

AGRICULTURE DECISIONS

Volume 80

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Part III (PACA)

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: SO ONO FOOD PRODUCTS, LLC.

Docket No. 20-J-0124.

Decision and Order of the Judicial Officer.

Filed June 1, 2021.

PACA-D – Agreements with sellers – *De minimis* amount – Full payment promptly, failure to make – “No pay” case – Violations, flagrant – Violations, repeated – Violations, willful.

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Shelton S. Smallwood, Esq., for AMS.

Bruce W. Akerly, Esq., and Carrie R. McNair, Esq., for Respondent.

Initial Decision and Order by Tierney Carlos, Administrative Law Judge.

Decision an Order entered by John Walk, Judicial Officer.

**Decision and Order Denying Respondent’s Appeal Petition and
Affirming the Initial Decision and Order of
Administrative Law Judge Tierney Carlos**

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 (7 C.F.R. §§ 46.1 through 46.5) (“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”). On February 12, 2021, Administrative Law Judge (ALJ) Tierney Carlos (“ALJ”) issued a Decision and Order Without Hearing against Respondent. On March 26, 2021, Respondent filed its Appeal Petition and Supporting Brief. For the reasons discussed herein, Respondent’s Appeal Petition is **DENIED** and the ALJ’s Initial Decision and Order is **AFFIRMED**.

Relevant Procedural History

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This proceeding was initiated by a Complaint filed on May 5, 2020, by the Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Services, United States Department of Agriculture (“Complainant”), on So Ono Food Products, LLC (“Respondent”). The Complaint alleges that Respondent, during the period March 2018 through March 2019, failed to make full payment promptly to seven (7) sellers for 230 lots of perishable agricultural commodities it purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$1,344,994.87. The Complaint also alleges that Respondent’s conduct constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Complaint requested that an administrative law judge find that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order the publication of the facts and circumstances surrounding the Respondent’s violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Respondent, through counsel, filed its Answer on June 1, 2020, denying that it owes seven (7) produce sellers the aggregate amount of \$1,344,994.87. The Answer also denied that Respondent willfully, flagrantly, or repeatedly violated the PACA.

On September 22, 2020, Complainant filed Complainant’s Motion For A Decision Without Hearing due to Respondent’s failure to make full and prompt payment for produce purchases made in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (“Complainant’s Motion”).

On November 16, 2020, Respondent filed Respondent’s Witness List and Exhibits List which included a copy of the sworn affidavit of [REDACTED] (“Mr. [REDACTED]”), an owner of So Ono Food Products, LLC., admitting that as of November 16, 2020, Respondent still owed five (5) of seven (7) sellers at issue in the Complaint a combined total of \$604,456.10.

On November 18, 2020, Respondent filed its Response To Complainant’s Motion for a Decision Without a Hearing (“Respondent’s Response”), wherein it requested that Complainant’s Motion be denied and that a hearing be held. Respondent claimed “[t]here is a material fact in this case that is in dispute – the amount owed to produce vendors. This

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material fact has not been determined.”¹ Respondent also alleged the existence of “agreements with each of its vendors to pay any purported debt owed over time.”² On December 2, 2020, the ALJ held a telephone conference with counsel for Respondent and counsel for Complainant wherein the ALJ provided the opportunity for Complainant to provide supplemental information to Complainant’s Motion and for Respondent to provide supplemental information to Respondent’s Response.³

Complainant filed its Supplemental Information to Motion for Decision Without Hearing on December 11, 2020 (“Complainant’s Supplemental”). Respondent filed its Supplemental Response to Motion for Decision Without Hearing, after receiving an extension of time to file, on February 8, 2021 (“Respondent’s Supplemental Response”), which states in part:

5. At the time the Court requested a supplement and granted an extension, Mr. [REDACTED], co-owner of So Ono, and by extension, the undersigned counsel for Mr. [REDACTED], understood that additional information could be provided demonstrating that the seven vendors had specific payment arrangements prior to receipt of produce.

6. However, since the Hawaii-based business has closed, and because Mr. [REDACTED] was not responsible for the day-to-day business or financial operations of So Ono, Mr. [REDACTED] has been unable to attain relevant records to supplement at this time.

7. Accordingly, at this time, Respondent has nothing additional to produce and therefore relies on its previously filed *Response to Complainant’s Motion for a Decision Without Hearing*, filed November 18, 2020.

¹ Respondent’s Response at 2.

² *Id.*

³ See Summary of December 2, 2020 Telephone Conference and Filing Order; Supplemental Response to Motion for Decision Without Hearing at 1.

The ALJ issued his Decision and Order Without Hearing on February 12, 2021 and granted Complainant's Motion ("Initial Decision and Order" or "IDO"). The Initial Decision and Order found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)) and ordered that the facts and circumstances of those violations be published. The ALJ found a hearing unnecessary based on the admission of Mr. [REDACTED] that Respondent owed more than a *de minimis* amount to produce sellers as of November 16, 2020, and the default orders issued by the Judicial Officer finding that Respondent violated the PACA.

On March 26, 2021, Respondent filed a timely appeal, and supporting brief, of the ALJ's Initial Decision and Order to the Judicial Officer ("Appeal Petition"). The Appeal Petition argues that material facts remain in dispute—the amount owed to produce vendors—and that Respondent entered into agreements with its vendors to pay its debts over time that were not reviewed. Respondent also argues that the ALJ's specific finding that from March 2018 through March 2019, it failed to make full payment promptly to seven (7) produce sellers for 230 lots of perishable agricultural commodities in the amount of \$1,344,994.87 is negated by Mr. [REDACTED]'s affidavit. The Appeal Petition asks the Judicial Officer to overturn the Initial Decision and Order and to allow for a hearing to receive evidence in the proceeding.

Complainant filed a response in opposition to the Appeal Petition on April 19, 2021 ("Response to Appeal Petition").

Statutory and Regulatory Background

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

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

...

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received

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in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

Complainant alleges in this proceeding that Respondent is in violation of the PACA by its failure to make “full payment promptly” to sellers for its purchase of perishable agricultural commodities.

Regulations issued under the PACA (7 C.F.R. § 46.2) provide in part:

(aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

...

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

...

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: Provided, That the party claiming the

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existence of such an agreement for time of payment shall have the burden of proving it.

The PACA authorizes the Secretary to take action against violations of 7 U.S.C. § 499b as follows:

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.⁴

Discussion

A. Respondent Admitted the Material Allegations of the Complaint and a Hearing is Not Necessary.

“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.”⁵ Full payment promptly in accordance with the PACA means payment by a buyer within ten (10) days of acceptance of the produce.⁶ The parties may elect to use a different time of payment so long as the terms of the agreement are reduced to writing before entering into the transaction.⁷ The party claiming that such an agreement exists has the burden of proving it.⁸

Respondent’s Answer does not deny the allegation in the Complaint that Respondent, during the period March 2018 through March 2019, on

⁴ 7 U.S.C. § 499h(a).

⁵ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547 (U.S.D.A. 1998); *see also* 7 U.S.C. § 499b(4)).

⁶ 7 C.F.R. § 46.2(aa)(5).

⁷ 7 C.F.R. § 46.2(aa)(11).

⁸ *Id.*

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or about the dates, and in the transactions set forth in Appendix A to the Complaint, failed to make full payment promptly to seven (7) sellers for 230 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$1,344,994.87. Rather, the Answer states that “Respondent does not owe seven (7) Produce Sellers the aggregate amount of \$1,344,994.87 as alleged in the Complaint, Appendix A.”⁹ But denying the amount of debt it owes does not address the allegation that Respondent failed to make full payment promptly to the sellers in the total amount of \$1,344,994.87.¹⁰ Section 1.136(c) of the Rules of Practice provides:

Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and 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, unless the parties have agreed to a consent decision pursuant to § 1.138.¹¹

The failure in the Answer to respond to the allegation that Respondent did not make full payment promptly for the amount specified to the sellers for the perishable agricultural commodities purchased constitutes an admission of the allegation.

Pursuant to the Department’s longstanding policy set forth in *Scamcorp, Inc.*,¹² to avoid sanctions as a “no pay” case, Respondent had 120 days from the date the Complaint was served upon it to achieve full compliance with the PACA. “Full compliance requires not only that a

⁹ Answer at ¶ 7 (emphasis added).

¹⁰ The Appeal Petition also asserts that Mr. ██████’s affidavit “specifically provides that So Ono did not owe seven produce sellers \$1,344,994.87.” Appeal Petition at 5. However, Mr. ██████’s affidavit discusses the amount of debt Respondent owed to sellers as of November 16, 2020, but does not address the allegation that Respondent failed to make *full payment promptly* to the sellers in the amount specified.

¹¹ 7 C.F.R. § 1.136(c).

¹² *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

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respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpentino Bros., Inc.*, [46 Agric. Dec. 486 (U.S.D.A. 1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988), 1988 WL 76618], that a respondent have no credit agreements with produce sellers for more than 30 days.”¹³ 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 the PACA, will be revoked.”¹⁴ However, where a PACA violator no longer has a license to revoke, publication of the facts and circumstances of the violations is the appropriate sanction.¹⁵

This case is properly treated as a “no pay” case. The Complaint was served upon Respondent on May 11, 2020. Therefore, Respondent had until September 8, 2020, to achieve full compliance with the PACA. Mr. [REDACTED] admits by his sworn affidavit that Respondent still owed \$604,456.10 to five (5) sellers listed in Appendix A of the Complaint as of November 16, 2020. Hence, the outstanding debt admitted as owed to sellers more than 120 days after service of the Complaint exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.¹⁶

It is well settled that “[a] respondent in an administrative proceeding does not have the right to an oral hearing under all circumstances, and an agency may dispose of a hearing where there is no material issue of fact

¹³ *Id.* at 549.

¹⁴ *Id.*

¹⁵ 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. 2007) (“Respondent’s PACA license has already been terminated for failure to pay the PACA license renewal fee. Thus, a finding that Respondent has committed willful, flagrant, and repeated violations of . . . the PACA (7 U.S.C. § 499b(4)) and the publication of the facts and circumstances of Respondent’s violations, is the only appropriate remedy.”); *KDLO Enters., Inc.*, 70 Agric. Dec. 1098, 1103 (U.S.D.A. 2011) (“The appropriate sanction for KDLO, since KDLO no longer has a PACA license, is publication of the facts and circumstances of KDLO’s violations of the PACA.”).

¹⁶ See *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (ruling on certified question) (finding that anything over \$5000.00 is more than a *de minimis* amount).

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regarding which a meaningful hearing may be held.”¹⁷ Respondent continued to object at various points of the proceeding to the accuracy of the amount alleged as owed. However, in a PACA disciplinary proceeding, “even if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total amount owed more than *de minimis*.”¹⁸ The admission by Mr. [REDACTED] that Respondent still owed \$604,456.10 to five (5) sellers as of November 16, 2020, more than a *de minimis* amount, supports the ALJ’s finding that an oral hearing is not necessary in this matter.

Moreover, between September 15 and September 17, 2020, [REDACTED] (“Mr. [REDACTED]”) of the PACA Division conducted a compliance investigation to determine the amount of unpaid debt owed by Respondent to the produce sellers listed in Appendix A to the Complaint at the time. As indicated in a declaration provided by Mr. [REDACTED], this investigation revealed that as of September 15, 2020, Respondent still owed all seven (7) of the sellers listed in Appendix A to the Complaint more than \$899,000.00 for purchases of various perishable agricultural commodities – more than a *de minimis* amount.¹⁹

The Judicial Officer has consistently held that “unless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed.”²⁰ Therefore, the ALJ properly decided that an oral hearing was not necessary.

B. Respondent’s Allegation of Agreements with Sellers.

The Appeal Petition also asserts that Respondent entered into

¹⁷ *The Square Group, LLC*, 75 Agric. Dec. 689, 695-96 (U.S.D.A. 2016); *see also Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (“[A]n agency may ordinarily dispense with a hearing when no genuine dispute exists.”).

¹⁸ *The Square Group, LLC*, 75 Agric. Dec. at 695.

¹⁹ *See* Attachment A to Complainant’s Motion.

²⁰ *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (ruling on certified question); *see also H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) (“[T]here is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, so long as the violations are not *de minimis*.”).

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agreements “with each of its vendors to pay any purported debt over time” which were not considered by the ALJ. Assuming that Respondent is alleging the existence of agreements to use “different times of payment” to satisfy the PACA’s full payment promptly requirement, Regulations require that such agreements be reduced to writing “before entering into the transaction.”²¹ Under the Regulations, Respondent was also required to maintain a copy of the alleged agreements in its records and it has the burden of proving their existence.²² Nevertheless, Respondent has not provided copies of the alleged agreements. Further, there is no evidence in the record that any alleged agreements were reduced to writing prior to the transactions.

During a telephone conference held on December 2, 2020, wherein the parties agreed to provide supplemental documentation to support their positions, Respondent was asked to provide information showing whether and when any payment agreements with Respondent’s creditors were entered into.²³ Respondent’s Supplemental Response states that “Mr. [REDACTED], co-owner of So Ono, and by extension, the undersigned counsel for Mr. [REDACTED], understood that additional information could be provided demonstrating that the seven vendors had specific payment arrangements prior to receipt of the produce.”²⁴ However, after the ALJ granted an extension of time²⁵ for Respondent to supplement its previously filed response to Complainant’s Motion, “Respondent ha[d] nothing additional to produce and therefore relie[d] on its previously filed *Response to Complainant’s Motion for a Decision Without Hearing*, filed November

²¹ 7 C.F.R. § 46.2(aa)(11); *see also Allred’s Produce v. U.S. Dep’t of Agric.*, 178 F.3d 743, 747 (5th Cir. 1999) (“Under the regulations, ‘full payment promptly’ means payment within 10 days of the date on which the produce is accepted, or payment within the time specified in writing by prior agreement of the parties.”) (citation omitted).

²² 7 C.F.R. § 46.2(aa)(11).

²³ IDO at 3.

²⁴ Respondent’s Supplemental Response at 2.

²⁵ The telephone conference took place on December 2, 2020. Respondent was originally provided the opportunity to supplement no later than January 8, 2021. The ALJ granted Respondent’s request for an extension to file to February 8, 2021. Hence, Respondent had a total of 68 days to supplement its previously filed Response to Complainant’s Motion. *See id.* at 1.

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18, 2020.”²⁶ To date, Respondent has not submitted any supplemental information, including the alleged agreements or evidence that they were reduced to writing prior to the transactions as required to meet full and prompt payment under the PACA.²⁷

“A request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held.”²⁸ The assertion by Respondent of the existence of agreements to pay its debts to sellers over time, without such evidence, does not raise a genuine dispute to require a hearing.²⁹

C. Respondent’s Violations Were Flagrant, Repeated, and Willful.

The ALJ correctly found that Respondent’s violations were flagrant. “Flagrancy is determined by evaluating the number of violations, total money involved, and length of time during which the violations occurred.”³⁰ Respondent failed to make full payment promptly in the amount of \$1,344,994.87 to seven (7) sellers for 230 lots of perishable agricultural commodities during the period March 2018 through March 2019. By its failure to make full payment promptly to multiple sellers with respect to these transactions which involved a large amount of money over an approximate twelve (12) month period, Respondent’s PACA violations

²⁶ Respondent’s Supplemental Response at 2.

²⁷ Complainant correctly points out that any alleged agreements entered with PACA creditors after the filing of an informal or formal reparation complaint would not satisfy the requirement to make full payment promptly. *See* Response to Appeal Petition at 8. The record reflects that all seven (7) sellers at issue in the Complaint filed reparation complaints against respondent.

²⁸ *Cnty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986).

²⁹ *See Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 608 (D.C. Cir. 1987) (“Here the submissions by Veg-Mix were not substantial enough to create a genuine dispute requiring a hearing.”)

³⁰ *Olympic Wholesale Produce, Inc.*, 78 Agric. Dec. 186, 191 (U.S.D.A. 2019); *see also Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997) (“The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.”).

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were flagrant.³¹ Mr. [REDACTED]'s affidavit admits that as of November 16, 2020, more than six (6) months after the Complaint was served, the Respondent still owed five (5) sellers \$604,456.10 – much more than a *de minimis* amount.

The ALJ also correctly found that Respondent's violations were repeated. "Violations are 'repeated' under PACA when they are committed multiple times, non-simultaneously."³² Respondent's violations were clearly repeated as it failed to make full payment promptly to multiple sellers in multiple transactions that occurred over an approximate twelve (12) month period.

"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."³³ Here, Respondent's violations of the PACA were done intentionally by withholding full and prompt payment of more than a *de minimis* amount from multiple sellers for numerous transactions over a period of approximately twelve (12) months.³⁴ Respondent knew or should have known that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, yet it continued to make purchases over a lengthy period of time and did not pay the sellers promptly. The ALJ correctly found that Respondent's violations were

³¹ See *Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895-97 (finding violations of the PACA involving 174 lots of perishable agricultural commodities in the total amount of \$238,274.08 over an approximate eleven month period flagrant); *Tolar Farms*, 56 Agric. Dec. 1865, 1878-80 (U.S.D.A. 1997) (finding failure to make full payment promptly for 46 lots of perishable agricultural commodities in the total amount of \$192,089.03 for violations that occurred over a 3 month period was flagrant).

³² *Olympic Wholesale Produce, Inc.*, 78 Agric. Dec. at 191; see also *Five Star Food Distribs., Inc.* 56 Agric. Dec. at 895 ("Respondent's violations are 'repeated' because repeated means more than one.").

³³ *Tolar Farms*, 56 Agric. Dec. at 1879.

³⁴ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998) ("Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499(b)(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.").

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willful.

ORDER

A decision and order without hearing was properly issued in this proceeding.

The ALJ's Initial Decision and Order of February 12, 2021, is AFFIRMED and Respondent's Appeal Petition of March 26, 2021, is DENIED.

The following findings are adopted:

1. Respondent, during the period March 2018 through March 2019, on or about the dates, and in the transactions set forth in Appendix A to the Complaint, failed to make full payment promptly to seven (7) sellers for 230 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$1,344,994.87.
2. The total unpaid balance due to sellers more than 120 days after the Complaint was served upon Respondent represents more than a *de minimis* amount and a hearing is not necessary in this proceeding.
3. Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).
4. The facts and circumstances of Respondent's PACA violations are hereby ordered to be published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

Right to Seek Judicial Review

Respondent 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 the date of entry of the Order in this Decision and Order, as indicated below.

In re: BAIN DISTRIBUTORS, INC.
Docket No. 20-J-0035.
Decision and Order.
Filed January 4, 2021.

PACA-D.

Shelton S. Smallwood, Esq., for AMS.
[REDACTED], representative of Respondent.
Decision and Order entered by Tierney Carlos, Administrative Law Judge.

Decision and Order Without Hearing

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“PACA”), the regulations promulgated pursuant to the PACA (7 C.F.R. Part 46) (“Regulations”), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice”).

The Complaint, filed January 31, 2020, alleges that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to nine (9) sellers for one hundred and seventy (170) lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$557,099.05 during the period from September 2015 through August 2018. Complainant requests the issuance of an order finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and publication of the facts and circumstances surrounding the violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

On February 21, 2020, Respondent filed its Answer, by and through its president and representative, [REDACTED], appearing *pro se*. Respondent states, Answer at 1, that “Bain admits all allegations in the Complaint except that Bain does not owe \$557,099.05 as alleged in the Complaint, does not owe the amounts as alleged on Exhibit ‘A,’ and has not willfully violated any section of the PACA.” In its Answer, Respondent also raises three affirmative defenses stating: 1) “The Complaint is barred by the applicable statutes of limitations[;]”¹

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2) “The Complaint is barred by the doctrine of waiver[;]” and 3) “Plaintiffs are estopped by their own acts from asserting the claims alleged in the Complaint.” Aside from the cited California Code of Civil Procedure, which is not applicable here, Respondent does not provide any other authority on which it relies for its affirmative defenses.

An Order Setting Deadlines for Submissions was issued by the undersigned on April 9, 2020. Complainant timely filed its list of proposed exhibits and witnesses on May 26, 2020. Respondent timely filed a request for extension of time to file submissions on July 13, 2020, which was granted on the same day. Respondent filed a second request for extension to file submissions on August 11, 2020, which was granted on August 12, 2020.

On August 24, 2020, Complainant filed a Motion for An Order Requiring Respondent To Show Cause Why A Decision Without Hearing Should Not Be Issued (“Complainant’s First Motion”) and a proposed Order Requiring Respondent to Show Cause Why a Decision and Order Should Not Be Issued. In its First Motion, at 2, Complainant states that that Respondent’s Answer and general denial “is not an acceptable defense to liability in a case in which a Complaint a Complaint has been filed alleging the violation of section 2(4) of the PACA due to the failure to make full payment promptly.”²

On September 23, 2020, Respondent, through ██████████, filed a Declaration of ██████████ In Response to Order to Show Cause Why a Decision Without Hearing Should Not Be Issued (█████████’ Declaration”). Therein, Mr. ██████████ states that he is the principal of Respondent, and claims that, regarding the debts with nine (9) sellers as alleged in the Complaint, Respondent “has paid and/or has agreements with most of the Sellers and thus does not owe \$557,099.05.” In his Declaration at 2-4, Mr. ██████████ explains the amounts outstanding, forgiven/settled, or disputed with each of the nine (9) sellers named in the Complaint. Mr. ██████████ does not dispute that payments were not made promptly as required by the PACA.

¹ Citing California Code of Civil Procedure §§ 337, 339(1), 343 and 344.

² Citing 7 C.F.R. § 1.136(b); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-549 (U.S.D.A. 1998).

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On October 14, 2020, Complainant filed a Motion for A Decision Without Hearing (“Complainant’s Second Motion”), which included Appendix A (which was also attached to the Complaint), [REDACTED] Declaration as Attachment A, and the Declaration of [REDACTED] as Attachment B. With the Second Motion, Complainant also filed a proposed Decision and Order, asking that a decision and order without hearing be issued against Respondent due to its failure to make a full and prompt payment for produce purchases made in willful, flagrant, and repeated violation of PACA (7 U.S.C. § 499b(4)).³ In its Second Motion, Complainant argues, at 2, that that Respondent admitted to violation of the PACA in its September 23, 2020 response, [REDACTED] Declaration.

Complainant made its motion based on admissions of fact that Respondent has made in its Response to the Show Cause Motion. As Respondent’s Response admits the material allegations of the Complaint, no hearing is warranted in this matter.

Respondent has admitted in its Response that it violated the PACA by failing to pay produce sellers fully and promptly when it admitted that “most of the Sellers” but not all produce sellers listed in Appendix A to the Complaint had been paid. Respondent, in its Response at 2-4, admits that there are a least three (3) produce sellers who are still owed at least \$322,653.655—more than a *de minimis* amount. In addition, after a compliance investigation was conducted on August 7, 2020, Complainant

³ United States Postal Service records reflect that Complainant’s Second Motion was sent to Respondent via certified mail on October 14, 2020 but remained “in transit” without further explanation past October 28, 2020. United States Postal Service records reflect that Complainant’s Second Motion was again sent via certified mail to Respondent on November 19, 2020 but was returned “Unclaimed” on December 4, 2020. The USDA Hearing Clerk’s records reflect that Complainant’s Second Motion was then sent to Respondent via ordinary mail pursuant to 7 C.F.R. § 1.147 (c)(1) on December 4, 2020. Respondent had twenty (20) days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not 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 workday. 7 C.F.R. § 1.147(h). In this case, Respondent’s objections were due by December 26, 2020. To date, Respondent has not filed any objections.

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determined that \$463,816.55⁴ still remains owed. The amount Respondent admits as still owed and the amount Complainant determined as still owed are each more than a *de minimis* amount.⁵

Respondent's violations in this case were flagrant and repeated.⁶ Respondent's violations were also 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.⁷ In other words, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.⁸ Here, Respondent knew or should have known that it could not make prompt payment for the large amounts of perishables it ordered, yet it continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.⁹

Respondent's actions are willful because Respondent intentionally withheld full and prompt payment from at least three (3) of the nine (9) sellers listed in Appendix A to the Complaint for produce it purchased, received and accepted in the course of or in contemplation of interstate and foreign commerce. Complainant need only demonstrate that Respondent

⁴ Complainant alleges, Second Motion at 4, that the investigation revealed that respondent owes \$419,480.46. However, the balances owed as stated in Attachment B to the Second Motion amount to \$463,816.55, not including outstanding balances owed to CAB Produce Company, LLC and V&L Produce, Inc. which were unreachable during the investigation. Either amount is more than a *de minimis* amount, *see infra* note 5.

⁵ *See Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (Ruling on Certified Question) (no hearing required unless "the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000"), final decision, 44 Agric. Dec. 870 (1985).

⁶ *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 the Act, and a finding of flagrant violations of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00).

⁷ *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (U.S.D.A. 1996); *see Ocean View Produce, Inc.*, Docket No. 08-0064, 2009 WL 218027, at *4 (U.S.D.A. Jan. 15, 2009).

⁸ *Hogan Distrib., Inc.*, 55 Agric. Dec. at 629-30.

⁹ *See* Complaint at 2 ¶ III.

failed to make full payment promptly to sellers for produce it purchased, received and accepted in more than a *de minimis* amount. Complainant has met that burden. Respondent has admitted that there remains an amount still owing of at least \$322,653.65 to three (3) of the nine (9) sellers listed in Appendix A to the Complaint and Complainant has demonstrated that a total amount of \$463,816.55 is still owed to at least six (6) of the nine (9) sellers listed in Appendix A to the Complaint--each more than a *de minimis* amount.¹⁰

Respondent was served with the Complaint on March 16, 2020. According to the USDA Judicial Officer's policy set forth in *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 548- 549 (U.S.D.A. 1998), which states that when a complaint is filed alleging the failure to make full payment promptly under the PACA, if the Respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the Respondent or the date of the hearing, whichever occurs first, (July 14, 2020, in this matter) the case will be treated as a "no pay" case for which the sanction is license revocation.¹¹ Complainant moves that a Decision Without Hearing be issued, finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that the facts and circumstances of Respondent's violations be published.

Pursuant to the Department's policy set forth in the *Scamcorp* decision, upon the Complainant's motion for the issuance of a decision and order without hearing, and due to Respondent's failure to object to Complainant's motion for a decision and order without hearing, the following decision and order is issued without further procedure or hearing pursuant to 7 C.F.R. § 1.139.

Findings of Fact

¹⁰ See *Fava*, *supra* note 5.

¹¹ In its First Motion at 1 n.1, Complainant notes that it seeks publication of the facts and circumstances surrounding Respondent's PACA violations, rather than revocation of Respondent's PACA license, as Respondent's PACA license terminated on May 20, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

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1. Respondent is or was incorporated and existed under the laws of the state of Delaware. Respondent's business address is 11912 Rivera Road, Suite E, Santa Fe Springs, California 90670. Respondent has a secondary business address of P.O. Box 2427, Santa Fe Springs, California 90670 whereupon the Complaint was also served. Finally, the Complaint in this case was served on Respondent's sole owner at his home address, which was provided to the Office of Hearing Clerk for service purposes; it was withheld from the Complaint to protect the owner's personal information and privacy.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 19990719 was issued to Respondent on March 17, 1999. This license was suspended on May 15, 2019, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)). The license was terminated on May 20, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period September 2015 through August 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 at least three (3) of the nine (9) sellers listed in Appendix A to the Complaint for lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$322,653.65.

Legal Conclusion

Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The failure of Respondent to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it 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)).

ORDER

A finding is made that Respondent committed willful, flagrant, and

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repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances of these violations shall be published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceeding thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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: IMPERIAL FROZEN FOODS OP CO, LLC.
Docket No. 21-J-0001.
Decision and Order.
Filed January 25, 2021.

PACA-D.

Shelton S. Smallwood, Esq. for AMS.
Gregory B. Crampton, Esq. and Steven C. Newton, Esq. for Respondent.
Decision and Order by Tierney Carlos, Administrative Law Judge.

Decision and Order Without Hearing

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (“PACA”), the regulations promulgated pursuant to the PACA (7 C.F.R. Part 46) (“Regulations”), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice”).

Procedural Background

The Complaint, filed October 5, 2020, alleges that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to

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31 sellers for 389 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$6,374,648.97 during the period from May 2019 through January 2020.¹

Complainant requests the issuance of an order finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and publication of the facts and circumstances surrounding the violations pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

On November 2, 2020, Respondent filed its Answer, by and through Gregory B. Crampton, an attorney, and Respondent's Chapter 7 Bankruptcy Trustee. In its Answer Respondent stated that it filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*) in U.S. Bankruptcy Court, Eastern District of North Carolina. The Answer also admitted the material allegations of the Complaint, including that Respondent failed to make full payment to the sellers listed on its bankruptcy Schedule E/F, a copy of which is attached as Appendix A to the Complaint. Answer at 2 ¶ III. Respondent also admitted in its Answer that its Schedule E/F of the voluntary bankruptcy petition listed the 31 sellers listed in Appendix A of the Complaint which hold unsecured produce debt claims against Respondent in the amount of \$5,247,130.63. Answer at 3 ¶ IV.² In its Answer, Respondent raised two affirmative defenses stating: "To the extent the USDA seeks in its Complaint the termination of Imperial's already terminated PACA license, such action appears futile, unnecessary and unreasonable, and beyond the proper exercise of any police or regulatory power of the USDA" and the

¹ Although the Complaint alleges Respondent failed to make full and prompt payment to 31 sellers between May 2019 and January 2020, Appendix A indicates payment due dates between May 2019 and December 2019 on transactions between April 2019 and November 2019. The dates listed in Appendix A are consistent with Respondent's Answer stating that it ceased business in November 2019 when it filed for Chapter 7 Bankruptcy. In addition, while the Complaint alleges 31 sellers of 389 lots and the Answer admitted to 31 unsecured creditors, Palmetto Processing Solutions LLC, a seller of one lot listed in Appendix A of the Complaint is not listed in Schedule E/F. Thus, the Schedule E/F lists 30 of the 31 sellers listed in Appendix A to the Complaint owing a total of \$5,247,130.63.

² See also *supra* note 1.

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Respondent “reserves the right to assert that the USDA’s pursuit of its Complaint against a Chapter 7 Debtor no longer in business, and no longer the holder of a PACA license, is in violation of 11 U.S.C. § 362 to the extent that such action are not properly excluded from the Automatic Stay provisions of Section 362 of the Bankruptcy Code.”

On December 17, 2020, Complainant filed a Motion for A Decision Without Hearing Based on Admissions (“Complainant’s Motion”) asking that a decision and order without hearing be issued against Respondent due to its failure to make a full and prompt payment for produce purchases made in willful, flagrant, and repeated violation of the PACA (7 U.S.C. § 499b(4)). With the Motion, Complainant also filed a proposed Decision and Order. In its Motion, at 3, Complainant states that Respondent’s Answer to the Complaint admitted the material allegations of the Complaint by stating that “it is also admitted on information and belief that Imperial failed to make full payment to the sellers in its bankruptcy Schedule E/F, a copy of which is attached to Appendix A to the Complaint” (internal quotations omitted) and Respondent specifically admitted in its Answer that in the Schedule E/F of the voluntary bankruptcy petition all 31 of the 31 sellers listed in Appendix A to the Complaint hold unsecured produce debt claims against Respondent in the amount of \$5,247,130.63.³

On January 7, 2021, Respondent, filed a Response and Objection to Motion (“Respondent’s Response”). Therein, Respondent stated, at 2, para. 8, that “at least twenty-one (21) of the claimants listed on Complaint’s Exhibit List filed on January 2, 2021 submitted themselves to the exclusive jurisdiction of the United States Bankruptcy Court in the Chapter 7 case for determination of the validity of their respective PACA claims” and proceeds to list five (5) sellers who were denied status as PACA claims. In its Response, at 3-4, Respondent also contends that

³ Complainant explains the discrepancy between its Complaint and its Motion in the amount owed in its Motion at 3 n.4: “The amounts listed in the Schedule E/F for six (6) of the PACA creditors are considerably smaller than the amounts listed in Appendix A to the Complaint: National Frozen Foods Corporation (\$35,830.15 v. \$278,507.01); Sun Mark Foods Limited (\$113,686.58 v. \$238,686.58); Fruitrade International, Inc. (\$261,832.34 v. \$437,689.27); MB Global Foods (\$422,629.37 v. \$559,709.94); Alex Ingredients, Inc. (\$531,470.79 v. 622,087.15); Bonduelle USA, Inc. (\$74,755.91 v. \$139,168.09).”

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Respondent's Answer did not admit the material allegations in the Complaint but contends that "the promptness of payment is a material element of the PACA violation alleged in the Complaint, and that element was **not** admitted in Respondent's Answer."

Discussion

The Rules of Practice, 7 C.F.R. §§ 1.130 *et seq.*, apply in this matter. Pursuant to 7 C.F.R. § 1.136, a respondent is required to file an answer within 20 days after service of a complaint. The Rules of Practice 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." Moreover, "[t]he 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." 7 C.F.R. § 1.139. Here, Respondent has in fact admitted the material allegations of fact alleged in the Complaint and, thus, a hearing is not necessary.

Respondent does not cite any authority for the defense raised in its Answer, at 4, paragraph 4, that the present action "is in violation of 11 U.S.C. section 362 to the extent that such actions are not properly excluded from the Automatic Stay provisions of Section 362 of the Bankruptcy Code." Likewise, Respondent's Response fails to cite any authority to show why the Bankruptcy Court's determinations of "no PACA claim" with respect to various sellers listed in both Respondent's Schedule E/F and Appendix A to the Complaint would have any effect on, or jurisdiction over, the present enforcement action by the USDA under its statutory and regulatory authority.

Although actions by creditors are automatically stayed by the filing of a petition in bankruptcy, 11 U.S.C. § 362(b)(4) of the Bankruptcy Act expressly provides that the automatic stay does not extend to an action of proceeding by a governmental unit to enforce that unit's police or regulatory power. Moreover, 11 U.S.C. § 525(a) specifically excludes the PACA from the code's provisions, limiting the revocation, suspension or refusal of licenses.⁴ The present case is a disciplinary action under the

⁴ As is clear from the legislative history, in carving out the above exceptions, Congress recognized the importance of having only financially responsible firms

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USDA's statutory and regulatory power. The present case will not have any impact on the bankruptcy proceeding and it will not determine any financial obligations or determine any claims judgments with respect to any of the parties to the bankruptcy proceeding. The same applies in reverse here. The findings of the Bankruptcy Court do not affect the administrative jurisdiction of the USDA to enforce the PACA. The Complaint seeks a finding that the Respondent violated the PACA and to publish the facts and circumstances of such violations. I see no difference between the authority to revoke, suspend, or refusal to grant a license and the authority to order the publishing of the facts and circumstances surrounding PACA violations. Both are disciplinary actions clearly authorized under the PACA.⁵ Accordingly, any objection to this Court's jurisdiction or authority to proceed in this matter is denied.

Moreover, even if this Court were to accept that five of the at least 21 creditors who submitted themselves to the jurisdiction of the Bankruptcy Court were found to have "no PACA claim,"⁶ that would still leave at least 25 sellers⁷ with approximately \$4,700,000.00 in outstanding claims, a

in the perishable agricultural commodity business and was well aware of the Department's well-established policy of revoking one's license for failure to pay in full for produce purchases. The Departmental policy has repeatedly been upheld in the Federal Circuit Courts. *See Melvin Beene Produce Co.*, 41 Agric Dec. 2422, 2447-48 (U.S.D.A. 1992), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *Carpenito Bros. Inc.*, 46 Agric. Dec. 486, 506 (U.S.D.A. 1987), *aff'd* 851 F.2d 1500 (D.C. Cir. 1988) (Table).

⁵ See 7 U.S.C. § 499b(4) (requiring 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); 7 U.S.C. § 499h(a) ("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.").

⁶ Respondent does not explain what a "no PACA claim" means and how it would be relevant to this proceeding.

⁷ Only 30 of the sellers were listed in Appendix A of the Complaint were listed in the Schedule E/F. *See supra* note 1. Thirty minus the five "no PACA claim" would equal 25 sellers.

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more than *de minimis* amount.⁸

In his Response, Respondent also alleges that it did not admit in its Answer that Respondent did not promptly pay all of the sellers. However, Respondent fails to explain how admitting to outstanding unsecured debt of over \$5 million dollars and filing for bankruptcy on such debts can be evidence of anything other than failure to promptly pay its creditors. As the Secretary stated in *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547-549 (U.S.D.A 1998) (emphasis added):

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. . . . 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.

Indeed, by filing for Bankruptcy protection and listing unsecured creditors, Respondent has affirmed under penalty of perjury, that it has not and is unable to pay such creditors.⁹

⁸ See *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (Ruling on Certified Question) (no hearing required unless “the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000”).

⁹ See *Evergreen Fresh Farms, Inc.*, PACA-D Docket No. 20-J-0110, 79 Agric. Dec. 620, 625 (U.S.D.A. 2020) (“The practice of taking official notice of documents filed in bankruptcy proceedings, such as the ‘Schedule F,’ that have a direct relation to matters at issue in PACA disciplinary proceedings is long-standing and well-established.”) (citing *Watford*, 69 Agric. Dec. 1533, 1535 (U.S.D.A. 2010); *KDLO Enters., Inc.*, 69 Agric. Dec. 1538 (U.S.D.A 2010); *Judith’s Fine Foods Int’l, Inc.*, 66 Agric. Dec. 758, 764 (U.S.D.A. 2007); *Five Star Distribs., Inc.*, 56 Agric. Dec. 827, 893 (U.S.D.A 1997); *Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (U.S.D.A. 1993); *Caito*, 48 Agric. Dec. 602, 609-10 (U.S.D.A. 1989)).

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Respondent's Response also states, at 4, paragraph 10, that although Respondent admitted Imperial lists in its Schedule E/F, 30 creditors as holding unsecured debt claims against Imperial in the amount of \$5,247,130.63, Respondent "did not admit that such Debtor-listed unsecured produce claims was accurate." Such claim is without merit and contradicted by its own filings in Bankruptcy Court. Schedule E/F filed in the Bankruptcy proceedings required Respondent to list all unsecured claims. Schedule E/F required Respondent to check a box indicating whether such claims were contingent, unliquidated, or disputed. Respondent did not check that any of the claims were contingent, unliquidated, or disputed. In addition, Respondent did not allege that any of the claims were subject to offset. The Schedule E/F was submitted under declaration under penalty of perjury by Respondent's Chief Financial Officer. To now allege that the amount of the outstanding claims that was submitted under declaration of perjury by the Respondent's CFO is not accurate is contradicted by the Schedule E/F filing and quite frankly irrelevant. Even if the \$5,247,130.63 is not the exact amount Respondent still owes the 30 produce sellers, Respondent cannot seriously contend, and lack support to prove, that the amount owed is *de minimis*.¹⁰

Respondent has admitted in its Answer, at 3, paragraph IV, that Imperial failed to make full payment to the sellers listed on its bankruptcy Schedule E/F, a copy of which is attached as Appendix A to the Complaint. Answer at 2, paragraph III. Respondent also admitted that in its Schedule E/F of the Voluntary Petition that 30 of the 31 sellers listed in Appendix A of the Complaint, hold unsecured produce debt claims against Respondent in the amount of \$5,247,130.63.

Respondent's violations in this case were flagrant and repeated.¹¹

¹⁰ See *supra* note 8, *Fava & Co.*, 46 Agric. Dec. at 81 (no hearing required unless "the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000").

¹¹ See *Melvin Beene Produce Co.* 41 Agric Dec. 2422 (U.S.D.A. 1992), *aff'd* 728 F.2d 347 (6th Cir. 1984); (In a series of transactions over a period of several months involving a deficit in excess of a quarter of a million dollars, it is inconceivable that Respondent was unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of PACA. It is hard to imagine clearer examples of "flagrant")

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Respondent's violations were also 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.¹² In other words, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.¹³ Here, Respondent knew or should have known that it could not make prompt payment for the large amounts of perishables it ordered, yet it continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.¹⁴

Respondent's actions are willful because Respondent intentionally withheld full and prompt payment from at least 30 sellers listed in Appendix A to the Complaint for produce it purchased, received and accepted in the course of or in contemplation of interstate and foreign commerce. Complainant need only demonstrate that Respondent failed to make full payment promptly to sellers for produce it purchased, received and accepted in more than a *de minimis* amount. Complainant has met that burden. Respondent has admitted by its Bankruptcy Schedule E/F filings that 30 sellers are still owed \$5,247,130.63 listed in Appendix A to the Complaint, more than a *de minimis* amount.¹⁵

Pursuant to the Complainant's motion for the issuance of a decision and order without hearing based upon admissions, the following decision

violations of the statute than exemplified by respondents conduct). See also *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 the Act, and a finding of flagrant violations of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00).

¹² *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (U.S.D.A. 1996); see *Ocean View Produce, Inc.*, Docket No. 08-0064, 2009 WL 218027, at *4 (U.S.D.A. Jan. 15, 2009).

¹³ *Hogan Distrib., Inc.*, 55 Agric. Dec. at 629-30.

¹⁴ See Appendix A to the Complaint, which lists continuing transactions between May 2019 and November 2019 totally over \$6 million dollars. The Schedule E/F filed in Bankruptcy proceeding lists a total of 274 creditors with a total of \$10,420,722.72 unsecured claims.

¹⁵ As stated *supra*, note 1, although Respondent admitted to 31 creditors listed in Appendix A, Schedule E/F lists only 30 of the 31 sellers listed in Appendix A to the Complaint.

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and order is issued without further procedure or hearing pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent is a limited liability company organized and existing under the laws of the State of North Carolina. Respondent's business address is 3150 Rogers Road, Suite 212, Wake Forest, North Carolina. The Complaint in this case was served on Respondent's Counsel, Gregory B. Crampton, of Nicholas & Crampton, P.A., P.O. Box 18237, Raleigh, NC 27619 and the Respondent's principal, whose address was provided to the Office of Hearing Clerk for service purpose; it was withheld from this Complaint to protect the principal's personal information and privacy.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 20150617 was issued to Respondent on April 20, 2015. The license was listed as Active with Bankruptcy after Respondent filed a Voluntary Bankruptcy Petition on November 22, 2019. The license was terminated on June 29, 2020, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period May 2019 through November 2019, 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 at least 30 sellers for at least 388 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$5,247,130.63.
4. On November 22, 2019, Respondent 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, Eastern District of North Carolina. The Petition was designated Case No. 19-05419-5-SWH. Respondent lists in its Schedule E/F 30 PACA creditors listed in Appendix A to this Complaint hold unsecured produce debt claims against Respondent in the amount of \$5,247,130.63.

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Legal Conclusion

Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The failure of Respondent to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it 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)).

ORDER

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

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceeding thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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: SO ONO FOOD PRODUCTS, LLC.
Docket No. 20-J-0124.
Decision and Order.
Filed February 12, 2021.

PACA-D.

Shelton S. Smallwood, Esq. for AMS.
Bruce W. Akerly, Esq. and Carrie R. McNair, Esq. for Respondent.
Decision and Order entered by Tierney Carlos, Administrative Law Judge.

Decision and Order Without Hearing

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 (7 C.F.R. Part 46) (“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 Complainant, Deputy Administrator, Fair Trade Practices Program, Agricultural Marketing Service (“AMS”), United States Department of Agriculture, initiated this proceeding against Respondent So Ono Food Products, LLC by filing a complaint on May 5, 2020. The Complaint alleged that Respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to seven sellers for purchases of 230 lots of perishable agricultural commodities in the course of interstate and foreign commerce in the amount of \$1,344,944.87 during the period March 2018 through March 2019. The Complaint sought the issuance of an order finding that Respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and publication of the facts and circumstances surrounding the violations.¹

Respondent timely filed an Answer on June 1, 2020, which generally denied the allegations in the Complaint pertaining to its failure to make full payment promptly.

On September 22, 2020 Complainant filed a motion requesting the issuance of a Decision Without Hearing due to Respondent’s failure to make full and prompt payment for produce purchases, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

¹ Complainant sought publication of the facts and circumstances surrounding Respondent’s PACA violations, rather than revocation of Respondent’s PACA license, as Respondent’s PACA license terminated on March 8, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

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On November 18, 2020, after being granted an extension to file,² Respondent filed its Response to Complainant’s Motion for a Decision Without a Hearing (“Respondent’s Response”) in which Respondent, at 2, requests a hearing and states that the Complaint and Complainant’s Motion are “not accurate.” Respondent, *id.*, claims that there “is a material fact in this case that is in dispute—the amount owed to produce vendors” and Respondent “*denies* that it willfully, flagrantly, or repeatedly violated the” PACA and Regulations (emphasis in original). Respondent, *id.*, also contends that it has “agreements with each of its vendors to pay any purported debt owed over time” but stated that “facts surrounding agreements made between the parties or the PACA trust rights of any purportedly unpaid supplier have also not been determined at this time.” Respondent’s Response failed to address the four reparations Default Orders issued in 2019 by the USDA Judicial Officer, wherein Respondent admitted to PACA violations and outstanding balances of over \$921,000 by failing to file a timely answer.³ Respondent’s Response also failed to address Mr. [REDACTED] Affidavit, wherein Respondent admitted that as of November 2020, Respondent still owed five (5) of the seven (7) sellers over \$604,000.⁴

A telephone conference was held on December 2, 2020,⁵ during which the parties agreed to provide any supplemental documentation to support their positions. Specifically, during the call Complainant was asked to provide additional information regarding reparation complaints creditors had initiated against Respondent, and Respondent was asked to provide information showing whether and when any payment agreements with Respondent’s creditors were entered into.

² See October 14, 2020 Orders Granting Respondent’s Motions for Extension of Time to File Submissions and to Respond to Complainant’s Motion for a Decision Without a Hearing.

³ See Complainant’s Supplement Attachment C; 7 C.F.R. § 47.8(c).

⁴ See November 16, 2020 Respondent’s Witness List and Exhibits List (with “RX-#1” Affidavit of [REDACTED] attached); Complainant’s Supplement Attachment A.

⁵ See Summary of December 2, 2020 Telephone Conference and Filing Order (“Summary and Filing Order”).

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In accordance with the Summary and Filing Order, Complainant filed its Supplemental Information to Motion for Decision Without Hearing (“Complainant’s Supplement”) on December 11, 2020, in which Complainant reiterates the conversation between the parties during the December 2, 2020 telephone conference, in particular that “Respondent’s alleged decision to enter into settlement agreements with PACA creditors, after the creditors initiated reparation complaints against Respondent with the Department, did not negate the PACA violations of failing to pay *promptly* and in full.”⁶ In its Supplement, at 5, Complainant explains that “all seven [footnote omitted] of the produce creditors listed in Appendix A to the Complaint filed reparation complaints against Respondent” and that, of the seven, four “of the reparation complaints resulted in the filing of formal complaints and issuance of default orders by the Judicial Officer” (referencing Attachment C) and one resulted in “resulted in the filing of a formal complaint and issuance of an Order Requiring Payment of Full Admission of Liability due to Respondent’s admissions” (referencing Attachment D).⁷

On February 8, 2021, after being granted an extension to file,⁸ Respondent filed its Supplemental Response to Motion for Decision Without Hearing (“Respondent’s Supplement”), in which Respondent states:⁹

5. At the time the Court requested a supplement and granted an extension, [REDACTED], co-owner of So Ono, and by extension, the undersigned counsel for Mr.

⁶ Complainant’s Supplement at 4 (citing 7 U.S.C. § 499b(4)).

⁷ *Id.* As attachments to its supplement, Complainant provided the Affidavit of [REDACTED] (Attachment A); three reparations complaints from Prime Produce Inc. dated December 21, 2018, Freska Produce International, LLC dated December 21, 2018, and Arellano Farms dated March 13, 2019 (Attachment B); copies of four reparations default orders against Respondent (Attachment C); and the Order Requiring Payment of Full Admission of Liability and Order Vacating Order Requiring Payment of Full Admission of Liability and Reissuing Order Requiring Payment of Full Admission of Liability (Attachment D).

⁸ See January 11, 2021 Orders Granting Respondent’s Motion Requesting Extension of Time to Respond.

⁹ Respondent’s Supplement at 2 ¶¶ 5-6.

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██████████, understood that additional information could be provided demonstrating that the seven vendors had specific payment arrangements prior to receipt of produce.

6. However, since the Hawaii-based business has closed, and because Mr. ██████████ was not responsible for the day-to-day business or financial operations of So Ono, Mr. ██████████ has been unable to attain relevant records to supplement at this time.

7. Accordingly, at this time, Respondent has nothing additional to produce and therefore relies on its previously filed *Response to Complainant's Motion for a Decision Without Hearing*, filed November 18, 2020.

Respondent's Supplement again failed to address the four default orders finding Respondent violated PACA and Mr. ██████████ Affidavit admitting amounts owed to sellers as of November 2020.

Respondent was served with the Complaint on May 11, 2020. According to the Judicial Officer's policy set forth *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998), Respondent in this case had 120 days from the date the Complaint was served upon it, or until September 8, 2020, to come into full compliance with the PACA. The Judicial Officer stated that "full compliance" requires "not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re: Carpentino Bros., Inc.* [46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988)], that a respondent have no credit agreements with produce sellers for more than 30 days."¹⁰ Respondent, despite an extended opportunity to provide any additional information demonstrating an issue of material fact to support its contentions, has not done so.

Thus, based on the admissions of Mr. ██████████, an owner of Respondent, to the more than *de minimis* amounts owed to produce sellers

¹⁰ *Id.* at 549.

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as of November 16, 2020, and the default orders finding Respondent violated PACA, a hearing in this matter is not necessary.¹¹

Respondent's violations in this case were flagrant and repeated.¹² Respondent's violations were also 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.¹³ In other words, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts.¹⁴ Here, Respondent knew or should have known that it could not make prompt payment for the large amounts of perishables it ordered, yet it continued to make purchases over a lengthy period of time and did not pay produce suppliers promptly.¹⁵

Respondent's actions are willful because Respondent intentionally withheld full and prompt payment from seven sellers listed in Appendix A to the Complaint for produce it purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

¹¹ See Attachments A and C to Complainant's Supplement. See also *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984) (Ruling on Certified Question) (no hearing required unless "the amount presently due and unpaid would be *de minimis*, e.g., less than \$5,000").

¹² See *Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2447-48 (U.S.D.A. 1992), *aff'd*, 728 F.2d 347 (6th Cir. 1984); (In a series of transactions over a period of several months involving a deficit in excess of a quarter of a million dollars, it is inconceivable that Respondent was unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of PACA. It is hard to imagine clearer examples of "flagrant" violations of the statute than exemplified by respondents conduct). See also *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 the Act, and a finding of flagrant violations of the Act is appropriate whenever the total amount due and owing exceeds \$5,000.00).

¹³ *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (U.S.D.A. 1996); see *Ocean View Produce, Inc.*, Docket No. 08-0064, 2009 WL 218027, at *4 (U.S.D.A. Jan. 15, 2009).

¹⁴ *Hogan Distrib., Inc.*, 55 Agric. Dec. at 629-30.

¹⁵ See Appendix A to the Complaint, which lists continuing transactions between March 2018 and March 2019 totally over \$1 million dollars.

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Complainant need only demonstrate that Respondent failed to make full payment promptly to sellers for produce it purchased, received, and accepted in more than a *de minimis* amount. Complainant has met that burden. Respondent has admitted by submission of Mr. [REDACTED] Affidavit that, as of November 2020, Respondent still owed at least five of the seven sellers listed in Appendix A to the Complaint over \$604,000, more than a *de minimis* amount.¹⁶

Pursuant to the Department's policy set forth in the *Scamcorp* decision, and upon the motion of Complainant for the issuance of a Decision Without Hearing, the following decision and order is issued without further procedure or hearing pursuant to section 1.139 (7 C.F.R. § 1.139) of the Rules of Practice.

Findings of Fact

1. Respondent is or was a limited liability company organized under the laws of the State of Hawaii. Respondent's business address is 3129 Ualena Street, Honolulu, Hawaii 96819. The Complaint was served on Respondent's business address and on Respondent's principals, whose addresses were provided to the Office of Hearing Clerk for service purposes; they were withheld from the Complaint to protect the principals' personal information and privacy.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 2017 0547 was issued to Respondent on March 8, 2017. The license terminated on March 8, 2019, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period March 2018 through March 2019, on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference, failed to make full payment promptly to seven sellers for 230 lots of perishable

¹⁶ See *Fava & Co.*, *supra* note 11, 46 Agric. Dec. at 81 (finding that anything over \$5,000 is more than a *de minimis* amount); *D.W. Produce, Inc.*, *supra* note 12, 53 Agric. Dec. at 1678.

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agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$1,344,994.87.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly with respect to the 230 transactions referenced in Finding of Fact No. 3 above, and 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 Order below is issued.

ORDER

1. Complainant's Motion for Decision Without Hearing is GRANTED.
2. A finding is made that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and I hereby order that the facts and circumstances of these violations be published.

This Decision and Order shall be final and effective without further proceedings 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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

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DEFAULT DECISIONS

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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://www.usda.gov/oha/services/decisions-and-determinations>].

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In re: FRESH PRODUCE INC.

Docket No. 20-J-0159.

Default Decision and Order.

Filed February 2, 2021.

In re: KENDALL FROZEN FRUITS, INC.

Docket No. 21-J-0002.

Default Decision and Order.

Filed February 9, 2021.

In re: FLORIDA COOL CARGO, INC.

Docket No. 20-J-0164.

Default Decision and Order.

Filed June 8, 2021.

Miscellaneous Orders & Dismissals
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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] 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://www.usda.gov/oha/services/decisions-and-determinations>.

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No miscellaneous orders or dismissals reported.

CONSENT DECISIONS

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In re: B & B ORGANICS, INC.

Docket No. 20-J-0136.
Consent Decision and Order.
Filed January 28, 2021.

In re: LEWIS MACLEOD.

Docket No. 18-0024.
Consent Decision and Order.
Filed February 1, 2021.

**In re: NORTH PACIFIC CANNERS AND PACKERS, INC., d/b/a
NORPAC FOODS, INC.**

Docket No. 20-J-0162.
Consent Decision and Order.
Filed March 3, 2021.

In re: SOUTHERN PRODUCE DISTRIBUTORS, INC.

Docket No. 19-J-0101.
Consent Decision and Order.
Filed June 25, 2021.