UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Amersino Marketing Group, LLC,	)	PACA Docket No. D-12-0221
	)	
and	)	
	)	
Southeast Produce Limited, USA,	)	PACA Docket No. D-12-0222
	)	
Respondents	)	**Decision and Order**

PROCEDURAL HISTORY

Charles W. Parrott, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this proceeding by filing a Complaint on February 1, 2012. 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]. On March 6, 2012, the Deputy Administrator filed an Amended Complaint, which is the operative pleading in this proceeding.

The Deputy Administrator alleges, during the period December 22, 2008, through August 5, 2010, Amersino Marketing Group, LLC, and Southeast Produce Limited, USA

[hereinafter Respondents], failed to make full payment promptly of the agreed purchase prices to 10 produce sellers in the total amount of $497,960.90 for 43 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce.[1]

On March 20, 2012, Respondents filed an Answer to the Amended Complaint [hereinafter Answer]. Respondents admit they failed to make full payment promptly to four of the 10 produce sellers identified in Appendix A of the Amended Complaint. Specifically, Respondents admit: (1) three produce sellers, Yi Poa International, Inc., Morris Okun, Inc., and Centre Maraicher, provided Respondents additional time to pay the amounts due for produce purchases; (2) they still owed Morris Okun, Inc., $28,000 for produce purchases; (3) they still owed Centre Maraicher $19,000 for a produce purchase; and (4) they settled and paid one produce seller, Cimino Brothers Produce, less than the agreed purchase prices for produce purchases.[2]

On June 5, 2012, pursuant to 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing. Respondents failed to file a response to the Deputy Administrator's Motion for Decision Without Hearing. On July 17, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order on the Record [hereinafter the ALJ's Decision], pursuant to 7 C.F.R. § 1.139, in which the ALJ: (1) found, during the period December 22, 2008, through August 5, 2010, Respondents failed to make full

[1]Am. Compl. ¶ III at 3, App. A.

[2]Answer at 1, Attachs. 1-3.

payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of $429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce; (2) concluded Respondents' failures to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of $429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce, constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (3) ordered publication of the facts and circumstances of Respondents' violations of 7 U.S.C. § 499b(4).[3]

On August 17, 2012, Respondents appealed to the Judicial Officer. On November 16, 2012, the Deputy Administrator filed a response to Respondents' Appeal Petition. On January 24, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Respondents' Request for Oral Argument

Respondents' request for oral argument,[4] which the Judicial Officer may grant, refuse, or limit,[5] is refused because the issues raised in Respondents' Appeal Petition are not complex and oral argument would serve no useful purpose.

Respondents' Appeal Petition

[3] ALJ's Decision at 6-7.

[4] Appeal Pet. at 6.

[5] 7 C.F.R. § 1.145(d).

Respondents raise six issues in their Appeal Petition. First, Respondents contend the business records and business activities of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were not commingled. Respondents assert Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were separate entities and there is no evidence that they disregarded corporate formalities. (Appeal Pet. at 1, 3, 5).

The Deputy Administrator alleges the following regarding the relationship between Amersino Marketing Group, LLC, and Southeast Produce Limited, USA:

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> (e) Respondent Amersino and Respondent Southeast operated from the same building, shared the same office space, and shared the same two principal officers and owners. The business records and business activities of Respondents Amersino and Southeast, particularly as they related to buying and selling of produce, were commingled.

Amended Complaint ¶ II(e) at 3. Respondents failed to deny or otherwise respond to the allegations in paragraph II(e) of the Amended Complaint. The Rules of Practice provide that a failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegation.[6] Therefore, I find the business records and business activities of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, were commingled and Respondents' assertion in their Appeal Petition that their business records and business activities were not commingled comes far too late to be considered.

Second, Respondents contend the ALJ's finding that Respondents failed to make full

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[6] 7 C.F.R. § 1.136(c).

payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of $429,031.50 for perishable agricultural commodities, is error (Appeal Pet. at 2).

The PACA requires produce buyers to make full payment promptly for produce purchases (7 U.S.C. § 499b(4)). Full payment promptly in accordance with 7 U.S.C. § 499b(4) means payment by a produce buyer within 10 days after the day on which the produce is accepted; provided that, the parties to the transaction may elect to use different payment terms, so long as those terms are reduced to writing before the parties enter into the transaction. The burden of proof of a written agreement is on the party claiming existence of the agreement. (7 C.F.R. § 46.2(aa)(5), (11)).

The Deputy Administrator alleges Respondents failed to pay promptly the full purchase prices in the total amount of $176,883.50 for 11 lots of broccoli purchased from Cimino Brothers Produce, Salinas, California, and accepted by Respondents during the period December 1, 2008, through December 12, 2008.[7] Respondents admit they settled with Cimino Brothers Produce and the record establishes that Cimino Brothers Produce accepted a partial payment of $25,000 in full satisfaction of the total past due amount of $176,883.50.[8] Acceptance of partial payment of the purchase price of produce in full satisfaction of a debt does not constitute full payment and does not negate a violation of the PACA.[9] Moreover, Southeast Produce Limited, USA, and

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[7] Am. Compl. ¶ III at 3, App. A ¶ 1.

[8] Answer ¶ 2a at 1, Attach. 1; Deputy Administrator's Motion for Decision Without Hearing Attach. 1.

[9] *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 723 (1994), *aff'd*, 50 F.3d 52 (D.C. Cir. 1995); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 559 (1989); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1250 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir.

Cimino Brothers Produce did not execute the settlement agreement until December 29, 2011, approximately 3 years after payment for the produce Respondents purchased from Cimino Brothers Produce became due.[10]

The Deputy Administrator also alleges Respondents failed to pay promptly the full purchase prices in the total amount of $191,039 for 18 lots of garlic purchased from Yi Pao International, Inc., Commerce, California, and accepted by Respondents during the period August 30, 2009, through February 22, 2010.[11] Respondents admit Yi Pao International, Inc., provided Respondents additional time to pay for the garlic without the existence of a written agreement made prior to Respondents' entering into the transactions.[12]

The Deputy Administrator further alleges Respondents failed to pay promptly the full purchase prices in the total amount of $40,088 for two lots of mixed vegetables purchased from Morris Okun, Inc., Bronx, New York, and accepted by Respondents during the period October 13, 2009, through October 22, 2009.[13] Respondents admit Morris Okun, Inc., provided Respondents additional time to pay for the mixed vegetables without the existence of a written agreement made prior to Respondents' entering into the transactions, and, as of the date Respondents filed the Answer, Respondents still owed Morris Okun, Inc., a balance of $28,000

1986); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981).

[10]Deputy Administrator's Motion for Decision Without Hearing Attach. 1.

[11]Am. Compl. ¶ III at 3, App. A ¶ 4.

[12]Answer ¶ 2d at 1.

[13]Am. Compl. ¶ III at 3, App. A ¶ 5.

for the mixed vegetables.[14]

Further still, the Deputy Administrator alleges Respondents failed to pay promptly the full purchase price of $21,021 for one lot of green onions purchased from Centre Maraicher, Sainte-Clotilde, Quebec, Canada, and accepted by Respondents on July 16, 2010.[15] Respondents admit Centre Maraicher provided Respondents additional time to pay for the green onions without the existence of a written agreement made prior to Respondents' entering into the transaction, and, as of the date Respondents filed the Answer, Respondents still owed Centre Maraicher a balance of $19,000 for the green onions.[16]

Therefore, I conclude the ALJ's finding that Respondents failed to make full payment promptly to at least four produce sellers of the agreed purchase prices in the total amount of $429,031.50 for perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce, is fully supported by the record and, in particular, by Respondents' admissions, and I reject Respondents' contention that the ALJ's finding, is error.

Third, Respondents contend the ALJ's conclusion that Respondents willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), is error (Appeal Pet. at 2, 5).

Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the record supports a finding that Respondents'

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[14]Answer ¶ 2e at 1, Attach. 2.

[15]Am. Compl. ¶ III at 3, App. A ¶ 10.

[16]Answer ¶ 2j at 1, Attach. 3.

violations of the PACA were "willful," as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)).[17] Willfulness is reflected by Respondents' violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and the number and dollar amount of Respondents' violative transactions. Respondents' violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.[18] Respondents' violations are "repeated" because repeated means more than one.[19] Therefore, I reject Respondents' contention that the ALJ's conclusion that Respondents willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), is error.

Fourth, Respondents contend the ALJ's failure to consider, and deem as credible, Respondents' Answer, is error (Appeal Pet. at 2).

A review of the ALJ's Decision reveals that the ALJ not only considered Respondents' Answer, but relied extensively on Respondents' admissions in the Answer.[20] Respondents do

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[17]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. *See*, *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); *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).

[18]*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997).

[19]*In re KDLO Enterprises, Inc.*, 70 Agric. Dec. 1098, 1101 (2011); *In re B.T. Produce Co.*, 66 Agric. Dec. 774, 812 (2007), *aff'd*, 296 F. App'x 78 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2075 (2009).

[20]ALJ's Decision at 3-4, 6.

not cite, and I cannot locate, any portion of the ALJ's Decision indicating the ALJ did not find Respondents' Answer credible. Therefore, I reject Respondents' assertion that the ALJ failed to consider, and deem as credible, Respondents' Answer.

Fifth, Respondents contend the ALJ's failure to provide Respondents and Henry Wang an opportunity for hearing, is error (Appeal Pet. at 2, 4-5).

The Rules of Practice provide that the admission of material allegations of fact contained in the complaint shall constitute a waiver of hearing.[21] Respondents admit, during the period December 22, 2008, through August 5, 2010, Respondents failed to make full payment promptly to at least four sellers of the agreed purchase prices in the total amount of $429,031.50 for 32 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in interstate and foreign commerce.[22] As Respondents admit material allegations of fact contained in the Amended Complaint, there are no issues of fact on which a meaningful hearing could be held in connection with those allegations which Respondents have admitted, and the ALJ properly issued the July 17, 2012, Decision pursuant to 7 C.F.R. § 1.139, without providing Respondents an opportunity for hearing. The application of the default provisions in the Rules of Practice do not deprive Respondents of their rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.[23]

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[21] 7 C.F.R. § 1.139.

[22] Answer ¶¶ 2a, 2d, 2e, 2j at 1.

[23] *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent

failed to deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

As for Respondents' contention that the ALJ erroneously failed to provide Henry Wang an opportunity for hearing, Mr. Wang is not a party to this proceeding;[24] therefore, Mr. Wang has no right to a hearing in this proceeding.

Sixth, Respondents assert publication of the facts and circumstances of Respondents' violations of 7 U.S.C. § 499b(4) will have the effect of depriving Mr. Wang of his means of livelihood. Respondents contend such an effect constitutes cruel and unusual punishment. (Appeal Pet. at 5).

Mr. Wang is not a party to the instant proceeding,[25] and no employment restriction is imposed on Mr. Wang in the instant proceeding. Moreover, any employment restriction on Mr. Wang, which may result from the disposition of the instant proceeding, is irrelevant to the disposition of this proceeding. Therefore, I decline to address Respondents' contention that an employment restriction imposed on Mr. Wang would constitute cruel and unusual punishment.

Based upon a careful consideration of the record, I affirm the ALJ's July 17, 2012,

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[24]Mr. Wang avers he was the owner of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA (Answer at 1). Respondents assert Mr. Wang was the owner of Amersino Marketing Group, LLC, formed in or about 2002 and the partial owner of Southeast Produce Limited, USA, formed in 1995. Respondents further assert Mr. Wang had no association with Southeast Produce Limited, USA, during the period from 2002 until 2008, when Mr. Wang purchased Southeast Produce Limited, USA. (Appeal Pet. at 3). Mr. Wang's ownership of Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, during the period of time when Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, violated 7 U.S.C. § 499b(4) does not make Mr. Wang a party to this proceeding. The only parties in this proceeding are the Deputy Administrator, the party who instituted this proceeding, and Amersino Marketing Group, LLC, and Southeast Produce Limited, USA, the parties against whom the Deputy Administrator instituted this proceeding. (See the definitions of the terms "Complainant" and "Respondent" in 7 C.F.R. § 1.132).

[25]See note 24.

Decision, and I find no change or modification of the ALJ's July 17, 2012, Decision 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.**
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> (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 ALJ's July 17, 2012, Decision is adopted as the final order in this proceeding.

RIGHT TO JUDICIAL REVIEW

Respondents have 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.[26] The date of entry of the Order in this Decision and Order is April 18, 2014.

Done at Washington, DC

April 18, 2014

[26] 28 U.S.C. § 2344.

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William G. Jenson
Judicial Officer