

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	<b>PACA Docket No. D-09-0006</b>
	)	
Rogers Produce, Inc.,	)	
	)	<b>Decision and Order</b>
Respondent	)	<b>by Reason of Default</b>

1. The Complaint, filed on October 6, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) (herein frequently the “PACA”). The Complaint alleged that Rogers Produce, Inc., the Respondent, willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Parties and Counsel

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “Complainant” or “AMS”). AMS is represented by Eric Paul, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309 Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. The Respondent is Rogers Produce, Inc. (herein frequently “Rogers Produce” or “Respondent”), a corporation registered in the State of Texas. The Respondent’s business

address, until it ceased operations on or about October 1, 2007, was 1015 South Harwood Street, Dallas, TX, 75201.

#### Procedural History

4. AMS's Motion for Decision Without Hearing by Reason of Default, filed February 19, 2009, is before me. Respondent Rogers Produce was served on February 26, 2009, with a copy of that Motion and a copy of the proposed Decision and has failed to respond.

5. Regarding service of the Complaint, on October 10, 2008, Respondent Rogers Produce was served with a copy of the Complaint by certified mail, together with a copy of the Hearing Clerk's notice letter and a copy of the Rules of Practice. *See* 7 C.F.R. §1.130 *et seq.* The Respondent's answer was due to be filed within 20 days after service, according to section 1.136(a) of the Rules of Practice. 7 C.F.R. § 1.136(a). The time for filing an answer to the Complaint expired on October 30, 2008. The Respondent failed to file an answer, so the Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

6. Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

Findings of Fact

7. Rogers Produce, Inc. is a corporation registered in the State of Texas. Respondent's business address, until it ceased operations on or about October 1, 2007, was 1015 South Harwood Street, Dallas, TX, 75201.

8. Respondent can be served by delivery made to:

(a) Roger M. Sutton, Respondent's president, director, and 100% stockholder, at his current residence address; and

(b) Robert Milbank, Jr., Respondent's Chapter 7 Trustee, at law offices of Robert Milbank, Jr., 500 N. Akard, Suite 2980, Dallas, TX 75201.

9. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1997-1788 was issued to Respondent on July 9, 1997. This license terminated on July 9, 2008, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

10. Respondent, during the period November 23, 2006 through October 7, 2007, failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$597,428.10 for 116 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate commerce. The transactions are as follows:

<b>SELLER'S NAME</b>	<b>LOTS</b>	<b>COMMODITY</b>	<b>DATES ACCEPTED</b>	<b>DATES DUE</b>	<b>AMOUNT PAST DUE</b>
Golman-Hayden Company Dallas, TX	116	Mixed Fruits & Vegetables	11/13/06 to 09/27/07	11/23/06 to 10/07/07	\$597,428.10

11. On October 10, 2007, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §701 et seq.) in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. This petition was designated case number 07-34995. Respondent admits in bankruptcy Schedule D. Creditors Holding Secured Claims that it owed 32 “Produce Vendors with trust fund claims pursuant to the Perishable Agricultural Commodities Act of 1930 (PACA)” undisputed amounts that totaled \$1,758,475.87, including \$652,830.75 which Respondent acknowledged that it owed to produce vendor Golman-Hayden Company.

12. On June 17, 2008, the United States Bankruptcy Judge issued an Order approving a settlement reached between Robert J. Milbank, Jr., Chapter 7 Trustee and certain PACA trust claimants pursuant to which at least \$40,000.00 [50 % of the amounts recovered by the Chapter 7 Trustee] would be remitted to the PACA Claimants c/o Meuers Law Firm, P.L. to be held in trust for pro-rata distribution to all qualified PACA trust beneficiaries of the Debtor.

13. The gross pro-rata share of PACA trust proceeds to be distributed to seller Golman-Hayden Company will be about 3 % of its trust claim, or approximately \$18,000, before the payment of this seller’s share of legal fees and expenses.

#### Conclusions

14. The Secretary of Agriculture has jurisdiction over Respondent Rogers Produce, Inc. and the subject matter involved herein.

15. Rogers Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during November 23, 2006 through October 7, 2007, by: (1) failing to make full payment promptly of the purchase prices, or balances thereof, in the total amount of \$597,428.10 to seller Golman-Hayden Company for 116 lots of fruits and vegetables, all being perishable agricultural commodities, which Rogers Produce, Inc. purchased, received, and accepted in interstate and/or foreign commerce; (2) failing to pay 32 produce vendors with PACA trust claims amounts totaling \$1,758,475.87 (including \$652,830.75 owed to Golman-Hayden Company), which were scheduled as undisputed secured claims in Respondent's bankruptcy proceeding; and (3) because an approved gross pro-rata distribution of at least \$40,000.00 to certain qualified PACA trust beneficiaries in Respondent's bankruptcy will only pay about 3 % of their trust claim amounts.

#### Order

16. Rogers Produce, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

17. This Order shall take effect on the 11th day after this Decision becomes final.

#### Finality

18. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.  
this 6<sup>th</sup> day of April 2009

Jill S. Clifton  
Administrative Law Judge

Hearing Clerk's Office  
U.S. Department of Agriculture  
South Bldg Room 1031  
1400 Independence Ave SW  
Washington DC 20250-9203  
202-720-4443  
Fax: 202-720-9776

**APPENDIX A**

**7 C.F.R.:**

**TITLE 7—AGRICULTURE**

**SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

**PART 1—ADMINISTRATIVE REGULATIONS**

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**SUBPART H—RULES OF PRACTICE GOVERNING FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

**VARIOUS STATUTES**

...

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition,

and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the 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. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145