

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-13-0195
)
Agri-Sales, Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Bruce W. Summers, Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this proceeding by filing a Complaint on March 21, 2013. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period April 2010 through February 2012, Agri-Sales, Inc., failed to make full payment promptly of the agreed purchase prices, or balances of the agreed purchase prices, to seven produce sellers in the total amount of \$403,741.90 for 62 lots of perishable agricultural commodities, which Agri-Sales, Inc., purchased, received, and

accepted in the course of interstate and foreign commerce, in violation of 7 U.S.C. § 499b(4).¹ Specifically, the Deputy Administrator alleges Agri-Sales, Inc., failed to make full payment promptly to: (1) Eddy Produce, LLC, Uvalde, Texas, the amount of \$64,238 for seven lots of mixed vegetables; (2) Skyline Produce, LLC, Hatch, New Mexico, the amount of \$154,172.40 for 20 lots of onions; (3) Double D Farms, Fresno, California, the amount of \$35,612 for seven lots of onions; (4) Nokota Packers, Inc., Buxton, Idaho, the amount of \$52,602.50 for eight lots of potatoes; (5) Natures Finest Produce, Pain Court, Ontario, Canada, the amount of \$47,880 for 10 lots of carrots; (6) CR-Farms, Shelley, Idaho, the amount of \$39,470.50 for eight lots of mixed vegetables; and (7) Eastern Oregon Produce, Inc., Vale, Oregon, the amount of \$9,766.50 for two lots of onions.²

On May 29, 2013, Agri-Sales, Inc., filed an Answer. Agri-Sales, Inc., admits it failed to make full payment promptly to six of the seven produce sellers identified in Appendix A attached to the Complaint, but denies it owes these six produce sellers the amounts alleged in the Complaint. Specifically, Agri-Sales, Inc.: (1) denies it owes Eddy Produce, LLC, \$64,238, as alleged in the Complaint; (2) admits it owes Skyline Produce, LLC, but states the amount owed Skyline Produce, LLC, is \$142,895, rather than \$154,172.40, as alleged in the Complaint; and (3) admits it owes Double D Farms, Nokota Packers, Inc., Natures Finest Produce, CR-Farms, and Eastern Oregon Produce, Inc., but denies it owes the amounts alleged in the Complaint.³

¹Compl. ¶¶ III-IV at 2-3, App. A.

²Compl. App. A.

³Answer ¶ III at 1-4.

On June 11, 2013, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] ordered the parties to exchange exhibits and to file with the Hearing Clerk exhibit lists and witness lists.⁴ On January 10, 2014, the Chief ALJ, citing Agri-Sales, Inc.'s admissions and Agri-Sales, Inc.'s failure to comply with the Chief ALJ's Order requiring the exchange of exhibits and the filing of exhibit and witness lists, ordered the parties to submit cross motions for summary judgment. On January 30, 2014, pursuant to 7 C.F.R. § 1.139 and the Chief ALJ's January 10, 2014, Order, the Deputy Administrator filed Complainant's Motion for Decision Without Hearing and Memorandum in Support Thereof [hereinafter Motion for Decision Without Hearing]. Agri-Sales, Inc., failed to file a motion for summary judgment or a response to the Deputy Administrator's Motion for Decision Without Hearing.

On March 12, 2014, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) found, during the period April 2010 through February 2012, Agri-Sales, Inc., failed to make full payment promptly to seven produce sellers of the agreed purchase prices in the total amount of \$403,741.90 for 62 lots of perishable agricultural commodities, which Agri-Sales, Inc., purchased, received, and accepted in interstate and foreign commerce; (2) concluded Agri-Sales, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); (3) ordered publication of the facts and circumstances of Agri-Sales, Inc.'s violations of 7 U.S.C. § 499b(4); and (4) ordered revocation of Agri-Sales, Inc.'s PACA license (PACA license number 20110806), unless Agri-Sales, Inc.'s PACA license had been previously terminated for failing to pay the PACA license renewal fee.⁵

⁴Chief ALJ's Order filed June 11, 2013.

⁵Chief ALJ's Decision and Order at 7.

On April 22, 2014, Agri-Sales, Inc., filed a Petition for Appeal to Judicial Officer and Memorandum in Support [hereinafter Appeal Petition]. On May 13, 2014, the Deputy Administrator filed Complainant’s Response to Respondent’s Appeal. On June 3, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Statutory and Regulatory Framework

The PACA makes unlawful the failure of any commission merchant, dealer, or broker to make full payment promptly for any perishable agricultural commodity, as follows:

§ 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[.] . . .

. . . .

7 U.S.C. § 499b(4). The Regulations define the term “full payment promptly,” as follows:

§ 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).

The PACA authorizes the Secretary of Agriculture to impose sanctions on any commission merchant, dealer, or broker who has violated 7 U.S.C. § 499b(4), as follows:

§ 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 by 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 U.S.C. § 499h(a), (e).

PACA requires full payment promptly, and commission merchants, dealers, and brokers are required to be in compliance with the payment provision of the PACA at all times. In any PACA disciplinary proceeding in which: (1) a respondent is alleged to have failed to pay in accordance with the PACA, (2) the respondent admits the material allegations in the complaint, and (3) the respondent makes no assertion that the respondent has achieved or will achieve full compliance⁶ with the PACA within 120 days after the complaint is served on the respondent, or the date of the hearing, whichever comes first, the PACA case will be treated as a “no-pay” case.

In any “no-pay” case in which the violations are flagrant⁷ or repeated,⁸ the license of the

⁶“Full compliance” requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than 30 days. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998); *In re Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988).

⁷Whether 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. *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997).

PACA licensee, shown to have violated the payment provision of the PACA will be revoked and/or the facts and circumstances of the respondent's violations of 7 U.S.C. § 499b(4) will be published.

Agri-Sales, Inc.'s Appeal Petition

Agri-Sales, Inc., raises five issues in its Appeal Petition. First, Agri-Sales, Inc., asserts it timely filed Respondent's Witness and Exhibit List on December 16, 2013, and contends the Chief ALJ's finding that Agri-Sales, Inc., did not file Respondent's Witness and Exhibit List until January 6, 2014, is error (Appeal Pet. ¶¶ 2-4 at 1-2).

⁸“Repeated” means more than once. *See Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.) (stating violations are “repeated” under the PACA if they are not done simultaneously), *cert. denied*, 528 U.S. 1021 (1999); *Magnolia Fruit & Produce Co. v. U.S. Dep't of Agric.*, No. 90-4643, slip op. at 6 (5th Cir. 1991) (stating courts have interpreted “repeated” as used in the PACA strictly; so interpreted, it requires little, if anything, beyond more than once, regardless of whether the purchases are part of a related group of transactions), *printed in* 50 Agric. Dec. 854 (1991); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (stating, since the violations of the PACA did not occur simultaneously, they must be regarded as “repeated” violations); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (same), *cert. denied*, 389 U.S. 835 (1967).

On June 11, 2013, the Chief ALJ filed an Order requiring Agri-Sales, Inc., to file with the Hearing Clerk Agri-Sales, Inc.'s exhibit and witness lists. On July 1, 2013, the Chief ALJ, pursuant to a joint request filed by the Deputy Administrator and Agri-Sales, Inc., extended the time for filing Agri-Sales, Inc.'s exhibit and witness lists to October 1, 2013.⁹ Agri-Sales, Inc., requested and the Chief ALJ granted three additional extensions of time to file Agri-Sales, Inc.'s exhibit and witness lists resulting in a due date of December 23, 2013, for filing Agri-Sales, Inc.'s exhibit and witness lists.¹⁰ Agri-Sales, Inc., contends, according to the mailbox rule, the Chief ALJ should have considered Respondent's Witness and Exhibit List filed on December 16, 2013, the date Agri-Sales, Inc., mailed Respondent's Witness and Exhibit List, rather than on January 6, 2014, the date the Hearing Clerk received Respondent's Witness and Exhibit List. Mary E. Gardner, attorney of record for Agri-Sales, Inc.,¹¹ in an affidavit attached to Agri-Sales, Inc.'s Appeal Petition, states Agri-Sales, Inc., mailed Respondent's Witness and Exhibit List on December 16, 2013, as follows:

8. By letter dated December 15, 2013, I personally mailed to the USDA Respondent's Witness and Exhibit List for filing, which was due a week later on December 23rd. I attached proper postage to the envelope and properly addressed it to:

USDA - PACA Branch
Room 1510-S
1400 Independence Avenue SW
Washington, D.C. 20250

This is the same address to which I have previously sent correspondence and filings for the above-referenced case, and the USDA has never objected to

⁹Chief ALJ's Order dated July 1, 2013.

¹⁰Complainant's Response to Respondent's Appeal at 2-3.

¹¹Appearance filed April 17, 2013; Appeal Pet. Aff. of Mary E. Gardner ¶ 2 at 1.

untimely receipt of any of those mailings.

9. I distinctly recall personally placing the envelope into the United States Post Office mail drop located at 611 South 8th Street, West Dundee, Illinois 60118, on the afternoon of December 16, 2013. I naively believed that a letter posted on December 16 would surely reach the USDA by December 23rd.

Appeal Pet. Aff. of Mary E. Gardner ¶¶ 8-9 at 2-3.

As an initial matter, reliance on the “mailbox rule” is dependent upon a properly addressed mailing. The Hearing Clerk’s March 25, 2013, service letter accompanying the Complaint served on Agri-Sales, Inc., informed Agri-Sales, Inc., that all filings should be submitted to the Hearing Clerk, as follows:

. . . . Your Answer, as well as any other pleadings or requests regarding this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1031, South Building, United States Department of Agriculture, Washington, DC 20250-9200.

Agri-Sales, Inc., failed to mail Respondent’s Witness and Exhibit List to the address provided by the Hearing Clerk.¹² Thus, even if the mailbox rule were applicable to this proceeding, which it is not, Agri-Sales, Inc., may have been precluded from reliance on the mailbox rule because Agri-Sales, Inc., did not properly address the envelope containing Respondent’s Witness and Exhibit List.

Moreover, I reject Agri-Sales, Inc.’s contention that the mailbox rule applies to this proceeding. The Rules of Practice provide that a document is deemed to be filed when it reaches the Hearing Clerk, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

¹²Appeal Pet. Aff. of Mary E. Gardner ¶ 8 at 2-3.

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

7 C.F.R. § 1.147(g). Moreover, the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings conducted under the Rules of Practice.¹³

The Hearing Clerk's date stamp establishes that the Hearing Clerk received Respondent's Witness and Exhibit List on January 6, 2014. Therefore, I reject Agri-Sales, Inc.'s contention that it timely filed Respondent's Witness and Exhibit List on December 16, 2013, and I reject Agri-Sales, Inc.'s contention that the Chief ALJ's finding that Agri-Sales, Inc., did not file Respondent's Witness and Exhibit List until January 6, 2014, is error.

Second, Agri-Sales, Inc., asserts on February 20, 2014, it filed a request for an extension of time to file a response to the Deputy Administrator's Motion for Decision Without Hearing. Agri-Sales, Inc., contends the Chief ALJ ignored Agri-Sales, Inc.'s motion for an extension of time and issued the Chief ALJ's Decision and Order prior to the expiration of the time Agri-Sales, Inc., requested in its motion to extend the time for filing a response to the Deputy Administrator's Motion for Decision Without Hearing. (Appeal Pet. ¶¶ 9-10 at 3, Aff. of Mary E. Gardner ¶ 28 at 6).

The Rules of Practice require administrative law judges to rule on all motions filed prior

¹³*In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 86 (2009) (stating the argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 302 (2005) (stating the mailbox rule does not apply in proceedings under the Rules of Practice); *In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

to the filing of an appeal of the administrative law judge's decision, as follows:

§ 1.143 Motions and requests.

(a) *General.* The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a). I find nothing in the record indicating that the Chief ALJ ruled on Agri-Sales, Inc.'s February 20, 2014, motion to enlarge the time to respond to the Deputy Administrator's Motion for Decision Without Hearing. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Agri-Sales, Inc.'s February 20, 2014, motion. Instead, I find the Chief ALJ's issuance of the Chief ALJ's March 12, 2014, Decision and Order and failure to rule on Agri-Sales, Inc.'s February 20, 2014, motion operate as an implicit denial of Agri-Sales, Inc.'s motion to enlarge the time to respond to the Deputy Administrator's Motion for Decision Without Hearing.¹⁴

¹⁴*See Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than 3 years as a denial of that motion); *United States v. Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); *Dabone v. Karn*, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); *Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co.*, 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); *In re Lee Marvin Greenly*, __ Agric. Dec. __, slip op. at 13-14 (July 2, 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *appeal docketed*, No. 13-2882 (8th Cir. Aug. 23, 2013).

Third, Agri-Sales, Inc., contends the Chief ALJ improperly denied Agri-Sales, Inc., a hearing and issued summary judgment (Appeal Pet. at 6-7).

Agri-Sales, Inc., admits in its Answer that it failed to make full payment promptly of the agreed purchase prices, or balances of the agreed purchase prices, to six of the seven produce sellers identified in Appendix A attached to the Complaint, for perishable agricultural commodities, which Agri-Sales, Inc., purchased, received, and accepted in the course of interstate and foreign commerce.¹⁵ Moreover, Michael Hughes, the president and owner of Agri-Sales, Inc.,¹⁶ in an affidavit attached to Agri-Sales, Inc.'s Appeal Petition reiterates the admissions in Agri-Sales, Inc.'s Answer, as follows:

SKYLINE PRODUCE, LLC

45. Skyline Produce, LLC and Agri-Sales have agreed upon a payment schedule for this produce debt. Attached as Exhibit 1 is a copy of Skyline's letter to the USDA, withdrawing its claim against Agri-Sales, including an Award issued May 31, 2013 and any disputed sums not resolved with the Award.

46. Agri-Sales has met its obligations to Skyline pursuant to the agreed-upon payment schedule. Payments are being made and the produce debt is being reduced pursuant to terms agreeable to Skyline.

CR-FARMS

47. CR-Farms and Agri-Sales have agreed upon a payment schedule for this produce debt. Attached as Exhibit 2 is a copy of CR-Farms' letter to the USDA, urging the USDA to not sanction Agri-Sales and Mike Hughes because any sanction would likely hinder Mr. Hughes' ability to pay Agri-Sales' produce debt to CR-Farms.

48. Agri-Sales admits that it owed CR-Farms \$30,775.50 on January 24, 2014.

49. Since then, however, I have made six payments, each in the amount of \$250. Those payments were made on February 1, February 10, March 3, March 10, March 17 and March 27, 2014, lowering the amount owed to \$29,448.50.

EASTERN OREGON PRODUCE, INC.

¹⁵Answer ¶ III at 1-4.

¹⁶Appeal Pet. Aff. of Michael Hughes ¶ 2 at 1.

50. Eastern Oregon Produce, Inc. and Agri-Sales have agreed upon a payment schedule for this produce debt. Attached as Exhibit 3 is a copy of Eastern Oregon's letter to the USDA, urging the USDA to not sanction Agri-Sales and Mike Hughes because any sanction would likely hinder Mr. Hughes' ability to pay Agri-Sales' produce debt to Eastern Oregon.

51. Agri-Sales admits that on January 24, 2014, it owed Eastern Oregon \$6,766.50.

52. However, since then, Agri-Sales has made six payments of \$500 each against this debt, lowering the total owed as of the date hereof to \$3,266.50.

NATURE'S FINEST PRODUCE

53. Agri-Sales admits that it owes Nature's Finest \$47,880. I have been unable to make any payments on this debt because Nature's Finest is out of business.

DOUBLE D FARMS

54. Agri-Sales admits that on January 24, 2014 it owed Double D Farms \$31,930.

55. I have been paying Double D as I have been able, although Double D has not insisted on a set payment plan.

....

NOKOTA

90. The principal owed to Nokota is not the largest of these Produce debts.

91. If Nokota told Mr. Hudson that Agri-Sales owed it \$52,602.50 in January 2014, then Nokota lied. While Agri-Sales has admitted, and has never denied, that it owes Nokota, the amount owed has been in dispute in Nokota's lawsuit against Agri-Sales in the district court for the Northern District of Illinois.

92. Agri-Sales has attempted on many occasions to resolve its dispute with Nokota, but Nokota has failed and refused to acknowledge credits against invoices and has failed to properly account for payments that Agri-Sales made to it.

93. Despite Nokota's refusal to settle its lawsuit against Agri-Sales, Agri-Sales has made periodic payments to Nokota to reduce this debt. However, *bona fide* disputes existed regarding most of the invoices that Nokota claims are unpaid.

94. Once Nokota filed its lawsuit against Agri-Sales, it relinquished any rights to have the USDA enforce its PACA trust rights. This is a debt that is subject to current, ongoing litigation.

Appeal Pet. Aff. of Michael Hughes ¶¶ 45-55, 90-94 at 7-9, 13-14 (emphasis in original).

The PACA requires commission merchants, dealers, and brokers to make full payment promptly to produce sellers for perishable agricultural commodities. Agri-Sales, Inc., admits that it violated the prompt payment requirement of the PACA. Based upon the number of Agri-Sales, Inc.'s violations, the amount of money involved, and the time period during which Agri-Sales, Inc., violated the PACA, Agri-Sales, Inc.'s violations are flagrant and repeated as a matter of law. Moreover, as I discuss, *infra*, I conclude Agri-Sales, Inc.'s violations of the PACA are willful. Therefore, there are no genuine issues of material fact to be heard.

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, I have consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.¹⁷ Therefore, I reject Agri-Sales, Inc.'s contentions that the Chief ALJ's failure to conduct a hearing and entry of summary judgment, are error.

Fourth, Agri-Sales, Inc., contends the Chief ALJ's conclusion that Agri-Sales, Inc.'s violations of 7 U.S.C. § 499b(4) are willful, is error (Appeal Pet. at 4-5).

¹⁷See *In re Lancelot Kollman*, __ Agric. Dec. __, slip op. at 5 (July 23, 2014); *In re Hope Knaust*, __ Agric. Dec. __, slip op. at 8 (Apr. 9, 2014); *In re Pine Lake Enterprises, Inc.*, 69 Agric. Dec. 157, 162-63 (2010); *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 858-59 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (2009). See also *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.¹⁸ The record supports the Chief ALJ's conclusion that Agri-Sales, Inc.'s violations of the PACA are "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)). Willfulness is reflected by Agri-Sales, Inc.'s violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the number and dollar amount of Agri-Sales, Inc.'s violative transactions.

Moreover, Mr. Hughes admits in an affidavit attached to Agri-Sales, Inc.'s Appeal Petition that Agri-Sales, Inc., knew it did not have sufficient funds to comply with the prompt payment provision of the PACA and intentionally violated the PACA, as follows:

**INABILITY TO PAY SUPPLIERS BECAUSE OF
FAILURE OF AGRI-SALES' CUSTOMERS TO PAY**

107. Because of the history of various slow-paying customers, who eventually would pay their bills, Agri-Sales continued to purchase and sell produce, paying as it was able. Most companies in the produce business do not pay within PACA's ten-day terms; they pay as they are paid. That's exactly what Agri-Sales was forced to do in 2010 and 2011.

108. As a direct result of Agri-Sales' customers' slow-pay and failure to pay Agri-Sales, Agri-Sales found itself in increasingly desperate financial condition.

109. The unpaid Agri-Sales' invoices to its customers outlined above are greater than the sums that Agri-Sales is alleged herein to have left unpaid to its suppliers.

¹⁸See, e.g., *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), cert. denied, 528 U.S. 1021 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), cert. denied, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

110. Except for Eddy Produce, Agri-Sales has never denied that it owes money to Skyline Produce, Double D, Nokota (although in a lower amount than claimed), Natures Finest, CR-Farms and Eastern Oregon.

Appeal Pet. Aff. of Michael Hughes ¶¶ 107-110 at 16. Therefore, I reject Agri-Sales, Inc.'s contention that the Chief ALJ's conclusion that Agri-Sales, Inc., willfully violated 7 U.S.C. § 499b(4), is error.

Fifth, Agri-Sales, Inc., contends the Chief ALJ's finding that Agri-Sales, Inc., failed to make full payment promptly to Eddy Produce, LLC, is error (Appeal Pet. at 5-6).

As an initial matter, even if I were to find that Agri-Sales, Inc., paid Eddy Produce, LLC, in accordance with the PACA, that finding would not affect the disposition of this proceeding. Agri-Sales, Inc., has admitted it failed to make full payment promptly to six produce sellers of the agreed purchase prices for produce, which Agri-Sales, Inc., purchased, received, and accepted in the course of interstate and foreign commerce. As Agri-Sales, Inc., owed these six produce sellers more than a de minimis amount more than 120 days after the Complaint was served on Agri-Sales, Inc., this PACA case would be treated as a "no-pay" case, even if I were to find Agri-Sales, Inc., paid Eddy Produce, LLC, in accordance with the PACA. In any "no-pay" case in which the violations are flagrant or repeated, the license of the PACA licensee shown to have violated the payment provision of the PACA is revoked and/or the facts and circumstances of the respondent's violations of 7 U.S.C. § 499b(4) are published.

On January 10, 2014, the Chief ALJ ordered the parties to submit cross motions for summary judgment. On January 30, 2014, the Deputy Administrator filed a Motion for Decision Without Hearing in which the Deputy Administrator asserts Agri-Sales, Inc., failed to make full payment promptly to Eddy Produce, LLC, the amount of \$64,238 for seven lots of mixed

vegetables. The Deputy Administrator supports this assertion with a declaration executed by Mark Hudson, senior marketing specialist, Agricultural Marketing Service, United States Department of Agriculture.¹⁹

If the moving party supports its motion for summary judgment, the burden shifts to the non-moving party who may not rest on mere allegation or denial in pleadings, but must set forth specific facts showing there is a genuine issue for trial.²⁰ In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials.²¹

Agri-Sales, Inc., failed to file a response to the Deputy Administrator's Motion for Decision Without Hearing or provide any evidence rebutting Mr. Hudson's declaration accompanying the Deputy Administrator's Motion for Decision Without Hearing. Instead, Agri-Sales, Inc., rested on the denial in its Answer of the allegation that it failed to make full payment promptly to Eddy Produce, LLC. Therefore, I reject Agri-Sales, Inc.'s contention that the Chief ALJ erroneously granted the Deputy Administrator's Motion for Decision Without Hearing as it relates to Agri-Sales, Inc.'s failure to make full payment promptly to Eddy Produce, LLC.

¹⁹Deputy Administrator's Mot. for Decision Without Hearing Attach. 3 ¶ 4 at 1.

²⁰*Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998); *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994); *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

²¹*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Based upon a careful consideration of the record, I find no change or modification of the Chief ALJ's March 12, 2014, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

§ 1.145 Appeal to Judicial Officer.

....

(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The Chief ALJ's March 12, 2014, Decision and Order is adopted as the final order in this proceeding.

RIGHT TO JUDICIAL REVIEW

Agri-Sales, Inc., has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §_ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.²² The date of entry of the Order in this Decision and Order is August 4, 2014.

Done at Washington, DC

August 4, 2014

William G. Jenson
Judicial Officer

²²28 U.S.C. § 2344.