce in the total amount of $284,981.65.[2] Moreover, the Complaint requested:

> 1. That unless Respondent fails to file an answer within the time allowed, *or admits all the material allegations of this Complaint*, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the PACA; and
>
> 2. That the Administrative Law Judge find that Respondent has willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. §499b(4)), and publish the facts and circumstances of Respondent's violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Complaint at 3-4 (emphasis added).

On October 17, 2019, Respondent filed a timely response ("Answer")

[2] *See* Complaint at 2-3.

to the Complaint,[3] which included several attachments.[4] The Answer did not deny the material allegations of the Complaint but provided, in pertinent part:

> I Genaro Aragon formally owner of Genaro Produce Inc. would like to take this opportunity to respond to the complaint I received on September 26 2019. I want first to point out that we at Genaro Produce inc. have ceased all operation since October 2018 and closed all accounts as well. I also would like to state that my company was also formally close using the Miami Dade website on February 2019. Regarding the balance owed there are some error; Burma Farms stated I owe $20,653.00 my balance is $16,816.00, Wayne E. Bailey $81,249.00 my balance is $71,476.76, and H&S Produce $56,204.40 I have $46,497.00 attach are my statement's as proof.
>
> In addition of closing my company doors on October 2018 there have been many Paca license companies that owed Genaro Produce Inc. open balance that never paid. The following companies are as follows Produce Connection $95,807.00, M.E. Ramos Produce $16,068.00, So Fresh Produce $50,873.00, American Fresh Produce $13,609.00, Tropical Fresh $20,458.50, The Green Guys Produce $19,984.15, Hialeah Tomatoes $8,168.00, Sunrise Fresh Produce $9,473.00, O.C. of

[3] United States Postal Service records reflect that the Complaint was sent to Respondent via certified mail and delivered on October 1, 2019. Respondent had twenty days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's answer was due by October 21, 2019.

[4] Attached to Respondent's Answer were copies of the following documents: a filing titled "Summons – Personal Service on a Natural Person" (Case No. 2019-025628-CC-25, County Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida); Vendor Open Balance sheets for Wayne E. Bailey, Buurma Farms, H&S Produce, and Agrosale; and balance Statements reflecting Respondent's transactions with various produce companies.

> Miami $13,609.00 and Agrosale who is in this complaint also owes Genaro Produce inc. $1,584.00; just to name a few. I also received a stroke in March 2018 which had me hospitalized for months. Due to nonpayment plus my current health status my company fell through hardship and I believe it will be impossible at this time for me to collect on any of these accounts and pay what was owed by Genaro Produce Inc. I have attached balance statement of all companies mention above plus a few others.
>
> Thank you for allowing me to explain my currents dilemma. Our intentions were not to owe money to the above companies. . . .

Answer at 1.

On May 4, 2020, AMS filed a Motion for Decision Without Hearing and proposed Decision Without Hearing by Reason of Default ("Proposed Decision")[5] on the basis that "Respondent has admittedly not paid promptly and in full the past-due produce debt identified in the Complaint."[6] Respondent has not filed any objections thereto.[7]

---

[5] *See* Motion at 1-2 ("Complainant hereby moves, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary [Under] Various Statutes (7 C.F.R. § 1.139) (Rules of Practice), for a Decision Without Hearing by Reason of Admissions. Complainant also moves for a Decision Without Hearing under the policy set forth by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547-549 (1998)(and in other case precedent relating to the subject of failure to pay promptly under the PACA . . .)").

[6] Motion at 2.

[7] United States Postal Service records reflect that the Motion for Decision Without Hearing and Proposed Decision were sent to Respondent via certified mail and delivered on May 13, 2020. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7

Authorities

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice" or "Rules"), set forth at 7 C.F.R. §§ 1.130 *et seq.*, apply to the adjudication of this matter. Pursuant to section 1.136 (7 C.F.R. § 1.136), a respondent is required to file an answer within twenty days after service of a complaint.[8] The Rules provide that an answer shall "[c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."[9] Moreover, "failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation."[10] With regard to such admission, section 1.139 (7 C.F.R. § 1.139) provides:

> The failure to file an answer, *or the admission by the answer of the all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing*. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. *If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing*.

7 C.F.R. § 1.139.

Also applicable to the instant proceeding are sections 2(4) and 8(a) of

---

C.F.R. § 1.147(h). In this case, Respondent's objections were due by June 2, 2020. Respondent has not filed any objections.

[8] 7 C.F.R. § 1.136(a).

[9] 7 C.F.R. § 1.136(b)(1).

[10] 7 C.F.R. § 1.136(c).

the PACA (7 U.S.C. §§ 499b(4), 499h(a)). Section 2(4) requires merchants and dealers to make "full payment promptly" for perishable agricultural commodities, usually within ten days of acceptance, unless the parties have agreed to different terms prior to the purchase.[11] Specifically, section 2(4) makes it unlawful "[f]or any commission merchant, dealer, or broker to . . . fail or refuse truly and correctly to account and make full payment promptly in respect of any such transaction in any such commodity to the person with whom such transaction is had."[12] Section 8(a) provides:

> Whenever . . . 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).

In cases where a PACA licensee has failed to make full or prompt payment of perishable agricultural commodities, the Department's policy is straightforward:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved *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 PACA case will be treated as a "no-pay" case.

---

[11] *See* 7 C.F.R. §§ 46.2(aa)(5), (11).

[12] 7 U.S.C. § 499b(4).

Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998). Further, "[i]n 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 PACA, will be revoked."[13]

Discussion

I. Respondent Has Admitted Failing to Make Full Payment Promptly in Accordance with the PACA and Controlling Case Law.

The PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases within ten days after the produce is accepted, provided that parties may elect to use different payment terms so long as the terms are reduced to writing prior to the transaction.[14] In cases where a respondent fails to make full payment promptly and "is not in full compliance 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."[15] "Full compliance" requires a respondent to have paid all its produce sellers and "have no credit agreements with produce sellers for more than 30 days."[16]

In Appendix A to the Complaint (attached hereto and incorporated herein by reference), AMS identified ten sellers to whom Respondent failed to make full payment promptly, in the total amount of $284,981.65, for 104 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce during the period of September 2016 through October 2018.[17]

---

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

[14] 7 C.F.R. § 46.2(aa)(5), (11).

[15] *Scamcorp, Inc.*, 57 Agric. Dec. at 548-549.

[16] *Id.* at 549.

[17] *See* Appendix A.

Respondent was served with the Complaint on October 1, 2019.[18] Therefore, in accordance with *Scamcorp*, Respondent had until January 29, 2020 to attain full compliance with the PACA.[19]'

In its Answer, Respondent does not deny that it failed to timely pay sellers for perishable agricultural commodities;[20] instead, Respondent contends there "are some error[s]" regarding the balances alleged to be owed to three sellers.[21] Specifically, Respondent asserts that: (1) Buurma Farms, Inc. is owed $16,816.00 rather than the $20,653.00 listed in Appendix A to the Complaint; (2) Wayne E. Bailey Produce Company is owed $71,476.76 rather than the $81,249.00 listed in Appendix A to the Complaint; and (3) H&S Produce and Packing, Inc. is owed $46,497.00 rather than the $56,082.75 listed in Appendix A to the Complaint.[22] Respondent also claims that Agrosale, Inc.—a seller listed in Appendix A as being owed $4,013.00 by Respondent—owes Respondent $1,534.00.[23] And with regard to *all* of the debt listed in Appendix A to the Complaint, Respondent states that "many P[ACA] licensee companies" owe Respondent "open balance[s] that [were] never paid" and Respondent's sole owner suffered a stroke in March 2018, alluding that these events contributed to Respondent's failure to pay the sellers.[24]

---

[18] *See supra* note 4; 7 C.F.R. § 1.147(c)(1) ("Any complaint . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party [or] last known principal place of business of the attorney or representative of record of such party[.]").

[19] *See Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

[20] *See Van Buren Cty. Fruit Exch., Inc.*, 51 Agric. Dec. 733, 740 (U.S.D.A. 1992) (holding that the failure to deny an allegation of a complaint is deemed admitted by virtue of the respondent's failure to deny the allegation); *Kaplinsky*, 47 Agric. Dec. 613, 617 (US.D.A. 1988).

[21] Answer at 1.

[22] *See id.*; Appendix A.

[23] *See* Answer at 1; Appendix A.

[24] Answer at 1.

The explanations provided in Respondent's Answer are not an acceptable defense to liability in a case such as this, where a complaint has been filed alleging violations of section 2(4) of the PACA due to the failure to make full payment promptly.[25] As the Judicial Officer stated in *Scamcorp*: "PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times."[26] Here, Respondent has specifically admitted that, as of the date the Answer was filed, Respondent owed a total of *at least* $134,789.46 to three sellers.[27] Even assuming *arguendo* that Respondent had paid the amounts it claims, Respondent has nonetheless admitted to owing more than a *de minimis* amount to produce sellers.[28]

Furthermore, Respondent has made no assertion—in its Answer or in any other filing[29]—that full payment has been made or that full compliance will be achieved pursuant to the parameters set forth by *Scamcorp*.[30]To the contrary, the Answer states that although Respondent's "intentions were not to owe money," Respondent "believe[s] it will be impossible at this time . . . to . . . pay what was owed by Genaro Produce

---

[25] *See, e.g.*, *Finer Food Sales Co.*, 41 Agric. Dec. 1154, 1171 (U.S.D.A. 1982), *aff'd sub nom. Finer Food Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983) ("[E]ven if it were determined that respondent had a good excuse for the failures to pay involved here, it has been repeatedly held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were willful since 'the Act calls for payment-not excuses.'") (quoting *Kafcsak*, 39 Agric. Dec. 683, 686 (U.S.D.A. 1980)).

[26] *Scamcorp, Inc.*, 57 Agric. Dec. at 548.

[27] *See supra* note 22 and accompanying text.

[28] *See The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question); *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (Ruling on Certified Question) (holding that a hearing is not required where "the amount presently due and unpaid would be *de minimis*, *e.g.*, less than $5,000").

[29] As previously stated, Respondent did not file any objections to AMS's Motion for Decision Without Hearing.

[30] *See Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

Inc."[31] Accordingly, I find that Respondent has not achieved full compliance with the PACA within 120 days after service of the Complaint.

II. Respondent's PACA Violations Were Repeated, Flagrant, and Willful.

The Secretary of Agriculture may revoke the license of a dealer who is found to have committed repeated, flagrant, and willful violations of the PACA.[32] Where a dealer has committed repeated, flagrant, and willful violations of the PACA but has no license to revoke, the appropriate sanction is publication of the facts and circumstances of the violations.[33]

First, Respondent's violations in this case were repeated. Violations are "repeated" under the PACA when they are committed multiple times, non-simultaneously.[34] As Respondent failed to pay ten sellers promptly and in full for 104 lots of perishable agricultural commodities over a two-year period, its violations were clearly repeated.[35]

Respondent's violations were also flagrant. Flagrancy is determined by evaluating the number of violations, total money involved, and length of time in which the violations occurred.[36] As previously discussed,

---

[31] Answer at 1.

[32] *See* 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); *Norinsberg v. U.S. Dep't of Agric.*, 47 F.3d 1224, 1225 (D.C. Cir. 1995).

[33] *See Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. at 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

[34] *See H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 592 (6th Cir. 2003); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

[35] *See* Appendix A; Answer at 1.

[36] *Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895; *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1270 (U.S.D.A. 1996); *see Reese Sales Co. v. Hardin*, 458 F.2d 183, 185, 187 (9th Cir. 1972).

Respondent itself admitted to owing a total of at least $134,789.46 to three of the sellers named in Appendix A to the Complaint.[37] By failing to pay that money—far more than a *de minimis* amount—to multiple sellers and still owing that money years later, Respondent has committed flagrant PACA violations.[38] Respondent submits no evidence to the contrary.

Lastly, Respondent's violations were willful.

> A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent'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 in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.

Scamcorp, Inc., 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998). Given the many transactions, substantial amount of debt, and continuation of violations over a two-year period in this case, I find that Respondent's violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of the PACA.[39]

III. A Decision Without Hearing Is Appropriate.

It is well settled that "a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact

---

[37] *See supra* notes 22, 28, and accompanying text.

[38] AMS is not required to prove—and I am not required to find—the exact number of unpaid produce sellers or the exact amount Respondent owes to each seller. *See Baiardi Chain Food Corp.*, 64 Agric. Dec. at 1834-26; *see also Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

[39] *The Square Group, LLC*, 75 Agric. Dec. at 695.

on which a meaningful hearing can be held."[40] Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) allows for a decision without hearing by reason of admissions: "The failure to file an answer, *or the admission by the answer of all the material allegations of fact contained in the complaint*, shall constitute a waiver of hearing."[41]

I find no genuine issues of fact that would require a hearing in this case. Respondent has admitted the material allegations of the Complaint and filed no objections to AMS's Motion for Decision Without Hearing.[42] As the amount admittedly owed is not *de minimis*, I need not determine the exact amount Respondent has failed to pay.[43]

Where, as in the present case, a complainant moves for default and the respondent files no meritorious objections,[44] the Rules of Practice provide that decision and order shall be entered without further procedure:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in

---

[40] *H. Schnell & Co.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see, e.g.*, *KDLO Enters., Inc.*, 70 Agric. Dec 1098, 1104 (U.S.D.A. 2011); *Kirby Produce Co.*, 58 Agric. Dec. 1011, 1027 (U.S.D.A. 1999).

[41] 7 C.F.R. § 1.139 (emphasis added).

[42] *See id.*

[43] *See The Square Group, LLC*, 75 Agric. Dec. at 695 ("[E]ven if certain debts are disputed, no hearing is required if the sum of all undisputed debt is enough to make the total more than *de minimis*."); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83 ("[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine the precise amount owed.").

[44] United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondents via certified mail and delivered on July 22, 2019. Respondents had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h), In this case, Respondents' objections were due on or before August 12, 2019. Respondents have not filed any objections.

> the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. *If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.*

7 C.F.R. § 1.139 (emphasis added).

Based on Respondent's admissions, and upon Complainant's motion for the issuance of a decision without hearing, the following Findings of Fact, Conclusions, and Order are entered without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Genaro Produce Incorporated is or was a corporation incorporated and existing under the laws of the state of Florida. Respondent's business and mailing address was 1200 N.W. 22nd Street, Bays 71-90, Miami, Florida 33142.

2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 20120989 was issued to Respondent on May 10, 2012. This license terminated on May 10, 2018, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), after Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period of September 2016 through October 2018, on or about the dates and in the transactions set forth in Appendix A to the Complaint (attached hereto and incorporated by reference), failed to make full payment promptly to ten sellers for 104

lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of $284,981.65 shown on Appendix A; OR, in accordance with Respondent's Answer, subtracting from AMS's amount about $24,000.00, in the total amount of more than $260,000.00.

Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties and the subject matter.

2. Respondent Genaro Produce Incorporated's failure to make full payment promptly with respect to the transactions referenced in Finding of Fact No. 3 above and as set forth in Appendix A to the Complaint constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the below Order is issued.

3. The total unpaid balance due to sellers represents more than a *de minimis* amount, thereby obviating the need for a hearing in this matter.[45]

4. As Respondent's license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Respondent's PACA violations.[46]

ORDER

1. AMS's Motion for Decision Without Hearing is GRANTED.

2. A finding is made that Respondent Genaro Produce Incorporated has

---

[45] *See The Square Group, LLC*, 75 Agric. Dec. at 695; *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

[46] *See Baiardi Chain Food Corp.*, 64 Agric. Dec. at 1832; *Scamcorp, Inc.*, 57 Agric. Dec. at 571 n.23; *Hogan Distrib., Inc.*, 55 Agric. Dec. at 633.

committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. The facts and circumstances of Respondent Genaro Produce Incorporated's violations, as set forth above, shall be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Finality

This Decision and Order becomes final and effective thirty-five (35) days after service upon the Respondent, unless appealed to the Judicial Officer by a party to the proceeding by filing with the Hearing Clerk within thirty (30) days after service pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). *See* Appendix B.

Copies of this "Decision and Order GRANTING AMS's Motion for Decision Without Hearing by Reason of Admissions" shall be served by the Hearing Clerk on each of the parties. The Hearing Clerk will use both certified mail and regular mail for the Respondent.

___

Errata

The Editor regrets having overlooked the timely inclusion of a Reparation Decision, specifically:

> *Ayco Farms, Inc. v. Benny's Farm Fresh Dist. Co.*, PACA-R Docket No. S-R-2018-369 (U.S.D.A. June 27, 2019).[*]

The Decision follows this page with guidance for special pagination.

[*] This decision should have appeared in Volume 78 of *Agriculture Decisions*.

AYCO FARMS, INC. v. BENNY'S FARM FRESH DIST. CO., INC.
Docket No. S-R-2018-369.
Reparation Decision.
Filed June 27, 2019.

[Cite as: 79 Agric. Dec. A (U.S.D.A. 2019).]

PACA-R.

Accord and Satisfaction – Tender by Instrument Necessary

U.C.C. section 3-311(a) requires good faith tender of an instrument to the claimant as full satisfaction of the claim. "Instrument" under the U.C.C. means "negotiable instrument." U.C.C. § 3-104(b). The official comments to U.C.C. section 3-104 state that "the term 'negotiable instrument' is limited to a signed writing that orders or promises payment of money." U.C.C. § 3-104, Official Comment 1. The ACH payments issued by Respondent were electronic, not written, and they were not signed. In addition, the transfer of funds through ACH payment is instantaneous and involves no promise or order to pay. The ACH payments issued by Respondent therefore cannot be considered a "tender of an instrument." Finally, neither the ACH payments nor any accompanying written communications contained the requisite conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. U.C.C. § 3-311(a). As a result, the accord and satisfaction provisions of the U.C.C. cannot be applied to those payments.

Complainant Ayco Farm, Inc., *pro se*.
Respondent Benny's Farm Fresh Dist. Co., Inc., *pro se*.
Leslie S. Veevers, Examiner.
Shelton S. Smallwood, Presiding Officer.
Decision and Order issued by Bobbie J. McCartney, Judicial Officer.

DECISION AND ORDER[*]

Preliminary Statement

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) ("PACA"); and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) ("Rules of Practice"), by filing a timely complaint. Complainant

[*] EDITOR'S NOTE: Respondent Benny's Farm Fresh Dist. Co., Inc. filed a petition for reconsideration of this Decision and Order on October 7, 2019. The Petition was denied on October 29, 2019. *Ayco Farms, Inc. v. Benny's Farm Fresh Dist. Co.*, PACA-R Docket No. S-R-2018-369 (U.S.D.A. Oct. 29, 2019) (Order on Recons.).

seeks a reparation award against Respondent in the amount of $7,873.33 in connection with two truckloads of cantaloupes shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation ("ROI") prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement and a Brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 1501 NW 12th Avenue, Pompano Beach, FL 33069. At the time of the transactions involved herein, Complainant was licensed under the PACA.

2. Respondent is a corporation whose post office address is 1187 Wilmette Avenue, Suite 131, Wilmette, IL 60091. At the time of the transactions involved herein, Respondent was licensed under the PACA.

3. On or about May 9, 2018, Complainant, by oral contract, sold to Respondent on a PAS basis one truckload of cantaloupes.[2] The cantaloupes were shipped on May 10, 2018, from loading point in Pompano Beach, Florida, to Respondent's customer in New Haven,

[1] 7 C.F.R. § 47.20.

[2] Compl. Ex. 7.

Connecticut.[3] Complainant issued invoice number 190505 billing Respondent for 288 cartons of cantaloupe 12's at $7.00 per carton, or $2,016.00, and 288 cartons of cantaloupe 9's at $7.00 per carton, or $2,016.00, for a total f.o.b. invoice price of $4,032.00.[4]

4. Respondent paid Complainant $1,172.22 for invoice number 190505 via ACH (automated clearinghouse) payment on September 21, 2018.[5]

5. On or about May 9, 2018, Complainant, by oral contract, sold to Respondent on a PAS basis one truckload of cantaloupes.[6] The cantaloupes were shipped on May 10, 2018, from loading point in Pompano Beach, Florida, to Respondent's customer in Bronx, New York.[7] Complainant issued invoice number 190506 billing Respondent for 720 cartons of cantaloupe 9's at $7.00 per carton, for a total f.o.b. invoice price of $5,040.00.[8]

6. Respondent paid Complainant $26.45 for invoice number 190506 via ACH (automated clearinghouse) payment on September 21, 2018.[9]

7. The informal complaint was filed on August 3, 2018,[10] which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the unpaid invoice balance of $7,873.33 for two truckloads of cantaloupes sold to Respondent.

[3] Compl. Ex. 8.

[4] Compl. Ex. 7.

[5] Answering Stmt. Ex. 1.

[6] Compl. Ex. 12.

[7] Compl. Ex. 13.

[8] Compl. Ex. 12.

[9] Answering Stmt. Ex. 2.

[10] ROI Ex. 001.

ERRATA

Complainant states the cantaloupes were sold to Respondent PAS (price after sale) with a target price of $7.00 per carton f.o.b., and that Respondent failed, neglected and refused to pay Complainant the market price of the cantaloupes.[11] As a result, Complainant invoiced Respondent for the cantaloupes at the target price of $7.00 per carton, for invoice prices totaling $9,072.00, of which Respondent has paid a total of $1,198.67, leaving an unpaid invoice balance of $7,873.33.[12]

In response to Complainant's allegations, Respondent asserts first that it is a "collect and remit" broker, and that as such it does not take title to the produce and therefore it is not the real party in interest in the transactions.[13] Complainant denies that Respondent was acting as a collect and remit broker and asserts that if that were the case it would have received a brokerage invoice from Respondent and would be billing Respondent's customer directly.[14] Complainant also asserts that Respondent received a sales confirmation, a customer passing, a bill of lading and an invoice, all of which stated Respondent was the responsible party, and Respondent never requested any change on the billing.[15]

The only evidence Respondent references in support of its contention that it was acting as a collect and remit broker is an email message sent to Complainant prior to the shipment of the cantaloupes that bears a statement below the signature line that reads, "BENNY's Farm Fresh invoices, collects and remits as an accommodation only. (PACA-§46.27(a)."[16] The section of the PACA Regulations referenced by Respondent, 46.27(a), covers the types of broker operations. The following section, 46.28, covers the duties of brokers and states:

> After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver

---

[11] Compl. ¶¶ 4, 6.

[12] Compl. Ex. 7, 12; Answering Stmt. Ex. 1-2.

[13] Answer ¶ 3.

[14] Opening Stmt. at 2.

[15] *Id.*

[16] Answering Stmt. Ex. 5B.

> promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due.

7 C.F.R. § 46.28(a). Respondent did not submit any evidence showing that it prepared and sent to the parties a memorandum of confirmation of sale for either of the transactions in question. Given the failure of Respondent to perform this most basic duty required of a broker, and in light of the arguments raised by Complainant, we conclude that Respondent has failed to prove that it was acting as a collect and remit broker for the transactions in question.

Respondent also asserts that the Complaint should be dismissed due to Complainant's acceptance of two ACH payments tendered in full accord and satisfaction of the claim.[17] Section 3-311 of the Uniform Commercial Code ("U.C.C."), entitled "Accord and Satisfaction by Use of Instrument," states:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

[17] Answering Stmt. ¶ 5.

ERRATA

> (1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
>
> (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).
>
> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

U.C.C. § 3-311. The record shows that on August 13, 2018, Respondent's Ron Pomerantz sent an email message to Complainant's Paulo Moreno that reads, in pertinent part:

> Regarding the 5/10/18 cantaloupe load (BFF 20942, 20944 / AF 190505, 190506), 1296 melons (1,008 – 9's and 288 – 12's).
> NY Market News, date of arrival 5/14/18, was $8 (9's) and $14 (12's). Based on Market News, the load "theoretically, could have" sold for $12,096. The two receivers (NY and CT) sold the combined load for $11,408.40, only five percent less than the Market News, a statistically insignificant difference. Allowing for 20% commission of $2,419.20, additional NY receiver's $110.50 deductible expense, freight of $7,200, brokerage of $648 *{Applicable brokerage fees*

> *are due upon contract negotiation and are not contingent on the completion of final sale. (PACA-§46.28(b)},* leaves a balance due Ayco of $1,718.30.
>
> Based on our two receiver's detailed accounting statements, the total return to Ayco is $1,198.67, a $519.63 difference. Certainly not worth a $600 PACA filing fee and waiting two years for a decision only to find that a "PACA compliant" accounting statement is "the best" and sufficient evidence to substantiate the "reasonable value ... at the time of delivery" of the PAS sales contract.
>
> In conclusion, our $1,172.22 check #16234, dated 7/9/18, representing payment-in-full (AF #190505) and our $26.45 check#16233, dated 7/9/18, representing payment-in-full (AF #190506), which you are in receipt of since 7/11/18, is our final payment on these two invoices.

ROI Ex. 133. Mr. Moreno responded on the same date with an email message stating:

> Ron, we haven't deposited this 2 checks and we forward them to PACA for check release request. We're going to proceed in a formal stage, remember we can add interest from the ship date so we don't have any problem to wait 2 years for a final decision and award.
>
> Thank you for your cooperation

ROI Ex. 133. On September 11, 2018, Mr. Moreno sent an email message to the Central Regional PACA Division Office stating:

> Todd, good afternoon. As per our phone conversation today, Bennys Farm submitted ACH payment on Friday 09.21.2018 for the same amounts for checks 16233 and 16234 that they were returned back to them

> last week. We clearly answered back, same day, that we are considering those payments as partial.

ROI Ex. 149. Respondent submitted evidence of the ACH payments referenced by Mr. Moreno with its Answering Statement. A South Central Bank statement provided by Respondent shows the payments were made to Complainant on September 19, 2018.[18] On September 21, 2018, an individual by the name of "Jackie" from Respondent's accounting department sent Complainant's Accounts Receivable/Collections Specialist, Heloise D. Rahmani, an email stating: "An ACH payment for your invoice #190505 in the total amount of $1,722.22 should be in your bank account on 9/21/18."[19] A statement at the bottom of the email reads:

> Acceptance of these funds constitute full accord and satisfaction of all past, current and future liabilities, claims, damages, disputes, debts and liens, whether known or unknown, including pending and/or future PACA complaints, claims or civil litigation relating to and regarding Ayco Farms Inc. invoice #190505 (current and past related companies) and Benny's Farm Fresh Dist. Co. Inc. #20942. Venue for any and all claims shall be Skokie, IL USA.

Answering Stmt. Ex. 1. On the same date, Jackie sent Ms. Rahmani an email stating: "An ACH payment for your invoice #190506 in the total amount of $26.45 should be in your bank account on 9/21/18."[20] A statement at the bottom of the email reads:

> Acceptance of these funds constitute full accord and satisfaction of all past, current and future liabilities, claims, damages, disputes, debts and liens, whether known or unknown, including pending and/or future PACA complaints, claims or civil litigation relating to and regarding Ayco Farms Inc. invoice #190506 (current

[18] Answering Stmt. Ex. 4.

[19] Answering Stmt. Ex. 1.

[20] Answering Stmt. Ex. 2.

> and past related companies) and Benny's Farm Fresh Dist. Co. Inc. #20944. Venue for any and all claims shall be Skokie, IL USA.

Answering Stmt. Ex. 2. In response, Ms. Rahmani sent an email message to Jackie stating on the same date stating: "Please note that we are considering those payments as partial. Your account is still in debit position."[21]

U.C.C. section 3-311(a) requires good faith tender of an instrument to the claimant as full satisfaction of the claim. "Instrument" under the U.C.C. means "negotiable instrument." U.C.C. § 3-104(b). The official comments to U.C.C. section 3-104 state that "the term 'negotiable instrument' is limited to a signed writing that orders or promises payment of money." U.C.C. § 3-104, Official Comment 1. The ACH payments issued by Respondent were electronic, not written, and they were not signed. In addition, the transfer of funds through ACH payment is instantaneous and involves no promise or order to pay. Finally, neither the ACH payments nor any accompanying written communications contained the requisite conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. U.C.C. § 3-311(a). It is important to note that an email sent to the claimant's accounting department after the ACH payment had been initiated does not meet the definition of an "accompanying written communication" as contemplated in the U.C.C. On this basis, we conclude that the ACH payments issued by Respondent cannot be considered a "tender of an instrument," and that the accord and satisfaction provisions of the U.C.C. therefore cannot be applied to those payments.

Having failed to establish that the transactions in question were settled through accord and satisfaction, Respondent is liable to Complainant for the full purchase price of the cantaloupes it accepted, less any damages resulting from any breach of contract by Complainant.[22] Respondent has

---

[21] Answering Stmt. Ex. 3.

[22] *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971).

not asserted a breach of contract by Complainant. Respondent is therefore liable to Complainant for the full purchase price of the cantaloupes.

There is no dispute that the cantaloupes were sold under PAS (price after sale) terms. The term "price after sale" is not defined in either the Uniform Commercial Code or the PACA and the Regulations (Other Than Rules of Practice) under the PACA (7 C.F.R. § 46.43(j)). It is considered a subcategory of the "open price term"[23] and is generally understood as meaning that the parties will agree on a price following the prompt resale of the produce.[24] If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery.

The evidence plainly shows that Respondent did not agree to the prices billed by Complainant, and Complainant did not agree to the return remitted by Respondent. Therefore, a reasonable price for the cantaloupes must be determined. On the issue of determining a reasonable price, in *Carmack v. Selvidge*[25] we stated that under normal circumstances, we would examine two factors in determining the reasonable price of produce at the time and place of delivery:

> 1) the average price of similar [commodities] at the time and place of delivery as reported in the Market News Service reports; and
>
> 2) any accountings of sale submitted by the parties.

Id. at 898. Similarly, in *M. Offutt Co. v. Caruso Produce, Inc.*,[26] we held that even where relevant market quotations are available, "the results of a

---

[23] U.C.C. § 2-305(1). *See Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-28 (U.S.D.A. 1980). U.C.C. section 2-305(1) states "the parties if they so intend can conclude a contract for sale even though the price is not settled."

[24] *See Eustis Fruit Co. v. The Auster Co.*, 51 Agric. Dec. 865, 877 (U.S.D.A. 1991).

[25] 51 Agric. Dec. 892 (U.S.D.A. 1992).

[26] 49 Agric. Dec. 596 (U.S.D.A. 1990).

prompt and proper resale should be given consideration, *i.e.*, they should be looked at, and if circumstances indicate that use of such results would enable us to arrive at a more accurate figure, they should be factored in."[27]

The USDA Market News report for New York, New York, the nearest reporting location to Respondent's customers, shows that on May 15, 2018, ½ cartons of cantaloupe 9's from Guatemala were selling for $8.00 per carton, and on May 16, 2018, ½ cartons of cantaloupe 12's from Guatemala were selling for $14.00 per carton.[28] Respondent submitted detailed accounts of sales from its customers, Robt. T. Cochran & Co., Inc. ("Cochran") and Carbonella & DeSarbo, Inc. ("Carbonella"), for the two shipments of cantaloupes in question. (ROI Ex. 56-57, 80-81.) Carbonella reported selling 288 cartons of cantaloupe 12's at prices ranging from $8.10 to $13.50 per carton, for total sales of $2,941.40. This equates to an average sales price of $10.21 per carton. Carbonella also reported selling all 288 cartons of cantaloupe 9's at $10.00 per carton. Cochran reported selling 720 cartons of cantaloupe 9's at prices ranging from $6.00 to $12.00 per carton, for total sales of $5,587.00. This equates to an average sales price of $7.76 per carton.

For the cantaloupe 8's, the average sales reported by both customers either approximate or exceed the average USDA Market News price. Accordingly, we accept those sales as the best available measure of the reasonable value of the cantaloupe 8's. For the cantaloupe 12's, the average sales price reported by Carbonella is several dollars less than the average price reported by USDA Market News. We recognize, however, that Carbonella is located in New Haven, Connecticut, so the prices reported by USDA Market News for New York City are not necessarily reflective of the value of the cantaloupes to Carbonella. For this reason, we find that the sales reported by Carbonella represent the best available measure of the reasonable value of the cantaloupe 12's.

---

[27] *Id* at 605; *see also Bonanza Farms, Inc. v. Tom Lange Co.*, 51 Agric. Dec. 839, 847 n.4 (U.S.D.A. 1992) (describing the *Offutt* decision).

[28] These are the first dates following delivery that prices for the applicable size and place of origin were reported.

ERRATA

The gross sales reported by Respondent's customers total $11,408.40. From this amount, Respondent is entitled to deduct 20 percent, or $2,281.68, for profit and handling.[29]

Respondent also reported a freight expense of $3,200.00 for the shipment of the cantaloupes to Carbonella, and $4,000.00 for the shipment of the cantaloupes to Cochran. Since the cantaloupes were sold f.o.b., Respondent is entitled to deduct this expense from the gross sales of the cantaloupes. After making these deductions, the net amount due Complainant from Respondent for the cantaloupes is $1,926.72. Respondent paid Complainant $1,198.67 for the cantaloupes. Therefore, there remains a balance due Complainant from Respondent of $728.05.

Respondent's failure to pay Complainant $728.05 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation."[30] Such damages, where appropriate, include interest.[31]

Complainant seeks pre-judgment interest on the unpaid produce shipments listed in the Complaint at a rate of 1.5 percent per month (18 percent per annum).[32] Complainant's claim is based on its invoices to Respondent which expressly state: "Past due accounts are subject to interest charge of 1 ½ % per month, maximum 18% per annum."[33] There is nothing to indicate that Respondent objected to the interest charge provision stated on Complainant's invoices. In the absence of a timely

---

[29] *A.P.S. Mktg., Inc. v. R. S. Hanline & Co.*, 59 Agric. Dec. 407, 411 (U.S.D.A. 2000).

[30] 7 U.S.C. § 499e(a).

[31] *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Rou v. Severt Sons Produce, Inc.*, 70 Agric. Dec. 489, 498 (U.S.D.A. 2011); *Rogers Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1618 (U.S.D.A. 2010).

[32] Compl. ¶ 8.

[33] Compl. Ex. 7, 12.

objection by Respondent, the interest charge provision stated on Complainant's invoices was incorporated into each sales contract.[34] Accordingly, pre-judgment interest will be awarded to Complainant at the rate of 1.5 percent per month (18 percent per annum). Post-judgment interest to be applied

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

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

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

ORDER

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $728.05, with interest thereon at the rate of 18 percent per annum from June 1, 2018, up to the date of this Order. Respondent shall also pay Complainant interest at the rate of percent per annum on the sum of $728.05 from the date of this Order, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

___

[34] *See Coliman Pac. Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 646 (U.S.D.A. 2014).

Errata

The Editor regrets having overlooked the timely inclusion of an order by the Judicial Officer, specifically:

> *Dyer*, PACA Docket Nos. 14-0166, 14-0167, 14-0168, 14-0169 (U.S.D.A. Feb. 7, 2019) (U.S.D.A. June 27, 2019) (Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168, and 14-0169 and Remand Order Regarding Docket No. 14-0167).[*]

The Order follows this page with guidance for special pagination.

[*] This decision should have appeared in Volume 78 of *Agriculture Decisions*.

In re: JONATHAN DYER; STEVEN C. FINBERG, a/k/a STEVE FINBERG; DREW JOHNSON, a/k/a DREW R. JOHNSON; and MICHAEL S. RAWLINGS.
Docket Nos. 14-0166; 14-0167; 14-0168; 14-0169.
Procedural Order and Remand Order.
Filed February 7, 2019.

[Cite as: 79 Agric. Dec. N (U.S.D.A. 2019).]

PACA-APP – Administrative law judges, appointment of – Appeal – Appointment, ratification of – Appointments Clause – *Lucia v. SEC* – Remand – Responsibly connected.

Stephen P. McCarron, Esq., for Petitioners.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order issued by Jill S. Clifton, Administrative Law Judge.
Order entered by Judge Bobbie J. McCartney, Judicial Officer.

PROCEDURAL ORDER AFFIRMING APPEAL STATUS REGARDING DOCKET NOS. 14-0166, 14-0168, AND 14-0169 AND REMAND ORDER REGARDING DOCKET NO. 14-0167

Summary of Procedural History and Preliminary Findings

This is a "responsibly connected" proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499(a) *et seq.*) ("PACA"), which is conducted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) ("Rules" or "Rules of Practice").

On June 28, 2013, a disciplinary complaint ("Complaint") was filed against Adams Produce Company LLC ("Adams"), for failing to make full payment promptly in the amount of $10,735,186.81 to 51 produce sellers for 9,314 lots of perishable agricultural commodities that the company purchased, received, and accepted during the period of August 8, 2011 through May 18, 2012. As of the filing of the Complaint, $1,928,417.72 remained unpaid.

On November 22, 2013, a Default Decision and Order was entered against Adams, finding that Adams willfully, repeatedly, and flagrantly

violated section 2(4) of the PACA by failing to make full payment promptly as alleged in the Complaint. The Default Decision and Order became final and effective on January 8, 2014.

Petitioners Jonathan Dyer, Steven C. Finberg, Drew Johnson, and Michael S. Rawlings each filed a petition for review of the determination of the Director of the PACA Division, Specialty Crops Program, Agricultural Marketing Service ("Respondent") determining that each Petitioner was "responsibly connected" with Adams, as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), during the period of time Adams violated section 2 of the PACA. These four "responsibly connected" cases were consolidated for hearing in accordance with 7 C.F.R. § 1.137 of the Rules of Practice by direction of Rulings and Preliminary Instructions filed on September 4, 2014. The hearings in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, DC, before the Administrative Law Judge ("ALJ") Jill S. Clifton ("Judge Clifton").[1]

Although the four petitions for review of the Director's responsibly connected determinations were consolidated for hearing, Judge Clifton indicated in her Initial Decision that she would issue a separate decision regarding Steven Finberg's responsibly connected status.

On May 19, 2017 Judge Clifton issued a Decision and Order ("Initial Decision" or "ID") in Dockets 14-0166, 14-0168, and 14-0169, finding that Petitioners Dyer, Johnson, and Rawlings were not "responsibly connected" with Adams during the period that Adams violated section 2(4) of the PACA.

On June 21, 2017, Respondent timely filed an appeal of Judge Clifton's Initial Decision seeking to establish that Petitioners Dyer, Johnson and Rawlings have each failed to rebut the presumption that they were "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA and requesting that the determination by the

[1] The parties' Updated Stipulation as to Proceedings filed on June 11, 2015 provided, among other things: "All evidence in the consolidated hearing will be available to be considered in each case." Updated Stipulation as to Proceedings at 2 ¶ 6.

Director of the PACA Division that Petitioners were "responsibly connected" with Adams during the period of its repeated and flagrant violations of the PACA be affirmed. Specifically, Respondent requests that the Judicial Officer reverse the ALJ's holdings in the Initial Decision that: (1) Petitioners Dyer, Johnson, and Rawlings were not owners of Adams when Adams violated the PACA; and (2) Adams was the alter ego of Scott Grinstead when Adams violated the PACA. Also, Respondent asserts that if the Judicial Officer agrees that one or both of these conclusions are in error, the determinations by the Director of the PACA Division that Petitioners Dyer, Johnson, and Rawlings were each "responsibly connected" with Adams during the period that Adams willfully, repeatedly, and flagrantly violated section 2(4) of the PACA should be affirmed.

On July 25, 2017, Judge Clifton issued her Decision and Order on Docket 14-0167, affirming the determination of the Agency and finding that Petitioner Finberg was "responsibly connected" to Adams, within the meaning of the PACA, pursuant to 7 C.F.R. § 499a(b)(9).

On August 21, 2017, Petitioner Finberg timely filed an appeal to the Judicial Officer asserting that he was not "actively involved" in the activities resulting in the violations, that Adams was the alter ego of Mr. Grinstead, and, therefore, that he had successfully rebutted the presumption that he was "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA.

On December 28, 2017, the Judicial Officer remanded the instant proceeding to Judge Clifton in order to put to rest any Appointments Clause claim that may arise in this proceeding in light of the Solicitor General's position in *Lucia v. SEC*, 138 S. Ct. 2044 (2018)) ("*Lucia*").[2] On February 1, 2018, the Judicial Officer denied Petitioners' request for reconsideration of the Remand Order.

On November 30, 2018, Judge Clifton issued her Notice of Completion of Judge's Tasks on Remand ("Notice") concluding that Docket Nos. 14-

[2] At the time, *Lucia* was pending before the Supreme Court of the United States. The Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

ERRATA

0166, 14-0167, 14-0168 & 14- 0169 were ready for return to the Judicial Officer based on the following findings:

1) That Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings have consistently declined to request relief pursuant to the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*;

2) That Petitioner Steven C. Finberg has respectfully requested a new hearing conducted under the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), before a different administrative law judge, who did not previously participate in the matter. (Petitioners' Response filed October 31, 2018, by Stephen P. McCarron, Esq.); and

3) That Respondent did not initiate a challenge to Judge Clifton's authority pursuant to the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018); further, AMS indicated that if the parties were to waive any challenge to the issue of Judge Clifton's authority to enter a Decision and Order in these cases, Respondent prefers that the cases continue to resolution before the Judicial Officer but that absent such waiver, the cases may need to be set for a new hearing, potentially before a different administrative law judge. (Respondent's Response filed October 10, 2018, by Charles L. Kendall, Esq.).

Notice at 1-2.

During the course of my February 1, 2019 phone conference with Mr. McCarron on behalf of the Petitioners and Mr. Kendall on behalf of Respondent, the parties reaffirmed their respective positions as reflected by these findings.

REMAND ORDER

Based on the foregoing, it is my determination that Docket Nos. 14-0166, 14-0167, 14-0168, and 14-0169 are properly before the Judicial Officer in accordance with Judge Clifton's November 30, 2018 Notice.

However, in light of the fact that Petitioner Finberg has requested that a new hearing be conducted in accordance with *Lucia*, while the other three petitioners have declined to request such relief, the dockets have become procedurally distinguishable.

Accordingly, Docket Nos. 14-0166, 14-0168 and 14-0169 pertaining to Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings will remain consolidated and will remain in appeal status before the Judicial Officer, while Docket No. 14-0167 pertaining to Petitioner Steven C. Finberg will be remanded for further proceedings to be conducted in accordance with *Lucia*.

In a ceremony on July 24, 2017, the Secretary of the United States Department of Agriculture, Sonny Perdue ("Secretary Perdue"), personally ratified the prior appointments of Chief ALJ Bobbie J. McCartney (retired from that position on 1/20/2018), ALJ Jill S. Clifton, and ALJ Channing D. Strother and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that he "conducted a thorough review of the qualifications of this Department's administrative law judges" and "affirm[ing] that in a ceremony conducted on July 24, 2017, [he] ratified the agency's prior written appointments of the [USDA ALJs] before administering their oath of office . . ."

On June 21, 2018, almost one year later, the U.S. Supreme Court held that the Securities and Exchange Commission's ALJs are inferior officers of the United States, U.S. Const. art. II, § 2, cl. 2., and therefore must be appointed consistent with the Appointments Clause.[3] The actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office go well beyond a simple recitation of ratification are clearly consistent with the Supreme Court's ruling in *Lucia* and are therefore entitled to full deference. Accordingly, certainly as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to the Appointments Clause, were duly appointed by a "head of the department" as required by U.S. Constitution, art. 2, § 2, cl. 2 and the Supreme Court's ruling in *Lucia*.

---

[3] *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

ERRATA

Because the hearing conducted by Judge Clifton in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, DC and because the ensuing Decision and Orders issued on July 25, 2017 pertaining to Petitioner Finberg, predate the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements, Petitioner Finberg's request for a hearing before an ALJ other than Judge Clifton is GRANTED, and the proceedings in Docket No. 14-0167 are hereby REMANDED for further proceedings to be conducted in accordance with *Lucia*.

The parties are advised that the newly appointed ALJ shall exercise the full powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued on July 25, 2017 by Judge Clifton in Docket No. 14-0167 is hereby VACATED and the written record which has already been made by the parties in this proceeding shall be reviewed de novo to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any new testimony or other evidence.

Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any new evidence not previously submitted in the prior proceeding.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

___

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive 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: https://oalj.oha.usda.gov/current.

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: JEFF PLAFF.
Docket No. 20-J-0027.
Order Dismissing Petition for Review.
Filed January 14, 2020.

In re: MIBO FRESH FOODS, LLC.
Docket No. 20-J-0022.
Order Denying Respondent's Petition for Rehearing.
Filed May 14, 2020.

—

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: https://oalj.oha.usda.gov/current].

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: WRITE ON MARKETING, INC.
Docket No. 19-J-0102.
Default Decision and Order.
Filed January 9, 2020.

In re: CORAM DEO FARMS, INC.
Docket No. 19-J-0103.
Default Decision and Order.
Filed January 9, 2020.

In re: VERSA MARKETING, INC.
Docket No. 20-J-0012.
Default Decision and Order.
Filed February 6, 2020.

In re: MIBO FRESH FOODS, LLC.
Docket No. 20-J-0022.
Default Decision and Order.
Filed February 11, 2020.

In re: CUSTOM FRESH CUTS, LLC.
Docket No. 20-J-0017.
Default Decision and Order.
Filed April 14, 2020.

In re: TRINITY FRESH DISTRIBUTION, LLC.
Docket No. 20-J-0047.
Default Decision and Order.
Filed April 28, 2020.

In re: DOUBLE D SALES COMPANY, INC.
Docket No. 20-J-0016.
Default Decision and Order.
Filed June 30, 2020.

___

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: H.D. HUME, d/b/a H&H LIVESTOCK.
Docket No. 20-J-0127.
Consent Decision and Order.
Filed May 21, 2020.

___