UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-01-0023
	)	
Baiardi Chain Food Corp.,	)	
	)	
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 August 2, 2001. 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 that Baiardi Chain Food Corp. [hereinafter Respondent], during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of $830,728.39

for 343 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 October 23, 2001, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On February 2, 2004, and May 25, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 30, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on September 10, 2004, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law. On October 4, 2004, Complainant filed Complainant's Reply Brief.

On April 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded 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

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[1]On October 4, 2004, Jeffrey J. Armistead entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed October 4, 2004).

commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordered the publication of the facts and circumstances of Respondent's violations.

On July 27, 2005, Respondent appealed to the Judicial Officer. On August 16, 2005, Complainant filed Complainant's Response to Respondent's Appeal. On August 22, 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.
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> . . . .
>
> **(e) Alternative civil penalties**
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> 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 U.S.C. §§ 499b(4), 499h(a), (e).

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

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

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948, until its PACA license terminated when Respondent failed to pay the annual PACA license renewal fee on June 8, 2001. David Axelrod was the president, director, and 100 percent stockholder of Respondent from at least 1998 until Respondent's PACA license terminated. (Tr. at 34-35; CX 1.) Complainant received a number of reparation complaints, generated by Respondent's alleged nonpayment for produce, between October 2000 and January 2001, and began an investigation of Respondent in early January 2001 (Tr. at 34). Carolyn Shelby, a marketing specialist employed by the United

States Department of Agriculture, personally conducted the investigation and met with David Axelrod on January 8, 2001 (Tr. at 38). David Axelrod produced an "entire sack of unpaid invoices" and confirmed that the invoices related to "past due and unpaid produce transactions" (Tr. at 41-42). These unpaid invoices involved 67 different produce sellers and 343 separate transactions, and totaled $830,728.39 (CX 5-CX 71). David Axelrod also provided Carolyn Shelby a copy of Respondent's accounts payable aging (Tr. at 42-43; CX 72). After Carolyn Shelby copied the records and returned the originals to David Axelrod, he confirmed that Respondent's unpaid invoice records were accurate (Tr. at 41-42).

Carolyn Shelby conducted two brief follow-up investigations in March 2002 and November 2003, in which she contacted several of Respondent's produce sellers to determine whether Respondent still owed them money. In March 2002, employees or agents of nine produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $342,906.75 for produce. In November 2003, employees or agents of seven produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $166,426.18 for produce. (Tr. at 57, 64-65; CX 74, CX 77.)

Many of Respondent's produce sellers eventually received partial payment. Thus, while, at the time of Carolyn Shelby's January 2001 investigation, Respondent owed Agrexco (USA), Ltd., $21,100 for produce, a portion of the debt, $11,791.45, was paid to Agrexco (USA), Ltd., in 2002. This amount was paid by Summit Business Capital Corporation, which apparently had the rights to Respondent's receivables and was

involved in using Respondent's remaining assets to pay part of Respondent's debt now that Respondent was no longer engaged in the produce business. The remainder of Respondent's debt to Agrexco (USA), Ltd., has never been paid. (Tr. at 14-15, 24-25.)

Richard Byllote testified that, on January 17, 2001, his company, Nathel & Nathel, Inc., formerly Wishnatzki & Nathel, Inc., agreed to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. Richard Byllote testified that this settlement was appropriate because he knew Respondent was having financial difficulties and, if he did not accept foregoing half the debt, he thought Respondent would not pay Wishnatzki & Nathel, Inc., anything. The agreement between the Respondent and Wishnatzki & Nathel, Inc., stated "Baiardi is closing its doors for business." (CX 78.) Respondent owed Wishnatzki & Nathel, Inc., approximately $30,000, of which Respondent paid $14,861 in accord with this agreement. (Tr. at 121-26; CX 78.)

At the hearing, Respondent called no witnesses, but rather presented its case through cross-examination of Complainant's witnesses. All of Respondent's exhibits were likewise admitted through cross-examination, so the record does not contain any direct Respondent testimony as to the preparation and meaning of Respondent's exhibits. Most of Respondent's exhibits were the final settlements of claims against Respondent based on Respondent's representation that it was going out of business and constituted settlements in the general range of 50 cents for each dollar Respondent owed to each produce seller with whom such an agreement was executed. While counsel for

Complainant voiced a continuing objection to the admission of these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents), I have no basis to doubt that the documents constitute agreements with numerous produce sellers to settle claims for less than the original purchase prices.

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). Respondent held PACA license 114748 from June 8, 1948, until Respondent's PACA license terminated on June 8, 2001, for failure to pay the required PACA license renewal fee (Compl. ¶ II(b); Answer ¶ 2).

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Carolyn Shelby, a marketing specialist employed by the United States Department of Agriculture, went to Respondent's place of business on January 8, 2001, and requested copies of Respondent's business records. David Axelrod, president, director, and 100 percent stockholder of Respondent, provided the requested records to Carolyn Shelby on January 11, 2001.

3. The records, which David Axelrod represented were accurate, demonstrated that, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of

$830,728.39 for 343 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in intestate and foreign commerce.

4. In March 2002, and again in November 2003, Carolyn Shelby contacted several produce sellers listed in the Complaint to ascertain whether Respondent still owed the produce sellers money for produce. In March 2002, employees or agents of nine produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $342,906.75 for produce. In November 2003, employees or agents of seven produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $166,426.18 for produce. (Tr. at 64-65; CX 74, CX 77.)

5. Carolyn Shelby's January 2001 investigation revealed Respondent owed Coronet Foods, Inc., $50,887.35 for produce (CX 5, CX 27). On January 29, 2001, Coronet Foods, Inc., entered into an agreement with Respondent in which Coronet Foods, Inc., agreed to accept $31,328 in full satisfaction of the $50,887.35 Respondent owed to Coronet Foods, Inc. Respondent paid Coronet Foods, Inc., $14,000. (RX 20-RX 22, RX 25-RX 27.)

6. Carolyn Shelby's January 2001 investigation revealed Respondent owed Wishnatzki & Nathel, Inc., $26,070 for produce (CX 5, CX 41). On January 17, 2001, Wishnatzki & Nathel, Inc., agreed to accept approximately 50 percent of the amount Respondent owed to Wishnatzki & Nathel, Inc., for produce (Tr. at 121, 125-26; CX 78).

7. Carolyn Shelby's January 2001 investigation revealed Respondent owed Agrexco (USA), Ltd., $21,100 for produce (CX 5, CX 11). Summit Business Capital Corporation, which had legal rights to Respondent's accounts receivable, paid Agrexco (USA), Ltd., $11,791.45 of the amount owed by Respondent. At the time of the commencement of the hearing, on February 2, 2004, Respondent had not paid the balance owed to Agrexco (USA), Ltd. (Tr. at 14-15).

8. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers listed in the Complaint by paying approximately 50 cents for each dollar Respondent owed. At least two other accounts were settled through court dispositions. There is no evidence that Respondent made full payment promptly to any sellers listed in the Complaint of the agreed purchase prices of the perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce.

Discussion

Respondent Willfully, Flagrantly, and Repeatedly Violated the PACA by Failing to Make Full Payment Promptly to 67 Produce Sellers Listed in the Complaint

Respondent's contentions that its agreements with produce sellers to settle claims for less than the agreed purchase prices is the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the PACA and the clear, long-standing case law that governs these matters. While the appropriate penalty for Respondent's willful, flagrant, and repeated violations of the prompt payment provision of section 2(4)

of the PACA (7 U.S.C. § 499b(4)) would normally be revocation of Respondent's PACA license, Respondent's PACA license has already been terminated for failure to pay the PACA license renewal fee. Thus, a finding that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the publication of the facts and circumstances of Respondent's violations, is the only appropriate remedy.

Respondent Failed to Pay Promptly 67 Produce Sellers the Agreed Purchase Prices for Perishable Agricultural Commodities

There is no legitimate dispute that Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce. Each of the 67 sellers was identified by David Axelrod as having unpaid invoices at the time of Carolyn Shelby's January 2001 investigation. Respondent has demonstrated that six of the 67 produce sellers listed in the Complaint signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims and that claims of two other produce sellers were resolved by court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other produce sellers to which Respondent owed payment for produce. Respondent contends these agreements to accept reduced payments on a delayed basis, made after Respondent had been delinquent in its produce payments and in the face of Respondent's decision to close the business, take

these transactions out of the scope of the PACA (Respondent's Proposed Findings of Fact and Conclusions of Law at 4-5).

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 from "no-pay" cases. In cases in which a respondent failed 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 and, in the case of flagrant or repeated violations, the violator's PACA license would be revoked. *Id.* at 548-49.

Agreements to Change the Terms of Payment Subsequent to the Initial Transaction Do Not Negate the PACA's Prompt Payment Provisions

While Respondent contends the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 619 (1993), "it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to the time within which payment is due, the Regulations specify the agreement must be reached before entering into the transaction and the agreement must be in writing. 7 C.F.R. § 46.2(aa)(11). Respondent's contention that a produce seller's choice to accept half payment, when the other choice is to accept

no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action, is not consistent with the PACA, the Regulations, or case law. Indeed, the type of situation faced by Respondent's produce sellers—accepting half payment or nothing—is just the type of situation the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that, because Agrexco (USA), Ltd., and Ocean Mist Farms may have received partial payment of the debt owed them by Respondent as a result of litigation, the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) ceases to apply to those transactions.

The Unpaid Balance Is Substantial

Respondent's contention that the unpaid balance is de minimus and only warrants the assessment of a civil penalty is likewise without basis. There is no evidence that Respondent made full payment promptly of the agreed purchase prices to any of the 67 produce sellers listed in the Complaint. At the time of Carolyn Shelby's January 2001 investigation, Respondent's president, director, and 100 percent stockholder supplied the very list of unpaid produce sellers Complainant is relying upon and affirmed that the records, which indicate Respondent owed 67 produce sellers $830,728.39, are accurate. That many of these claims were settled at 50 cents on the dollar does not negate Respondent's violations of the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Even if all payments were made under the work-out agreements, and even with the two court "dispositions," a substantial amount of the $830,728.39 in

non-payments alleged in the Complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of Complainant's witnesses and the statement of Respondent's president, director, and 100 percent stockholder that none of the 67 produce sellers were fully and promptly paid.

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, 714 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous produce sellers at risk, Respondent was "clearly operat[ing] in disregard of the payment requirements of the PACA," *id*., and has committed willful violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In determining whether a violation is flagrant, the Judicial Officer has factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551 (1998). *Scamcorp*, as well as numerous other cases, involved fewer transactions with fewer produce sellers for a lesser amount of money than is involved in the instant case, and in

each of those cases, the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 10-month period of time over which Respondent's violations occurred, and the repeated nature of Respondent's violations is established by the 343 occurrences.

A Significant Penalty Is Warranted

Normally, in light of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Respondent's PACA license would be revoked. Here, with Respondent's PACA license already terminated, the only appropriate sanction is the publication of the facts and circumstances of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three 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 contends "the amount of unpaid PACA governed accounts amounts to less than $30,000." (Respondent's Appeal Pet. at 1-4.)

The Chief ALJ found, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in a total amount over $830,000 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce (Initial Decision at 6). 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 "$830,728.39."

Moreover, the Chief ALJ addressed Respondent's contention that, at the time of the hearing, only $30,000 remained unpaid, as follows:

> . . . The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original amount that was due for the perishable produce. Witnesses testified that at the time of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over $830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Initial Decision at 9-10.

Again I find the Chief ALJ's approximation of the amount that remained unpaid at the time of the hearing ("over $570,000 of the $830,000") sufficient. The Chief ALJ was not required to calculate the exact amount that Respondent still owed produce sellers at the commencement of the hearing.

Second, Respondent contends the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not applicable to transactions in which the produce buyer and produce seller agree to extend the time for payment. Respondent contends an agreement to extend the time for payment may be written or oral and may be made before or after the transaction, which is the subject of the extension. Respondent cites *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004), as support for this contention. (Respondent's Appeal Pet. at 5-6.)

I reject Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) defines the term *full payment promptly* for purposes of determining violations of the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the Regulations (7 C.F.R. § 46.2(aa)(5)) provides payment for produce must be made within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records. Further, the party claiming the existence of the agreement to use a different time for payment has the burden of proving the existence of the agreement. Respondent did not introduce any evidence to show that

Respondent entered into a written agreement with the produce sellers listed in the Complaint before the transactions, which are the subject of this proceeding.

Moreover, I find *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004), inapposite. The Court in *American Banana Co.* held, if a produce seller enters into a pre-transaction or post-default oral or written agreement extending the time for payment beyond the 30-day maximum allowed to qualify for coverage under the PACA trust, the produce seller loses PACA trust protection. *American Banana Co.* offers no support for Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

Third, Respondent contends, based on Respondent's substantial efforts to pay its produce sellers, the only sanction warranted is a civil monetary penalty (Respondent's Appeal Pet. at 7).

Section 8 of the PACA (7 U.S.C. § 499h) provides, whenever the Secretary of Agriculture determines a commission merchant, dealer, or broker has flagrantly or repeatedly violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary of Agriculture may publish the facts and circumstances of the violation, revoke the violator's PACA license, suspend the violator's PACA license, or assess the violator a civil monetary penalty. However, I have long held that a civil penalty is not appropriate in a "no-pay" case. "No-pay" cases include cases 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.[2] As discussed in this Decision and Order, *supra*, the record establishes that Respondent failed to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Hearing Clerk served Respondent with the Complaint on August 8, 2001,[3] and the hearing commenced February 2, 2004.[4] Therefore, in order to avoid classification of this proceeding as a "no-pay" case, Respondent must have been in full compliance with the PACA no later than December 8, 2001. The record establishes that Respondent failed to make full payment to all produce sellers identified in the Complaint by December 8, 2001. Therefore, a civil monetary penalty is not justified by the facts in this proceeding.

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

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[2]*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

[3]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 1546.

[4]Tr. at 1, 3.

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.

Done at Washington, DC

September 2, 2005

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William G. Jenson
Judicial Officer