

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	PACA Docket No. D-01-0032
	)	
KOAM Produce, Inc.,	)	
	)	<b>Decision and Order</b>
Respondent	)	<b>Following Reargument</b>

**Decision Summary**

[1] Respondent KOAM Produce, Inc. (frequently herein “KOAM”), during April through July 1999, committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), at the Hunts Point Terminal Market in the Bronx, New York, New York. Under the Perishable Agricultural Commodities Act (frequently herein “the PACA”), the acts of the employee acting within the scope of his employment are deemed to be the acts of the employer. KOAM’s violations of the PACA were committed when its employee Marvin Friedman made 42 illegal cash payments to United States Department of Agriculture (frequently herein “USDA”) produce inspector William J. Cashin, in connection with federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from 11 sellers. KOAM is responsible under the PACA for the conduct of its employee Marvin Friedman, who, in the scope of his employment, paid the unlawful bribes or gratuities to the USDA produce inspector, even if everyone at KOAM except Marvin Friedman was ignorant of Marvin Friedman’s actions. Making illegal payments to a USDA produce

inspector was an egregious failure by KOAM to perform its duty under the PACA to maintain fair trade practices. The remedy of revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA.

### **Procedural History**

[2] The Complainant is the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently herein "AMS"). On May 3, 2002, AMS filed its Motion to Amend Complaint, together with the proposed Amended Complaint.

[3] KOAM opposed the Motion to Amend Complaint, in its Opposition filed June 18, 2002. By Order dated June 21, 2002, I granted the Motion to Amend Complaint. On July 29, 2002, KOAM filed its Answer to Amended Complaint.

[4] The hearing was held before me in New York, New York, on March 25, 2003, and on November 17 and 18, 2003. AMS was represented by Andrew Y. Stanton, Esq., Ann K. Parnes, Esq., and Christopher Young-Morales, Esq., each with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture. KOAM was represented by Paul T. Gentile, Esq., of the law firm of Gentile & Dickler, New York, New York.

[5] AMS called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. KOAM called one witness and submitted 4 exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. The transcript is referred to as Tr.

[6] This "Decision and Order Following Reargument" REPLACES my "Decision and Order" issued initially on April 18, 2005. KOAM timely filed its Petition to Rehear and Reargue (frequently herein "KOAM's Reargument"), in accordance with Rule 1.146 of the Rules of

Practice (7 C.F.R. § 1.146), on May 27, 2005. AMS timely filed its Response on July 1, 2005.

[7] KOAM did not actually seek rehearing; what KOAM filed is reargument. Prompted by KOAM's Reargument and AMS's Response, I have made changes, which are included herein. KOAM's Reargument refers in part to evidence that was not presented in this case (*See* Tr. 181-83), and to the Baiardi case (which is not before me). Nevertheless, KOAM's Reargument did call attention to issues that I have now addressed more fully, including my finding that the testimony of William J. Cashin was credible.

### **Findings Of Fact**

[8] After careful consideration of all the evidence before me, I accept as credible the testimony of William J. Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong "C.J." Park. *See* paragraphs [30] through [34] regarding my acceptance of William Cashin's testimony as credible.

[9] KOAM Produce, Inc. is a New York corporation, incorporated on or about June 18, 1996, holding PACA license no. 961890, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474. CX 1.

[10] KOAM began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997. Tr. 270.

[11] KOAM Produce, Inc. was owned in equal shares (50% each) by Jung Yong "C.J." Park (frequently herein "Mr. Park") and his wife, Kimberly S. Park (frequently herein "Mrs. Park") at all times material herein and particularly in 1999. CX 1, Tr. 269, 283-84.

[12] KOAM's Vice-President and Secretary were Mr. Park; KOAM's President and Treasurer were Mrs. Park; and KOAM's only two Directors were Mr. and Mrs. Park, at all times material

herein and particularly in 1999. CX1, Tr. 269, 283-84.

[13] KOAM hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Tr. 270. Marvin Friedman became a produce buyer in October 1998. Tr. 270-71, 274. Marvin Friedman continued to work for KOAM at all times material herein, and particularly in 1999.

[14] Marvin Friedman was arrested on or about October 27, 1999. Tr. 271.

[15] On February 25, 2000, Marvin Friedman pled guilty to and was convicted of each count of the 10-count indictment in Case No. 99 Crim. 1095, in the United States District Court for the Southern District of New York. CX 3, CX 18.

[16] On September 20, 2000, Marvin Steven Friedman was found to have paid \$29,550<sup>1</sup> in bribes to USDA produce inspectors at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus one day on each of the 10 counts, to run concurrently; followed by supervised release of 2 years on each count, to run concurrently; plus a \$300 fine on each counts, for a total of \$3,000; plus a \$100 special assessment on each count, for a total of \$1,000. CX 19, CX 4.

[17] The 10 counts of "Bribery of a Public Official" from April 6, 1999 through July 1, 1999, of which Marvin Friedman was convicted (CX 4), were based on the undercover work of William J. Cashin. Tr. 115-197.

[18] William J. Cashin was a USDA agricultural commodities grader, also called produce inspector, at the Hunts Point Terminal Market from July 1979 until August 1999. Tr. 192.

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<sup>1</sup> The \$29,550 in bribes paid by Marvin Steven Friedman was determined through the sentencing process (CX 19 p. 20; CX 4 p. 9); the bribes specified in the Indictment totaled \$2,100. CX 3.

[19] For about 19 years of those 20 years (from 1980 through August 1999), William J. Cashin, in the course of his USDA work, accepted unlawful bribes or gratuities from many produce workers. Tr. 177-78, 192.

[20] William J. Cashin had agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation, by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 133-34, CX 16.

[21] Beginning on March 23, 1999, William Cashin no longer kept the unlawful bribes or gratuities that were given to him, but instead turned them over to the law enforcement authorities over at the end of each work day. Tr. 194.

[22] More than half (approximately seven to eight) of the approximately 12 to 13 USDA agricultural commodities graders who were working at the Hunt's Point Terminal Market in March or April 1999, were convicted of taking bribes (including William Cashin). Tr. 161-62.

[23] In response to William J. Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. See CX 17. The portions of the FD-302s which correlate to the unlawful bribes or gratuities that Mr. Cashin received from Marvin Friedman are organized for each count of the Indictment, together with applicable inspection certificates, which show KOAM as having applied for the inspections. Tr. 136-97, CX 6 through CX 16.

[24] Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM each time he paid an unlawful bribe or gratuity to William Cashin as reported in CX 6 through CX 16, and as reflected in each of the 10 counts of which he was convicted, regardless of whether anyone at KOAM directed him to make the unlawful payments, provided him the money

to make the unlawful payments, or was even aware that he was making the unlawful payments.

Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 178-80, 184-86, 193.

[25] Factors which show that Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM, when he paid the unlawful bribes and gratuities, include the following: (a) Marvin Friedman paid the unlawful bribes and gratuities while performing, or in connection with, his job responsibilities; (b) the unlawful payments were incorporated into Marvin Friedman's regular work routine for KOAM; (c) Marvin Friedman was at his regular work place at KOAM when he paid the unlawful bribes and gratuities; (d) Marvin Friedman made the unlawful payments during his regular work hours for KOAM; (e) Marvin Friedman made the unlawful payments on a regular basis; (f) Marvin Friedman appeared to be acting on behalf of his employer KOAM; and the unlawful payments could have benefitted KOAM.

Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 307; CX 19 pp. 15-17.

[26] There is no evidence that Marvin Friedman or anyone else at KOAM was intimidated or coerced into making the unlawful payments. The only evidence on that issue came from William Cashin, who testified that he never specified a payment amount and never pressured anyone at Koam to pay. William Cashin testified that he kept Marvin Friedman apprised of the number of inspections he had performed, and that Marvin Friedman gave him \$50 for each inspection. Tr. 164, 178-80, 184-86, 193.

## Discussion

[27] Here, there is no question whether KOAM's employee Marvin Friedman paid unlawful bribes or gratuities to USDA produce inspector William Cashin during April 6, 1999 through July 1, 1999, in connection with produce inspections requested by KOAM. He did.

Unquestionably. The only question is whether what Marvin Friedman did, causes his employer KOAM to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[28] The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

[29] Both the D.C. Circuit<sup>2</sup> and the 6th Circuit<sup>3</sup> have affirmed the PACA's use of its principal-agency provision under circumstances like those here. William J. Cashin, the USDA produce inspector (agricultural commodities grader), testified about the circumstances. Tr. 123-26, 128-29, 131-32.

Mr. Young-Morales: While he was at KOAM, as an employee, did Marvin Friedman ever give you any money in connection with any of your inspections?

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<sup>2</sup> *Post & Taback, Inc. v. USDA*, 64 Agric. Dec. \_\_\_\_ (February 11, 2005), 123 Fed. Appx. 406 (D.C. Cir. 2005).

<sup>3</sup> *H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir. 2003).

Mr. Cashin: Yes, he did.

Mr. Young-Morales: Was the money that he gave you in payment of your normal inspection fee?

Mr. Cashin: No.

Mr. Young-Morales: that you have described?

Mr. Cashin: Not at all. By the time Marvin came along, KOAM had already established an account, and their billing - - they were on the billing system.

Mr. Young-Morales: Were the payments made by Marvin Friedman, that you've described, done in connection with each inspection?

Mr. Cashin: Yes, they were.

Mr. Young-Morales: How much were those payments per each inspection?

Mr. Cashin: Fifty dollars per inspection.

Mr. Young-Morales: And approximately what year was it that Marvin Friedman started making payments to you?

Mr. Cashin: Marvin came along, to the best of my recollection, about 1996 or '97.

Mr. Young-Morales: Just to back up very quickly, do you know, do you remember when Ralph died?

Mr. Cashin: It wasn't long after the Company opened. It was some time in late '96 or early '97, as I recall.

Mr. Young-Morales: To your knowledge, were Ralph and Marvin Friedman at Koam at the same time ever?

Mr. Cashin: No. Not that I was aware of.



Mr. Young-Morales: How would - - were payments give(n) (to) you in connection with every inspection that you made?

Mr. Cashin: Yes.

Mr. Young-Morales: Okay. How would Marvin Friedman go about making the payments to you?

Mr. Cashin: After I was finished examining all the products, I used to write the inspections in the office upstairs. Marvin sat in the office all the way in the back. You go through the door, there's a few other offices, and he was in the back. And there was an extra desk there, and it was warm and it was dry, and I would sit there at the desk and I would write -- and he would ask me how many and I would tell him, and he would count the money and hand it to me.

Mr. Young-Morales: Was anyone else ever present during that transaction that you've described?

Mr. Cashin: No.

Mr. Young-Morales: What was your understanding as to why you were receiving payments in connection with your inspections at Koam?

Mr. Cashin: I was helping Marvin.

Mr. Young-Morales: When you say help, what was your understanding of the meaning of help? What do you mean by help? In connection with an inspection.

Mr. Cashin: Helping in connection with an inspection came in any one of three ways. Altering the percentage of defects, especially the condition defects, in such a way that it was over the good delivery marks. Frequently, someone like Marvin and Ralph, too, would examine product, see a few decayed specimens in a box or a couple of boxes, and then call an inspection, and want that

particular load of product - - produce, written so that the percentage of defects, especially decay, was over the good delivery mark.

Another way of help was the number of containers. Frequently, the amount that was inside -- the amount present at the time when I would arrive to do the inspection was less than what it originally was unloaded or came in as, and they would want the number of containers increased so it more closely matched the manifest.

The other way was to alter the temperatures. They would want the temperatures recorded on, or written on the certificate to be of a more acceptable level so it would lend legitimacy to the certificate.

Tr. 123-26.

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Mr. Young-Morales: Okay. How would Marvin Friedman have let you know that he wanted help, any kind of help, on a particular load?

Mr. Cashin: It was our, it was my policy with Marvin that when I arrived at Koam, I would find him, talk to him. Sometimes he was downstairs. Sometimes he was upstairs. And then we would discuss the various loads. And he would tell me I need a little help with this one. This one shows problems; you'll see it. This one - - and he and I would discuss the different things and he would tell me he needed help on things and what he needed help on.

Mr. Young-Morales: Were the figures that you had put down on an inspection, on an inspection certificate, when you gave help, an accurate reflection of the produce you were actually inspecting?

Mr. Cashin: No.

Tr. 128-29.

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Mr. Young-Morales: If you -- and on what percentage of the loads that you inspected at Koam would you actually give help?

Mr. Cashin: I would estimate 75 to 80 percent.

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Mr. Young-Morales: If you did state the results inaccurately on any particular inspection back then, can you state today why you would have done so?

Mr. Cashin: Yes, I can.

Mr. Young-Morales: Why?

Mr. Cashin: It goes back to the original deal of help in any one of the three ways, help meaning the number of containers, help meaning to raise the percentage of defects, or to put down the temperatures at the correct level.

Mr. Young-Morales: In the event that - - well, even if the inspection certificates that you prepared were accurate, did you still get paid by Marvin Friedman?

Mr. Cashin: Yes, I did.

Mr. Young-Morales: What was your understanding as to why that would occur?

Mr. Cashin: I - - my understanding in that sense was either he was just saying thank you for helping in general, and also, it was my understanding that he was possibly paying for future help, just in general.

Tr. 131-32.

[30] I find the testimony of William J. Cashin (Tr. 115-197), to be credible. KOAM's

Reargument challenges me to make more specific findings regarding William Cashin's credibility. There are factors that could impeach William Cashin's credibility: (a) William Cashin is a convicted felon (convicted of taking bribes such as those at issue here). (b) William Cashin admits to a 19-year history of taking unlawful bribes and gratuities (the last 5 months was for the benefit of the investigation). Tr. 177-78, 192. (c) William Cashin was given a light sentence; he was not required to serve jail time (beyond "time served", the day he was arrested, and he was not taken to jail); and he was not required to pay restitution or a fine. Tr. 160-161. (d) William Cashin was allowed to retire and was not asked to waive his Civil Service Retirement System pension. Tr. 161, 192, 195.

[31] William Cashin's taking of unlawful bribes and gratuities ("extra money", as Mr. Cashin thought of it, Tr. 194) demonstrates a disregard for honesty and truthfulness in the past.<sup>4</sup>

Nevertheless, William Cashin appeared to me to be telling the truth when he testified before me.

[32] The incentives that motivated William Cashin to cooperate in the investigation, and then to testify in numerous cases, may well have included the hope of a lenient sentence (which he got) and favorable treatment from his employer USDA (which he got). William Cashin did not need to report or testify untruthfully to receive the benefits of cooperating; he could receive the benefits of cooperating by reporting truthfully and testifying truthfully. There would have been no greater gain and thus, there was no incentive, to report or testify untruthfully.

[33] In observing Mr. Cashin, I found his testimony, on both direct- and cross-examination, to

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<sup>4</sup> William Cashin failed initially to report and pay income tax on the unlawful bribes and gratuities he received. This is an additional illustration of disregard for honesty and truthfulness in the past, which is known to me not from this case, but from a similar case. *See* M. Trombetta & Sons, Inc., 64 Agric. Dec. \_\_\_ slip op., PACA Docket No. D-02-0025, September 27, 2005. Still, I find the testimony of William Cashin to be credible.

be intelligent, with good recall, and responsive, attentive, and thoughtful. Mr. Cashin's demeanor was otherwise unremarkable and sent no signal that I should be cautious in accepting his statements as true.

[34] Most persuasively to me, Mr. Cashin's testimony was essentially consistent with the all of the other evidence,<sup>5</sup> including the in-Court assertions of Marvin Friedman and his lawyer and the other documentary evidence, and the testimony of Mr. Park and the other witnesses.

[35] Marvin Friedman paid the unlawful bribes and gratuities within the scope of his employment as KOAM's produce buyer. As Judicial Officer William G. Jenson recently commented in a similar case:

Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

In re: M. Trombetta & Sons, Inc., 64 Agric. Dec. \_\_\_ slip op., PACA Docket No. D-02-0025, September 27, 2005.

[36] Marvin Friedman paid the unlawful bribes and gratuities while performing, or in connection with, his job responsibilities; the unlawful payments were incorporated into his regular work routine for KOAM; he was at his regular work place at KOAM when he paid the unlawful bribes and gratuities; he made the unlawful payments during his regular work hours for

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<sup>5</sup> There is one discrepancy between William Cashin's testimony and other evidence. Mr. Cashin testified that, when Marvin Friedman paid him, there was never anyone else from KOAM present. Tr. 166-67. Mr. Cashin's testimony appears to conflict with notes from June 28, 1999 in one of the FBI form FD-302s, CX 14, p. 2, which suggests that C.J. last name unknown, was present (or at least nearby) when Marvin (Friedman) paid William Cashin \$300 (six \$50 bills). I find William Cashin's testimony to be reliable, despite the apparent conflict.

KOAM; he made the unlawful payments on a regular basis; he appeared to be acting on behalf of his employer KOAM; and the unlawful payments could have benefitted KOAM. These factors show that Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM, when he paid the unlawful bribes and gratuities. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 307; CX 19 pp. 15-17.

[37] Marvin Friedman was acting within the scope of his employment when he paid the unlawful bribes and gratuities, even if KOAM did not authorize or direct him to do so, and even if KOAM was unaware of his doing so. *H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir. 2003).

[38] KOAM argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman's criminal activity here cannot have been within the scope of his employment and cannot become KOAM's violation of the PACA. KOAM's argument has already been addressed by the United States Court of Appeals, the District of Columbia Circuit, in *Post & Taback, Inc. v. USDA*:

Post & Taback's argument that the Secretary should have looked to New York Penal Law § 20.20 to determine "when ... a criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable" is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law concept, such as "the scope of employment," the Supreme Court has directed that we rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision Post & Taback advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

*Post & Taback, Inc. v. USDA*, 64 Agric. Dec. \_\_\_\_ (February 11, 2005), 123 Fed. Appx. 406 (D.C. Cir. 2005) (copy enclosed to counsel).

[39] KOAM is responsible under the PACA for the unlawful bribes and gratuities Marvin Friedman paid in connection with the produce inspections ordered by KOAM. 7 U.S.C. § 499p. After careful review of the evidence as a whole, I am unable to determine whether anyone at KOAM besides Marvin Friedman was involved in making the unlawful payments. Yet the evidence on that subject, together with the more than six years of experience AMS has had with KOAM since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with KOAM and KOAM's principals.

[40] It is difficult to believe that Marvin Friedman paid the unlawful bribes and gratuities out of his own pocket, even if he was the most highly compensated employee at KOAM, at about \$50,000 per year. CX 5. He apparently received no bonuses in addition. Tr. 274-75. The evidence fails to prove whether the money Marvin Friedman gave unlawfully to USDA inspectors was his own money, KOAM's money, Mr. or Mrs. Park's money, or money from some other source.

[41] Mr. Park testified that neither he, nor Mrs. Park to his knowledge, at any time, authorized, directed, or had knowledge that Marvin Friedman was paying money to inspectors. Tr. 286. Mr. Park testified that he had not known that Marvin Friedman was giving money to the USDA produce inspectors until after Mr. Friedman was arrested; that he was not present on June 28, 1999 when Marvin Friedman paid William Cashin, despite a notation to the contrary in the FBI form FD-302 (*see* footnote 5; CX 14, p. 2); and that he was unaware that Marvin Friedman's attorney represented to the Court during sentencing, that Marvin Friedman's letter to the Court said that his employer directed him to pay bribes. Tr. 271-72, 278-79, 283. The letter is not in evidence, as access to it is apparently restricted. Tr. 339. Perhaps, as KOAM argues, Marvin

Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the Court that there was no factual support in the record that the employer directed this scheme. Tr. 329. CX 19 pp. 15-17.

[42] Marvin Friedman was not a witness before me. Neither KOAM nor AMS nor I had the opportunity to see Marvin Friedman confronted or cross-examined. The hearsay evidence suggesting that someone at KOAM besides Marvin Friedman may have involved in paying the unlawful bribes and gratuities is not sufficiently reliable. The evidence fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors. The most valuable information on this topic, in my opinion, was the prosecutor's statement at Marvin Friedman's sentencing on September 20, 2000, which includes, in part, the following:

THE COURT: I will listen to you for anything the government would like to tell me in connection with sentence.

MR. BARR: Thank you, your Honor, and I will be brief because most of my arguments have been set forth in some detail already in our memorandum.

With respect to the minor role issue, your Honor, essentially Mr. Krantz's argument hinges on the way that he is framing the issue and the people involved. The government views it differently. This is really a two-person crime. There is a briber, mainly (sic) the businessman wholesaler, and a bribee, namely the produce inspector.

The inclusion of Mr. Friedman's employer in the context here I think is inappropriate based on the record before your Honor. While Mr. Krantz has asserted it to the court there is no factual support in the record that the employer directed this scheme. Mr. Friedman did not provide the



government or probation with any details on that allegation. So I think that is not really properly before the court. There is no factual foundation for it.

It may be true but it is not something that has ever been set forth. And so we find ourselves at a loss to be able to reply to something like that.

With respect to the relative culpability of the remaining players, namely, the inspector and the wholesaler, while it is certainly true that the public official has abused his or her trust when he or she commits bribery, that is an inherent component of the offense and under Mr. Krantz's logic essentially every bribe payer would be entitled to the inference of being less culpable than every bribe recipient. And I don't think that is the law and I don't think that it's even a fair inference.

In this case the inspectors got \$50 per inspection. The wholesaler got, we believe based on our efforts, something more than \$50. Putting our finger on the exact amount, as we told probation and the court, is difficult, but it is surely in a magnitude far greater than \$50.

While it is true, as Mr. Krantz points out, that the primary beneficiary is the company that Mr. Friedman works for, it is quite clear to us that the individual salesman who helps the company make money looks better in the company's eyes and in a competitive atmosphere such as the Hunt Point Market that is a significant advantage for any salesman.

CX 19, pp. 15-17.

[43] Whether Marvin Friedman's unlawful payments were, or were not, being made with Mr. or Mrs. Park's involvement or awareness, would make no difference in the sanction recommended by AMS. Mr. Basil W. Coale, Jr. was AMS's sanction witness. Following is an excerpt of Mr. Coale's testimony on cross-examination. Tr. 319-22.

Mr. Gentile: Now the - - you've recommended on behalf of the Agency that the license for

Koam, that it should be revoked; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: In doing so, have you taken into consideration the employment sanctions that follow such a sanction?

Basil W. Coale, Jr.: Yes.

Mr. Gentile: So it's your understanding that should the sanction be granted as you requested, that those responsibly connected with Koam Produce would not be permitted to be employed within the industry for at least a year; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: And that would include, by obvious definition, the active owners such as C.J. Park; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: And does that seem appropriate to you if Mr. Park was not aware, did not have knowledge of what Mr. Friedman was doing?

Basil W. Coale, Jr.: Under the Act, that's how it's written.

Mr. Gentile: But you've said you've taken into consideration that there is a sanction. Is it part of your consideration that he should, based upon your recommendation, not be permitted to work in this industry, even though he didn't know what was going on? Is that part of your recommendation?

Basil W. Coale, Jr.: The recommendation is that, based on the violations, that the license should be revoked, and now the sanctions are defined by the statute and flow from that finding.

Mr. Gentile: And if the sanction was a civil penalty, a fine, some sort of suspension, that would

have a different effect on Mr. Park and anyone else responsibly connected; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: As part of your recommendation, have you taken into consideration whether or not Koam should lose its license or not based upon the actual knowledge of the owners of the Company?

Basil W. Coale, Jr.: The, that issue, we believe, was -- is dealt with in Section 16, is that the actions of the employees and the scope of their employment are the actions of the licensee.

Mr. Gentile: I understand what the section says. I've asked you whether or not you've taken into consideration whether or not the actual knowledge by the owner is a factor to be considered?

Basil W. Coale, Jr.: I guess you could say it's what we would recognize could be the position of someone, but it's not a driving factor that's considered, whether or not the principals knew or whether it's necessary to prove that the principals knew. It's that the actions of the employee and the scope of the employment are the actions of the licensee.

Mr. Gentile: Would you say, based upon what you just said, that it's the Agency's position that it's irrelevant as to whether or not there was actual knowledge by the owners?

Basil W. Coale, Jr.: I can't argue with that word.

Mr. Gentile: Does that mean yes or no? Does that mean you agree that it's the Agency's position that it's irrelevant --

Basil W. Coale, Jr.: Yes.

Mr. Gentile: -- as to whether or not the owners actually knew?

Basil W. Coale, Jr.: Yes.

Tr. 319-22.

[44] Mr. Coale had previously testified to explain AMS's basis for recommending revocation as the only appropriate sanction. Tr. 309-15.

Mr. Young-Morales: Are you aware of the sanction recommendation that Complainant recommends in this case?

Basil W. Coale, Jr.: Yes, I am.

Mr. Young-Morales: How are you aware of the sanctions?

Basil W. Coale, Jr.: I participated in the development of the recommendation.

Mr. Young-Morales: And what is the recommendation in this case?

Basil W. Coale, Jr.: The revocation of PACA license.

Mr. Young-Morales: What's the basis for your sanction recommendation?

Basil W. Coale, Jr.: There are several factors that were considered. One is the evidence of paying as part of the criminal investigation conducted by the FBI in the 42 different inspection certificates involved with the bribery.

As an aggravating factor, there is Mr. Cashin's testimony that the bribes were paid for a period much longer than that that is documented by the criminal investigation.

There is the factor to consider of the impact to the industry of bribes. The potential impact is very great. The fresh products branch of the Agricultural Marketing Services issues approximately 150,000 inspection certificates in a year. This come out to average out to hundreds a day. Shippers, growers, brokers, carriers, all use the results of those certificates to resolve their disputes, to evidence that they met their contract terms or to document the condition of product or products.

Paying bribes to an inspector undermines the credibility of the entire inspection process,

and can impact how these traders resolve their disputes.

In addition, there's the fact of in a competitive market, especially like Hunt's Point, if one firm would know, would be paying bribes and another firm finds out, a competitive firm, they may feel to (sic) need to pay bribes just to compete.

And then, in addition, there's the deterrent effect. The Agency wants to not only deter with sanctions, this individual from repeating, this respondent from repeating its violations, but, in addition, deter any other firms who may be considering similar violations.

Mr. Young-Morales: Now in this case, Complainant's intention is that the payment of bribes to William Cashin were a violation. Does the fact that Mr. Cashin would -- excuse me. Does the fact that Mr. Cashin was a USDA employee have any effect on Complainant's sanction recommendations?

Basil W. Coale, Jr.: No, it does not.

Mr. Young-Morales: Why doesn't it?

Basil W. Coale, Jr.: Paying a bribe is a very serious violation of the PACA. Whether the bribe is paid to another industry member, another trader, or to a USDA employee such as an inspector, the fact that the bribes in this case were paid to - - excuse me, to a USDA produce inspector, does not excuse the fact that the bribes were paid.

Mr. Young-Morales: Does Complainant recommend any kind of civil penalty in this case as an alternative, possible alternative, to license revocation? And this is based on your sanction recommendation and on what you've heard in the court case so far.

Basil W. Coale, Jr.: No, it does not believe that a monetary penalty would be appropriate in this situation.

Mr. Young-Morales: Why not?

Basil W. Coale, Jr.: Paying bribes is a very serious violation of PACA, and in this specific instance, it went on for a long period of time. There's a great potential for damage to the industry in the way it does business, and this calls for the, only the most severe sanction, and that sanction is revocation of PACA license.

Mr. Young-Morales: In the course of the proceedings as a whole, have you heard anything with respect to Marvin Friedman paying bribes for expedited access to inspectors?

Basil W. Coale, Jr.: Not that I recall.

Mr. Young-Morales: Are you aware that it's a potential defense of the Respondent in this case?

Basil W. Coale, Jr.: Yes, I am.

Mr. Young-Morales: And, Mr. Coale, with that potential defense in mind, have you reviewed CX-18? And do you have a copy in front of you?

Basil W. Coale, Jr.: I have the official copy right here.

Mr. Young-Morales: Have you read it in its entirety?

Basil W. Coale, Jr.: Yes, I have.

Mr. Young-Morales: Could I direct you to page 17 of that document? Well, first of all, what is this document?

Basil W. Coale, Jr.: This is a copy of the February -- a transcript of the February 25th proceeding involving United States of America v. Marvin Steven Friedman.

Mr. Young-Morales: Would this be the plea agreement transcript, so to speak?

Basil W. Coale, Jr.: Where Mr. Friedman entered his pleas to the criminal proceeding?

Mr. Young-Morales: Uh-huh.

Basil W. Coale, Jr.: Yes.

Mr. Young-Morales: If I could direct you to page 17. Well, excuse me. Let me direct you to page 16. Could I ask you -- and you may have to familiarize yourself with it again, but could I ask you who Mr. Krantz is in this transcript?

Basil W. Coale, Jr.: It is my understanding that he is Mr. Friedman's counsel.

Mr. Young-Morales: All right. And on line 19 -- excuse me, line 17, could you read the question by the Court?

Basil W. Coale, Jr.: The Court says, "Mr. Krantz, do you know of any valid defense that would prevail at a trial of Mr. Friedman?"

Mr. Young-Morales: And what is Mr. Krantz's response?

Basil W. Coale, Jr.: "No, Your Honor."

Mr. Young-Morales: And the Court's question?

Basil W. Coale, Jr.: The next question is, "Do you know any reason why Mr. Friedman should not be permitted to plead guilty?"

Mr. Young-Morales: And the answer?

Basil W. Coale, Jr.: "No."

Mr. Young-Morales: And the next question, and I'll stop there.

Basil W. Coale, Jr.: It appears that the Court says, "Mr. Friedman, tell me in your own words what you did in connection with the crime to which you are entering a plea of guilty?"

Mr. Young-Morales: Could you please read his answer on the next page?

Basil W. Coale, Jr.: "The defendant: On approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the

payments was to influence the outcome of the inspection of fresh fruit and produce conducted at Koam Produce, Inc., located in the Bronx. I was an employee of Koam at the time. I acted knowingly and intentionally, and I knew the payments were unlawful."

Mr. Young-Morales: And do you remember, ultimately, what Mr. Friedman pled guilty to when this transcript was all said and done? If not, I --

Basil W. Coale, Jr.: I believe it was 10 counts of bribery.

Mr. Young-Morales: Thank you, Your Honor. I have no further questions. Well, I may have -- well, yes.

Mr. Young-Morales: Even absent this, the evidence in this transcript, or the information contained in this transcript, and absent the evidence that we have heard, much of the evidence that we've heard so far, if Respondent were to have shown that Marvin Friedman paid bribes to William Cashin for expedited inspections, would that change, do you think, your recommended sanction today?

Basil W. Coale, Jr.: No.

Mr. Young-Morales: Why?

Basil W. Coale, Jr.: Illegal payments made to a produce inspector undermine the credibility of the inspection process and therefore that could lead to industry-wide impact. And, in addition, even if the inspections themselves are not fraudulent factually, times, dates, temperatures, count, all that is still correct, it's still not a fair trading practice because other competitors on the market, then someone is moved getting moved to the back of the line and somebody else is moving to the front to get expedited treatment. So that's an unfair advantage as well.

Tr. 309-15.



## Conclusions

[45] Marvin Friedman, an employee of Respondent KOAM Produce, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture (USDA) inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[46] Marvin Friedman was acting as KOAM Produce, Inc.'s agent, when he did what is described in paragraph [45]. 7 U.S.C. § 499p.

[47] Marvin Friedman was acting within the scope of his employment, when he did what is described in paragraph [45]. 7 U.S.C. § 499p.

[48] Marvin Friedman's willful violations of the PACA are deemed to be KOAM's willful violations of the PACA. *In re: H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[49] KOAM Produce, Inc., through its employee and agent Marvin Friedman, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[50] KOAM is responsible under the PACA, even if ignorant of the misconduct of its employee Marvin Friedman, who paid the unlawful bribes or gratuities to the USDA produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. USDA*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[51] KOAM willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[52] Respondent KOAM 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)).

[53] KOAM's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 Agric. Dec. 763, 780-781 (2003).

[54] Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA. Tr. 309-15. KOAM's violations were so egregious as to warrant revocation whether Marvin Friedman's unlawful cash payments (a) were a bribe or were a gratuity; (b) were associated with certificates that were falsified or with certificates that were truthful; (c) were or were not paid in response to intimidation or coercion (and the evidence in this case fails to prove intimidation or coercion; see paragraph [26]); and (d) were or were not known to Mr. or Mrs. Park or anyone else or KOAM (and the evidence in this case fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors; see paragraph [42]).

[55] Any lesser remedy than revocation would not be commensurate with the seriousness of KOAM's violations, even though many of KOAM's competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them. Tr. 309-15.

### Order

[56] Respondent KOAM Produce, Inc.'s PACA license is revoked.

[57] The revocation of Respondent KOAM Produce, Inc.'s PACA license shall become effective on the 11th day after this Decision becomes final.

### Finality

[58] This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

A copy of this Decision and Order Following Reargument shall be served by the Hearing Clerk upon each of the parties, **together with** a copy of *Post & Taback, Inc. v. USDA*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

Done at Washington, D.C.  
this 6th day of January 2006

Jill S. Clifton  
Administrative Law Judge

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