

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-03-0014
)
Hunts Point Tomato Co., Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 31, 2003. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Hunts Point Tomato Co., Inc. [hereinafter Respondent], during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80

for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On August 7, 2003, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On August 10, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On October 15, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on November 17, 2004, Respondent filed Respondent's Proposed Findings of Fact and Law. On December 6, 2004, Complainant filed Complainant's Reply Brief.

On April 21, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding 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 sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations (Initial Decision at 7-8, 12).

On October 7, 2005, Respondent appealed to the Judicial Officer. On October 17, 2005, Complainant filed Complainant’s response to Respondent’s appeal petition. On October 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ’s Initial Decision. Therefore, except for minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ’s Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ’s discussion, as restated.

Complainant’s exhibits are designated by “CX.” Respondent’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with

any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

....

(e) Alternative civil penalties

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

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF
AGRICULTURE**

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE AGRICULTURAL
COMMODITIES ACT, 1930**

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

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

....

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

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

7 C.F.R. § 46.2(aa)(5), (11).

**CHIEF ADMINISTRATIVE LAW JUDGE’S
 INITIAL DECISION
 (AS RESTATED)**

Decision Summary

I find 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 sellers of the agreed purchase prices for perishable agricultural commodities. By way of sanction, I order publication of the facts and circumstances of Respondent’s violations.

Factual Background

Respondent is a corporation that was licensed under the PACA from July 25, 1979, until its PACA license terminated when Respondent failed to pay the required annual PACA license renewal fee on July 25, 2002 (CX 1; Tr. 67-71). Anthony Guerra was Respondent’s president, sole director, and sole stockholder since July 2000 (CX 1 at 7-8).

Complainant received at least 10 reparation complaints against Respondent and, in June 2002, initiated an investigation of Respondent’s alleged failures to pay, fully and promptly, for perishable agricultural commodities. Wayne Shelby, a marketing specialist

employed by the United States Department of Agriculture, and Timothy Swainhart, an assistant regional director of the Perishable Agricultural Commodities Branch, United States Department of Agriculture, were assigned to conduct the investigation.

(Tr. 23-24.) After sending Respondent a letter notifying it of the initiation of an investigation of Respondent's alleged failures to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities, Wayne Shelby and Timothy Swainhart visited Respondent's place of business on July 24, 2002 (CX 2 at 1; Tr. 27-28, 31). Lenny Guerra, Respondent's office manager, met with Wayne Shelby and Timothy Swainhart. Lenny Guerra identified Respondent's accounts payable files, each of which was in a separate jacket, which Wayne Shelby and Timothy Swainhart removed from the premises, copied, and returned. (Tr. 31-35.)

Wayne Shelby and Timothy Swainhart conducted an exit conference with Frederick, Anthony, and Lenny Guerra on August 7, 2002, at Respondent's place of business, at which time they handed a Notice of Investigation to Anthony Guerra (CX 2 at 2; Tr. 35-36). (Lenny Guerra had refused to accept the Notice of Investigation during the July 24, 2002, meeting (Tr. 35).)

The accounts payable files indicated that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate commerce (CX 3-CX 35; Tr. 37-49). Anthony Guerra admitted Respondent

owed produce sellers over \$1,000,000 (Tr. 46), but in the absence of evidence that several transactions were in the course of interstate commerce, Complainant excluded those apparently intrastate transactions from the Complaint, resulting in the allegation that Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities in violation of the PACA (Tr. 47). Anthony Guerra said Respondent had been having business difficulties since September 11, 2001 (Tr. 46-47).

During the period August 2, 2004, through August 6, 2004, Josephine Jenkins, a marketing specialist employed by the United States Department of Agriculture, made follow-up telephone calls to several of Respondent's produce sellers listed in the Complaint to determine whether Respondent had paid these produce sellers since the initial investigation in 2002. She determined, by speaking with Lawrence Meuers, an attorney representing a number of Respondent's produce sellers in a PACA trust action, that eight of the produce sellers, who Complainant alleged were owed \$321,082.40, had been paid \$275,338.17 and were still owed \$45,744.23. Josephine Jenkins also contacted two of the other produce sellers listed in the Complaint and determined Respondent had not paid any of the \$68,302.50 Respondent owed them. (CX 36; Tr. 73-77.)

On May 31, 2002, nearly 10 months before Complainant filed the Complaint, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the

PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust.¹ On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2). On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies.² The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure: (1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

On August 6, 2004, the Friday before the hearing in the instant proceeding, counsel for Respondent suggested to counsel for Complainant that the hearing should be

¹*Nobles-Collier, Inc. v. Hunts Point Tomato Co.*, No. 02 CV 4128, 2004 WL 102756 (S.D.N.Y. Jan. 22, 2004).

²On July 26, 2002, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., amended the complaint in *Nobles-Collier, Inc. v. Hunts Point Tomato Co.*, No. 02 CV 4128, 2004 WL 102756 (S.D.N.Y. Jan. 22, 2004), to include 14 additional produce sellers with claims against Respondent subject to the trust provisions of the PACA (RX 2 at 2).

postponed so that Respondent could fully pay all its produce sellers. At the hearing, Respondent suggested postponement of the hearing to allow Respondent to pay its produce sellers. (Tr. 5-7.) No evidence was introduced suggesting that Respondent had petitioned the United States District Court for the Southern District of New York to release Respondent's assets so that any of the produce sellers could be paid, and no one testified as to how long the process would take, or why the suggestion was made only 4 days before the commencement of the hearing.

Findings of Fact

1. Respondent is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the Complaint (Compl. ¶ II(a); Answer ¶ 2).
2. Respondent held PACA license 791770 from July 25, 1979, until Respondent's PACA license terminated on July 25, 2002, for failure to pay the required PACA renewal fee (Compl. ¶ II(b); Answer ¶ 2).
3. Complainant conducted an investigation of Respondent after Complainant received at least 10 complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist employed by the United States Department of Agriculture, and Timothy Swainhart, an assistant regional director for the Perishable Agricultural Commodities Branch, United States Department of Agriculture, went to Respondent's place of business on July 24, 2002. Wayne Shelby and Timothy Swainhart met with Lenny Guerra, Respondent's

office manager, who identified and provided for copying Respondent's accounts payable files. (Tr. 23-24, 27-28, 31-35.)

4. The accounts payable files which Respondent provided to Complainant indicated that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (CX 3-CX 35; Tr. 37-49).

5. At an exit conference on August 7, 2002, Respondent's president, sole director, and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than \$1,000,000 for produce purchased and received, some of which was not in interstate or foreign commerce (Tr. 46).

6. The Hearing Clerk served Respondent with the Complaint on April 23, 2003 (Memorandum to the File, from LaWuan Waring, Legal Technician, dated April 23, 2003).

7. During the period August 2, 2004, through August 6, 2004, Josephine Jenkins, a marketing specialist employed by the United States Department of Agriculture, made follow-up telephone calls to several of Respondent's produce sellers listed in the Complaint to determine whether Respondent had paid these produce sellers since the initial investigation in 2002. Josephine Jenkins determined, by speaking with Lawrence Meuers, an attorney representing a number of Respondent's produce sellers in a PACA

trust action, that Respondent still owed them \$45,744.23 for produce Respondent purchased, received, and accepted in interstate commerce. Josephine Jenkins also contacted two of the other produce sellers listed in the Complaint and determined Respondent had not paid any of the \$68,302.50 Respondent owed them for produce Respondent purchased, received, and accepted in interstate commerce. (CX 36; Tr. 73-77.)

8. On May 31, 2002, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust. On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2).

9. On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies. The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure: (1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's

PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

Discussion and Conclusions of Law

Respondent Violated the PACA

Respondent's failure to pay the 33 produce sellers listed in the Complaint fully and in a timely manner is essentially undisputed. Respondent's August 6, 2004, offer to pay the 33 produce sellers in full does not change this case from a "no-pay" to a "slow-pay" case. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's PACA license, Respondent's PACA license has already been terminated for failure to pay the annual PACA license renewal fee. Thus, a finding that Respondent has committed willful, flagrant, and repeated violations, and the publication of the facts and circumstances of Respondent's violations, is the only appropriate remedy.

Respondent Failed to Timely Pay 33 Produce Sellers Listed in the Complaint the Agreed Upon Purchase Prices for Perishable Agricultural Commodities

Respondent failed to pay 33 produce sellers the amounts that Respondent had originally agreed to pay. Respondent's own accounts payable files, which Complainant's representatives inspected and copied, indicated that, at the time of the 2002 inspection, Respondent had failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural

commodities which Respondent purchased, received, and accepted in interstate or foreign commerce.

Sixteen of Respondent's unpaid produce sellers participated in a PACA trust action filed under section 5(c) of the PACA (7 U.S.C. § 499e(c)). In a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure issued in the PACA trust action, the escrow agent appointed by the United States District Court for the Southern District of New York was directed to pay the undisputed valid PACA claims against Respondent at 95 cents on the dollar, subject to availability of funds. No evidence was submitted as to how many produce sellers were actually paid. Complainant submitted, through the testimony of Josephine Jenkins, evidence that of the 10 produce sellers she had contacted, either directly or through their counsel, approximately 1 week before the August 10, 2004, hearing, none of the produce sellers had been paid in full. In particular, she was notified that eight produce sellers represented by Lawrence Meuers had been partially compensated by the PACA trust. These eight produce sellers had been paid \$275,338.17 out of the \$321,082.40 owed to them, which represents a payout of approximately 85.7 percent, significantly under the 95 percent authorized in the PACA trust action. Two other companies contacted by Josephine Jenkins indicated they had not been paid any of the \$68,302.50 Respondent owed them. There is no evidence that any of the 33 produce sellers listed in the Complaint have been paid in full.

*The Court Order in the PACA Trust Case
Does Not Excuse Respondent's Failure to Pay*

While Judge Lawrence M. McKenna enjoined Respondent from disbursing any of its PACA trust assets other than through the actions of the court-appointed escrow agent operating the PACA trust, the injunction does not act as a relief from Respondent's "no-pay" status. Since the PACA trust action arose directly from Respondent's failures to pay its produce sellers in the first place, to allow the PACA trust action to protect Respondent against "no-pay" sanctions would be counter to the clear purposes of the PACA. While Respondent protests that it has the assets to pay all produce sellers fully, the record clearly indicates that, as of the hearing date, Respondent's produce sellers were only being paid 85 cents on the dollar, rather than the 95 cents on the dollar authorized in the PACA trust action. This partial payment is hardly consistent with Respondent's contention that it has sufficient assets to pay all produce sellers in full. Postponing a hearing based on Respondent's contention that it could now pay all produce sellers in full, where there is no evidence that Respondent petitioned Judge Lawrence M. McKenna to allow such payment and there is no affirmative evidence that such financial capability actually exists, is unwarranted.

Respondent implies Complainant had an obligation to "attempt to have Judge McKenna modify his order." (Respondent's Proposed Findings of Fact and Law at 5). I find no basis for this suggestion. Clearly, if Respondent had the funds to fully pay all produce sellers, such funds would have been required to be deposited in the PACA trust

account established in the Preliminary Injunction and Order Establishing PACA Trust Claims Procedure issued by Judge Lawrence M. Mckenna. Presumably, if the funds existed, all Respondent's produce sellers would have been paid—a circumstance that undisputedly has not occurred.

This Case Is a “No-Pay” Case

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing “slow-pay” cases, in which civil penalties or PACA license suspensions would be imposed, from “no-pay” cases, in which, in the case of flagrant or repeated violations, PACA license revocation would be the appropriate sanction. In the cases of failure to achieve “full compliance” with the PACA within 120 days after service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a “no-pay” case. *Scamcorp*, 57 Agric. Dec. at 548-49.

Although Respondent has offered to settle this case by paying all produce sellers in full, the Preliminary Injunction and Order Establishing PACA Trust Claims Procedure issued by Judge Lawrence M. Mckenna, which Respondent has not sought to lift, indicates that Respondent's offer was made without any legitimate basis and is quite speculative, to say the least. While it is unusual to even hear the discussion of settlement offers in open court, Complainant was under no obligation to accept Respondent's offer, particularly when there is no indication that the offer could even be honored, given Judge

McKenna's Preliminary Injunction and Order Establishing PACA Trust Claims Procedure. Given the uncertainty as to whether Respondent's offer to pay in full could even be effectuated, Respondent's contention that Complainant's failure to accept its offer was "arbitrary, capricious and an abuse of discretion" (Respondent's Proposed Findings of Fact and Law at 6), has no basis.

Further, rescheduling a hearing to allow a settlement of a PACA case is inconsistent with the agency's case law. In *Scamcorp*, the Judicial Officer held:

Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R. § 1.141(b)) that "the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties."

Scamcorp, 57 Agric. Dec. at 548.

Respondent's Violations Are Willful, Flagrant, and Repeated

In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 713 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, during the period September 2001 through June 2002, putting numerous produce sellers at risk,

Respondent was clearly operating in disregard of the payment requirements of the PACA and has committed willful violations.

Moreover, I conclude that, as a matter of law, Respondent's violations are repeated and flagrant. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 9-month period during which Respondent committed the violations.³

³See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant), *cert. denied*, 528 U.S. 1021 (1999); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981) (describing 20 violations of the payment provisions of the PACA as flagrant); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding because the 295 violations of the payment provisions of the PACA did not occur simultaneously, the violations must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967).

A Significant Penalty Is Warranted

Normally, in a “no-pay” case in which there are flagrant or repeated violations, revocation of the violator’s PACA license would be appropriate. Here, with Respondent already out of business and Respondent’s PACA license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent’s violations shall be published.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises five issues in its Appeal Petition. First, Respondent contends the Chief ALJ erroneously failed to determine the exact number of unpaid produce sellers and the exact amount Respondent failed to pay to these produce sellers (Respondent’s Appeal Pet. at 2).

The Chief ALJ found, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 produce sellers of the agreed purchase prices in a total amount over \$795,000 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (Initial Decision at 7-8). This finding alone is sufficient to conclude that Respondent violated the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). I reject Respondent’s contention that the Chief ALJ was somehow required to find that the exact amount Respondent failed to pay in accordance with the PACA was

“\$795,878.80,” and I disagree with Respondent’s contention that the Chief ALJ failed to determine the exact number of Respondent’s unpaid produce sellers.

Second, Respondent contends the Chief ALJ erroneously failed to determine the exact number of produce sellers that had not been paid in full by the August 10, 2004, hearing and the exact amount Respondent owed to these produce sellers (Respondent’s Appeal Pet. at 2).

The Chief ALJ found Josephine Jenkins contacted 10 of the produce sellers listed in the Complaint approximately 1 week before the hearing and found Respondent had paid eight of the produce sellers \$275,338 of the \$321,082 owed to them and the two other produce sellers had not been paid any of the \$68,302 owed to them. The Chief ALJ also stated “[t]here is no evidence in this record that any of the 33 creditors listed in the complaint have been paid in full.” (Initial Decision at 3, 8-9.)

I disagree with Respondent’s contention that the Chief ALJ was required to determine the exact number of produce sellers that remained unpaid at the commencement of August 10, 2004, hearing and the exact amount Respondent owed each produce seller at the commencement of the August 10, 2004, hearing. The United States Department of Agriculture’s “slow-pay-no-pay” policy merely requires that an administrative law judge determine whether a respondent is in full compliance with the PACA within 120 days after the Hearing Clerk serves the respondent with the complaint or the date of the hearing, if that occurs first. 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 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. Full compliance requires that a respondent have paid all produce sellers in full.

The Hearing Clerk served Respondent with the Complaint on April 23, 2003.⁴ The Chief ALJ found that 1 week prior to the August 10, 2004, hearing Respondent had not paid all of the produce sellers listed in the Complaint. Respondent was not in full compliance with the PACA within 120 days after the Hearing Clerk served Respondent with the Complaint; therefore, in accordance with the United States Department of Agriculture’s “slow-pay-no-pay” policy, this case is a “no-pay” case. The Chief ALJ was not required to determine the exact number of produce sellers that had not been paid in full by the August 10, 2004, hearing and the exact amount Respondent owed each of these produce sellers in order to determine that this case is a “no-pay” case, as Respondent contends.

⁴Memorandum to the File, from LaWuan Waring, Legal Technician, dated April 23, 2003.

Third, Respondent contends the burden is on Complainant to prove that Respondent failed to pay produce sellers and the amount that Respondent failed to pay its produce sellers.

I agree with Respondent that the burden of proving Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is on Complainant.⁵ However, I find Complainant

⁵Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal*
(continued...)

proved by a preponderance of the evidence that Respondent, during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Moreover, Complainant proved by a preponderance of the evidence that 1 week before the August 10, 2004, hearing and more than 120 days after the Hearing Clerk served Respondent with the Complaint, Respondent had not paid all of the produce sellers listed in the Complaint in full.

Fourth, Respondent asserts, 5 days before the August 10, 2004, hearing, it offered to settle this proceeding by paying all unpaid produce sellers in full and by paying a civil

⁵(...continued)

withdrawn, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

penalty. Respondent contends Complainant's failure to accept Respondent's settlement offer was an abuse of discretion and a scandalous decision. (Respondent's Appeal Pet. at 3-4.)

Voluntary settlements are highly favored in proceedings under the Rules of Practice.⁶ However, the Rules of Practice do not require a party to accept a settlement offer made by another party, as Respondent suggests. Complainant had complete discretion to accept or reject Respondent's settlement offer. Respondent's assertion that Complainant's rejection of Respondent's settlement offer is an abuse of discretion and a scandalous decision is without merit.

Fifth, Respondent contends the Chief ALJ's failure to direct Complainant to accept Respondent's settlement offer was an abuse of discretion. Respondent requests that I remand the proceeding to the Chief ALJ with directions to conduct a conference to determine Complainant's policies regarding the settlement of proceedings, and, if the Chief ALJ determines Complainant has settled proceedings similar to the instant proceeding by the payment of a civil penalty, the Chief ALJ should direct Complainant to settle the instant proceeding by Respondent's payment of a civil penalty. (Respondent's Appeal Pet. at 3-5.)

⁶*In re Gwain Wilson*, 64 Agric. Dec. ____, slip op. at 3 (Oct. 3, 2005) (Remand Order as to John R. LeGate, Sr.); *In re Gwain Wilson*, 64 Agric. Dec. ____, slip op. at 3 (Sept. 27, 2005) (Remand Order as to William Russell Hyneman).

The Rules of Practice authorizes administrative law judges to direct parties or their counsel to attend conferences and, at those conferences, to consider the negotiation, compromise, or settlement of issues and such other matters as may expedite and aid in the disposition of the proceeding.⁷ However, administrative law judges have no authority under the Rules of Practice to direct a party to accept another party's settlement offer. Therefore, I deny Respondent's request that I remand this proceeding to the Chief ALJ with the instructions proposed by Respondent.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

⁷7 C.F.R. § 1.140(a)(3)(v), (ix).

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of this Order.⁸ The date of entry of this Order is November 2, 2005.

Done at Washington, DC

November 2, 2005

William G. Jenson
Judicial Officer

⁸See 28 U.S.C. § 2344.