

AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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PERISHABLE AGRICULTURAL COMMODITIES ACT**COURT DECISION**

HAVANA POTATOES OF NEW YORK CORPORATION and HAVPO, INC. v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF AGRICULTURE and UNITED STATES SECRETARY OF AGRICULTURE.

No. 604, Docket 97-4053.

Decided December 19, 1997.

(Cite as: 1997 WL 829211 (2nd Cir.)).

Judicial review - Substantial evidence - Willful flagrant and repeated violations - Failure to make full payment promptly - Sanction policy - License revocation.

The United States Court of Appeals for the Second Circuit, denied the petition for review of the Secretary's decision which revoked petitioners' licenses for committing willful, flagrant, and repeated violations of the PACA, by failing to make prompt payment for produce. The court found that there was substantial evidence to support the Secretary's findings. The court also found that revocation of Petitioners' licenses was an appropriate sanction under the circumstances.

Before: WINTER, Chief Judge, CARDAMONE, Circuit Judge, and POLLACK, District Judge.*

**United States Court of Appeals
Second Circuit**

WINTER, Chief Judge:

Havana Potatoes of New York Corporation and Havpo, Inc., petition for review of an order of the Secretary of Agriculture revoking petitioners' licenses under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a-499t. The Secretary found that petitioners committed willful, flagrant, and repeated violations of Section 2(4) of PACA, 7 U.S.C. § 499b(4), by failing to make prompt payment for produce. Petitioners argue that the Secretary's findings regarding failures to meet the prompt-payment requirement were not supported by

*The Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

substantial evidence and that the Secretary improperly failed to consider sanctions less harsh than revocation of petitioners' licenses. We disagree and deny the petition for review.

PACA requires covered entities, such as petitioners, to "make full payment promptly" for all purchases of perishable agricultural commodities received in interstate commerce. 7 U.S.C. § 499b(4). "Full payment promptly" has been defined as, inter alia, payment, "for produce purchased by a buyer, within 10 days after the day on which the produce is accepted," 7 C.F.R. § 46.2(aa)(5), unless the parties have agreed, in writing and before entering into the transaction, to different payment terms. 7 C.F.R. § 46.2(aa)(11).

The Administrative Law Judge ("ALJ") found that, from February 1993 through January 1994, Havana Potatoes "failed to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of \$1,960,958.74," *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1996 WL 678860, at * 2 (U.S.D.A. Nov. 15, 1996), and that, during the same period, Havpo "failed to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of \$101,577.50." *Id.* at *3. The Judicial Officer ("JO") upheld the ALJ's decision, and the JO's Decision and Order constitutes the final order of the Secretary of Agriculture. *See* 7 C.F.R. § 2.35.

We must uphold the Secretary's factual findings if they are supported by substantial evidence. *See, e.g., Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427 (2d Cir.1996). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). In determining whether the Secretary's findings are supported by substantial evidence, we review the whole record, not just the evidence that supports the Secretary's conclusions. *See, e.g., Williams v. Bowen*, 859 F.2d 255, 258 (2d Cir.1988). Nevertheless, we may not reweigh the evidence or substitute our judgment for that of the Secretary. *See, e.g., Valante v. Secretary of HHS*, 733 F.2d 1037, 1041 (2d Cir.1984). Even if we are inclined to draw different conclusions from those drawn by the Secretary, we will uphold the Secretary's decision so long as it is based on adequate findings sustained by evidence having "rational probative force." *Williams*, 859 F.2d at 258 (quoting *Consolidated Edison Co.*, 305 U.S. at 230); *see also Kinney Drugs*, 74 F.3d at 1427.

The Secretary's findings in the instant matter easily meet this deferential standard. The JO relied principally on past-due invoices for unpaid deliveries found in petitioners' files and on the testimony of two investigators for the Department of

Agriculture who reviewed petitioners' records and spoke with Pedro Perez, president of both Havana Potatoes and Havpo. The invoices reflected that, as of January 1994, Havana Potatoes owed over \$1.9 million and Havpo owed over \$100,000 to sellers of produce. One of the investigators testified that Perez admitted that the estimates of \$1.9 million and \$100,000 of overdue debt to sellers "seemed reasonable."

It is agreed that petitioners ultimately paid the amounts listed in the invoices reviewed by the investigators, but another investigator testified that the debts were paid after the PACA-specified dates. That investigator also testified, and the ALJ found, that although the past-due amounts shown by the invoices had been paid by April 1995, Havana Potatoes had accumulated new overdue debts of approximately \$1.2 million from March 1994 to April 1995 and Havpo had accumulated new debts of approximately \$58,000 from August to November 1994. *See In re Havana Potatoes*, 1996 WL 678860, at *3.

Petitioners' principal argument is that the invoices were unreliable evidence of late payment because they were insufficient by themselves to prove that the goods listed on the invoices were actually delivered, that the dates listed on the invoices were dates of receipt (as opposed to, for example, dates of shipment), that petitioners had not made other payment arrangements under 7 C.F.R. § 46.2(aa)(11), or that petitioners had accepted the produce indicated on the invoices. The JO, noting that petitioners introduced no evidence showing that the invoices were inaccurate, rejected petitioners' arguments. *See In re Havana Potatoes*, 1996 WL 678860, at *14-16.

We see no error in the JO's findings based on the invoices, especially given the lack of any evidence showing that the invoices were inaccurate. *Cf. Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 606 (D.C.Cir.1987) (reliance on invoices permissible in "absence of a serious, nonspeculative argument that [they] were something other than they appeared to be"); *United Fruit & Vegetable Co. v. Director of Fruit & Vegetable Div., United States Dep't of Agric.*, 668 F.2d 983, 984-85 (8th Cir.1982) (substantial evidence, consisting of petitioner's admission of debts, invoices from unpaid sellers, and testimony from agency investigators, supported Secretary's finding of PACA violation).

Because the record shows that petitioners ultimately paid for the produce reflected on the invoices, the evidence that the produce was actually received and accepted was overwhelming. We agree with petitioners that the dates on the invoices did not necessarily represent when the goods were received; they might have represented only shipment dates. However, PACA requires payment within 10 days after acceptance of the goods, see 7 C.F.R. § 46.2(aa)(5), and the vast majority of the unpaid invoices found by the investigators in January, 1994, had

various dates throughout 1993. Given that the invoices involved perishable commodities and the time between shipment and receipt could not have been lengthy, PACA violations have been shown even if the invoices had dates of shipment. Moreover, the admissions of petitioners' president concerning both the reasonableness of estimates of overdue debts based on the invoices and his desire to pay off those debts over the next 12 to 18 months are themselves sufficient to uphold the ALJ's findings regarding those debts.

Finally, the lack of evidence undermining the conclusion that the dates on the invoices approximated dates of receipt and acceptance is not irrelevant. To be sure, the Secretary bears the burden of persuasion, but a trier does not have to ignore the lack of such evidence given the ease with which petitioners could have produced it, if it existed. For example, if petitioners had made arrangements with sellers for payments over extended periods of time, petitioners need only have directed the investigators to these contracts or have produced the contracts in the hearing before the ALJ. Petitioners introduced the testimony of one Robert Reich, the sales manager of one of petitioners' principal vendors, who claimed that his company had an agreement with petitioners that contained "flexible" repayment terms. Petitioners, however, never brought that alleged contract to the attention of the investigators, never produced the contract in the administrative hearing, and never even alleged that similar agreements with other sellers existed. Reich's testimony alone does not undermine the Secretary's finding that petitioners violated the prompt-payment provisions of PACA. See 7 C.F.R. § 46.2(aa)(11) (parties using different repayment terms must have copy of written agreement in their records, and party claiming existence of such an agreement has burden of proving it). Accordingly, we conclude that the Secretary's finding that petitioners violated PACA was supported by ample evidence.

Petitioners next argue that the Secretary's choice of sanction, revocation of petitioners' PACA licenses, was based in part on an erroneous policy regarding sanctions. Specifically, they contend that the Secretary failed to consider several mitigating circumstances.¹ See *Frank Tambone, Inc. v. United States Dep't of*

¹It is not clear whether less drastic sanctions--short of no sanction--are as a practical matter available. PACA requires buyers of produce to hold receivables and proceeds from the sale of commodities "in trust for the benefit of all unpaid suppliers or sellers of such commodities ... until full payment of the sums owing...." 7 U.S.C. § 499e(c)(2). Were a buyer to be sanctioned, it could find financing difficult to obtain because lenders might anticipate being held to have had constructive or actual notice that any loan repayments were in violation of the buyer's obligations as a trustee for unpaid produce sellers. See *Consumers Produce Co. v. Volante Wholesale Produce, Inc.*, 16 F.3d

Agric., 50 F.3d 52, 55 (D.C. Cir.1995) (noting that Secretary's policy prior to 1991 was that mitigating circumstances are irrelevant to choice of sanctions, but that, since 1991, mitigating circumstances are relevant). We may not overturn the Secretary's choice of sanction unless it is unwarranted in law or so unjustified in fact as to constitute an abuse of discretion. See *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir.1997); *ABL Produce, Inc. v. United States Dep't of Agric.*, 25 F.3d 641, 645 (8th Cir.1994). We find no error here.

PACA allows the Secretary to revoke a violator's license if "the violation is flagrant or repeated." 7 U.S.C. § 499h(a). The Secretary found that petitioners committed willful, flagrant, and repeated violations of PACA over an extended period of time. The JO accepted the recommendation of Department of Agriculture officials, who advised that revocation was appropriate due to the number and seriousness of petitioners' PACA violations, the period over which such violations occurred, the dollar amount, the warning letter petitioners received in November 1991, and the effect of failures to make prompt payment on the produce industry as a whole. See *In re Havana Potatoes*, 1996 WL 678860, at *27-29. Petitioners argue that the JO misapplied the policy announced in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991). There, the Secretary announced that

the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

50 Agric. Dec. at 497. Petitioners contend that the JO failed to consider as relevant circumstances the financial condition of the produce industry, the petitioners' relatively strong payment history, the "devastating effect that the elimination of such [] large dealer[s] would have on the smaller firms," Petitioners' Brief at 36, and the fact that petitioners had, by the time of the ALJ's decision,

1374, 1381-82 (3d Cir.1994); *C.H. Robinson Co. v. Trust Co. Bank, N.A.*, 952 F.2d 1311, 1315-16 (11th Cir.1992).

made "great progress ... towards returning to a timely paying status."² *Id.* at 35. The JO determined that such factors should not be considered in determining the sanction and further found that petitioners' purported mitigating circumstances were not supported by the record. *In re Havana Potatoes*, 1996 WL 678860, at *29.

The JO relied in large part on *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1996 WL 532852 (U.S.D.A. Sept. 12, 1996), appeal docketed, No. 96-4238 (7th Cir. Dec. 30, 1996), where the Secretary further discussed the policy regarding sanctions:

The sanction policy in *In re S.S. Farms Linn County, Inc.* ... does not alter the doctrine ... that, because of the peculiar nature of the perishable agricultural commodities industry, and the articulated congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.

1996 WL 532852, at 14. *Andershock Fruitland* determined that previous compliance with PACA, good-faith efforts to pay suppliers, excuses for nonpayment, and collateral effects of revocation are not relevant to the question of whether revocation is warranted. Rather, the relevant factors are whether the violations entail flagrant or repeated failures to pay more than a de minimis amount, whether the company had paid all sellers by the opening of the administrative hearing, and whether the company is in compliance with PACA. *Id.* The JO in the instant matter followed *Andershock Fruitland*. *In re Havana Potatoes*, 1996 WL 678860, at *29.

We agree in substantial and sufficient measure with the JO. To be sure, isolated failures to pay within ten days or even substantial delays in payments fully cured after a temporary period of financial difficulty might justify mitigation. However, PACA simply cannot be read to allow the continued licensing of a produce buyer in the face of its persistent failures to comply with the statute's terms because of the produce buyer's long-standing financial difficulties. Persistent violations indicate

²At oral argument, counsel for petitioners added a claim that PACA's payment requirements are obsolete in modern produce markets.

willfulness in the sense that a persistent violator must know when placing orders for produce that some or all will not be paid for in a timely fashion under PACA. Moreover, financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds.

Nor is the fact--if indeed fact--that small produce sellers may be injured by the demise of large buyers like petitioners to be considered as relevant to mitigation under PACA. Congress has determined that the balance of rights, obligations, and duties struck by PACA is the proper one, and we are bound by that determination. For the same reason, we cannot entertain petitioners' assertion that an industry-wide crisis has caused rampant late payment--and that other buyers are in more serious noncompliance with PACA than are petitioners--or their related claim made at oral argument, *see supra* Note 2, that PACA's scheme is not consistent with current realities in the market for produce. If PACA's payment requirements are too harsh or even counter-productive, Congress is the body that must make that judgment.

At the time of the administrative hearing--May 1995--petitioners had paid the \$2 million in overdue debts to sellers described above but had accumulated over \$1.2 million in new overdue debts. The JO concluded, therefore, that revocation of petitioners' licenses was warranted. *In re Havana Potatoes*, 1996 WL 678860, at *30. In our view, the JO's conclusion did not constitute an abuse of discretion. Although petitioners did reduce the amount of their overdue debts by the time of the administrative hearing, a pattern of PACA violations extending over two years continued, albeit in lesser--but nevertheless substantial--amounts.

We have considered petitioners' remaining contentions and have found them to be without merit. We therefore deny the petition for review.

PERISHABLE AGRICULTURAL COMMODITIES ACT
DEPARTMENTAL DECISIONS

In re: SOL SALINS, INC.

PACA Docket No. D-97-0015.

Bench Decision and Order issued June 3, 1997 (Excerpted Copy from Hearing Transcript filed June 25, 1997).

Failure to make full payment promptly - Wilful, flagrant, and repeated violations - Good excuses for nonpayment do not negate violation and are not relevant to sanctions - License revocation.

Judge Hunt revoked Respondent's license after finding that it committed wilful, flagrant, and repeated violations of the PACA by failing to make full payment promptly for purchases of perishable agricultural commodities. The defense that nonpayment resulted from the embezzlement of funds by a company official is not sufficient to prevent a finding that Respondent's failure to pay constituted wilful or flagrant violations, and is not relevant to the issue of sanctions.

Timothy Morris, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Bench Decision and Order issued by James W. Hunt, Administrative Law Judge.

The following bench decision (corrected for errors of spelling, punctuation, and transcription) is excerpted from the record of the hearing held June 3, 1997, in Washington, D.C.

Preliminary Statement

This disciplinary proceeding arises under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a et seq.) (PACA). A Complaint, filed on January 27, 1997, alleges that Respondent committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failure to make full payment promptly to 107 sellers in the amount of \$1,198,992.31 for purchases of 784 lots of perishable agricultural commodities in the course of interstate or foreign commerce during the period September 1995 through March 1996.

At the hearing conducted on June 3, 1997, Respondent stipulated that it still has not paid \$696,854.46 of the \$1,198,992.31 alleged in the Complaint. Furthermore, Respondent has further stipulated the difference of \$502,137.85 is

comprised of cash payments made by Respondent and offsets of payments owed Respondent by produce sellers, as well as amounts which creditors had accepted as partial payments from Respondent in settlements. Except for offsets, it represents payments for which the Respondent failed to pay promptly.

Further, under requirement of the PACA for full payment promptly, Respondent continues to owe for that portion of the \$502,137.85 debt which represents the difference between the original amount owed creditors and the partial payment accepted by creditors as part of a settlement with Respondent.

Respondent, in its defense, alleges that these failures to pay resulted from embezzlement of company funds by one of its officials. However, it is the Secretary's well established policy that, even where a respondent has good excuses for payment violations, excuses are never regarded as sufficient to prevent a finding that a respondent's failure to pay are considered flagrant or wilful violations.

Furthermore, such excuses are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly. The sanction for such violation is revocation of a respondent's license. These repeated failures to make prompt payments therefore constitute wilful, flagrant, and repeated violations of the PACA.

In view of Respondent's wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), I issue this bench decision at the close of hearing pursuant to Section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)) finding the occurrence of these violations and ordering that Respondent's license be revoked.

Findings of Fact

1. Respondent, Sol Salins, Inc., was a corporation organized and existing under the laws of the District of Columbia. Its business address is [REDACTED] Washington, DC [REDACTED]
2. PACA License No. [REDACTED] was issued to Respondent on March 29, 1961. This license has been renewed annually and is next subject to renewal on or before March 29, 1998. However, this license was suspended on June 11, 1996, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g) for failure to pay a reparation order, and this license remains suspended at the time of hearing.
3. During the period September 1995 through March 1996, Respondent committed wilful, 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 107 sellers for purchases of 784 lots of perishable agricultural commodities in the course of

interstate or foreign commerce in the amount of \$1,198,992.31. At the time of the hearing, Respondent still had not paid \$696,854.46 of that original amount. Some portion of the \$502,137.85 difference between these figures represents additional amounts that remain unpaid, which creditors have accepted as partial payment from Respondent in settlement.

Conclusion of Law

Respondent's failures to make full payment promptly, as more fully set forth in Paragraph III of the Complaint, constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's license is revoked.

This Order shall take effect 14 days after this decision becomes final. This decision will become final and effective without further proceedings 35 days after service upon Respondent pursuant to Section 1.142 of the Rules of Practice (7 C.F.R. § 1.142).

Written copies of this bench decision and order are being provided to the parties in accordance with Section 1.142(c)(2) of the Rules of Practice, 7 C.F.R. § 1.142(c)(2)).

[This Decision and Order became final on July 8, 1997, and effective July 22, 1997.-Editor]

In re: SOL SALINS, INC.
PACA Docket No. D-97-0015.
Memorandum to File Clarifying Bench Decision filed June 25, 1997.

Timothy Morris, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
Memorandum to File issued by James W. Hunt, Administrative Law Judge.

The bench decision issued on June 3, 1997, in the above-captioned matter erroneously states in the Order that the "decision will become final and effective without further proceedings 35 days after service upon Respondent pursuant to Section 1.142 of the Rules of Practice (7 C.F.R. § 1.142)." However, Section 1.142 provides that the "decision shall become effective without further proceedings 35 days after issuance of the decision, if announced orally at the hearing, . . . unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145." My decision does not waive the provisions of § 1.142.

A copy of this memorandum shall be served on the parties with a written copy of the June 3, 1997, bench decision.

In re: JSG TRADING CORP., GLORIA and TONY ENTERPRISES, d/b/a G&T ENTERPRISES, ANTHONY GENTILE, and ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.

PACA Docket No. D-94-0508.

and

In re: GLORIA and TONY ENTERPRISES, d/b/a G&T ENTERPRISES, and ANTHONY GENTILE.

PACA Docket No. D-94-0526.

Decision and Order as to Albert Lomoriello, Jr. filed June 17, 1997.

Commercial bribery - Wilful, flagrant, and repeated violations - License revocation.

Administrative Law Judge Edwin S. Bernstein found that Respondents committed wilful, flagrant, and repeated violations of the PACA by engaging in a scheme in which JSG made payments: (1) to G&T, under the direction, management, and control of Mr. Gentile, to induce it to purchase tomatoes from JSG on behalf of L&P Fruit Corp., and (2) to Mr. Lomoriello, to induce him to purchase tomatoes from JSG on behalf of American Banana Co., Inc. Respondents were on notice that commercial bribery is prohibited by the PACA, as two prior cases, decided by the Judicial Officer and affirmed by the Court of Appeals, have so held. Judge Bernstein further found that Respondents' violations were extremely serious and warranted no lesser sanction than license revocation.

Andrew Y. Stanton, for Complainant.

Mark C.H. Mandell, Annandale, NJ, for Respondent JSG.

Sherylee F. Bauer, New York, NY, for Respondents G&T and Anthony Gentile.

Respondent, Albert Lomoriello, Jr., Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

These are related disciplinary proceedings brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; the "PACA"), the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151).

The proceeding in PACA Docket No. D-94-0508 was instituted by a Complaint filed on November 8, 1993, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, and amended on April 8, 1994. The Amended Complaint alleged that Respondents, JSG Trading Corp. ("JSG"), Gloria and Tony Enterprises d/b/a G&T Enterprises ("G&T"), Anthony Gentile ("Mr. Gentile"), and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co. ("Mr. Lomoriello"), wilfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by engaging in a scheme in which JSG made payments (1) to G&T, under the direction, management, and control of Mr. Gentile, to induce it to purchase tomatoes from JSG on behalf of L&P Fruit Corp. ("L&P"), and (2) to Mr. Lomoriello, to induce him to purchase tomatoes from JSG on behalf of American Banana Co., Inc. ("American Banana"). The Amended Complaint requested that the PACA license of JSG be revoked, and that an Order be issued finding that G&T, Mr. Gentile, and Mr. Lomoriello committed wilful, flagrant, and repeated violations of the PACA, and that such violations be published.

The proceeding in PACA Docket No. D-94-0526 was instituted by a Notice to Show Cause filed on February 8, 1994, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, challenging the PACA license applications of G&T and Mr. Gentile, based on their alleged commission of the PACA violations alleged in PACA Docket No. D-94-0508. In May 1995, G&T's license application was withdrawn and the Notice to Show Cause filed against it was dismissed. The Notice to Show Cause filed against Mr. Gentile was unaffected by the dismissal.

Respondents denied the Complaint's allegations in Answers in the two proceedings.

I presided over a hearing in New York City on numerous dates beginning on December 5, 1995, and concluding on March 19, 1996. The evidence included Complainant's exhibits ("CX"); JSG, G&T and Mr. Gentile's exhibits ("RX"); and Mr. Lomoriello's exhibits ("RL"). Complainant was represented by Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. JSG was represented by Mark C.H. Mandell, Annandale,

New Jersey. G&T and Mr. Gentile were represented by Sherylee F. Bauer, New York, New York. Mr. Lomoriello represented himself. The parties have filed proposed findings, proposed conclusions, proposed orders, and memoranda of law. All proposed findings, conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Pertinent Statutory Provisions

1. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) states:

§ 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; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

2. Section 46.26 of the PACA regulations (7 C.F.R. § 46.26) reads:

§ 46.26 Duties of licensees

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these

regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

Findings of Fact

1. Respondent, JSG Trading Corp., is a corporation organized and existing under the laws of the State of New Jersey. Its business mailing address is [REDACTED] New Jersey [REDACTED] PACA license number [REDACTED] was issued to JSG on January 19, 1988. This license has been renewed annually and was again subject for renewal on or before January 19, 1997 (CX 1b). Since January 1992, Steve Goodman has been president, treasurer, and a 75% stockholder of JSG and his wife, Jill Goodman, has been vice-president, secretary, and a 25% stockholder of JSG (CX 1b, p. 13). Prior to January 1992, Jill Goodman was the sole officer and shareholder of JSG.

2. Mr. Goodman began JSG in 1988 (Tr. 2154). As of February 1993, JSG had \$36,000,000 in annual sales and employed six or seven produce buyers (Tr. 77). All of the buyers had joint account arrangements with JSG by which they earn a percentage of the profits derived from their sales (Tr. 2080-2081). Mr. Goodman is JSG's only tomato buyer (Tr. 77) and earns 50 percent of the profits derived from his sales (Tr. 2079). Tomato transactions constitute about 40 percent of JSG's business (Tr. 78).

3. Respondent, Anthony Gentile, is an individual whose business mailing address is [REDACTED] New York [REDACTED] Mr. Gentile is not licensed under the PACA but, at all times material, was operating subject to the PACA.

4. On January 12, 1994, Complainant received an application for a PACA license from Mr. Gentile (CX 2). Complainant determined that, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Mr. Gentile should be refused a license because Complainant concluded that he engaged in practices prohibited by the PACA.

5. Respondent, Gloria and Tony Enterprises, d/b/a G&T Enterprises, is a corporation organized and existing under the laws of the State of New York. Its business mailing address is [REDACTED] New York [REDACTED] PACA license number [REDACTED] was issued to G&T on November 14, 1988. This license expired on November 11, 1990, when the firm advised that it had ceased operation subject to the PACA and failed to pay the required annual renewal fee (CX 1).

Mrs. Gentile owns 100 percent of G&T's stock (CX 1). At all times material, G&T was operating subject to the PACA under the direction, management, and control of Mr. Gentile (Tr. 2948). G&T was formed for tax purposes (Tr. 448, 2829, 2948, 3216).

6. On January 12, 1994, Complainant also received an application for a PACA license from G&T (CX 1). G&T withdrew its license application in a letter dated April 28, 1995. Subsequently, Complainant moved to withdraw its Notice to Show Cause proceeding against G&T and the proceeding against G&T was dismissed.

7. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman at L&P Fruit Corp., a fruit and vegetable dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). Mr. Gentile managed L&P's sales operation and was its head salesman and tomato buyer (Tr. 442). Mr. Gentile had a joint account arrangement with L&P. He would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market which means that he was a salesman who was present on the street (Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by the Hunts Point Market to be the person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160, 2161).

8. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-2155). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 2171).

9. Mr. Gentile left the walk late in 1990 or early in 1991 because he became ill (Tr. 2909). However, from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446). After Mr. Gentile left the walk, he continued to be compensated on a joint account basis, but at a reduced rate of 15% of the profits and losses (Tr. 447).

10. Dirtbag Trucking Corp. ("Dirtbag") was a corporation which was formed in 1989 when Mr. Goodman decided to enter the trucking business (Tr. 2089-2090). In November 1989, Mr. Goodman and Mr. Gentile each were issued 75 shares of Dirtbag's stock (RX 2; Tr. 2102-2103). In January 1991, Mr. Goodman and Mr. Gentile each loaned Dirtbag \$40,000 to enable Dirtbag to purchase two trucks (RX 4 and 5; Tr. 2121, 2780). In return for the loan, they obtained security interests in Dirtbag's assets. The security agreements required Dirtbag to repay the loans by August 18, 1994 (RX 4 and 5). However, Dirtbag never repaid the loans

(Tr. 2130, 2499). Dirtbag never had its own office, but was operated from JSG's office (Tr. 2047). Dirtbag always had a cash flow problem. JSG constantly advanced money to Dirtbag (CX 55, pp. 1-2; Tr. 2049), often paying Dirtbag's creditors directly (Tr. 1585). Dirtbag was never a very profitable company (Tr. 1564, 2496). In fact, Mr. Goodman called Dirtbag "a loser" (Tr. 2149). Mr. Goodman became very disgusted with Dirtbag because it was not making money and he sold Dirtbag's trucks (Tr. 2050). The last truck was sold in 1994 (Tr. 2498).

11. In approximately January 1991, Tony Gentile transferred his 75 shares of stock in Dirtbag to his wife, Gloria (RX 2; Tr. 2827). On February 20, 1991, Gloria Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for \$80,000 (RX 3; Tr. 2926). The agreement provided that the stock would be placed in escrow with JSG's attorney, Mr. Mandell, and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next two years. After each \$25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provided that the final payment of \$30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile was paid the \$80,000 by either Mr. Goodman or JSG, and she authorized the release of her 75 shares of stock on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 2, pp. 3a, 3b and 3c; Tr. 2942-2943).

12. Respondent, Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., is an individual whose business mailing address is [REDACTED] Connecticut [REDACTED]. Mr. Lomoriello is not licensed under the PACA but, at all times material, was operating subject to the PACA.

13. In approximately December 1991, Mr. Lomoriello became employed by American Banana Co., Inc., a produce firm located at the Hunts Point Market (Tr. 1256). Demetrius Contos ("Mr. Contos"), American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business. Mr. Lomoriello was to receive 40% of the profits on the produce that he purchased, and be liable for 40% of the losses (Tr. 1245-1246). Mr. Lomoriello purchased tomatoes from JSG for American Banana (Tr. 1263).

14. In approximately January 1993, Complainant's PACA Branch received a telephone complaint about JSG (Tr. 69, 81). The caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying for L&P (Tr. 84). Joan Colson and David Nielson were assigned to audit JSG for

Complainant. On February 25, 1993, Ms. Colson and Mr. Nielson met with Mr. Goodman, who provided JSG's records (Tr. 78).

15. JSG maintains a file jacket for each transaction. The file number on the jacket includes a two-letter prefix which corresponds to the buyer's initials (Tr. 80). All documents related to the transaction are filed in the jacket and information regarding the transaction is recorded on the front and back portions of the jacket (Tr. 80).

16. In sampling JSG's sales to L&P, Ms. Colson and Mr. Nielson found 81 file jackets that raised questions about improper payments (CX 8 through 42; Tr. 109). The file jackets concerned sales of tomatoes to L&P by Mr. Goodman and the numbers all contained the prefix "SG" for "Steve Goodman" (Tr. 80). Each file jacket had handwritten notations on its front and back covers and contained documents related to its transactions (Tr. 132). These file jackets also contained a total of 35 checks or check skirts showing payments from JSG to "A. Gentile" (Tr. 111-113). The reverse side of the checks contained the endorsement "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, JSG's bookkeeper (Tr. 1705).

17. The back covers of the 81 file jackets show revenues at the top portions and the expenses at the bottom portions (Tr. 127). The expenses sections listed checks issued to "A. Gentile." The notations regarding these checks corresponded to actual checks or check skirts payable to "A. Gentile" which were found in the file jackets (Tr. 128).

18. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that the references to "A. Gentile" meant that Mr. Goodman would give receipts to Ms. Levine for various functions, such as having his car washed, and she would expense them to the files (Tr. 129, 1038-1039). Mr. Goodman initially said that "A. Gentile" was a fictitious name (Tr. 129, 1039). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039). Mr. Goodman stated that JSG utilized "A. Gentile," a person's name, on the checks to enable Ms. Levine to endorse and redeposit the checks (Tr. 1039).

19. Mr. Goodman told Ms. Colson and Mr. Nielson that the use of checks to "A. Gentile," which were redeposited into JSG's account, was his method of keeping track of or making up losses that he incurred from sales to L&P. He also told her that if a file contained checks to Mr. Gentile that were not redeposited into JSG's account, that money was for services that Mr. Gentile had provided to him (Tr. 242).

20. Some of the file jackets reflecting JSG's sales to L&P contained a slip of paper on which the check to "A. Gentile" was noted (e.g., CX 13b, p. 8; Tr. 137).

Ms. Levine told Ms. Colson and Mr. Nielson that she wrote this information to indicate JSG's expense for the file jacket (Tr. 137).

21. Ms. Colson prepared a table reflecting the numbers of the JSG files that she randomly selected, the numbers of the JSG checks that they contained, and the total amounts that each file showed as payments to "A. Gentile" (CX 7; Tr. 110).

22. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony \$2.00" (CX 13b, p. 1; Tr. 132-133), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-133). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense relating to "A. Gentile" (Tr. 145).

23. JSG maintains a Closed File Journal (CX 53). Each week, after a JSG file was closed, Ms. Levine would summarize that file's information in the journal (Tr. 226). The "Open SC" column refers to "open split commissions" (Tr. 226). Mr. Goodman stated that the "Open SC" column reflects what he paid to someone who provided a service to him (Tr. 227). All of the references to payments to "A. Gentile" in JSG's file jackets are noted in JSG's Closed File Journal under the "Open SC" column corresponding to the date that the transaction occurred (Tr. 228). The relationships between payments to "A. Gentile" recorded in the file jackets and the listings in the "Open SC" column in JSG's Closed File Journal were set forth in a table prepared by Ms. Colson (CX 52; Tr. 228-235).

24. JSG also maintains a General Ledger Chart of Accounts (CX 6; Tr. 106-107). This computer-generated record lists accounts contained in JSG's general ledger, the number assigned to each account, and a description of the account (Tr. 107). Account number 108 is "loans and exchanges." This account records loans made by JSG (Tr. 2053-2054).

25. JSG also maintains a General Ledger Journal Entry Edit Report (CX 13a, p. 3; Tr. 146). This computer-generated document describes how JSG's financial transactions are maintained in JSG's general ledger (Tr. 1765). JSG's General Ledger Journal Entry Edit Report reflects that Ms. Levine recorded 16 of the 35 checks made payable to "A. Gentile" in JSG's "loans and exchanges" account as "L/E Tony" (CX 13a, p. 3, CX 14a, p. 3, CX 17a, p. 3, CX 28a, p. 3, CX 29a, p. 3, CX 30a, p. 3, CX 31a, p. 3, CX 32a, p. 3, CX 33a, p. 3, CX 34a, p. 3, CX 35a, p. 3, CX 36a, p. 3, CX 37a, p. 3, CX 38a, p. 3, CX 39a, p. 3, and CX 42a, p. 3).

26. Ms. Colson obtained a spreadsheet from Ms. Levine or from JSG's accountant, Mr. Daily, which detailed the 1992 transactions in JSG's "loans and exchanges" account (CX 55, pp. 1 and 2; Tr. 158, 1605). The spreadsheet

contained 13 columns, reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-2056). All 16 of the "A. Gentile" checks described in the General Ledger Entry Edit report as "L/E Tony" and a \$38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P", and reflect a reduction of Mr. Gentile's loan payable to JSG (CX 55, p. 1-3; Tr. 161, 215-216).

27. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about JSG's "loans and exchanges" account and the spreadsheet that reflected that account (CX 55, pp. 1 and 2). Ms. Colson took detailed notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in JSG's records refers to JSG's "loans and exchanges" account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-150). Mr. Daily stated that Mr. Gentile had a loan with JSG (CX 76; Tr. 158) and that Mr. Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-1621). On April 1, 1993, Ms. Colson requested Mr. Daily to provide an audit trail for the spreadsheet (CX 77; Tr. 159, 2864, 2865). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55, pp. 3-6; Tr. at 166).

28. JSG maintained an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of JSG's accounts receivable for its customers on a monthly basis, from January 1992 through February 1993 (CX 51; Tr. 252). The report indicates that when L&P was rebilled for a product (such as on CX 25b, p. 1, where L&P was rebilled from \$5,001.35 to \$3,251.75), the rebilled price would be noted in the Accounts Receivable Aged Analysis Report for L&P, and a credit memo would be issued canceling L&P's accounts receivable for the original price (CX 51, p. 117; Tr. 254). None of the 16 "A. Gentile" checks found by Ms. Colson that are referenced in the General Ledger Entry Edit report as "L/E Tony" are listed in JSG's Accounts Receivable Aged Analysis Report (Tr. 258). All of the remaining 19 "A. Gentile" checks found by Ms. Colson (such as on CX 25b, p. 1 for \$129.60), are listed in the Accounts Receivable Aged Analysis Report for L&P, with the amount of the check noted as a "customer charge" and the check itself noted as "payment received" (Tr. 256-257).

29. JSG's General Ledger Entry Edit Reports for 1992 and 1993 show that JSG issued checks as payments to Mr. Gentile (Tr. 171-193). These checks are described in the General Ledger Entry Edit Reports as follows: Check number 3941 for \$467.59 as "Steve's Loan, Tony's Boat" (CX 54, pp. 1-3); number 1847 for \$38,475.30 as "L/E Tony" (CX 54, pp. 4-7); number 3899 for \$806.51 as "Steve's Loan Tony's Car" (CX 54, pp. 8-11); number 3975 for \$806.51 as "Steve's Loan Tony's Car" (CX 54, pp. 12-15); number 4051 for \$800 as "L/E Dirtbag for Tony's Car" (CX 54, pp. 16-17); number 2151 for \$3,317 as "Steve's Loan Tony's

Watch" (CX 54, p. 18); and a JSG payment of \$6,400 as "L/E Tony" (CX 54, p. 19).

30. JSG's records showed that JSG check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for \$38,475.30 (CX 54, p. 3; Tr. 182). Midlantic National Bank's records revealed that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately \$45,000 to \$50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for \$10,000 (CX 57). The boat needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, one of L&P's owners, that he was getting a very good price for the boat (Tr. 2888).

31. JSG's records contained check numbers 3899, 3975, and 4051 issued to Mercedes-Benz Credit Corporation (CX 54, pp. 6, 10, 14; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly payments of \$798.99, for a total of \$38,351.52 (CX 56, pp. 3-5; Tr. 198-199). Although a corporate resolution was prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56, p. 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, he placed a large red ribbon on it (Tr. 2828, 2838).

32. JSG check number 2151, dated July 28, 1992, for \$3,317, was issued to a jewelry store in payment for a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift (RX 40; Tr. 2478-2479).

33. JSG's payroll records for 1992 show that Mrs. Gentile received wages (CX 50, pp. 1-2; Tr. 266). Check stubs and canceled checks for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50, pp. 3-12; Tr. 268).

34. When Ms. Colson returned to Washington, D.C., she found that several JSG file jackets relating to sales to L&P contained statements from G&T (CX 44a, p. 4, CX 45a, p. 4, CX 46, p. 4, CX 47a, p. 4, CX 48a, p. 4, CX 49a, p. 3; Tr. 271). Two of the file jackets containing the statements also contained adding machine tapes (CX 44b, p. 20, CX 46, p. 5) which contain amounts that correspond to the total of the packages noted in the statements multiplied by 5¢ per package (Tr. 272-

280). The file jackets in which the statements were found showed payments to "A. Gentile" which corresponded to the amounts listed on the adding machine tapes (Tr. 281). The "A. Gentile" notations also corresponded to the checks to Mrs. Gentile noted in JSG's payroll records (Tr. 281-282). Many of JSG's file jackets, reflecting sales to L&P, contained a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Ms. Gentile and their relationships to the files noted in G&T's statements were listed in a table prepared by Ms. Colson (CX 43).

35. JSG's records also contained 22 file jackets concerning JSG's sales of tomatoes to American Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63-69; Tr. 550-551). The notations indicate that payments per box were made to "AI" as well as to "HPT" or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. The file jackets contained seven JSG checks totaling \$9,733.45 made payable to Hunts Point Produce Co. on which were written JSG file numbers corresponding to those on the file jackets which contained the notations (CX 63a, p. 1, CX 64a, p. 1, CX 65a, p. 1, CX 66a, p. 1, CX 67a, p. 1, CX 68a, p. 1, CX 69a, p. 4; Tr. 550, 553-554).

36. These 22 JSG file jackets also contained several invoices from Hunts Point Produce Co. to JSG in amounts that corresponded to the amounts of the checks. The invoices contained JSG file numbers which corresponded to the file numbers that were written on the checks (CX 63b, p. 4, CX 63c, p. 5, CX 64b, p. 4, CX 64c, p. 4, CX 65b, p. 5, CX 65c, p. 5, CX 65d, p. 5, CX 65e, p. 4, CX 65f, p. 4, CX 65g, p. 4, CX 66b, p. 5, CX 66c, p. 5, CX 66d, p. 4, CX 67b, p. 4, CX 67c, p. 4, CX 67d, p. 5, CX 68b, p. 7, CX 68c, p. 5, CX 68d, p. 5, CX 68e, p. 4, CX 69a, p. 5; Tr. 554-559). Ms. Colson prepared a table that summarized this information (CX 62).

37. Ms. Colson recognized that the address of Hunts Point Produce Co. belonged to Mr. Lomoriello (Tr. 559-560). In answer to Ms. Colson's question of why Mr. Lomoriello was receiving money from JSG, Mr. Goodman replied that Mr. Lomoriello gave inside information to Mr. Goodman and performed various tasks for him at the Hunts Point Market (Tr. 560).

38. JSG's Closed File Journal, under the "Open SC" column, reflects the amounts of the checks written by JSG to Hunts Point Produce (CX 53; Tr. 604-605). Ms. Colson prepared a table showing the references in JSG's Closed File Journal to the payments to Hunts Point Produce (CX 71; Tr. 629-630).

39. Ms. Colson and another PACA official interviewed Demetrius Contos, American Banana's vice-president. Mr. Contos stated that Mr. Lomoriello was

compensated by receiving 40% of profits on his transactions (Tr. 607). Mr. Contos wanted Mr. Lomoriello to repay American Banana 60% of the money that he had received from JSG (Tr. 607).

40. Ms. Colson and her associate, Mr. Summers, also interviewed Pat Prisco, L&P's president (Tr. 637). Mr. Prisco was unaware that JSG's payments to Mr. Gentile were being recorded in JSG's files associated with JSG's sales to L&P (Tr. 458).

Conclusions and Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Passage of the PACA was in response to the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930). The PACA's primary purpose is to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers is declared to be unlawful." *O'Day, supra*, at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H. Rep. 1041, 71st Cong., 2d Sess. (1930). See also *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973) *aff'd sub nom. George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

The issue presented is whether Respondents have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by engaging in commercial bribery.

While the PACA does not expressly prohibit commercial bribery, two decisions by the Judicial Officer of the Department of Agriculture in 1990 and 1991 held that commercial bribery violates section 2(4) of the PACA. Both cases were affirmed by the Court of Appeals and appealed to the Supreme Court, which denied certiorari. The decisions are *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1585 (1992) and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 84 (1992). Since the

issuance of these decisions, the produce industry has been on notice that commercial bribery is prohibited by the PACA.

In both *Goodman* and *Tipco*, the respondents, produce dealers, entered into an arrangement with the produce buyer for a supermarket chain to pay the buyer 25¢ for each box of produce that he purchased from them. The supermarket chain had no knowledge of this arrangement. The Judicial Officer found these actions to be wilful, flagrant, and repeated violations of section 2(4) of the PACA, and ordered the respondents' licenses revoked, explaining:

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying . . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him. It is the inevitable consequence of commercial bribery, as it is also, with other unfair business practices, that competitors will adopt similar tactics to procure business. No matter what the character of the competitor's goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy.

(*Goodman*, at 1185-1186 and *Tipco*, at 884-885)

The Judicial Officer expressed concern that commercial bribery by one firm in a market will inevitably lead to bribery by many firms, in an effort to compete. He stated:

Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

(*Goodman*, at 1186 and *Tipco*, at 885)

The Judicial Officer provided the following guidelines:

The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another--a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, e.g., each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter). [emphasis in original]

(*Tipco*, at 882-883)

The present case is in all material respects similar to *Goodman* and *Tipco*. That Mr. Gentile and Mr. Lomoriello were not "employees" of their principals is not a material distinction. As in *Goodman* and *Tipco*, JSG was obligated to refrain from making payments to Mr. Gentile and Mr. Lomoriello since such payments would encourage Mr. Gentile and Mr. Lomoriello to purchase tomatoes from JSG. JSG could only make such payments with its customers' permission. Even if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. These payments were more than *de minimis*. Therefore, these payments constituted commercial bribery, in violation of section 2(4) of the PACA.

Conclusions Regarding Credibility

USDA obtained and carefully analyzed JSG's records. These records support USDA's contentions that JSG bribed Tony Gentile, a buyer of tomatoes for L&P, and that JSG bribed Al Lomoriello, a buyer of tomatoes for American Banana. Apparently, JSG did not anticipate that these records would come into USDA's hands because JSG's file jackets, accounts, checks, and other records fully document and support USDA's allegations of bribery.

I found Complainant's lead investigator and principal witness, Joan Colson, to be completely credible. She had no motive to be untruthful, her testimony was consistent, and her testimony was supported by her written notes, as well as by Respondents' records.

I found Complainant's other witnesses to be truthful. I found Carlos Valencia to be a truthful witness and where his testimony conflicted with Mr. Lomoriello's testimony, I found Mr. Valencia to be the more believable witness.

Respondents' witnesses were not very believable. JSG's bookkeeper/office manager, Marsha Levine, and its accountant, Thomas Daily, tried to explain away the overwhelming documentary evidence that supported Complainant's allegations, but their explanations were not convincing. They seemed to be suffering as they testified and strained to show that their records did not support the conclusion that JSG bribed Mr. Gentile and Mr. Lomoriello. Although I could not conclude from their demeanor that either Mr. or Mrs. Gentile were being untruthful, their testimonies seemed illogical and, therefore, were not believable. By his demeanor, Al Lomoriello was not believable. I also conclude that he manufactured documents after the fact.

However, the pivotal witness for Respondents was Steve Goodman. Mr. Goodman is an articulate, personable, and persuasive individual. These are traits that have enabled him to become an effective and extremely successful salesman. He is rarely at a loss for explanations. Just listening to Mr. Goodman, one wants to believe him. However, an analysis of the evidence and the application of logic render many of Mr. Goodman's critical explanations unbelievable.

I believe Mr. Goodman's testimony that he is meticulous about his record keeping. He testified:

There were so many files . . . All I can say is all my notations are identical . . . the notations - my paperwork, like I said its kind of like the McDonald's of the produce business, its always the same . . .

(Tr. 2268)

Mr. Goodman later reiterated this theme, stating:

. . . What I'll do a lot of times is I write everything on my files so this way when I come back to them 15 days later, 20 days later, 30 days later, its very important for me to keep a good accurate account of everything I've done . . .

(Tr. 2368)

I believe this testimony that Mr. Goodman's notations on his file jackets were meticulous and accurate. Mr. Goodman was constantly making oral agreements, mostly by telephone, talking to many people about various lots of tomatoes each day. Thus, he realized that to be successful and effective he needed to write down his prices, his costs and all data relevant to transactions on the file jackets, including the amounts that he paid to Mr. Gentile and to Mr. Lomoriello for each transaction.

Mr. Goodman's careful record keeping supported USDA's allegations of bribery.

In attempting to rebut USDA's allegations, Mr. Goodman adopted an opposite tact, trying to explain that things were vague and imprecise in other respects. I found this testimony, which conflicted with his meticulous record keeping, to be unbelievable.

Thus, Mr. Goodman testified that money that was paid to Mr. Lomoriello was for various jobs but he did not know which. He testified:

It was not my policy that I would write down what Al did for me. I knew what Al did.

(Tr. 2196)

Talking about "clips," his explanation for some of the payments, he stated:

The way that was kept track of and how much it worked out to Gloria stock and a clip balance and things like that and the circular checks, I only -- I bought and sold the produce. I really don't have a clear understanding -- I think Marsha could explain that better or already has explained it for the time being better than I am.

(Tr. 2279)

He further testified about "clips":

I never asked Marsha how she was doing it but obviously I am not dumb. I knew we were doing it. We were keeping a running balance some place. I never knew of any journals or ledgers, or how she was doing it, but I knew that she was keeping track of this for me.

(Tr. 2180)

This is totally inconsistent with Mr. Goodman's meticulous record keeping style, as well as his style of being an effective, controlling, "hands on" manager.

Discussion of the Evidence

I. JSG's Payments to Mr. Gentile.

Complainant has provided extensive evidence that in 1992 and early 1993, JSG made numerous payments to Mr. Gentile either directly, or through his wife, Gloria Gentile, or through G&T, a corporation owned by Mrs. Gentile and established only for tax purposes (Tr. 448, 2829, 2948, 3216). At the time that these payments were made, Mr. Gentile was buying tomatoes from JSG for L&P (Tr. 2171).

JSG's payments to Mr. Gentile included: (1) The use and eventual purchase of Mr. Goodman's boat at a price substantially below its value; (2) Mr. Gentile's use of a valuable Mercedes automobile paid for by JSG; (3) a Rolex watch; (4) payments to Mr. Gentile through Mrs. Gentile; and (5) payments to Mr. Gentile in the form of 35 JSG checks.

A. The Boat.

The boat that was loaned and then sold to Mr. Gentile was purchased in 1987 by Mr. Goodman for approximately \$45,000 to \$50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). Mrs. Gentile testified that, although the boat needed work, it was "nicely laid out" (Tr. 2930).

While Mr. Gentile was using the boat, JSG's records indicate that JSG considered it to be Mr. Gentile's boat. JSG's General Ledger Entry Edit Report for 1992 and 1993, and the check stubs of the JSG checks noted in the report, show that check number 3941 for \$467.59 was issued on July 1992 for "Steve's Loan, Tony's Boat" (CX 54, pp. 1-2). When Mr. Daily, JSG's accountant, was asked about this entry at the hearing, he explained that "Tony" referred to Tony Gentile (Tr. 1559).

In August 1992, JSG issued check number 1847 for \$38,475.30 to Midlantic National Bank (CX 54, p. 3; Tr. 182) in final payment for a loan made to Mr. Goodman to purchase the boat (CX 73; Tr. 186). At that time, the record owner of the boat was Jill Goodman, Steve Goodman's wife (CX 73). Soon after JSG satisfied the boat's \$38,475.30 loan balance, Mr. Goodman sold the boat to

Mr. Gentile for \$10,000 (CX 57). Mr. Gentile told Louis Beni, one of L&P's owners, that he was getting a very good price on the boat (Tr. 2888). He certainly was. By permitting Mr. Gentile to use Mr. Goodman's boat, which cost \$45,000 to \$50,000 in 1987, since 1990, and then selling it to him for a mere \$10,000 in 1992, immediately after having satisfied a bank loan balance of \$38,475.30, JSG and Mr. Goodman made a substantial unlawful payment to Mr. Gentile.

B. The Mercedes.

On May 11, 1990, a new Mercedes automobile was leased to Mr. Gentile (CX 56, pp. 3-5; Tr. 198-199). The lease was for 48 months, with monthly payments of \$798.99, for a total of \$38,351.52 (CX 56, p. 5). Mr. Gentile was authorized to lease the car by Dirtbag Trucking, a corporation which Mr. Goodman and Mr. Gentile jointly owned (RX 2; Tr. 2102-2103).

Dirtbag was never a profitable company (Tr. 1564, 2496). It never had its own offices, but was operated from JSG's office (Tr. 2047). Dirtbag constantly experienced cash flow problems and JSG constantly advanced money to it (CX 55, pp. 1-2; Tr. 2049). JSG often paid Dirtbag's creditors directly (Tr. 1585). When Mr. Daily discovered these advances, he was concerned that Dirtbag's independence for tax purposes would be compromised (Tr. 1594). Mr. Goodman called Dirtbag "a loser" (Tr. 2149).

However, despite Dirtbag's constant financial problems and dependence upon JSG for financial support, Mr. Goodman on behalf of Dirtbag presented Mr. Gentile with the leased Mercedes in 1990. It made no business sense for this company, which was constantly experiencing financial problems, to lease this expensive automobile for Mr. Gentile's use. When asked at the hearing why a less expensive car was not leased, Mr. Goodman explained:

Q Any particular reason why a Mercedes was the car that was leased rather than a Chevy, a Ford?

A Yes, we work hard and we like the best.

(Tr. 2787)

It is also doubtful that Mr. Gentile ever used the Mercedes for Dirtbag's business. Mr. Gentile testified that he drove the Mercedes to work at the Hunts Point Market (Tr. 2838). Mrs. Gentile testified that she did not know for what aspects of Dirtbag's business Mr. Gentile could have used the Mercedes (Tr. 2936).

Additionally, when Mr. Goodman presented the Mercedes to Mr. Gentile, he placed a large red ribbon on it (Tr. 2828, 2838). This also implies that the car was a gift.

Thus, the payments of approximately \$38,000 made by JSG to provide Mr. Gentile with the Mercedes also were unlawful.

C. The Rolex Watch.

In approximately August 1992, Mr. Goodman gave a Rolex watch to Mr. Gentile, for which Mr. Goodman paid \$3,317 (RX 40; Tr. 2478). Mr. Goodman admitted that he gave the watch to Mr. Gentile as a gift (Tr. 2479). Although Mr. Goodman said he was motivated by his friendship with Mr. Gentile, the bestowing of such an expensive present upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P also was unlawful.

D. The Payments to Mrs. Gentile and to G&T.

JSG's payroll records for 1992 indicated that Mrs. Gentile was receiving regular wages from JSG (CX 50, pp. 1-2; Tr. 266). The check stubs indicated that the checks were written for "comm" which Ms. Levine stated referred to "commission" (CX 50, pp. 3-12; Tr. 268). Ms. Levine explained that Mrs. Gentile was paid for providing services to JSG as an informant (Tr. 271).

The amounts of the checks to Mrs. Gentile related to deductions of 5¢ per box for boxes of tomatoes sold by JSG to L&P. In several JSG file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44a, p. 4, CX 45a, p. 4, CX 46, p. 4, CX 47a, p. 4, CX 48a, p. 4, CX 49a, p. 3; Tr. 271). In two of the file jackets that contained the statements, Ms. Colson found adding machine tapes (CX 44b, p. 20, CX 46, p. 5) that seemed to add packages, corresponding to the number of packages noted in the statements, and multiply the total by 5¢ per package (Tr. 272-280). Ms. Colson also noticed that the file jackets in which these statements were found showed payments to "A. Gentile" which corresponded to the amounts on the adding machine tapes (Tr. 281). The amounts of the "A. Gentile" payments shown on the file jackets also corresponded to the amounts of checks to Mrs. Gentile noted in JSG's payroll records (Tr. 281-282). Ms. Colson further noticed that many of JSG's file jackets, reflecting sales to L&P, contained a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" had the same numbers as those on the statements of G&T (CX 44; Tr. 283).

After Ms. Colson presented this evidence at the hearing, Ms. Levine provided a completely different explanation for the checks payable to Mrs. Gentile. According to Ms. Levine, Mr. Goodman ordered JSG's employees to write "Tony 5¢" on every L&P file jacket to pay Mrs. Gentile for his purchase of her stock in Dirtbag Trucking (Tr. 1715).

However, JSG's claim that the checks to Mrs. Gentile were for her Dirtbag stock is inconsistent with the fact that the checks were listed in JSG's payroll records as commissions. At the hearing, Ms. Levine stated that noting the checks to Mrs. Gentile on JSG's payroll records as commissions was an error (Tr. 1941). However, this explanation was never given to Ms. Colson. This alleged error also came as a complete surprise to Mr. Daily, who testified that he had sent 1099 tax forms to Mrs. Gentile in 1991 and 1992 based upon his assumption that she was a salaried employee of JSG (Tr. 1541-1542, 1595). In mid-1993, after Mr. Daily issued JSG's tax return for 1992, he was told by Ms. Levine that Mrs. Gentile was not an employee (Tr. 1561-1562). Ms. Levine testified that when Mr. Daily heard this, he "went through the roof" because the 1099 tax forms had been improperly issued (Tr. 1940). Mr. Daily then was requested to file an amended personal tax return for Mr. Goodman, which he did just before the hearing (Tr. 1601-1602).

Ms. Levine's contention that she erred in noting Mrs. Gentile's "commissions" in JSG's personnel records is further contradicted by her testimony that, as of late 1992, before she allegedly learned of her error in treating the payments to Mrs. Gentile as commissions because that would unlawfully require issuing 1099 tax forms to Mrs. Gentile, Ms. Levine was aware that Mr. Lomoriello could not be entered in JSG's books as a wage earning employee, or else JSG would need to send a 1099 form to Mr. Lomoriello (Tr. 1965).

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 3, p. 2; Tr. 2827) and, on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for \$80,000 (Tr. 2926). The agreement (RX 3, p. 1) provided that the stock would be placed in escrow with JSG's attorney and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next two years. After the payment of each \$25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of \$30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized release of her 75 shares of stock on

December 30, 1991, February 14, 1993, and February 2, 1994 (RX 2, pp. 3a, 3b and 3c; Tr. 2942-2943).

However, Respondents presented no evidence that Dirtbag was worth \$80,000 during the period from 1991 through 1994. To the contrary, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984, 2049, 2149, 2496). Even if the JSG checks to Mrs. Gentile, calculated by deducting 5¢ per box for every box of tomatoes sold to L&P, did amount to \$80,000, the payment was still unlawful. Mr. Gentile had only loaned Dirtbag \$40,000 and had invested only \$7,000 in a new truck (Tr. 2783). JSG's payments, therefore, would have included a profit of approximately \$33,000 which would have been unjustified, given Dirtbag's unprofitable status.

The payment of \$80,000 was also improper because, as Mr. Goodman acknowledged, if JSG did more business with L&P during the period that the 5¢ per box deductions were to be made, Mrs. Gentile would receive the \$80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of JSG's tomatoes as possible. In addition, Mr. Goodman stated that Mrs. Gentile's final 25 shares of Dirtbag stock would not be released from escrow until 1994, to coincide with the end of the lease of Mr. Gentile's Mercedes (Tr. 2495). That would permit Mr. Gentile's continued use of the car, since it would remain deductible by Dirtbag as a business expense as long as Mrs. Gentile retained ownership of some of the stock (Tr. 1680).

Further evidence of unlawful payments to Mr. Gentile is a January 30, 1992, JSG check made payable to G&T in the amount of \$5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to JSG and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-2043). Mrs. Gentile said the \$5,600 was for checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 2933-2934). No documentation was ever provided to justify the \$5,600 payment. I conclude that this \$5,600 payment also was a bribe.

E. The 35 Checks to "A. Gentile."

JSG's unlawful payments to Mr. Gentile also include 35 checks, totaling \$62,535 (CX 7), which JSG issued to "A. Gentile." JSG refers to these checks as "circular checks" because they were redeposited to JSG's bank account. However, JSG's records show that the 35 checks were treated as if Mr. Goodman was sharing

his profit with Mr. Gentile. Further, 16 of the checks were shown in JSG's records as reducing a loan that Mr. Gentile owed to JSG.

The 35 checks to "A. Gentile" were found in file jackets that Ms. Colson examined (CX 8 through 42; Tr. 109, 111-113). All of the file jackets concerned sales of tomatoes by JSG to L&P. Mr. Goodman represented JSG in all of the transactions since all of the file numbers contained the prefix, "SG" (Tr. 80). Each file jacket contained handwritten notations and supporting documents (Tr. 132). The reverse sides of the 35 checks contained the endorsement "A. Gentile, payable to JSG Trading," which Ms. Levine wrote (Tr. 122, 1705). Some of the file jackets also contained a slip of paper on which the payment to "A. Gentile" was noted (CX 13b, p. 8; Tr. 137). Ms. Levine told Ms. Colson that she recorded this information to indicate JSG's expenses for the file jacket (Tr. 137).

The back of each JSG file jacket shows the revenues at the top portion and the expenses at the bottom portion (Tr. 127). The revenues sections show the amount that JSG's customer was billed for the produce and how much the customer paid (Tr. 128). The expenses sections show from whom JSG purchased the produce, the date of purchase, the seller's invoice number, the date that JSG made payment, JSG's check number, and the amount of the check. The expenses sections also show incidental expenses, such as freight. The expenses sections for the files in question showed payments to "A. Gentile" in the same amounts as the "A. Gentile" checks found by Ms. Colson (Tr. 128).

When Ms. Colson asked Mr. Goodman what "A. Gentile" listed on the file jackets meant, Mr. Goodman was evasive. At first, he stated that he would give Ms. Levine receipts for various functions, such as having his car washed, and she would expense them to the files and that "A. Gentile" was a fictitious name (Tr. 129, 1039). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039).

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile" which were deposited into JSG's account, were his way of keeping track of and making up losses that he incurred from sales to L&P and that if checks payable to Mr. Gentile were not deposited into JSG's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets, such as "Tony \$2.00" (CX 13b, p. 1; Tr. 132-133). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-133). The number of boxes of tomatoes in the load, multiplied by

the amount noted on the back of the file jacket associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145).

1. The 35 Checks Were Treated as a Profit Split Between Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Loan which Mr. Gentile had with JSG.

JSG's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile. Further, 16 of the 35 checks were shown in JSG's records as reducing a loan that Mr. Gentile had payable to JSG.

JSG's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-1897). All 35 of the "A. Gentile" checks were noted in JSG's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-229). This is evidence that JSG was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in JSG's records as payments to reduce a loan that Mr. Gentile owed to JSG. In JSG's General Ledger Journal Entry Edit Report (CX 13a, p. 3; Tr. 146), a computer-generated document that reflects how JSG financial transactions are recorded in JSG's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into a JSG account described as "L/E Tony" (CX 13a, p. 3, CX 14a, p. 3, CX 17a, p. 3, CX 28a, p. 3, CX 29a, p. 3, CX 30a, p. 3, CX 31a, p. 3, CX 32a, p. 3, CX 33a, p. 3, CX 34a, p. 3, CX 35a, p. 3, CX 36a, p. 3, CX 37a, p. 3, CX 38a, p. 3, CX 39a, p. 3, and CX 42a, p. 3). The number of the account noted is "108," which was identified in JSG's Chart of Accounts as "loans and exchanges" (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily, detailing the 1992 transactions in JSG's "loans and exchanges" account (CX 55, pp. 1 and 2; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-2056). One of these columns was entitled "L&P" (Tr. 160, 1617-1621). Ms. Colson found that all 16 of the "A. Gentile" checks described in the General Ledger Entry Edit report as "L/E Tony" plus the \$38,475.30 boat payment to Midlantic Bank, were noted in the spreadsheet as a reduction of Mr. Gentile's loan payable to JSG (CX 55, pp. 1-3; Tr. 161, 215-216).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about JSG's "loans and exchanges" account and the spreadsheet that reflected the account

(CX 55, pp. 1-2). Ms. Colson took detailed notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to JSG's "loans and exchanges" account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-150). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to JSG (CX 76; Tr. 158). The references to "L/E Tony" contained in JSG's general ledger were set forth in the column in the spreadsheet under the heading "L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55, pp. 3-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993, telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes "L/E Tony" then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule? - A. That's correct." (CX 76).

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-635, 1657), nor did JSG ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of loans that Mr. Gentile owed to JSG.

It is clear that 16 of the 35 "A. Gentile" checks were treated by JSG as reductions of Mr. Gentile's loan payable to JSG. The other 19 checks also constituted a sharing of Mr. Goodman's profits on the sales to L&P. All of these checks evidenced unlawful payments by JSG to Mr. Gentile.

2. JSG's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.

JSG contends that these checks payable to "A. Gentile" related to an arrangement with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by JSG as part of a system to adjust L&P's files because of L&P's "clipping" of JSG invoices. A "clip" would result in L&P paying less than JSG's invoice price. Ms. Levine testified as follows:

Q Would you tell us what clips are in your understanding.

A Okay.

Q With regard to L&P.

A Yes. As I understand it what was happening was he would -- they would make let's say or how can I explain it. They would take some money off -- they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.

So we cut the check but we redeposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.

Q Miss Levine, why were you doing this with checks?

A Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say, well, these are the checks that we had. On this particular file we made up \$320. This way we always had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

(Tr. 1705-1706)

Ms. Levine stated that when a customer of JSG had a problem with a load and "clips" an invoice, and JSG did not object to the "clip," JSG would rebill the customer at a lower price (Tr. 249-250, 2063-2064).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second journal became wet when JSG's basement was flooded early in 1995 (Tr. 1706, 1794-1795). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, JSG's attorney, said the information was needed, but she was unable to do this (Tr. 1772). However,

Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been filed by then and she had been told by JSG's attorney that such a journal would be important evidence (Tr. 1772, 1804-1808). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, \$10,092.65, and worked backward in time (RX 20, p. 27; Tr. 1809). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the hearing (Tr. 1809, 1812). Without any tangible written evidence that JSG maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of neither Mr. Goodman nor Ms. Levine to explain its operation with any clarity. Mr. Goodman testified:

Q Well, this file, 13(b), [page 1, indicates a \$3,200 circular check to A. Gentile under the expenses portion of the file, correct?

A Okay.

Q It looks like from the file jacket, that this \$3,200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?

A Pretty close to it, yes.

Q That this \$3,200 is being taken away from your commissions?

A Yes.

Q Well, if that's the case, then how does this --

A Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she

explained it to you and she can do a much more accurate job of explaining it than I can.

(Tr. 2804)

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into JSG's account could have effected the balance owed between JSG and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

Q Let's see. How about GS4300. Was that just a make up?

A Yes. That is just a make up.

Q That is a make up for what 3120?

A Yes, that is correct.

Q Now and it is noted in your table at page 22 where you have minus 3120?

A That is correct.

Q That means that the amount of money that L&P owed JSG at that point was reduced by 3120?

A That is correct.

Q So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A Yes.

Q Now --

A It is not that we gained. We got back money that they had ---

Q That had lost on other ---

A Right.

Q Now if you look at this file jacket, it indicates at the bottom an A. Gentile circular check for 3120.

A Yes.

Q And that is under expenses for that particular file.

A That is correct.

Q So it looks like it increased the expenses of JSG on that file.

A Yes.

Q Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 3100 less money is coming to JSG on this file?

A Well, what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q On the other file?

A Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q The circular check?

A Yes. I had to redeposit it somewhere.

Q Okay. So that would balance out the circular check.

A That would increase -- yes.

Q The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A That is right.

Q So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A When I deposited it, it increased our sales I guess you would say.

Q The revenues or sales right.

A Yes.

Q By 3120 so that would balance out this 3120 negative amount on this file.

A That is correct.

Q But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A We were just getting back the money we were supposed to get.

Q But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL:

I am going to object because the question seems to confuse the witness.

(Tr. 3129-3133)

JSG's credibility on this issue is also seriously compromised by its admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, JSG introduced into evidence copies of hundreds of JSG file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance by means of the notation "Tony clip." Ms. Levine testified how these file jackets reflected the ongoing nature of JSG's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip" on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, 4300, 4301, 4314, 4353, 4399, 4710, and 4886), had been added after Ms. Colson's

investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

A Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or, no, I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I ---

JUDGE BERNSTEIN:

Q In preparing for the hearing?

THE WITNESS:

A In preparing for the hearing.

JUDGE BERNSTEIN:

Okay.

THE WITNESS:

And there were just -- I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip. So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

(Tr. 3169)

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut JSG's contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from JSG's credibility in general.

As I have stated earlier in this decision, Mr. Goodman's testimony about the "clips" also was unbelievable. His lack of specific knowledge about what was going on with respect to the "clips" was inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total - add them up and subtract the pluses and minuses.

(Tr. 2181)

I also found unbelievable Mr. Goodman's testimony as to why 5¢ per box was utilized as a "clip." He answered his lawyer's questions about that as follows:

Q All right. I understand about the length of time but who arrived at the five cents per box out of your commission? Why not 10? Why not 20? Why not some other figure, do you remember?

A No, I don't as a matter of fact.

Q Huh?

A I don't remember. I don't know how that came about.

Q Pardon.

A Well, first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A You know it was easy to -- the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were used and we just kept on going with it.

(Tr. 2591-2592)

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

Neither Pat Prisco nor Tony Gentile on a file-by-file basis ever sat there and went over it file-by-file as far as where we added or subtracted -- well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious -- not cautious, wrong word.

(Tr. 2372)

And to the same effect, Mr. Goodman answered:

Q Did you have any conversations with anyone at L&P about the \$3 make-up?

A Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. .

..

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

(Tr. 2269)

I, therefore, conclude that all of these 35 checks payable to "A. Gentile" constituted illegal payments to Mr. Gentile.

II. JSG's Payments to Mr. Lomoriello.

From December 1992 through February 1993, JSG issued seven checks to Mr. Lomoriello totaling \$9,733.45 at a time when Mr. Lomoriello was a key employee of American Banana, responsible for buying tomatoes from JSG. Mr. Contos, vice-president and co-owner of American Banana, was unaware that any payments to Mr. Lomoriello were being linked directly to the number of boxes of tomatoes which American Banana was purchasing from JSG (Tr. 322-323). These payments also constitute bribes in violation of the PACA.

Mr. Lomoriello became employed by American Banana in December 1991 and left its employ in 1993 (Tr. 315). Mr. Contos wanted Mr. Lomoriello to expand the firm's business. Mr. Lomoriello was to receive 40% of the profit on the produce he purchased, and be liable for 40% of any losses (Tr. 1245-1246).

Mr. Lomoriello received seven checks from JSG totaling \$9,733.45 from December 1992 through February 1993. JSG and Mr. Lomoriello claim that these checks were for work done by Mr. Lomoriello not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or JSG to earn these sums. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets which contained notations that were similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-551). The file jackets concerned sales of tomatoes from JSG to American Banana. The notations indicated that payments per box were being made to "Al," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found invoices from JSG to Hunts Point Produce Co. in the file jackets in amounts corresponding to the payments listed on the file jackets. She also found seven JSG checks totaling \$9,733.45, made payable to Hunts Point Produce Co., on which were written JSG file numbers corresponding with those on the file jackets which contained the notations (CX 63a, p. 1, CX 64a, p. 1, CX 65a, p. 1, CX 66a, p. 1, CX 67a, p. 1, CX 68a, p. 1, CX 69a, p. 4; Tr. at 553-554). Ms. Colson found in the file jackets several invoices from JSG to Hunts Point Produce Co. in amounts corresponding to the amounts of the checks on which were written JSG file numbers which were the same as those written on the checks (Tr. 554-559). Examination of these invoices reveals that only the earliest one, dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63b, p. 4). When Ms. Colson examined JSG's Closed File

Journal, the amounts of the checks written by JSG to Hunts Point Produce Co. were listed in the "Open SC" column (CX 52; Tr. 604-605).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello (Tr. 1962), although she did not know what services Mr. Lomoriello was rendering to JSG (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not an employee of JSG (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on certain of the American Banana files, and completed an invoice to reflect this information (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording bribes, she stated that Mr. Lomoriello was quite upset when he received the December 14, 1992, invoice, since it appeared to him as if he was receiving a "kickback." She testified:

When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his -- actually he didn't say it as nicely as that, but I won't say what he said.

(Tr. 1969)

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr. 2036). After being made aware that Mr. Lomoriello was upset that JSG's payments to him were documented in a way that suggested that the payments were bribes, JSG did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

JSG and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Mr. Goodman. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records (Tr. 609), Mr. Lomoriello stated they were at his home and that he would provide them to her on the following day (Tr. 609). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets, supposedly reflecting his deposit of the funds received from JSG (Tr. 631).

However, at the hearing, Mr. Lomoriello suddenly disclosed what he alleged were notes that he had written in 1992 in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 1180-1181). These appeared to be on papers

containing an American Banana letterhead. Mr. Lomoriello explained: "RL -- RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-1195, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written from the desk of American Banana's bookkeeper, Carlos Valencia:

Q The documents -- the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?

A The blank documents, that's American Banana stuff, yeah -- yes.

Q Now, explain again where you -- actually in American Banana you obtained them from?

A Carlos keeps them on his desk. You have to ask him, he gives you the papers and you -- they're are pretty tight in that office there so you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

(Tr. 1196-1197)

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead in these alleged notes (CX 65g, p. 7; CX 66b, p. 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know the facts about this (Tr. 1228).

However, Mr. Valencia testified that the letterhead used for the alleged notes was identical to the heading used for American Banana's invoices (e.g., RL 1), and that the only letterhead that American Banana used for correspondence was that found in JSG's files.

JUDGE BERNSTEIN:

Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS [Valencia]:

No.

JUDGE BERNSTEIN:

Have you ever seen that letterhead in RL-19 before?

THE WITNESS:

Yes.

JUDGE BERNSTEIN:

Can you explain about it?

THE WITNESS:

I seen this on the invoice that we sent to the customers.

....

JUDGE BERNSTEIN:

And, you've seen that -- let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer.

THE WITNESS:

It's been used on the statements that we send out to the customers. It is the headlines of the statements.

(Tr. 1486)

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any such letterheads were ever left outside his locked filing cabinet (Tr. 1490-1492).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-1494). I conclude that is exactly what occurred -- that Mr. Lomoriello manufactured this evidence to support his contention that the payments that he received from JSG were not bribes.

JSG also introduced into evidence other file jackets (RX 50, pp. 1-3 (SG 5206), 4-6 (SG 5176), 7-9 (SG 5175), 10-13 (SG 5298), 14-16 (SG 5304), 17-19 (SG 5476), 20-22 (SG 5480) and 23-25 (SG 5521)) which contained handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for JSG in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-3034). Further, the reference to "Al" in SG 5476 appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for JSG in other matters. Yet there was no reliable evidence that the moneys paid to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr. Goodman's notations of expenses on associated files, it is also unbelievable that these fees would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that these payments from JSG to Mr. Lomoriello totaling \$9,733.45 were bribes, in violation of section 2(4) of the PACA.

**Respondents' Violations Were Wilful, Flagrant, and
Repeated Violations of Section 2(4) of the PACA
Which Warrant the Maximum Sanctions**

As in the *Goodman* and *Tipco* cases, Respondents have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA. Respondents knew or should have known that the payments made by JSG to Mr. Gentile and Mr. Lomoriello to influence their buying practices and to induce them to make purchases of tomatoes for L&P and American Banana, respectively, were unlawful, and Respondents should have known that they were violating the law. *Tipco, supra*, at 887-888.

This case is, in all material respects, similar to *Goodman* and *Tipco*. JSG made payments to Mr. Gentile and to Mr. Lomoriello to induce them to buy tomatoes for L&P and American Banana, respectively. Respondents' alternative explanations for these payments are not believable. JSG's large payments,

especially to Mr. Gentile, as well as those to Mr. Lomoriello, warrant the most severe sanctions.

As in *Goodman* and *Tipco*, the extremely serious violations in this case mandate no lesser sanctions than a license revocation for JSG; findings that Gloria and Tony Enterprises, Mr. Gentile, and Mr. Lomoriello committed wilful, flagrant, and repeated violations of section 2(4) of the PACA; and the denial of Mr. Gentile's license application. The assessment of a civil penalty in lieu of revocation would be grossly inadequate.

Order

JSG Trading Corp.'s PACA license is revoked.

I find that Gloria and Tony Enterprises, d/b/a G&T Enterprises, Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and I order this finding to be published.

The PACA license application of Anthony Gentile is denied.

This decision shall become final without further proceedings 35 days after the date of service upon Respondents as provided by section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days as provided in section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order as to Respondent, Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co. became final August 4, 1997.-Editor]

In re: CAITO & MASCARI, INC.
PACA Docket No. D-97-0008.
Bench Decision and Order filed August 27, 1997.

Failure to make full payment promptly - Willful, flagrant and repeated violations - License revocation - Publication.

Administrative Law Judge Dorothea A. Baker issued a bench decision finding that Respondent failed to make full payment promptly for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce. Judge Baker further found that such failure to pay constituted willful, flagrant and repeated violations of section 2(4) of the PACA, and that any excuse

proffered by Respondent for its failure to pay was not sufficient to prevent the revocation of its license or to prevent a finding of willfulness.

Timothy Morris, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Bench Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

In this disciplinary proceeding under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) (PACA), a complaint was filed on November 7, 1996, in which it was alleged that respondent had 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 77 sellers the amount of \$997,652.91 for purchases of 295 lots of perishable agricultural commodities in the course of interstate or foreign commerce during the period September 1995 through May 1996. Complainant requested that a finding be made that respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that the license of respondent be revoked.

Respondent filed an answer consisting only of a one-page general denial. No explanation was offered in support of these assertions.

At the time of the disciplinary hearing (scheduled to commence on August 26, 1997), respondent will have not paid at least \$169,896.92 of the original \$997,652.91 alleged in the complaint. So long as there is no legitimate dispute that respondent has failed to make full payment promptly for produce purchases, respondent must be found to have committed willful, flagrant, and repeated violations of the PACA, for which the appropriate sanction is a license revocation, a finding of the commission of such violations and publication thereof. *See In re: Caito Produce Co.*, 48 Agric. Dec. 602 (1989). *See also In re: Andershock Fruitland, Inc. and James A. Andershock dba AAA Recovery* 55 Agric. Dec. 1204 (Sept. 12, 1996); *Havana Potatoes of New York Corp.*, and *Havpo, Inc.* 55 Agric. Dec. 1234 (Nov. 15, 1996).

Any excuse proffered by respondent for its failure to pay is not sufficient to prevent the revocation of its license for violations of the PACA. Even where a respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. Furthermore, such excuses are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly. *See In re: Kanowitz Fruit and Produce Co., Inc.*, 56 Agric. Dec. ___ (March 21, 1997); *In re: Andershock Fruitland, Inc. and*

James A. Andershock dba AAA Recovery 55 Agric. Dec. 1204 (1996); *In re: Moreno Bros.*, 54 Agric. Dec. 1425 (1995).

In view of respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the issuance of a bench decision orally at the close of the hearing finding the occurrence of these violations and ordering the revocation of respondent's license is warranted pursuant to section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Indiana. Its business and mailing address was [REDACTED] Indiana [REDACTED].

2. Pursuant to the licensing provisions of the PACA, license number [REDACTED] was issued to respondent on May 17, 1951. This license terminated on May 17, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual renewal fee.

3. On December 23, 1996, respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*) in the United States Bankruptcy Court for the Southern District of Indiana. This petition has been designated Case No. 96-12380-FJO-7.

4. The Secretary has jurisdiction over respondent and the subject matter involved herein.

5. As set forth more fully in paragraph III of the Complaint, during the period September 1995 through May 1996, respondent failed to make full payment promptly to 77 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$997,652.91 for 295 lots of perishable commodities purchased, received, and accepted in interstate and foreign commerce.

6. As of August 8, 1997, respondent still had not paid at least \$169,896.92 to 30 of the 77 sellers whose transactions account for \$736,359.20 of the total \$997,652.91 alleged in the Complaint.

7. Respondent also failed to make full payment promptly to six of these 30 sellers for an additional \$116,657.71 in perishable agricultural commodities purchased, received, and accepted after May 1996. Respondent has still not paid this amount as of August 8, 1997.

Conclusions

Respondent's failures to make full payment promptly, as more fully set forth in paragraph III of the complaint, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that such finding is ordered published.

This Order shall take effect 14 days after this Decision becomes final. This Decision will become final and effective without further proceedings 35 days after service upon respondent, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

[This Decision and Order became final September 30, 1997 and effective October 14, 1997.-Editor]

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Decision and Order filed October 21, 1997.

Responsibly connected — Active involvement in violations — Rebuttable presumption standard — Nominal officer and director — Alter ego.

The Judicial Officer reversed Judge Bernstein's (ALJ) decision that Petitioner was not responsibly connected with The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. Petitioner admits that he was the nominal officer of The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. During this time, Petitioner signed 14 checks totaling \$59,728.60 which were payable to persons who were not The Norinsberg Corporation's produce creditors. Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of the resources available to The Norinsberg Corporation to make full payment promptly to produce creditors in accordance with the PACA. Petitioner was therefore actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA and the fact that Petitioner engaged in these activities at the direction of another does not negate Petitioner's active involvement. Since Petitioner, who admits that he was an officer of The Norinsberg Corporation, albeit an officer in name only, has failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA, Petitioner was responsibly connected with The Norinsberg Corporation within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

Andrew Y. Stanton, for Respondent.

Stephen P. McCarron, Washington, D.C., for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was *responsibly connected* with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA,¹ in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg Corporation and involved in the daily activities of The Norinsberg Corporation.

On January 2, 1997, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in New York, New York. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner. Mr. Andrew Y. Stanton, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 10, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and a Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, and on February 11, 1997, Respondent filed Respondent's Brief. On February 19, 1997, Petitioner filed Petitioner's Reply Brief and Respondent filed Respondent's Reply Brief.

On May 6, 1997, the ALJ issued an Initial Decision and Order in which the ALJ found that: (1) "The Norinsberg Corporation was the alter ego of Robert Norinsberg"; (2) "Petitioner . . . only nominally was a secretary, a treasurer, a director and a stockholder of The Norinsberg Corporation during the period of

¹During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of \$424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and its PACA license was revoked pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995).

violation of the PACA by the corporation"; and (3) "Petitioner . . . was not actively involved in the activities resulting in the violation" (Initial Decision and Order at 8-9). The ALJ concluded that "Michael Norinsberg was not responsibly connected to The Norinsberg Corporation at the time of the corporation's violations of the PACA" (Initial Decision and Order at 4) and reversed the "Order of the Chief, PACA Branch, Fruit and Vegetable Division, USDA, dated August 11, 1993, which found that Michael Norinsberg was 'responsibly connected' to The Norinsberg Corporation" (Initial Decision and Order at 13).

On May 28, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in adjudication proceedings which are subject to the Rules of Practice (7 C.F.R. § 2.35).² On July 21, 1997, Petitioner filed Petitioner's Opposition to Respondent's Appeal Petition, and on July 23, 1997, the case was referred to the Judicial Officer for decision.

Petitioner in this proceeding instituted under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) has the burden of proving by a preponderance of the evidence that: (1) he was not actively involved in the activities resulting in a violation of the PACA; and (2) he either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Based upon a careful consideration of the record, I find that Petitioner has not proven by a preponderance of the evidence that he was not actively involved in the activities resulting in a violation of the PACA. I agree with many of the ALJ's findings of fact. Nonetheless, based on my disagreement with the ALJ's conclusion that the Petitioner was not responsibly connected with The Norinsberg Corporation during the time The Norinsberg Corporation violated the PACA, I have not adopted the ALJ's Initial Decision and Order.

Petitioner's exhibits are designated by the letters "PX"; Respondent's exhibits are designated by the letters "RX"; documents relied upon by Respondent to make the August 11, 1993, determination that Petitioner was responsibly connected with The Norinsberg Corporation are designated by the letters "AX"; and transcript references are designated by "Tr."

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Applicable Statutory Provisions

7 U.S.C.:

§ 499a. Short title and definitions

.....

(b) Definitions

.....

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

§ 499d. Issuance of license

.....

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

.....

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a

hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

7 U.S.C. §§ 499a(b)(9), 499d(b)(A)-(B), (c), 499h(b).

Findings of Fact

1. The Norinsberg Corporation's business was founded in 1926 by Jack Norinsberg (Tr. 26). Jack Norinsberg's son, Robert M. Norinsberg, joined the business in 1960 after he left college (Tr. 26).

2. The Norinsberg Corporation was first incorporated under the laws of the State of New York in 1972. Its business address was [REDACTED] New York [REDACTED] AX 15 at 2; PX 11 at 1; Tr. 26).

3. Robert M. Norinsberg became the president of The Norinsberg Corporation in 1974 and at all times material to this proceeding was the president of The Norinsberg Corporation (Tr. 26-27). Jack Norinsberg was involved with The Norinsberg Corporation until his death in 1975 (Tr. 27).

4. Pursuant to the licensing provisions of the PACA, The Norinsberg Corporation was issued PACA license number [REDACTED] on August 12, 1975, which it renewed annually at least through August 12, 1992 (AX 15 at 2).

5. During the period from April 1991 through February 1992, The Norinsberg Corporation failed to make full payment promptly to 10 sellers of the agreed purchase prices of 46 lots of perishable agricultural commodities, in the total amount of \$424,913.75, which The Norinsberg Corporation had purchased, received, and accepted in interstate commerce (AX 15 at 2).

6. The Norinsberg Corporation's failures to make full payment promptly for 46 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate commerce are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (AX 15 at 3, 6).

7. Based on The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), The Norinsberg Corporation's PACA license was revoked (AX 15 at 6; *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995)).

8. On August 11, 1993, J.D. Flanagan, Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, determined that Petitioner was responsibly connected to The Norinsberg Corporation at the time of The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Pet. ¶ 1).

9. Petitioner is an individual whose address is [REDACTED] (b) (6) (Tr. 145).

10. Petitioner graduated from Muhlenberg College in 1985 when he was 22 years old (Tr. 145). Petitioner was hired by The Norinsberg Corporation in 1986 (Tr. 35, 146). In July 1986, Petitioner signed an employment agreement in which he agreed "to perform such duties in such positions as may be determined and assigned from time to time by" The Norinsberg Corporation, and the Norinsberg Corporation agreed to pay Petitioner "a salary at the rate of \$25,000 per annum, payable in installments in accordance with [The Norinsberg Corporation's] normal payroll practices" (PX 11). The employment agreement (PX 11) remained in effect during the period of Petitioner's employment by The Norinsberg Corporation (Tr. 148), and Petitioner continued to be employed by The Norinsberg Corporation until it ceased operations in 1992 (Tr. 36, 146).

11. The Norinsberg Corporation issued 1,000 shares of common stock and 4,035 shares of preferred stock (PX 1; Tr. 109). The only differences between the preferred stock and the common stock was that the holders of the preferred stock had the right to a cumulative dividend and holders of the common stock received no dividend (Tr. 59-61, 110, 135) and that the preferred stock had a par value of \$100 per share and the common stock had no par value (Tr. 118). In 1986, The Norinsberg Corporation issued Petitioner 150 shares of the common stock in The Norinsberg Corporation (Tr. 40, 157-58). At all times material to this proceeding, the 5,035 outstanding shares of stock in The Norinsberg Corporation were held as follows: (1) the estate of Jack Norinsberg held 2,535 shares of preferred stock; (2) Susan Norinsberg held 1,500 shares of preferred stock; (3) Robert M. Norinsberg held 850 shares of common stock; and (4) Petitioner held 150 shares of common stock (PX 1; Tr. 109). The Norinsberg Corporation never held a shareholders' meeting (Tr. 39, 43, 109).

12. At all times material to this proceeding, Petitioner held approximately 2.97914 per centum of the outstanding stock of The Norinsberg Corporation.

13. At all times material to this proceeding, Robert M. Norinsberg controlled the operations of The Norinsberg Corporation. Robert M. Norinsberg: (1) hired, fired, and set salaries for all employees (Tr. 37); (2) directed all produce and equipment purchases and leases (Tr. 36, 39); (3) personally guaranteed loans made to The Norinsberg Corporation (Tr. 32-34, 43); and (4) met with accountants, lawyers, and bankers to make all corporate decisions beyond routine, daily operational matters (Tr. 38-39). Robert M. Norinsberg had the power to appoint and remove officers and directors of The Norinsberg Corporation (Tr. 40). Robert M. Norinsberg removed money from The Norinsberg Corporation for his own

benefit or the benefit of corporations in which he had an interest; all other employees of The Norinsberg Corporation were paid "set salaries" (Tr. 42).

14. Petitioner was hired by The Norinsberg Corporation in 1986 to work as a clerk for the corporation's sales manager, Judith Shapiro Cutler (AX 12 at 3; Tr. 35-36, 71). Petitioner's immediate supervisor was Ms. Cutler (AX 12 at 3; Tr. 164). Petitioner prepared manifests (AX 12 at 3; Tr. 36, 146), inspected fruit (Tr. 147), arranged for and loaded trucks (AX 12 at 3; Tr. 36, 151-52), made bank deposits (AX 12 at 3; Tr. 36), and ran "general errands for [Ms. Cutler] and the office" (Tr. 36).

15. Petitioner is Robert M. Norinsberg's son and Robert M. Norinsberg and Petitioner intended that Petitioner would eventually take over the family business (Tr. 74, 162).

16. Robert M. Norinsberg appointed Petitioner as secretary and treasurer of The Norinsberg Corporation so that Petitioner could sign checks and other documents for Robert M. Norinsberg when he was unavailable (Tr. 39-40, 43). Petitioner's duties and compensation did not change after he was appointed secretary and treasurer of The Norinsberg Corporation (Tr. 43-44, 154). On April 21, 1992, Robert M. Norinsberg wrote Bill Addington, an investigator for the PACA Branch, Agricultural Marketing Service, informing him that Petitioner is the "secretary/treasurer" of The Norinsberg Corporation (AX 2 at 1).

17. Petitioner did not "manage" The Norinsberg Corporation "in any way" (Tr. 157) nor did Petitioner have any responsibility for the administration of The Norinsberg Corporation (AX 12 at 3). Petitioner did not: (1) buy produce for The Norinsberg Corporation (AX 12 at 4; Tr. 36, 152); (2) decide who to pay for produce or other items (AX 12 at 4; Tr. 36); (3) decide who The Norinsberg Corporation should hire or fire (Tr. 36-37, 157); (4) have any control over the salaries or wages of employees (Tr. 157); (5) meet with accountants, bankers, and lawyers (Tr. 38-39, 157); (6) make any personal guarantees to any creditor (Tr. 72); (7) co-sign for any loans to The Norinsberg Corporation (Tr. 157); (8) have access to the books or records of The Norinsberg Corporation (Tr. 149); or (9) have decision making authority with respect to contracts or leases executed by The Norinsberg Corporation (Tr. 39).

18. Petitioner worked in a single office with Ms. Cutler; the controller, Annette Adario; and two bookkeepers, Grace Ambrosino and Anne Eldred (Tr. 74-76). Petitioner was paid weekly, and Petitioner's annual salary ranged between \$25,000 and \$27,000 from 1986 to 1992 (PX 11 at 1; Tr. 42, 66, 68-69, 148). Petitioner was not compensated in any way other than his salary during the period of his employment by The Norinsberg Corporation (Tr. 68). The 1992 payroll records reveal the yearly salaries of persons employed by The Norinsberg

Corporation as follows: (1) Annette Adario, \$59,323.16; (2) Grace Ambrosino, \$26,760; (3) Judith Shapiro Cutler, \$60,368; (4) Anne Eldred, \$16,990; (5) Michael Norinsberg \$26,936; (6) Robert Pelletier, \$46,110; (7) Barton Weitz \$25,680; and (8) Robert M. Norinsberg, \$342,468.93 (PX 6). Ms. Cutler received bonuses which increased her yearly salary to over \$100,000 (Tr. 68). The Norinsberg Corporation provided cars to Ms. Cutler and Ms. Adario (Tr. 68, 76) and American Express and Visa credit cards to Robert M. Norinsberg (Tr. 41-42).

19. In September 1987, Petitioner was authorized by The Norinsberg Corporation to be signatory on bank accounts with Chase Manhattan Bank and the Republic National Bank of New York (AX 5, 8). Petitioner signed three bank signature cards authorizing him to sign checks on behalf of The Norinsberg Corporation drawn on a checking account with Chase Manhattan Bank (AX 4) and a money market account and checking account with Republic National Bank of New York (AX 7). On the signature card for the money market account with Republic National Bank of New York, Petitioner signed as "secretary/treasurer" (AX 7 at 1). On the signature cards for the two checking accounts, Petitioner signed as "secretary" (AX 4 at 1, AX 7 at 2).

20. Between May 1991 and February 1992, Petitioner signed nine of approximately 929 checks drawn by The Norinsberg Corporation on its Chase Manhattan Bank account (AX 6; Tr. 101-03) and seven of approximately 267 checks drawn by The Norinsberg Corporation on its Republic National Bank of New York account (AX 9; Tr. 103-04). The checks were presented to Petitioner for signature with the checks already made out as to payee and amount, and Petitioner signed the checks as presented to him (Tr. 170-71). Petitioner signed checks when Robert M. Norinsberg was unavailable and at the direction of Robert M. Norinsberg (Tr. 82, 149-50).

21. The checks which Petitioner signed drawn on The Norinsberg Corporation's Chase Manhattan Bank account totaled \$41,728.60 (AX 6), and the payees and the total amounts to each payee are as follows:

| | |
|---------------------------------------|-------------|
| Robert M. Norinsberg (7 checks) . . . | \$33,369.60 |
| Susan Norinsberg (1 check) | \$ 5,359.00 |
| Carmela Quito (1 check) | \$ 3,000.00 |

Susan Norinsberg is Petitioner's grandmother and at all times material to this proceeding was the holder of 1,500 shares of preferred stock in The Norinsberg Corporation (PX 1; Tr. 82, 109). The check issued to Ms. Norinsberg was a dividend payment based on the preferred shares held by Ms. Norinsberg (Tr. 82).

Carmela Quito is Robert M. Norinsberg's housekeeper, and the check issued to Ms. Quito was to reimburse Ms. Quito for expenses she incurred on Robert M. Norinsberg's behalf (Tr. 82-83).

22. The checks which Petitioner signed drawn on The Norinsberg Corporation's Republic National Bank of New York account totaled \$133,966.27 (AX 9), and the payees and the total amounts to each payee are as follows:

| | |
|---|--------------|
| Robert M. Norinsberg (5 checks) | \$ 18,000.00 |
| Shoreham Cooperative (2 checks) | \$115,966.27 |

The Shoreham Cooperative is a produce seller, one-third of which is owned by the estate of Jack Norinsberg, and the checks issued to the Shoreham Cooperative were for produce sold by the Shoreham Cooperative to The Norinsberg Corporation (Tr. 85-86).

23. Petitioner knew that The Norinsberg Corporation was not making full payment promptly to produce creditors, and Petitioner was troubled by his signing checks made payable to Robert M. Norinsberg, Susan Norinsberg, and Carmela Quito (Tr. 167-69).

24. On or about January 8, 1992, Petitioner signed one purchase agreement with Orbaker's Fruit Farm, Inc. (AX 10), but "must have asked [for permission] before he could sign it." (Tr. 79.)

25. In October 1989, Robert M. Norinsberg sought additional financing and attempted to obtain a \$250,000 line of credit with Banco Di Roma (Tr. 88-90). On October 5, 1989, Banco Di Roma sent documents to Robert M. Norinsberg to effectuate the financing agreement (AX 11 at 1). Petitioner, using the title "secretary," signed a proposed bank assignment and security agreement at the direction of Robert M. Norinsberg (AX 11 at 7-13; Tr. 88-94, 104). The bank security agreement was never executed by Banco Di Roma (AX 11).

26. Petitioner's name was signed on an August 1991 PACA license renewal application, which identified Petitioner as "secretary/treasurer" (AX 1 at 5). The August 1991 PACA license renewal application was signed by someone other than Petitioner (Tr. 55, 155).

27. Numerous PACA license renewal forms identify Petitioner as a secretary, treasurer, director, and 15 per centum stockholder of The Norinsberg Corporation (AX 1 at 1-4, 6).

28. The Norinsberg Corporation did not hold any directors' meetings (Tr. 39, 109, 156-57), and Petitioner does not remember ever being designated as a director of The Norinsberg Corporation (Tr. 153, 156).

Conclusions of Law

1. The Norinsberg Corporation was not at any time material to this proceeding a partnership, and Petitioner was not at any time material to this proceeding a partner in The Norinsberg Corporation.

2. At all times material to this proceeding The Norinsberg Corporation as a corporation.

3. Petitioner was not a holder of more than 10 per centum of the outstanding stock of The Norinsberg Corporation at any time material to this proceeding.

4. Petitioner was only nominally an officer and director of The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner was an owner of The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

7. Petitioner was responsibly connected with The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

As originally enacted in 1930, section 8 of the PACA empowered the Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who violated section 2 of the PACA, but the Secretary of Agriculture had no authority to impose any employment restrictions on individuals who were responsibly connected with the violator and actively involved in the activities resulting in the violation.³ Amendments to the

³The Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 8, 46 Stat. 535, provides:

Sec. 8. Whenever the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, he 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 a flagrant or repeated violation of such provisions, the Secretary may, by order, revoke the license of the offender.

PACA in 1934 empowered the Secretary of Agriculture to revoke the PACA license of any commission merchant, dealer, or broker, who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been revoked,⁴ and 1956 amendments to the PACA authorized the Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been suspended or revoked.⁵ However, until 1962, the PACA did not define the term

⁴The Act of April 13, 1934, Pub. L. No. 159, ch. 120, § 5, 48 Stat. 586, provides:

Sec. 5. That a new paragraph lettered (c) and reading as follows is hereby added to section 4 of the Perishable Agricultural Commodities Act, 1930:

"(c) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker, who after the date given in such notice continues to employ in any responsible position any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year prior to the date of such notice. Employment of such individual by a licensee in any responsible position after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond or other satisfactory assurance that its business will be conducted in accordance with the provisions of [the PACA.]"

⁵The Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 5, 70 Stat. 727, provides:

Sec. 5. Section 8(b) of [the PACA] (7 U.S.C., sec. 499h(b)) is amended to read as follows:

"(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of [the PACA.]"

responsibly connected. In order to give the term *responsibly connected* "specific meaning" and avoid "possible confusion as to interpretations,"⁶ section 1 of the PACA (7 U.S.C. § 499a) was amended by adding a definition of the term *responsibly connected* to read as follows:

The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association[.]

Act of October 1, 1962, Pub. L. No. 87-725, § 2, 76 Stat. 673.

The applicable House of Representatives Report and Senate Report each state that the definition of the term *responsibly connected* "[i]mprove[s] and clarif[ies] provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated with them[.]"⁷ Further, both reports state that:

Responsible connection by the applicant (or one of the applicant's officers, directors, or members, or a holder of more than 10 percent of the applicant's stock) with a person guilty of the specified conduct would require a refusal of a license, without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct.

H.R. Rep. No. 1546, 87th Cong., 2d Sess. 6 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2753; S. Rep. No. 750, 87th Cong., 1st Sess. 5 (1961).

Until 1975, an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered per se responsibly connected and subject to the licensing and employment restrictions in the PACA.

The per se standard was first enunciated in *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966). The court held that the 1962 amendment to the PACA

⁶H.R. Rep. No. 1546, 87th Cong., 2d Sess. 4 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2751; S. Rep. No. 750, 87th Cong., 1st Sess. 2 (1961).

⁷H.R. Rep. No. 1546, 87th Cong., 2d Sess. 2 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2750; S. Rep. No. 750, 87th Cong., 1st Sess. 1 (1961).

adding a definition of the term *responsibly connected* was intended to establish a per se exclusionary standard whereby an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be subject to the Secretary of Agriculture's authority to prohibit employment under section 8(b) of the PACA (7 U.S.C. § 499h(b)) and that no defense, such as lack of real authority within the corporation or partnership, would be available to individuals who fell within the definition of the term *responsibly connected*.

This per se exclusionary rule was followed in other circuits.⁸ However, in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), a court determined, for the first time, that the presumption that an individual who was a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was responsibly connected is a rebuttable presumption. The court found that an individual who held the title of vice-president was not *responsibly connected* to a corporation that had committed flagrant and repeated violations of the PACA because he neither participated in the management of the corporation nor had the power to participate.

The United States Court of Appeals for the District of Columbia continued to adhere to the doctrine that a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation could

⁸See *Conforti v. United States*, 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a per se rule to the definition of the term *responsibly connected* in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied*, 117 S. Ct. 49 (1996); *Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1130 (5th Cir. 1993) (holding that the definition of *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) commands the application of a per se rule); *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (holding that if a person is an officer, director, or holds over 10 per centum of the outstanding stock of a corporation that has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b, that person is considered *responsibly connected* and subject to sanctions under the PACA; PACA does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected); *Pupillo v. United States*, 755 F.2d 638, 644 (8th Cir. 1985) (stating that a per se analysis of the definition of *responsibly connected* in section 1 of the PACA accomplishes Congress' objective of providing a clear definition of *responsibly connected*, and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator). See also *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing with approval the per se approach taken by the court in *Birkenfield*), *cert. denied*, 389 U.S. 835 (1967).

rebut the presumption that he or she was *responsibly connected* as defined in section 1 of the PACA (7 U.S.C. § 499a).⁹

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation to rebut his or her status as responsibly connected with a violator.¹⁰ Specifically, section 12(a) of the PACAA-1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to

⁹See *Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997) (stating that this court has held that the presumption that an officer, director, or holder of more than 10 per centum of the stock of a corporation is responsibly connected is a rebuttable presumption); *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating that this circuit has consistently read 7 U.S.C. § 499a and 499h(b) as establishing only a rebuttable presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected with the violator; and that a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder); *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating that, as construed by this court, characterization as *responsibly connected*, as defined in the PACA, is rebuttable, not absolute); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating that the definition of the term *responsibly connected* in section 1 of the PACA establishes only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1413 (D.C. Cir. 1986) (stating that PACA's provisions on responsible connection establish, not an incontrovertible rule, but rather a rebuttable presumption); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (stating that the court had established in *Quinn* that being a director, officer, or 10 percent stockholder is only prima facie evidence that one is *responsibly connected* to a company that has violated the PACA and that a finding of liability under 7 U.S.C. § 499h must be premised upon personal fault or failure to counteract or obviate the fault of others).

¹⁰Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) [hereinafter PACAA-1995].

license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."¹¹ The House Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation."¹²

While PACAA-1995 generally incorporated the rebuttable presumption standard followed by the United States Court of Appeals for the District of Columbia Circuit into the definition of the term responsibly connected in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), District of Columbia circuit case law does not premise responsible connection with a PACA violator on active involvement in the activities resulting in a violation, as does section 12(a) of the PACAA-1995. Instead, United States Court of Appeals for the District of Columbia cases decided prior to the enactment of PACAA-1995 premise responsible connection with a PACA violator upon personal fault or the failure to counteract or obviate the fault of others.¹³ Thus, I do not rely on District of Columbia circuit case law regarding the issue of Petitioner's active involvement in activities resulting in The Norinsberg Corporation's violations of the PACA.

Petitioner Was Actively Involved in Activities Resulting in the PACA Violations Committed By The Norinsberg Corporation

¹¹H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

¹²H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

¹³*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975).

Petitioner must prove by a preponderance of the evidence that he was not actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, during the period that The Norinsberg Corporation failed to make full payment promptly for perishable agricultural commodities, Petitioner signed 16 checks drawn on The Norinsberg Corporation's account with Chase Manhattan Bank and the Republic National Bank of New York (AX 6, 9; Tr. 101-04). Fourteen of these checks, totaling \$59,728.60, were payable to persons who were not produce creditors of The Norinsberg Corporation.¹⁴

The checks were presented to Petitioner for signature with the checks already made out as to payee and amount, and Petitioner signed the checks as presented to him (Tr. 170-71). Petitioner signed checks when Robert M. Norinsberg was unavailable and at the direction of Robert M. Norinsberg (Tr. 82, 149-50). Petitioner knew at the time that he signed these 14 checks that The Norinsberg Corporation was not making full payment promptly to produce creditors, and Petitioner was troubled by his signing checks made payable to Robert M. Norinsberg, Susan Norinsberg, and Carmela Quito (Tr. 167-69).

Petitioner's act of signing 14 checks drawn on two of The Norinsberg Corporation's accounts made payable to three individuals who were not produce creditors in amounts totaling \$59,728.60 constitutes active involvement in an activity resulting in violations of the PACA by The Norinsberg Corporation. Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of the resources available to The Norinsberg Corporation to make full payment promptly to produce creditors in accordance with the PACA. Petitioner was therefore actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA and the fact that Petitioner engaged in these activities at the direction of another does not negate Petitioner's active involvement.

The ALJ appears to have based his decision that Petitioner was not actively involved in activities that resulted in The Norinsberg Corporation's violations of the PACA on the fact that Petitioner did not actively participate at a managerial level in decision making activities that resulted in The Norinsberg Corporation's violations of the PACA as follows:

¹⁴The checks signed by Petitioner payable to individuals who were not The Norinsberg Corporation's produce creditors are as follows: (1) 12 checks made payable to Robert M. Norinsberg in amounts totaling \$51,369.60; (2) one check made payable to Susan Norinsberg in the amount of \$5,359; and (3) one check made payable to Carmela Quito in the amount of \$3,000.

As to the criterion as to whether or not Petitioner was "actively involved in the activities resulting in the violation" of the PACA, what is contemplated is an active participation at a managerial level in decision making activities that resulted in the violation. The weight of the evidence shows that Petitioner did not serve in such a role in connection with his duties as an employee. The evidence is that he did what he was directed to do. His father was the decision-making authority in the business and to a lesser extent the corporation's comptroller and sales manager, who were paid more than twice what Petitioner was paid, exercised authority. Petitioner appeared to sign checks or sign his name only when he was told to do such. Therefore, I conclude that Michael Norinsberg's activity in the business was limited to following orders of others and he was not an active participant in the corporation's violations of the PACA.

Initial Decision and Order at 12-13.

I disagree with the ALJ's conclusion that an individual is not actively involved in activities resulting in a violation of the PACA unless that individual actively participated at a managerial level in decision making activities that resulted in the violation. I find nothing in section 12(a) of the PACAA-1995 or the applicable legislative history to indicate that Congress intended to limit active involvement in activities resulting in a violation of the PACA to "active participation at a managerial level in decision making activities that resulted in the violation." (Initial Decision and Order at 12.)

The checks signed by Petitioner were presented to Petitioner for signature with the checks already made out as to payee and amount and Petitioner signed checks at the direction of the president of The Norinsberg Corporation. There is no evidence in the record in this proceeding that Petitioner participated at a managerial level in any decision making activities regarding the signing of the 14 checks in question. Instead, the evidence indicates, as the ALJ found, that Petitioner signed the checks in question when he was told to do so (Initial Decision and Order at 12-13). Nonetheless, the act of signing checks is active involvement in an activity, and in this instance, the activity resulted in The Norinsberg Corporation's violations of the PACA.

Since Petitioner, who admits that he was an officer of The Norinsberg Corporation, albeit an officer in name only, has failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA, Petitioner at all times material

to this proceeding was responsibly connected with The Norinsberg Corporation within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

Petitioner Was Only Nominally an Officer and Director of The Norinsberg Corporation

The issue of whether Petitioner was only nominally an officer or director of The Norinsberg Corporation and whether The Norinsberg Corporation is the alter ego of Robert M. Norinsberg is not dispositive of this case because Petitioner admits that he is a nominal officer of The Norinsberg Corporation, and as discussed in this Decision and Order, *supra*, pp. 23-26, Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA. These findings alone are sufficient to conclude that Petitioner was responsibly connected with The Norinsberg Corporation.

Nonetheless, I note my agreement with the ALJ that Petitioner has proven by a preponderance of the evidence that he was only nominally an officer and director of The Norinsberg Corporation and that The Norinsberg Corporation was the alter ego of Robert M. Norinsberg.

The provisions of the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) relating to nominal partners, officers, directors, or shareholders and a violating licensee being the alter ego of its owners appear to be in accord with District of Columbia circuit case law which preceded enactment of PACAA-1995. That case law is summarized in *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), as follows:

We have identified two sets of circumstances under which a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder. The first involves cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as "to negate its separate personality." *Quinn*, 510 F.2d at 758. . . .

The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could establish by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d at 409.

Bell v. Department of Agriculture, supra, 39 F.3d at 1201.

Turning to the question whether an individual is a nominal officer or director, the crucial factor is the individual's real relationship to the company, and not that corporate records indicate that the individual was an officer or director. As the court in *Bell* noted, corporate records indicating that one is an officer or director can be consistent with the conclusion that an officership or directorship is nominal.

Quinn was indisputably a vice-president on paper. After the sole proprietorship for which he worked was incorporated, he became its vice-president, but his duties did not change, he was paid no additional salary, and he never had anything to do with policy or business decisions. Nor did he have access to company records or any knowledge of the company's financial difficulties. We said that these circumstances "would demonstrate not only that Quinn did not to any extent participate in the management of the company's affairs, but also that he was totally without power to do so; in other words, that Quinn did not bear any responsible connection with the company." *Quinn*, 510 F.2d at 753. Although *Quinn* may be distinguishable because of Bell's apparent awareness of some company financial difficulties, the decision makes clear that an officer may be "nominal" even though the corporate records, such as those relied on here by the Presiding Officer, make him out to be a real one.

So too for directors. Lilly Minotto, a clerical employee of a PACA licensee, was put on its board of directors because she was always in the office and could be counted on to attend meetings and ensure a quorum. . . . That we held her not to be responsibly connected, however, makes it clear that one may hold a paper directorship, and more, and yet be classified as nominal.

Bell v. Department of Agriculture, supra, 39 F.3d at 1202.

In further discussing the factors involved in whether a person's paper-status as an officer or director should be considered nominal, the court in *Bell* stated:

. . . Like Quinn and Minotto, Bell seems to have been made an officer and a director of Sunrise for the administrative convenience of the company as it completed paperwork for PACA and for legally required corporate formalities. Moreover, like Quinn, Bell never participated in the formal decisionmaking structures of the corporation,

such as board meetings; the meetings were never held, and the structures existed only on paper. . . . In that sense, Bell's case is more compelling than that of Minotto, who attended all board meetings and voted on resolutions.

Id. at 1204.

In *Minotto*, the court explained that Lilly Minotto was only a nominal director because she lacked training and experience to be an active director, and she had no real authority within the company. She simply acquiesced in decisions made by the company president who was her boss. The court also noted she had no policy or decision making role and was essentially a clerical employee. *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 409 (D.C. Cir. 1983).

Petitioner was, during the period of violation, a secretary, treasurer, director, and stockholder of The Norinsberg Corporation. Petitioner admits that he was secretary-treasurer of the corporation, but disputes that he was a director. However, based upon the fact that The Norinsberg Corporation's license application (AX 1) lists Petitioner as a director ("STD" or "SD"), I agree with the ALJ's conclusion that Petitioner was a director. Moreover, Petitioner held 15 per centum of the outstanding common stock of The Norinsberg Corporation during the period in which The Norinsberg Corporation violated the PACA, but if the outstanding preferred stock is added to the outstanding common stock, Petitioner would be a holder of approximately 2.97914 per centum of The Norinsberg Corporation's total outstanding stock.

I conclude that Petitioner has shown by a preponderance of the evidence that he only nominally was a secretary, treasurer, and director, and that he held less than 10 per centum of the outstanding stock of The Norinsberg Corporation during the period of violation of the PACA by the corporation.

The testimony of Petitioner and Robert M. Norinsberg supports the conclusion that during the time period when The Norinsberg Corporation violated the PACA, Petitioner was an officer and director in name only. Petitioner had no managerial authority and did what he was told to do by Robert M. Norinsberg, who made the business's important decisions.

Admittedly, both Petitioner and Robert M. Norinsberg have motives to be untruthful. However, the ALJ found no reason to disbelieve their testimonies. The ALJ found that Petitioner and Robert M. Norinsberg were not only credible in demeanor but also that the documentary evidence supports their assertions. Normally, the Judicial Officer accords great weight to the credibility determinations of the administrative law judges since they have the opportunity to

see and hear the witnesses testify,¹⁵ and I find nothing on this record to indicate that either Petitioner or Robert M. Norinsberg was not credible.

Respondent's conclusion that Petitioner was more than a nominal officer and director and a holder of more than 10 per centum of the outstanding stock of The Norinsberg Corporation is based solely upon documentary evidence. The key documents show:

1. A letter by Robert M. Norinsberg to PACA asserted that The Norinsberg Corporation's outstanding shares of capital stock consisted of 1,000 shares of common stock of which Robert M. Norinsberg held 850 and Petitioner held 150 (AX 2 at 1).
2. Petitioner was listed as a secretary, treasurer, director, and stockholder on the corporation's 1991 and 1992 license applications (AX 1) and Petitioner's name was signed on an application for a PACA license for The Norinsberg Corporation (AX 1 at 5).
3. Petitioner was listed as a signatory of checks for three corporate bank accounts and signed 16 corporate checks (AX 4-9).
4. Petitioner signed one purchase agreement (AX 10).
5. Petitioner signed a proposed bank assignment and security agreement which was never ratified (AX 11).
6. New York State Department of Agriculture & Markets wrote a letter to Petitioner as secretary-treasurer of The Norinsberg Corporation (RX 1).

I believe Petitioner's witnesses' testimony that there were 4,035 shares of preferred stock outstanding in addition to the outstanding common stock. AX 1 and AX 2 are rebutted by the testimony which is supported by a copy of a letter of

¹⁵See *In re Fred Hodgins*, 56 Agric. Dec. ____, slip op. at 158 (July 11, 1997); *In re Saulsbury Enterprises*, 55 Agric. Dec. 6, 38 (1996), appeal docketed, No. CV-F-97-5136-REC-SMS (E.D. Cal. Feb. 19, 1997).

an attorney in 1986 (PX 1) and a financial statement certified to by a certified public accountant (PX 2 at 16-17), both of which establish that there were 4,035 shares of preferred stock outstanding in addition to 1,000 shares of common stock outstanding.

Petitioner also argued that because the Internal Revenue Service and the State of New York found Petitioner was an officer in name only (PX 9, 10) that Petitioner should be found in this proceeding to be only a nominal officer and director of The Norinsberg Corporation. Although this evidence was received it is not given any weight because it is not clear what criteria the State of New York and the Internal Revenue Service applied in reaching their conclusions.

However, Respondent's evidence is far from overwhelming. Respondent made a thorough investigation and examination of all of The Norinsberg Corporation's records and from all of these records found relatively few checks and documents to support its conclusions that Petitioner was an officer, director, and holder of more than 10 per centum of the outstanding stock of The Norinsberg Corporation.

Petitioner's witnesses testified that Petitioner was listed as an alternate signer of checks because his father spent as much as 3 months at a time in Vermont supervising the family apple growing operation. Petitioner signed relatively few checks and always at the direction of Robert M. Norinsberg. Of approximately 929 checks issued on The Norinsberg Corporation's account at the Chase Manhattan Bank between May 1991 and February 1992, Respondent found that Petitioner signed nine (AX 6). Of approximately 267 checks issued on The Norinsberg Corporation's account at Republic National Bank of New York between May 1991 and July 1991, Respondent found that Petitioner signed seven (AX 9). Although these checks were in large amounts, they were very few and Petitioner signed them because he was directed to sign them during Robert M. Norinsberg's absence.

Similarly, in all of the corporate records that Respondent thoroughly examined, Respondent found relatively few documents to support its position (AX 1, 10, 11; RX 1). With respect to the PACA license application (AX 1 at 5), Petitioner testified that he did not sign the document but someone else in the corporation signed his name.

Petitioner was made an officer for "administrative convenience." Robert M. Norinsberg simply wanted corporate checks and other documents signed with the Norinsberg name, and Petitioner was available to do that while Robert M. Norinsberg was away (Tr. 80-81). These circumstances are similar to the circumstances in *Minotto*, where Ms. Minotto was made an officer "solely for the convenience of the Company; because of her presence in the office, Minotto could

be counted upon to attend Board meetings and to insure the availability of a quorum." *Minotto, supra*, 711 F.2d at 408.

I find credible the testimony of Petitioner's witnesses that from 1986 to 1992, Petitioner was an employee who made no independent managerial decisions. His annual salary was approximately \$26,000 and there is no evidence that he received any additional compensation from the business as an employee, officer, director, or stockholder. During some of this time period Annette Adario, The Norinsberg Corporation's comptroller, was paid over \$59,000 per year; Judith Shapiro Cutler, The Norinsberg Corporation's sales manager, was paid over \$60,000 per year; and Robert M. Norinsberg was paid approximately \$342,000 per year (PX 5, 6). Based upon the corporate payroll records, the meager evidence by Respondent despite its exhaustive search of the corporate records, the consistent testimony of Robert M. Norinsberg and Petitioner, the weight of the evidence leads to the clear conclusion that Petitioner was only nominally an officer and director of The Norinsberg Corporation during the time The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Petitioner Was An Owner of The Norinsberg Corporation

Petitioner has proven by a preponderance of the evidence that The Norinsberg Corporation was the alter ego of Robert M. Norinsberg. At all times material to this proceeding, Robert M. Norinsberg controlled the operations of The Norinsberg Corporation. Robert M. Norinsberg: (1) hired, fired, and set salaries for all employees (Tr. 37); (2) directed all produce and equipment purchases and leases (Tr. 36, 39); (3) personally guaranteed loans made to The Norinsberg Corporation (Tr. 32-34, 43); and (4) met with accountants, lawyers, and bankers to make all corporate decisions beyond routine, daily operational matters (Tr. 38-39). Robert M. Norinsberg had the power to appoint and remove officers and directors of The Norinsberg Corporation at will (Tr. 40). Robert M. Norinsberg removed money from The Norinsberg Corporation for his own benefit or the benefit of corporations in which he had an interest; all other employees of The Norinsberg Corporation were paid "set salaries" (Tr. 42). Moreover, The Norinsberg Corporation never held a shareholders' meeting (Tr. 39, 43, 109) and never held a directors' meeting (Tr. 39, 109, 156-57). In short, Robert M. Norinsberg so dominated The Norinsberg Corporation that he negated its separate personality.

Nonetheless, Petitioner at all times material to this proceeding held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation. Consequently, Petitioner was an owner of The Norinsberg Corporation. In order to avoid *responsibly connected status*, a petitioner must prove not only that the

violating licensee or entity subject to the license is the alter ego of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license. As Petitioner was an owner of The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA, the defense that The Norinsberg Corporation was the alter ego of Robert M. Norinsberg is not available to Petitioner.

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

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA, is affirmed.

In re: TOLAR FARMS and/or TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Decision and Order filed November 6, 1997.

**Default — Admissions — Promissory notes — Willful, flagrant, and repeated violations —
Publication of facts and circumstances.**

The Judicial Officer affirmed Judge Hunt's (A.I.J) Decision Without Hearing by Reason of Admissions publishing the finding that Respondents committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. Respondents' Answer, in conjunction with their promissory notes, constitutes an admission of the material allegations of fact in the Complaint, and there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations in the Complaint because the same order would be issued unless the proven violations are *de minimis*. Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents had purchased, received, and accepted in interstate commerce. These failures to pay took place over a period of 3 months. Respondents' violations are repeated because repeated means more than one, and Respondents' violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred. While willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the

applicability of restrictions on employment provided in 7 U.S.C. § 499h(b), Respondents' violations of 7 U.S.C. § 499b(4) are willful as a matter of law.

Jane McCavitt, for Complainant.

Respondents, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative 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. §§ 46.1-.48) [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], by filing a Complaint on July 29, 1996.

The Complaint alleges, *inter alia*, that: (1) Tolar Farms, during the period July 1995 through September 1995, failed to make full payment promptly to three sellers of the agreed purchase prices in the total amount of \$66,696.06 for 19 lots of perishable agricultural commodities which Tolar Farms purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) Tolar Sales, Inc., during the period July 1995 through September 1995, failed to make full payment promptly to four sellers of the agreed purchase prices in the total amount of \$125,392.97 for 27 lots of perishable agricultural commodities which Tolar Sales, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶ V); and (3) by reason of the facts alleged in paragraphs III and V of the Complaint, Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI). Complainant requests: (1) a finding that Respondents willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) an order revoking Tolar Farms' PACA license; and (3) the publication of the facts and circumstances regarding Tolar Sales, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI(2)-(3)).

Respondents filed an Answer on September 17, 1996, denying that they violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) as alleged in paragraphs III and V of the Complaint (Answer ¶¶ 3, 5). Respondents state in their Answer, as an affirmative defense, that "TOLAR FARMS alleges accord and satisfaction as it has come to agreements in principle with all creditors listed on the Complaint

to make full payment promptly. Respondent will deliver copies of the settlement agreements when available." (Answer ¶ 8.)

On July 10, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Proposed Default Decision]. Complainant asserts that "respondents never sent the Department any settlement agreements" and states that "[p]urported partial payment agreements with unpaid sellers does [sic] not excuse the respondent's [sic] failure to make full payment promptly to its [sic] sellers." (Complainant's Motion for Default Decision at 2.) Moreover, Complainant attached to Complainant's Motion for Default Decision copies of promissory notes which Complainant asserts "constitute evidence that of the amount alleged in the complaint as owing, \$192,089.03, at least \$142,052.37 remains unpaid" (Complainant's Motion for Default Decision at 4 and Exhibit B).

Respondents did not file objections to Complainant's Motion for Default Decision within the time provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), and on September 4, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter ALJ] issued a Decision Without Hearing By Reason of Admissions [hereinafter Default Decision], in which the ALJ: (1) found that Respondents' Answer, in conjunction with the promissory notes attached to Complainant's Motion for Default Decision, constitutes an admission of all the material allegations of fact contained in the Complaint (Default Decision at 2); (2) found that during the period July 1995 through September 1995, Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents purchased, received, and accepted in interstate commerce and that, as of May 20, 1997, at least \$142,052.37 of the amount alleged in the Complaint remained past due and unpaid (Default Decision at 3); (3) concluded that Respondents committed willful, flagrant, and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) (Default Decision at 3); and (4) ordered the facts and circumstances set forth in the Default Decision be published (Default Decision at 3).

On October 1, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557

(7 C.F.R. § 2.35).¹ On November 3, 1997, Complainant filed Objection to Respondents' Appeal Petition [hereinafter Complainant's Response], and the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

PERTINENT STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

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

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

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; or to fail to maintain the trust as required under section 499e(c) of this title[.]

§ 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, . . . 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.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

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).

ADMINISTRATIVE LAW JUDGE'S DECISION WITHOUT HEARING BY REASON OF ADMISSIONS (AS MODIFIED)

Preliminary Statement

....

On September 17, 1996, Respondents filed an Answer and generally denied that sellers were owed for [perishable agricultural commodities] as alleged in the Complaint. Respondents made an affirmative defense that the debts of Tolar Farms had been satisfied by accord and satisfaction because Tolar Farms had come to agreement in principle with all creditors listed on the Complaint to make full

payment promptly. While Respondents never [filed] copies of their settlement agreements, [Complainant filed] copies of promissory notes . . . that show Respondents still owe at least \$142,052.37 to four of the seven sellers [identified in the Complaint as produce sellers who Respondents failed to pay in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4))]. Respondents' Answer, in conjunction with their promissory notes, constitutes an admission of all the material allegations of fact contained in the Complaint pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Complainant moved for the issuance of a Decision pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Tolar Farms is a partnership composed of Robert M. Tolar and Tony L. Tolar. Tolar Farms' business address is [redacted] Florida [redacted]. Tolar Farms' mailing address is [redacted] (b) (6) [redacted].

2. Pursuant to the licensing provisions of the [PACA], license number [redacted] [was] issued to [Tolar Farms] on August 14, 1992. This license was renewed annually, but terminated on August 14, 1996, pursuant to section 4(a) of the [PACA] (7 U.S.C. § 499d(a)) when [Tolar Farms] failed to pay the required annual license fee.

3. Tolar Sales, Inc., is a corporation organized and existing under the laws of the State of Florida. Tolar Sales, Inc.'s business mailing address is [redacted] Florida [redacted].

4. At all times material [to this proceeding], Tolar Sales, Inc., operated subject to the PACA without holding a PACA license.

5. As more fully set forth in paragraphs III and V of the Complaint, Tolar Farms and Tolar Sales, Inc., during the period July through September 1995, failed to make full payment promptly to seven sellers of the agreed purchase prices for 46 [lots of perishable agricultural commodities] in the total amount of \$192,089.03. As of May 20, 1997, at least \$142,052.37 remained past due and unpaid.

Conclusions

Respondents' failures to make full payment promptly with respect to the 46 transactions [referenced] in Finding of Fact No. 5 [in this Decision and Order]

constitute willful, repeated, and flagrant violations of section 2[(4)] of the [PACA] (7 U.S.C. § 499b[(4)]). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Default Decision was served on Respondents by certified mail on September 11, 1997 (Return Receipt for Article Number P 093 033 725). In accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondents had 30 days after receiving service of the Default Decision within which to appeal the Default Decision to the Judicial Officer as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Further, the Default Decision served on Respondents on September 11, 1997, provides that Respondents have 30 days after service of the Default Decision on Respondents within which to file an appeal as follows:

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Default Decision at 3-4.

Moreover, a letter dated September 4, 1997, from the Office of the Hearing Clerk to Respondents which accompanied the Default Decision specifically informs Respondents that "[e]ach party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer."

On October 1, 1997, Respondents filed a letter [hereinafter Respondents' Appeal Petition] which states in its entirety as follows:

September 26, 1997

Ms. Joyce A. Dawson
Hearing Clerk
U.S. Dept. of Agriculture
Room 1081
South Building
1400 Independence Ave., SW
Washington, DC 20250-9200

Dear Ms. Dawson;

Subject: PACA Docket No. D-96-0530

We are appealing [sic] this decision on the grounds that we have the paperwork dismissing all PACA filings against us.

The appropriate documents will follow.

Sincerely,

Tony Tolar
Partner
/s/

Robert Tolar
Partner
/s/

The time for Respondents' filing an appeal petition ended October 14, 1997, and Respondents did not supplement Respondents' Appeal Petition with the "paperwork dismissing all PACA filings" or "appropriate documents" referenced in Respondents' Appeal Petition or any other document within the time for filing their appeal petition.

On November 3, 1997, Complainant filed Complainant's Response requesting the dismissal of Respondents' Appeal Petition on the ground that Respondents have not raised any issues or arguments (Complainant's Response at 2). Section 1.145(a) of the Rules of Practice addresses the content of appeal petitions as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* . . . As provided in § 1.41(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 petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

I agree with Complainant that Respondents have not raised any issues or arguments in Respondents' Appeal Petition, and even if Respondents' Appeal Petition could be construed as raising issues or arguments, Respondents' Appeal Petition does not provide a basis for setting aside the Default Decision.

Respondents were served with a copy of the Complaint and a copy of the Rules of Practice in this proceeding on August 8, 1996 (Return Receipt for Article Number Z 068 837 997). In their Answer, Respondents assert, as an affirmative defense, that "TOLAR FARMS alleges accord and satisfaction as it has come to agreements in principle with all creditors listed on the Complaint to make full payment promptly. Respondent will deliver copies of the settlement agreements when available." (Answer ¶ 8.)

Section 1.139 of the Rules of Practice provides:

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the

Subject: In re: Tolar Farms and/or Tolar Sales, Inc.,
Respondents -
PACA Docket No. D-96-
0530

Enclosed is a copy of Complainant's Motion for Decision Without Hearing by Reason of Admissions, together with a copy of the Decision Without Hearing by Reason of Admissions, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Respondents had ample opportunity during this 20-day period to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondents failed to file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on September 4, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued a Default Decision in which, *inter alia*, the ALJ found that Respondents' Answer, in conjunction with the promissory notes attached to Complainant's Motion for Default Decision, constitutes an admission of all the material allegations of fact contained in the Complaint (Default Decision at 2).

While Respondents did not file any documents referenced in paragraph 8 of their Answer or in Respondents' Appeal Petition, Complainant filed documents that Complainant received from Respondents after October 14, 1997 (Complainant's Response at 2, Attach. A). One of these documents establishes that a Complaint in a reparation proceeding instituted against Tolar Farms under the PACA was dismissed. *Classie Sales Corp. v. Tolar Farms*, PACA Docket No. R-96-140 (Sept. 11, 1996) (Dismissal Order Based on Election of Remedies). Further, Complainant filed additional documents which Complainant asserts that Complainant "has located" (Complainant's Response at 3, Attach. B). One of these documents establishes that a second reparation proceeding instituted against Tolar Farms under the PACA was dismissed. *Larry D. Ellerman v. Robert M. Tolar and Tony L. Tolar, d/b/a Tolar Farms*, PACA Docket No. R-96-149 (Dec. 16, 1996) (Order of Dismissal). However, dismissal of reparation proceedings instituted against Tolar Farms by private parties has no bearing on the instant disciplinary

proceeding instituted by Complainant against Respondents. The record contains no evidence that the instant disciplinary proceeding was ever dismissed.

Further, Complainant filed six documents entitled "Acknowledgment of Settlement" that Complainant received from Respondents after October 14, 1997 (Complainant's Response at 2, Attach. A) and one document entitled "Acknowledgment of Settlement" that Complainant "has located" (Complainant's Response at 3, Attach. B). Each of the documents entitled "Acknowledgment of Settlement" is a private agreement between Respondents and one of their produce sellers which states that the seller "will receive payment in full for the debt due it from the Tolars." All of the documents entitled "Acknowledgment of Settlement" were executed in October 1996 and December 1996, well after the instant disciplinary proceeding was instituted. "Full payment promptly" is defined as "[p]ayment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted" (7 C.F.R. § 46.2(aa)(5)) and parties who elect to use different times of payment "must reduce their agreement to writing before entering into the transaction" (7 C.F.R. § 46.2(aa)(11)). The documents entitled "Acknowledgment of Settlement," which were executed well after Respondents entered into the transactions, which are the subject of the Complaint in this proceeding, do not satisfy the requirement under the PACA that commission merchants, dealers, and brokers make full payment promptly for perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce. Respondents' promises of future payment of debt, which were made long after the transactions for the purchase of perishable agricultural commodities and which are the subject of this proceeding, do not constitute full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,² Respondents have shown no

²*In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ, L.A.W.A.* Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric.

basis for setting aside the Default Decision. In view of Respondents' Answer and Respondents' promissory notes attached to Complainant's Motion for Default Decision, there is no material issue of fact that warrants holding a hearing.³ Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.⁴ The same order would be issued in this case unless the proven violations are *de minimis*.⁵

Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' violations are "repeated" because repeated means more than one, and Respondents' violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.⁶

Dec. 1254 (1981).

³See *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the Chief ALJ correctly held that a hearing was not required where the record, including respondent's bankruptcy documents, shows that respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996).

⁴The Complaint alleges that Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices for 46 lots of perishable agricultural commodities in the total amount of \$192,089.03, which Respondents purchased, received, and accepted in interstate commerce (Compl. ¶¶ III, V). Respondents' promissory notes establish that Respondents owe four of the sellers identified in the Complaint \$142,052.37.

⁵*In re Five Star Food Distributors Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

⁶See, e.g., *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.⁷ Since Respondents violated

over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that Respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996).

⁷See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is

express requirements of the PACA by failing to make full payment for perishable agricultural commodities promptly, the ALJ's finding of willfulness is correct.⁸ However, willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondents' violations of 7 U.S.C. § 499b(4) were willful.

Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period July 1995 through September 1995, a period of 3 months.

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved. Respondents knew or should have known that they could not make prompt payment for the large amount of perishable agricultural commodities they ordered. Nonetheless, Respondents continued over a 3-month period to make purchases knowing they could not pay for the produce as the bills came due. Respondents should have made sure that they had sufficient capitalization with which to operate. They did not, and consequently could not pay their suppliers of perishable agricultural commodities. Respondents deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondents have both intentionally violated the PACA and operated in careless

'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations were willful.

⁸See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondents' violations are, therefore, willful.⁹

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution. See *United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondents to present matters by way of defense at this time.

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

Order

Respondents have committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances set forth in this Decision and Order shall be published, effective 65 days after service of this Order on Respondents.

In re: R. M. ALLRED.
PACA Docket No. APP-97-0001.
Decision and Order filed September 29, 1997.

Responsible connection - More than a nominal partner - Wilful, flagrant, and repeated violations of the PACA.

Administrative Law Judge James W. Hunt found that Petitioner was responsibly connected to Allred's Produce, a partnership which committed willful, flagrant, and repeated violations of the PACA. To avoid a finding of responsible connection, an officer or partner must prove, first, that he or she was not actively involved in the activities resulting in the violation, and second, that he or she was only nominally an officer or partner. Although Petitioner proved that he was not actively involved in the activities resulting in the violations committed by Allred's Produce, he was a fifty percent partner and managed at least half of the business. As such, he was more than a nominal partner, and was responsibly connected to Allred's Produce.

⁹*In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Beverly Hefner, for Petitioner.

Jane McCavitt, for Respondent.

Decision and Order issued by Administrative Law Judge James W. Hunt.

Preliminary Statement

In this proceeding, Petitioner, R. M. Allred, challenges the determination of Respondent, Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, that, under section 1(9) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a(9)) ("PACA"), Petitioner was "responsibly connected" with Allred's Produce, a company that was found to have committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (*Allred's Produce*, PACA Docket No. D-96-0531, August 20, 1997).¹

A hearing was held in Dallas, Texas, on June 18, 1997. Petitioner was represented by Beverly Hefner. Respondent was represented by Jane McCavitt, Esq.

Statement of the Facts

Petitioner, R. M. Allred, has been in the produce business for thirty years and has not committed any previous violations of the PACA. He entered into a partnership called "Allred's Produce" with his son, Ronnie Allred, to operate two branches of the business buying and selling produce. The partnership operates under one PACA license.

R. M. Allred, who is 81 and in poor health, works twelve hours a day running the branch of the business located in Tyler Texas, while Ronnie runs the branch located in McAllen, Texas. The two sites are over 500 miles apart. The address for the partnership on the PACA license and income tax returns is Tyler. The bookkeeping for the partnership is performed at Tyler and its records are also maintained there. However, each location operates independently and each makes its own decisions on buying and selling produce. They also maintain separate bank accounts.

The McAllen branch operated by Ronnie Allred began having a difficulty paying for its produce purchases. R. M. Allred tried to help out by borrowing money and transferring other funds to the McAllen branch. Altogether he paid

¹*Allred's Produce* and this proceeding, *R. M. Allred*, were initially consolidated. However, the parties agreed to sever the two proceedings, hold separate hearings, and have separate decisions issued.

over \$400,000 to the McAllen branch. These measures, however, were not enough for the McAllen branch to pay its produce suppliers. The result was a finding that Allred's Produce failure to pay violated the PACA. An order was issued revoking its license. Respondent also determined that R. M. Allred was "responsibly connected" with Allred's Produce, which determination, if affirmed, brings with it a bar to R. M. Allred's employment in the produce industry. R. M. Allred appeals that determination.

Law

The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Discussion

Petitioner, R. M. Allred, argues that he was not actively involved in the activities that led to the violation of the PACA because the McAllen branch, under Ronnie Allred's management, operated autonomously and he had no control over Ronnie's decisions to buy produce. Respondent counters that Petitioner was involved in the violations because he had the capacity to prevent them and he could also have withdrawn from the partnership. However, even if R. M. had the power to control Ronnie's decisions, the violation obviously occurred before he could take preventative action. Once the violation occurred, R. M. Allred, at that point in time, whether he knew of the violation or not, was, under the PACA, guilty by association because he was a partner with Ronnie in the business. It was also then too late for him to escape responsibility by withdrawing from the partnership. The only realistic action in the circumstance was the action he did take to minimize the damage through the infusion of money to the McAllen branch to pay its produce suppliers. However, he lacked sufficient funds to pay all the McAllen's branch creditors. The sanction for this violation, as required by the Department's policy, was revocation of the partnership's PACA license.

Even though R. M. Allred was not actively involved in the activities resulting in the PACA violation, he was still responsibly connected. For an officer or partner in a business violating the PACA to escape being found responsibly connected under section 1(9) of the PACA, the person must meet a two part test. First, he or she must not have been actively involved in the activities resulting in the violation and, second, the person must be only a "nominal" officer or partner (i.e., one in name only) in the business. Since R. M. Allred was a fifty percent partner in the business and active at least in managing half the business, he was not a nominal partner. Accordingly, as a partner, R. M. Allred is found to be responsibly connected with Allred's Produce.

Findings of Fact

1. R. M. Allred is a partner in Allred's Produce.
2. R. M. Allred is more than a nominal partner in Allred's Produce.
3. Allred's Produce committed flagrant and repeated violations of the PACA.
4. R. M. Allred was not involved in the activities resulting in a violation of the PACA by Allred's Produce.

Conclusion of Law

Petitioner, R. M. Allred, is responsibly connected with Allred's Produce under section 1(9) of the PACA (7 U.S.C. § 499a(9)).

Order

Respondent's October 10, 1996, determination that Petitioner, R. M. Allred, is responsibly connected with Allred's Produce is affirmed.

[This Decision and Order became final November 7, 1997.-Editor]

In re: ALLRED'S PRODUCE.

PACA Docket No. D-96-0531.

Decision and Order filed December 5, 1997.

License revocation — Willful, flagrant, and repeated violations — Failure to make full payment promptly — Roll over debt — Preponderance of the evidence — Industry payment practices —

**Deterrent effect of sanction — Collateral effects of revocation — Mitigating circumstances —
Selective prosecution — Written notification — Sanction witness.**

The Judicial Officer affirmed Judge Hunt's (ALJ) Decision and Order revoking Respondent's PACA license because Respondent committed flagrant and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce. Complainant proved Respondent's violations of the PACA and past-due debt by a preponderance of the evidence. The Regulations clearly define *full payment promptly* for the purpose of determining violations of the PACA. The sanction of PACA license revocation has the effect of deterring others in the industry from failing to make full payment promptly in accordance with the PACA and revocation is necessary to fulfill the congressional intent that only financially responsible persons should be engaged in the perishable agricultural commodities industry. Collateral effects of a respondent's PACA license revocation and mitigating circumstances are not relevant. Respondent's violations are repeated because repeated means more than one; Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred; and willfulness is reflected by Respondent's violation of express requirements of the PACA and in the length of time during which the violations occurred and the number and amount of violative transactions involved. No evidence supports Respondent's contention that it is the target of selective enforcement of the PACA. The issue of the Secretary's receipt of a written notification, raised for the first time in Respondent's Appeal Petition, comes too late. Sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are relevant and are entitled to great weight; however, the recommendation of administrative officials as to the sanction is not controlling.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to 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. §§ 46.1-.48) [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], by filing a Complaint on July 29, 1996.

The Complaint alleges that, during the period May 1993 through February 1996, Allred's Produce [hereinafter Respondent] violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$336,153.40 for 86 lots of perishable agricultural commodities, which Respondent received and accepted in interstate commerce (Compl. ¶ III). Respondent filed Response of Allred's Produce to the

Complaint of the Secretary of Agriculture [hereinafter Answer] on September 30, 1996, in which Respondent denies violating the PACA, but asserts that \$187,404.76 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on September 30, 1996 (Answer ¶ 5). Respondent filed Amended Response of Allred's Produce to the Complaint of the Secretary of Agriculture [hereinafter Amended Answer] on April 17, 1997, in which Respondent denies violating the PACA, but asserts that less than \$148,984.07 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on April 16, 1997 (Amended Answer ¶ 5).

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing begun on June 18, 1997, in Dallas, Texas, and continued and completed on August 8, 1997, in Washington, D.C. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Bruce W. Akerly, Esq., Bell & Nunnally, PLLC, Dallas, Texas, represented Respondent.¹ The ALJ issued a bench decision on August 8, 1997, in which the ALJ concluded that Respondent violated section 2 of the PACA (7 U.S.C. § 499b) and revoked Respondent's PACA license (Tr. 286). On August 20, 1997, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for errors of spelling, punctuation, and transcription [hereinafter Initial Decision and Order].

On September 5, 1997, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).² On October 1, 1997, Complainant filed Complainant's Response to Respondent's Appeal, and on October 23, 1997, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because

¹On November 12, 1997, Bruce W. Akerly, Esq., filed a Motion to Withdraw as Counsel for Petitioner [sic] which was granted (Ruling on Motion to Withdraw as Counsel, filed November 14, 1997).

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

the issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's Conclusion of Law.

Complainant's exhibits are designated by the letters "CX," Respondent's exhibits are designated by the letters "RX," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS AND REGULATION

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; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 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, . . . 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.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

....

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE AGRICULTURAL
COMMODITIES ACT**

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, 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.

**ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER
(AS MODIFIED)**

. . . .

Statement of the Case

Respondent, Allred's Produce, is a partnership composed of Raymond M. Allred and Ronald D. Allred [(Answer ¶ 3; Tr. 8, 67, 122). Respondent's] business addresses are [redacted] Texas [redacted] and [redacted] Texas [redacted] [(Answer ¶ 3)]. Respondent is a licensed produce dealer which received PACA license number [redacted] on April 5, 1977 [(Answer ¶ 4)].

A PACA compliance review of Respondent's operation in 1996 revealed that, during the period May 1993 through February 1996, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 86 lots of perishable agricultural commodities in the total amount of \$336,153.40, which [Respondent] had purchased, received, and accepted in interstate . . . commerce [(CX 2-21; Tr. 13-26)].

Another compliance review conducted in May 1997 revealed that, during the period May 1993 through May 1997, Respondent failed to make full payment promptly to 25 sellers of the agreed purchase prices for 125 lots of perishable agricultural commodities in the total amount of \$463,328.61, which Respondent had purchased, received, and accepted in interstate and foreign commerce [(CX 22-25; Tr. 26-36)]. Of this debt, \$[1]49,329.66 continued from the prior investigation, while \$313,998.95 was new debt [(CX 24-25)]. Of the \$336,153.40 of Respondent's indebtedness, which was the subject of the Complaint, \$186,823.[7]4 was paid by Respondent by May 1997, with \$149,329.66 remaining unpaid at the time of the hearing [(CX 24-25; Tr. 28-29)].

The Complaint alleges that these failures to make full payment promptly of the agreed purchase prices for the 86 lots of perishable agricultural commodities that Respondent . . . received and accepted [in interstate commerce] constitute willful, flagrant, and repeated violations of section 2[(4)] of the PACA [(Compl. ¶ V)].

Discussion

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to "make full payment

promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Full payment promptly is defined by the regulations in 7 C.F.R. § 46.2(aa)(5) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

The Complaint alleges that Respondent violated the PACA and the Regulations by failing to make full and prompt payment of the agreed purchase prices with respect to the 86 transactions involving perishable agricultural commodities in interstate commerce for a total of \$336,153.40.

Th[ese] failure[s] of Respondent to make [full] . . . payments [promptly] for its produce purchases constitute violation[s] of section 2[(4)] of the PACA (7 U.S.C. § 499b[(4)]). The fact that [Respondent] paid part of this indebtedness by the time of the hearing does not alter the fact of the violation[s]. Despite the payment, Respondent continues to owe its [produce] creditors substantial sums of money. Respondent's failures to pay promptly and in full for 86 transactions involving substantial sums of money over a period of almost 3 years also constitute [willful,] repeated, and flagrant violations.

Sanction

As sanction for these violations, Complainant seeks revocation of Respondent's [PACA] license. The Department's policy is firm and well-established that, where [a] respondent is not in compliance at the time of the hearing, the appropriate sanction is license revocation.

Respondent argues that its problems stem largely from customers being unable to pay Respondent the money they owe [(Respondent's Opposition to Complainant's Motion for Bench Decision ¶ 4(c)). Respondent] states that in 1992 its accounts payable were over one million dollars and that it has managed to pay down a substantial amount of that sum and that it expects to continue to make inroads into the amount it owes, if allowed to remain in business as a viable company [(Respondent's Opposition to Complainant's Motion for Bench Decision ¶ 4(c))].

Respondent, therefore, contends that if it loses its PACA license it will be unable to pay its creditors the money to which they are entitled [(Respondent's Opposition to Complainant's Motion for Bench Decision ¶ 4(c)). Respondent] requests that these circumstances be considered and that discretion be exercised in the imposition of a sanction. However, [collateral effects of a PACA license revocation are relevant, neither to a determination whether a respondent made full

payment promptly, as required, nor to the sanction to be imposed for willfully, flagrantly, and repeatedly failing to make full payment promptly.]

Respondent presented evidence that [the definition of the term *full payment promptly* in 7 C.F.R. § 46.2(aa)(5) providing for payment for produce within 10 days after the day on which the produce is accepted] is outdated and does not reflect the real world [(Tr. 187-88, 198-200). However, until the definition is amended, Respondent is bound by it, and even if I found that the 10-day requirement in 7 C.F.R. § 46.2(aa)(5) is outdated and does not reflect the real world, as Respondent contends, that finding would not excuse Respondent's failure to comply with the provisions of the regulation. Moreover, the definition of *full payment promptly* specifically provides that parties may agree to times for payment for produce other than the times provided in 7 C.F.R. § 46.2(aa)(1)-(10) (7 C.F.R. § 46.2(aa)(11)).]

As for Respondent's argument that it was singled out for selective enforcement, [nothing in the record supports Respondent's contention that it was the target of selective enforcement].

Accordingly, . . . since Respondent failed to make full payment promptly for 86 lots of perishable agricultural commodities totalling over \$300,000, the penalty is an Order revoking Respondent's [PACA] license.

Findings of Fact

1. Respondent, Allred's Produce, is a partnership composed of Raymond M. Allred and Ronald D. Allred [(Answer ¶ 3; Tr. 8, 67, 122)].
2. Respondent is a produce dealer [(Answer ¶ 4)].
3. At all times material [to this proceeding] Respondent, Allred's Produce, was licensed under the provisions of the PACA [(Answer ¶ 4)].
4. During the period May 1993 through February 1996, Respondent, Allred's Produce, failed to make full payment promptly to 19 sellers of the agreed purchase prices for 86 lots of perishable agricultural commodities in the total amount of \$336,153.40, which Respondent, Allred's Produce, had purchased, received, and accepted in interstate . . . commerce [(CX 2-21; Tr. 13-26)].

Conclusion of Law

Respondent [has committed willful, flagrant, and repeated violations of] section 2[(4)] of the PACA (7 U.S.C. § 499b[(4)]).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,³ and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.⁴ Complainant has proved its case by much more than a preponderance of the evidence, which is all that is required.

Respondent raises seven issues in Respondent's Appeal Petition.

First, Respondent contends that revocation of its PACA license for failure to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) is irrational, inappropriate, arbitrary, and capricious because:

In the industry, no supplier realistically expects to be paid accordingly to terms (whether they be those imposed under the regulations or otherwise) and it is not uncommon for suppliers to extend payment terms during and after transacting business to accommodate the buyer. (August 18 Tr. at 197-198). What is important is the "business relationship between

³*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC.* 450 U.S. 91, at 92-104 (1981).

⁴*In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

the buyer and the seller." (*Id.* at 198). And, in the context of the industry, the prompt pay provision of the PACA, as currently enforced by the Secretary, "doesn't reflect the real world and what actually goes on. . . ." (*Id.*).

Respondent's Appeal Petition at 9.

Even if I agreed with Respondent's contention that the prompt pay requirement of the PACA does not reflect the "real world and what actually goes on," I would not find that revocation of Respondent's PACA license for failure to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) is irrational, inappropriate, arbitrary, and capricious.

The Regulations clearly provide that *full payment promptly* for the purpose of determining violations of the PACA means payment for produce purchased by a buyer within 10 days after the day on which the produce is accepted (7 C.F.R. § 46.2(aa)(5)). Moreover, the Regulations provide that parties who elect to use times of payment that are different than those set out in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) may do so by agreement as provided in section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)).

The evidence clearly establishes that Respondent failed to pay 19 sellers for 86 lots of perishable agricultural commodities within 10 days after the day on which Respondent accepted the produce. Further, there is no evidence that Respondent and these produce sellers entered into a written agreement to use a different time of payment. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and even if I found, as Respondent contends, that "no supplier expects to be paid" in accordance with the Regulations and that the definition of the term *full payment promptly* in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) "doesn't reflect the real world and what goes on," those findings would not constitute a basis for concluding that the sanction imposed on Respondent in this proceeding is irrational, inappropriate, arbitrary, and capricious.⁵

Respondent also contends that the sanction of revocation is irrational, inappropriate, arbitrary, and capricious because it "would not achieve any deterrent

⁵If Respondent believes that the definition of *full payment promptly* in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) should be amended to "reflect the real world," Respondent should exercise its right under 5 U.S.C. § 553(e) to petition USDA, in accordance with 7 C.F.R. § 1.28, for amendment of the regulation, rather than repeatedly and flagrantly violating the prompt payment requirements of the PACA.

effect in the industry." (Respondent's Appeal Petition at 10.) Respondent cites, as support for its position, Mr. Byron Edward White, former regional director of the Southwest Region, PACA Branch, Fruit and Vegetable Division, AMS, USDA (Tr. 184), who testified regarding the deterrent effect of sanctions under the PACA as follows:

[BY MR. AKERLY:]

Q. With respect to whether or not the industry practice has been affected by the Secretary's promotion of this policy of going after prompt pay cases, and if there is [sic] no payments as of the time of the hearing, that revocation is a necessary sanction, that that particular policy and enforcement has not had any impact on the custom and practice in the industry?

[BY MR. WHITE:]

A. I don't know of a single occurrence of a party paying within 10 days just because another firm was sanctioned by the USDA.

Q. Suppose Judge Hunt in this case were to adopt the Secretary's recommendation of revocation, in your opinion would that have any real impact on the industry practices in McAllen or Tyler?

A. As to Tyler, as it pertains to the prompt payment provision, I don't think it never [sic] had an effect at all. It certainly would have an effect as far as the current sellers, the current people that sold to them and not paid. They certainly wouldn't benefit from it.

Q. And do you have an opinion as to whether or not the adopting of the Secretary's recommendation would have any impact on customers and all other businesses that are served in those communities?

A. Certainly. There is always an impact. You have an impact on people it employed, the services. Evidently I understand that they have two locations; one in Tyler and one in McAllen, and they have long-established customers that look to them for service, and this would be another seller to them that would be put out of business. The competition would be reduced, and it would be

theoretical as to the economic impact that it would create in those two markets where this party is located.

Q. In your opinion, would any -- would any buyers in those geographic regions or even beyond be prompted as a result of adoption of the Secretary's recommendation to make sure that they are paid all of their accounts within 10 days or within the term agreements?

In other words, would sanctioning Allred in this case according to the way the Secretary would want, would that cause other buyers of produce in the McAllen and Tyler area to pay their suppliers more promptly?

A. No, I think you could monitor those firms that you are speaking of, I don't think you would notice any change in the way they do business.

Tr. 207-09.

However, Ms. Joan Marie Colson, auditor with the Trade Practices Section, PACA Branch, Fruit and Vegetable Division, AMS, USDA, whose duties include making sanction recommendations (Tr. 157-58), testified regarding the deterrent effect of sanctions and the role of regional personnel, such as Mr. White, regarding sanction recommendations and sanction policies as follows:

[BY MS. McCAVITT]

Q. Is the industry also unique because of the Secretary's role?

[BY MS. COLSON:]

A. Well, the Secretary's role is to enforce the PACA. He does this evenhandedly so a level playing field exists for everyone. The Secretary issues licenses to all fruit and vegetable traders. When he issues a license, he's making a statement that he has no reason to believe that these firms can't or won't abide by the laws or the Act that Congress has imposed on the industry.

The Secretary investigates firms that he thinks may have violated the Act, and he prosecutes those firms where violations are found. It serves as a deterrent-- you know, when you prosecute, it serves as a deterrent effect to the industry as well.

Q. So what effect do you believe the sanction will have on the industry?

....

THE WITNESS: There are two effects basically. In this particular case it prevents Allred Produce and their responsibly connected individuals from continuing to violate the law because they're still in business. A revocation would stop them from continuing violations.

Second of all, the deterrent effect that I spoke of before is one of the largest effects for the sanction.

....

Q. Okay. Ms. Colson, to your knowledge, do regional office personnel ever assist the chief regarding sanction recommendations?

A. No.

Q. And to your knowledge, do regional supervisors ever assist the chief regarding the PACA branch's sanction policies?

A. No.

Q. You heard Mr. White testify that this sanction would have no deterrent effect on the industry.

Do you agree?

A. No.

....

JUDGE HUNT: Did you hear Mr. White's testimony that the Department's policy on license revocation does not serve as a deterrent or effectuate the interest of the industry in his opinion?

THE WITNESS: Right.

JUDGE HUNT: Did Mr. White present any arguments that you believe your supervisors, Ms. Servais or Mr. Frazier should consider in whether this policy continues to -- should remain in effect?

THE WITNESS: No.

JUDGE HUNT: So you don't want any time to take up the matter with them?

THE WITNESS: No, sir.

Tr. 168-69, 240, 277-78.

As an initial matter, I give much more weight to Ms. Colson's testimony regarding the deterrent effect of sanctions than I give to Mr. White's testimony on the same subject because one of Ms. Colson's duties, which she has performed for 7 years, is to assist with sanction recommendations to the chief of the PACA Branch, Fruit and Vegetable Division, AMS, USDA (Tr. 157-58). On the other hand, while Mr. White has had 30 years' experience with USDA, 10 years of which was in a PACA Branch regional office, and over 2 years' experience as a consultant to produce marketers (Tr. 183-85), Mr. White's duties have never included making sanction recommendations or formulating sanction policies (Tr. 219, 240). Moreover, Mr. White contradicted his own testimony that the Secretary's policy has no deterrent effect as follows:

[BY MR. AKERLY:]

Q. Now, you also reviewed Ms. Colson's testimony concerning deterrence.

[BY MR. WHITE:]

A. Yes, I --

Q. Specifically, on page 158 of the transcript Ms. Colson states that the Secretary[s] investigations and prosecutions of firms where violations are found they are a deterrent effect to the industry.

Do you have an opinion as to whether or not the Secretary's policy promotes a deterrent effect in the industry?

A. That plays in the background certainly. There is no question about it. . . .

Tr. 200.

Therefore, I do not find that the record supports Respondent's contention that the sanction of revocation "would not achieve any deterrent effect in the industry." (Respondent's Appeal Petition at 10.) Instead, I find that the record supports a finding that the sanction of PACA license revocation has the effect of deterring others in the industry from failing to make full payment promptly in accordance with the PACA.

The Department's policy is to revoke the PACA license of a respondent that has not made full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing.⁶ This sanction policy is harsh, but has consistently been upheld by the courts.⁷ Therefore, even if I found that the sanction of license revocation would not deter others in the industry from failing to make full payment promptly, the deterrent

⁶See, e.g., *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Petition for Reconsideration); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 788 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1623 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), cert. denied, 116 S.Ct. 474 (1995); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1441 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 765 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 53 Agric. Dec. 686 (1994); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1467 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Carpenito Bros. Inc.*, 46 Agric. Dec. 486, 506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988); *In re Clarence Miller Co.*, 43 Agric. Dec. 529, 532 (1984); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 123, 149-50 (1984).

⁷*In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), printed in 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), cert. denied, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974).

effect on Respondent alone would be sufficient to find that revocation of Respondent's PACA license is reasonable and appropriate.

This sanction is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also is necessary to fulfill the congressional intent that only financially responsible persons should be engaged in the perishable agricultural commodities industry.⁸ Allowing Respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension, when Respondent has failed to pay promptly for large produce purchases over a long period of time, with substantial produce debt still owing, would defeat the purposes of the PACA. A civil penalty or a suspension under these circumstances would not protect those who sell perishable agricultural commodities to Respondent.

Respondent also contends that the sanction of revocation is irrational, inappropriate, arbitrary, and capricious because of the "wholesale failure to consider outside factors" (Respondent's Appeal Petition at 11). Respondent states that there was a failure to consider the fact that "no supplier was complaining about Allred's failure to pay" (Respondent's Appeal Petition at 10) and that if Respondent were allowed to "remain[] in business[,] it could pay its creditors" (Respondent's Appeal Petition at 11 n.7).

⁸*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 940-41 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216 (1996), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), aff'd, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), aff'd, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), aff'd, 668 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), aff'd mem., 673 F.2d 551 (D.C. Cir. 1982), printed in 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), aff'd, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977). See also *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (stating that the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

Often produce creditors support a respondent's efforts to avoid PACA license revocation and remain in business in hopes that they (the produce creditors) will be paid some or all of the money that they are owed for perishable agricultural commodities. However, allowing a PACA licensee that has flagrantly or repeatedly failed to make full payment promptly in accordance with the PACA to remain in business in hopes that the PACA licensee will pay its current produce creditors frequently exposes other produce sellers to the risk of nonpayment. Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry, as a whole, is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment. In order to carry out the purposes of the PACA, it is imperative that PACA licenses be revoked as quickly as possible from licensees who flagrantly or repeatedly fail to make full payment promptly.

Moreover, collateral effects of a respondent's PACA license revocation are relevant, neither to a determination whether a respondent made full payment promptly, as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment.⁹ The adverse impact on Respondent's produce sellers of the revocation of Respondent's PACA license and the absence of complaints by Respondent's produce sellers about Respondent's failure to pay in accordance with the PACA, are not relevant to this proceeding.¹⁰

⁹*In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1282-83 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225-28 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996).

¹⁰*In re Hogan Distributing Co.*, 55 Agric. Dec. 622, 639 (1996) (stating that the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (stating that adverse impact of revocation of respondent's PACA license on respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (stating that a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if respondent were

Respondent also contends that the record shows that "a large number of produce suppliers are frequently in non-compliance with the 'prompt pay' provision of the PACA on a daily basis" (Respondent's Appeal Petition at 11). The fact that others may violate the prompt payment requirement of the PACA or that violation of the prompt payment requirement is widespread is relevant, neither to a determination whether a respondent made full payment promptly, as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment. Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay more than a *de minimis* amount, whether Respondent had paid all produce sellers by the opening of the hearing, and whether Respondent is in compliance with the PACA and the regulations under the PACA. The ALJ considered all relevant factors, and there is no basis for finding that the sanction of revocation of Respondent's PACA license is irrational, inappropriate, arbitrary, and capricious for failure to consider "outside factors."

Second, Respondent contends that the ALJ "[e]rr[or]ed [i]n [f]ailing [t]o [c]onsider [m]itigating [c]ircumstances [i]n [i]mposing [s]anctions [o]n Allred's" (Respondent's Appeal Petition at 12-16). Respondent lists mitigating circumstances as follows:

[N]o supplier of Allred's demands that they be put out of business; closure of Allred's will have no deterrent effect in the industry; in excess of 30 people will lose their jobs; small to medium size business[es] who depend on Allred's will fail because they will be required to buy produce from more costly sources; and, a 30 year old business with an unblemished record will close its doors.

Respondent's Appeal Petition at 15.

With the exception of Respondent's alleged "unblemished record," I do not find that any of the circumstances listed by Respondent on page 15 of Respondent's Appeal Petition are "mitigating circumstances." Further, I have discussed my

permitted to remain in business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (stating that collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating that detriment to creditors if respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (stating that the fact that a respondent's creditors will suffer if respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (stating that the fact that respondent's creditors will suffer if respondent's PACA license is revoked is irrelevant).

reasons for concluding that the failure of Respondent's produce creditors to demand revocation of Respondent's PACA license is irrelevant and my disagreement with Respondent's contention that revocation of its license will have no deterrent effect on the perishable agricultural commodity industry in this Decision and Order, *supra*, pp. 13-21. Moreover, I find that the effect of the revocation of Respondent's PACA license on employment of 30 persons and on small and medium-sized businesses, which rely on Respondent, to be collateral effects of license revocation, not mitigating circumstances. Collateral effects are not relevant to a determination whether a respondent made full payment promptly as required or to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.¹¹ This Department routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees.¹²

The only mitigating circumstance which Respondent cites as a basis for its contention that the ALJ erred by revoking Respondent's PACA license is Respondent's alleged "unblemished record." However, mitigating circumstances, like collateral effects, are not relevant circumstances under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA.¹³ Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay more than a *de minimis* amount, whether Respondent had

¹¹See note 9.

¹²*In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding that the fact that a respondent's 25 employees will suffer harm from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating that hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating that the Department routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

¹³Section 8(e) of the PACA (7 U.S.C. § 499h(e)) which provides "alternative civil penalties" for violations of section 2 of the PACA, in lieu of suspension or revocation, requires the Secretary of Agriculture to give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, but only when determining the amount of a civil penalty to be assessed. However, the factors that must be considered under section 8(e) of the PACA (7 U.S.C. § 499h(e)) are not required by the PACA to be considered with respect to the revocation or suspension of a PACA license. *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279 n.8 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 1204, 1225 n.13 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996).

paid all sellers by the opening of the hearing, and whether Respondent is in compliance with the PACA and the regulations under the PACA. Even if a respondent has been a commission merchant, dealer, or broker for an extended period of time and can demonstrate that the firm has never violated the PACA during that extended period of time, such circumstances are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. Moreover, such circumstances are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly.¹⁴

Third, Respondent contends that the ALJ's conclusion that Respondent's failures to make full payment promptly were "repeated and flagrant" is in error (Respondent's Appeal Petition at 16-17).

I disagree with Respondent's contention. Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$336,153.40 for 86 lots of perishable agricultural commodities which Respondent received and accepted in interstate commerce. These failures took place over the period May 1993 through February 1996, a period of 2 years and 10 months.

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are willful, repeated, and flagrant as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are

¹⁴*In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279 (1996) (stating that an industry-wide crisis that has resulted in few purchasers paying for perishable agricultural commodities within 10 days, respondents' excellent payment history relative to others in the perishable commodities industry, and respondents' good faith efforts to address their payment problems are not relevant circumstances under the Department's sanction policy), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 1204, 1225 (1996) (stating that previous compliance with the PACA, good faith efforts to pay produce suppliers, and excuses for failure to pay are not relevant to the sanction to be imposed), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (stating that the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that respondent was in business for 35 years with no complaints or financial difficulties, and that nonpayment was caused by \$200,000 in losses in 2-year period from theft of produce from respondent's warehouse are not relevant circumstances).

flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.¹⁵

Further, I find that Respondent's violations of the payment provisions are willful. A violation is willful under the Administrative Procedure Act (5 U.S.C.

¹⁵See, e.g., *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 violations of the payment provisions of the PACA occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the PACA payment provisions did not occur simultaneously, they must be considered *repeated*; and finding that the 295 violations are *flagrant* violations of the PACA because they occurred over several months and involved more than \$250,000). *cert. denied*, 389 U.S. 835 (1967); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 16-17 (Nov. 6, 1997) (holding that respondents' failure to pay 7 sellers \$192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that Respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that the failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

§ 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.¹⁶ Willfulness is reflected by Respondent's violation of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa))¹⁷ and in the length of time during which the violations occurred and the number and amount of violative transactions

¹⁶See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 18 (Nov. 6, 1997); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 925 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruittland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), aff'd, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

¹⁷See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 18-19 (Nov. 6, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

involved. Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 2-year and 10-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not, pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.¹⁸

Fourth, Respondent contends that the ALJ erred by failing to conclude that Respondent "was singled out for selective enforcement under the PACA's disciplinary provisions." (Respondent's Appeal Petition at 17.) Specifically, Respondent contends that it was singled out for enforcement based on its size as follows:

The record further reflects that most complaints and disciplinary actions are maintained against small to mid-sized buyers, primarily because complaints are rarely maintained against institutional buyers - because of their monetary clout in the industry. As such, the brunt of enforcement falls on the shoulders of the small to mid-sized buyer. (August 8 Tr. 195-197).

Respondent's Appeal Petition at 17.

As an initial matter, an examination of the record in this proceeding reveals no evidence that supports Respondent's contention that it was "singled out for selective enforcement" of the PACA. Moreover, an examination of *Agriculture Decisions* reveals that a great number of disciplinary proceedings for violations of the PACA have been instituted by the Administrator of AMS or delegates of the Administrator against firms of various sizes.

¹⁸See *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 19-20 (Nov. 6, 1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

However, even if Respondent could show that it was singled out for a disciplinary action under the PACA, such selection would be lawful so long as the administrative determination to selectively enforce the PACA was not arbitrary.¹⁹ Respondent has no right to have the PACA go unenforced against it, even if it is the first firm against whom the PACA is enforced and even if Respondent can demonstrate that it is not as culpable as some others that have not had disciplinary proceedings instituted against them. PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings for violations of the PACA.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.²⁰

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.²¹ Respondent bears the burden of proving that it is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.²² In order to prove its selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.²³ Respondent has not shown that it is a member of a protected group, that no

¹⁹*FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (*per curiam*).

²⁰*Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied*, 117 S. Ct. 296 (1996).

²¹*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

²²*United States v. Armstrong*, 116 S. Ct. 1480, 1487 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

²³*See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied*, 117 S. Ct. 296 (1996)

disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must show: (1) it exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.²⁴ Respondent has not shown any of these circumstances.

Fifth, Respondent contends that the ALJ erred by allowing the introduction at the hearing of evidence of "new claims" against Respondent for failure to make full payment promptly. Respondent asserts that it was denied due process because the Complaint was never amended to include these "new claims" and that the ALJ erred when he relied on these "new claims" when determining the sanction to be imposed against Respondent (Respondent's Appeal Petition at 18-20).

This argument is rejected because the ALJ properly allowed and considered outstanding indebtedness at the time of the hearing. A respondent demanding that complainant amend the complaint before being allowed to show a respondent's current indebtedness at the hearing is a routine occurrence in these types of cases. On the surface, the argument seems logical, but it misses the whole point of the prompt payment requirement, which calls for payment, not promises. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment requirement of the PACA to escape license revocation. Allowing a respondent who has not paid all produce sellers in full by the time of the hearing to remain licensed would put produce sellers at financial risk. In a case in which an administrative law judge took the position advanced in this proceeding by Respondent, the Judicial Officer took the opportunity to set forth the Department's policy on this issue:

The ALJ's views set forth above are based on a failure to apply the Department's policy stated, *inter alia*, in *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989). In *Caito*, it is explained that a revocation order is warranted where a Respondent fails to pay promptly, over an extended period of time, for produce transactions involving a substantial amount of money. It is further explained, however, that if the Respondent demonstrates by the time of the hearing, or if no hearing is held, by the time Respondent files its Answer, (i) that it has made full payment of the

²⁴*Id.*

transactions alleged in the Complaint, and (ii) such payment was not made by "robbing Peter to pay Paul," the sanction will be mitigated. *Caito* further states that, not only must Respondent be in present compliance with the payment provisions at the time of the hearing, or at the time the Answer is filed if there is no hearing, but, also, Respondent cannot even have agreements with creditors for payment to be made beyond 30 days. Finally, *Caito* makes it clear that if Complainant demonstrates that Respondent is merely "rolling over" its debt, by "robbing Peter to pay Paul," the sanction to be issued is for the violations alleged in the Complaint--not for the more current transactions in which Complainant shows that Respondent is merely "rolling over" its debt. Since the sanction is being imposed only for the transactions alleged in the Complaint, there is no need for Complainant to amend the Complaint in order to refute Respondent's allegation that the sanction for the Complaint-transactions should be mitigated because of later compliance.

In re S W F Produce Co., 54 Agric. Dec. 693, 700 (1995).

The compliance review conducted in May 1997 revealed that, during the period May 1993 through May 1997, Respondent failed to make full payment promptly to 25 sellers for the agreed purchase prices of 125 lots of perishable agricultural commodities in the total amount of \$463,328.61, which Respondent had purchased, received, and accepted in interstate and foreign commerce (CX 22-25; Tr. 26-36). The May 1997 investigation reveals that, as of May 1997, Respondent had not paid \$149,329.66 of the \$336,153.40 which Respondent is alleged in the Complaint to have failed to pay fully and promptly to sellers of perishable agricultural commodities. The remaining \$313,998.95 revealed during the May 1997 audit was new debt which Respondent owed to produce sellers (CX 24-25; Tr. 28-29).

Respondent's bookkeeper, Ms. Beverly Heffner, conducted her own audit of Respondent's books and testified that, as of June 17, 1997, Respondent had not paid \$130,131.47 of the \$336,153.40 which Respondent is alleged in the Complaint to have failed to pay fully and promptly to sellers of perishable agricultural commodities and that Respondent owed a total of \$447,384.71 to sellers of perishable agricultural commodities (RX 7-8; Tr. 90-91, 94-95, 116).

In order to avoid revocation of its PACA license, Respondent would have to have paid every produce seller in full by the time of the hearing. There is no escaping the fact that Respondent had not only failed to pay all produce sellers by the date of the hearing, but also had not paid all of the debts alleged in the Complaint to be owed to produce sellers.

Sixth, Respondent contends that the ALJ erred by revoking Respondent's PACA license because there is no evidence that the investigation which resulted in the Complaint in this proceeding was based on receipt by the Secretary of written notification of a violation of the PACA (Respondent's Appeal Petition at 21).

Respondent raises the issue of the Secretary's receipt of a written notification for the first time in Respondent's Appeal Petition. It is well settled that new issues cannot be raised for the first time on appeal to the Judicial Officer.²⁵ Respondent's failure to raise the issue of receipt by the Secretary of a written notification until it filed Respondent's Appeal Petition is too late.

However, even if Respondent's argument was timely, it would still fail. The Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 [hereinafter PACAA-1995], was approved on November 15, 1995. Prior to the approval of the PACAA-1995, written notification of an alleged violation of the PACA was not required to precede an investigation of a violation of the PACA by the Secretary. Section 7 of the PACAA-1995 amends section 6(b) and (c) of the PACA to require that either a reparations complaint must be made or a written notification must be filed prior to the initiation of an investigation of a violation of the PACA by the Secretary as follows:

²⁵*In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

§ 499f. Complaints, written notifications, and investigations

....

(b) Disciplinary violations

Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of an agency of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker. In addition, any official certificates of the United States Government or States or Territories of the United States and trust notices filed pursuant to section 499e of this title shall constitute written notification for the purposes of conducting an investigation under subsection (c) of this section. The identity of any person filing a written notification under this subsection shall be considered to be confidential information. The identity of such person, and any portion of the notification to the extent that it would indicate the identity of such person, are specifically exempt from disclosure under section 552 of title 5 (commonly known as the Freedom of Information Act), as provided in subsection (b)(3) of such section.

(c) Investigation of complaints and notifications**(1) Commencing or expanding an investigation**

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the evidence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

7 U.S.C. § 499f(b), (c) (Supp. I 1995).

The record reveals that an initial investigation of Respondent's failure to make full payment promptly in accordance with the PACA occurred in 1994 and that the February 1996 investigation, which resulted in the Complaint filed in this proceeding, was a follow-up to the initial 1994 investigation. Mr. Jeffrey Spradlin, the USDA, AMS, PACA Branch employee, who conducted the February 1996 and May 1997 investigations of Respondent, testified as to the connection between the 1994 investigation and the February 1996 investigation of Respondent as follows:

BY MS. McCAVITT:

Q. Mr. Spradlin, do you think that -- You talked about you didn't know the reason why you went in for the investigation in February of 1996, but you did mention in your direct testimony that there was a previous investigation; is that true?

[BY MR. SPRADLIN:]

A. Yes, there was.

Q. Do you think that might have been what was prompting the second --

A. Yes. Probably it was --

....

Q. I'm just trying to ask if you believe that there might -- part of the reason that you were sent in to do the investigation in February of '96 was because there had been an introductory investigation --

....

A. Yes, that more than likely was a factor in conducting the February '96 investigation, as a follow-up.

Tr. 52-54.

Further, Mr. White testified as to the circumstances regarding the 1994 investigation as follows:

[BY MS. McCAVITT:]

Q. So you have become familiar recently with Allred's Produce; is that correct?

[BY MR. WHITE:]

A. I knew of the existence of Allred's Produce prior to my retirement.

Q. Did you assign an investigator to investigate the firm?

A. Let's see. In restoration [sic] matters, yes.

Q. Do you recall that you assigned an investigator to investigate the firm in a disciplinary matter in 1994?

Well, to do an audit; it wasn't necessarily going to be a disciplinary matter.

A. Yes, there was an audit.

Q. Do you recall what prompted the investigation?

A. I'm pretty sure it was the number of trust notices that were filed against them, and perhaps there was one large reparation complaint that was filed against them that was, I think, somewhere in the neighborhood of \$300,000 on some tomatoes that were flown in from Mexico that all that produce was involved in. That's kind of a mixed up mess to put it in the various flat turns [sic]. Allred's did not deny that they owed the money but it was a very convoluted circumstance.

Q. Okay. So that prompted the investigation?

A. That was one of the things, yes.

Q. Okay. And do you recall what was the result of that investigation?

A. That there were repeated instances of slow pay.

Q. Okay. And since then, as you know from getting familiar with the facts of this case, there has been two more audits done of the firm; is that correct? You know that?

A. I think there was an audit at one of the locations. . . .

Tr. 220-22.

Respondent's bookkeeper, Ms. Heffner, testified regarding her recollection of the nature of the 1994 investigation as follows:

[BY MR. AKERLY:]

Q. Do you remember the -- Were you present during the 1994 USDA audit that Mr. Spradlin mentioned earlier?

[BY MS. HEFFNER:]

A. Yes.

Q. Do you recall Mr. Dutton coming out for that audit?

A. Yes, I do.

Q. Do you recall receiving any disciplinary complaint or any kind of action taken as a result of that audit?

A. It has been a long time, but the only thing I recall is a letter stating that we were outside of compliance or were not complying. But there was no disciplinary action of any kind.

Q. You're not aware of any action taken as a result of that audit?

A. No.

Q. And between 1994 and 1996, you're not aware of any other audit that took place?

A. 1994 and '96? No.

Tr. 102.

Further, a letter sent by J.D. Flanagan, Chief, PACA Branch, to Respondent and served on Ms. Heffner on February 12, 1996, prior to the February 1996 investigation, advises Respondent that the PACA Branch is conducting a follow-up to the 1994 investigation as follows:

R.M. Allred
Allred's Produce



Dear Mr. Allred:

This is to advise you that we are conducting a follow-up investigation involving allegations that your firm has committed violations of the Perishable Agricultural Commodities Act (PACA). An investigation

in June 1994, documented that your firm failed to make full payment promptly, a violation of Section 2(4) of the Act.

Allred's Produce is required to allow access, examination and photocopying of its business record by Jeffrey Spradlin, a Marketing Specialist with USDA, AMS, PACA Branch. This request includes, but is not limited to, financial statements, accounts receivable, accounts payable, purchases and related documentation, bank records, and any other business documents pertinent to the completion of this investigation.

....

Sincerely,

J.D. Flanagan, Chief
P.A.C.A. Branch
Fruit and Vegetable Division

Complainant's Response to Respondent's Appeal, Exhibit A.

I find, based on the record, that the February 1996 investigation was a follow-up investigation to the 1994 investigation of Respondent which was conducted before the PACAA-1995 was approved. As the investigation of Respondent was begun prior to the approval of the PACAA-1995, which amended the PACA to require that investigations by the Secretary be preceded by a complaint made in accordance with section 6(a) of the PACA (7 U.S.C. § 499f(a)) or a written notification filed in accordance with section 6(b) of the PACA (7 U.S.C. § 499f(b)), I find that written notification of a violation of the PACA was not required to precede the investigation in this proceeding.

Seventh, Respondent contends that the ALJ erred by relying on the testimony of Ms. Colson regarding the sanction recommended by agency officials against Respondent (Respondent's Appeal Petition at 22-23).

This case is governed by the sanction policy adopted by the Secretary of Agriculture in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, *supra*, 50 Agric. Dec. at 497.

Moreover, since 1971, the Department has followed the policy of permitting, and in most types of cases encouraging, the complainant and the respondent to introduce evidence at administrative disciplinary proceedings to aid the administrative law judge and the judicial officer in determining what sanction to impose in the event that it is found that a violation occurred.²⁶

The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less than that recommended by administrative officials.²⁷ Witnesses for parties in these proceedings frequently testify regarding the appropriate

²⁶*In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Petition for Reconsideration); *In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 527-29 (1984); *In re Larry W. Peterman*, 42 Agric. Dec. 1848, 1850 (1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1944 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Samuel Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1096 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re J.A. Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Professional Commodity Serv.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re George Rex Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 505 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

²⁷*In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Petition for Reconsideration); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

sanction to be imposed, and in this proceeding, Respondent, as well as Complainant, introduced testimony regarding the appropriate sanction.

Further, the record reveals that Ms. Colson was a reliable witness with respect to the sanction recommendation. Ms. Colson testified that she had been an auditor with the Trade Practices Section, PACA Branch, AMS, USDA, for 7 years and that during that time her duties included recommending to the chief of the PACA Branch the sanction to be sought for violations of the PACA and testifying at hearings, such as the hearing conducted in this proceeding, as to sanction recommendations of the chief of the PACA Branch. Moreover, I do not find any reference in the ALJ's Initial Decision and Order to Ms. Colson's testimony, and it is not clear to what extent, if any, the ALJ relied on Ms. Colson's testimony. Nevertheless, even if I found that the ALJ relied extensively on Ms. Colson's sanction testimony, I would not find such reliance on her testimony to constitute error. Further, I agree with the sanction recommended by the agency officials and imposed by the ALJ and find that the revocation of Respondent's PACA license under the circumstances in this proceeding is in accordance with the PACA and Department policy.

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

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

**In re: STEVEN J. RODGERS.
PACA-APP Docket No. 96-0002.
Decision and Order filed December 12, 1997.**

Responsibly connected — Active involvement in violations — Officer and shareholder — Alter ego — Rebuttable presumption standard.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that Petitioner was responsibly connected with World Wide Consultants, Inc. (World Wide), during the time that World Wide violated the PACA. Petitioner admits that he was a nominal officer and shareholder of World Wide, during the time that World Wide violated the PACA. Petitioner was aware that World Wide employed Harold Marvin Offutt in willful violation of 7 U.S.C. § 499h(b) and made no real effort to stop World Wide's violation; therefore, Petitioner was actively involved in activities resulting in World Wide's violation of the PACA. Petitioner was not a nominal officer and shareholder as demonstrated by: (1) the

substantial per centum (33.3%) of the outstanding stock of World Wide held by Petitioner; (2) Petitioner's experience in the produce business; (3) Petitioner's intent, from the beginning of his association with World Wide, to purchase the company; (4) Petitioner's knowledge of the company's financial situation and access to corporate financial records; (5) Petitioner's authority to conduct a number of financial activities for the company, including signing checks drawn on the company's account; and (6) Petitioner's signing of 30 checks for payroll, utilities, and produce. Since Petitioner admits that he was a holder of 33.3 per centum of the stock of World Wide, he is an owner and the defense that World Wide was the alter ego of its president and holder of 66.6 per centum of the stock is not available to Petitioner.

Andrew Y. Stanton, for Respondent.

Mark L. Johansen and Steven R. Block, Dallas, TX, for Petitioner.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

Steven J. Rodgers [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], 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], by filing a Petition on April 23, 1996.

The Petition challenges the October 31, 1995, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was *responsibly connected* with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the PACA⁷ in that Petitioner was a vice president and a 33.3 percent shareholder of World Wide Consultants, Inc., and active in the business activities of World Wide Consultants, Inc.

On February 6, 1997, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] conducted an oral hearing in Dallas, Texas. Mr. Mark L. Johansen, Esq., of Crotty & Johansen, Dallas, Texas, and Mr. Steven R. Block, Esq., Block & Balestri, Dallas, Texas, represented Petitioner. Mr. Andrew Y.

*During the period October 1991 through May 1993, World Wide Consultants, Inc., purchased, received, and accepted in interstate commerce 36 lots of perishable agricultural commodities from eight sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of \$117,017.92. World Wide Consultants, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b (4)). During the period from January 11, 1992, through August 26, 1993, World Wide Consultants, Inc., unlawfully employed Harold M. Offutt. World Consultants, Inc.'s unlawful employment of Harold M. Offutt constitutes willful violations of section 8(b) of the PACA (7 U.S.C. § 499h(b)). *In re World Wide Consultants, Inc.*, 54 Agric. Dec. 1462 (1995).

Stanton, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On April 11, 1997, Petitioner filed Post-Hearing Brief of Petitioner Steven J. Rodgers, and Respondent filed Respondent's Brief. On May 19, 1997, Petitioner filed Post-Hearing Reply Brief of Petitioner Steven J. Rodgers and Respondent filed Respondent's Reply Brief.

On August 22, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ affirmed "[t]he finding of the Chief of the Perishable Agricultural Commodities Branch that Petitioner was responsibly connected with World Wide [Consultants, Inc.,] at the time it . . . willfully, flagrantly and repeatedly violated section 2(4) of the Perishable Agricultural Commodities Act by failing to make full payment promptly for produce purchases and . . . willfully violated section 8(b) of the Perishable Agricultural Commodities Act by unlawfully employing Harold Marvin Offutt" (Initial Decision and Order at 23).

On September 26, 1997, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as *final deciding officer* in adjudication proceedings which are subject to the Rules of Practice (7 C.F.R. § 2.35).^{**} On October 28, 1997, Respondent filed Respondent's Response to Appeal Petition, and on October 29, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Petitioner's exhibits are designated by the letters "PX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

^{**}The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

(10) The term "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self employment.

....

§ 499d. Issuance of license

....

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited

from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

- (1) whose license has been revoked or is currently suspended by order of the Secretary;
- (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
- (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a

reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9)-(10), 499d(b)(A)-(B), (c), 499h(b) (Supp. I 1995).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

Preliminary Statement

This is an administrative proceeding to determine whether or not Petitioner . . . was "responsibly connected" with World Wide Consultants, Inc., . . . Garland, Texas, a firm that was found to have committed willful, flagrant, and repeated violations of the . . . PACA. Respondent determined that Petitioner was responsibly connected [with World Wide Consultants, Inc., as the term *responsibly connected* is defined in] section 1[(b)](9) of the PACA (7 U.S.C. § 499a[(b)](9)). . . . [P]remised upon adequate reasons, Respondent found that Petitioner was responsibly connected because he was vice president and [holder of] 33.3 [per centum of the outstanding stock] of World Wide Consultants, Inc., and [Respondent] further found that Petitioner was responsibly connected as a result of his active involvement in World Wide Consultants, Inc.'s activities during the time World Wide Consultants, Inc., was found to have willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)). The violations of section 2(4) [of the PACA] resulted from World Wide Consultants, Inc.'s failure to make full payment promptly for produce purchases during the period October 1991 through May 1993, in the total amount of \$117,017.92. The [violations of] section 8(b) [of the PACA] resulted from World Wide Consultants, Inc.'s unlawful employment of Harold Marvin Offutt, as the term "employed" is [defined in] section 1[(b)](10) of the PACA [(7 U.S.C. § 499a(b)(10))], from January 11, 1992,

through August 26, 1993. [*In re World Wide Consultants, Inc.*, 54 Agric. Dec. 1462 (1995).]

Pursuant to section 1[(b)](9) of the PACA (7 U.S.C. § 499a[(b)](9)), a person who was an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation can show he [or she] was not responsibly connected with that corporation if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of the PACA and that the person either was only nominally a partner, officer, director, or [shareholder] of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. Petitioner contends that, for a number of reasons, there was a lack of responsible connection between him and World Wide Consultants, Inc. However, [Petitioner's] contentions lack factual basis and are contrary to applicable legal principles. Accordingly, I affirm the finding of [Respondent] that Petitioner was responsibly connected with World Wide Consultants, Inc., at the time [World Wide Consultants, Inc.,] . . . willfully, flagrantly, and repeatedly violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by failing to make full payment promptly for produce purchases and willfully violated section 8(b) of the PACA [(7 U.S.C. § 499h(b))] by unlawfully employing Harold Marvin Offutt.

A[t the] hearing [conducted in this proceeding] . . . three witnesses testified on behalf of Petitioner and three [witnesses testified] on behalf of Respondent. Eight exhibits were introduced into evidence by Petitioner . . . and 15 exhibits were introduced [into evidence] by Respondent. . . .

.....

Findings of Fact

1. Petitioner in this proceeding, Steven J. Rodgers, is an individual whose home address is [REDACTED] (RX 7 at 2)].

2. . . .

3. Jane E. Servais, Head of the Trade Practices Section, PACA Branch, [Fruit and Vegetable Division, Agricultural Marketing Service[hereinafterAMS], United States Department of Agriculture [hereinafter USDA]], wrote a letter dated October 20, 1994, to Petitioner (RX 7) advising that a disciplinary complaint had been filed against World Wide Consultants, Inc., because of the firm's failure to make full payment promptly for fruits and vegetables, and the firm's unlawful employment of Harold M. Offutt . . . in violation of the PACA. Ms. Servais informed Petitioner that USDA's records indicated that Petitioner was responsibly

connected with World Wide Consultants, Inc., as its vice president and [a holder of] 33.3 [per centum of the outstanding stock] during the period in which the alleged violations occurred. Ms. Servais advised that if a decision were issued finding that [World Wide Consultants, Inc.,] committed the alleged violations, Petitioner could be subject to certain employment and licensing restrictions as provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d([b]) and 499h(b)). Petitioner was given 30 days to deny that he was responsibly connected and provide evidence supporting his position. In a letter to Ms. Servais dated November 17, 1994, Petitioner's counsel denied that Petitioner was responsibly connected [with World Wide Consultants, Inc.] (RX 8).

4. World Wide Consultants, Inc., did not file an answer to the disciplinary complaint and a [Decision Without Hearing by Reason of Default] was issued on September 13, 1995, finding World Wide Consultants, Inc., to have willfully, flagrantly, and repeatedly violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by failing to make full payment promptly for produce purchases, during the period October 1991 through May 1993, in the amount of \$117,017.92 and to have willfully violated section 8(b) of the PACA [(7 U.S.C. § 499h(b))] by unlawfully employing Harold Marvin Offutt from January 11, 1992, through August 26, 1993 [(RX 9; *In re World Wide Consultants, Inc.*, 54 Agric. Dec. 1462 (1995))].

5. In a letter to Petitioner's counsel dated October 31, 1995, the former Chief of the PACA Branch, John D. Flanagan, stated that Respondent had determined Petitioner to be responsibly connected with World Wide Consultants, Inc., during the time of its violations [(RX 11)]. Mr. Flanagan advised that Petitioner would have 30 days from receipt of the letter to file a petition for review [(RX 11 at 2)]. On November 22, 1995, Petitioner's counsel submitted a letter requesting [reconsideration] of Mr. Flanagan's October 31, 1995, determination, in view of the [approval of the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) [hereinafter PACAA-1995] which, *inter alia*, amended the definition of the term *responsibly connected* in the PACA (RX 12)]. In a letter dated December 18, 1995, Mr. Flanagan stated that [he had re-examined Petitioner's responsibly connected status in light of the November 15, 1995, amendment to the definition of *responsibly connected* in the PACA and using the new definition] still [found] Petitioner responsibly connected [with World Wide Consultants, Inc. (RX 13)]. On January 3, 1996, Petitioner submitted a Petition for Review which was filed on April 23, 1996 (RX 14).]

6. Petitioner has been in the produce business his entire working life, since 1974 [(Tr. 22-23). Petitioner's] first experience in the business was working for his father's firm, W. W. Rodgers and Sons Produce, Dallas, Texas [(Tr. 22-23)].

Petitioner was involved in all aspects of the business, including . . . unloading trucks, purchasing and selling produce, and setting up a tomato repacking business [(Tr. 23)]. In 1987 Petitioner left the produce business for about 1½ years [(Tr. 23)]. Petitioner returned to the produce business in 1989, becoming employed as a salesman for Quality Produce, Dallas, Texas [(Tr. 23-24)]. . . .

7. Petitioner left Quality Produce in mid-December 1991 [(Tr. 24)]. . . . [In mid-December 1991,] Petitioner's father, W. W. Rodgers, told Petitioner that Ms. Rose Volpe, [president] of World Wide Consultants, Inc., [a produce brokerage business,] was interested in hiring a salesman to work at World Wide Consultants, Inc. [(Tr. 24, 29-30)]. The next day Petitioner spoke with Ms. Volpe [about a sales position with World Wide Consultants, Inc. (Tr. 7, 25)]. A couple of days after this first meeting with Ms. Volpe] Petitioner [again] met with Ms. Volpe, who told him that she wanted to get out of the produce business and was looking for someone to invest money in [World Wide Consultants, Inc.,] with the hope of ultimately purchasing it over the next couple of years [(Tr. 26)]. Petitioner was interested in this idea[, and went to work as a salesman for World Wide Consultants, Inc., in mid-December 1991 (Tr. 26-27)]. The officers of World Wide Consultants, Inc., in December 1991, included Rose Volpe (president) and her two sons, Marc Mattoni (secretary) and David Mattoni (treasurer) [(Tr. 33-34)].

8. By Decision and Order issued on August 26, 1991, effective October 20, 1991, M. Offutt Co., Inc., Dallas, Texas, was found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA by failing to make full payment promptly of \$1,005,412.87 for [202] lots of perishable agricultural commodities purchased in interstate commerce [during the period] June 1987 through September 1989. *In re M. Offutt Co.*, 50 Agric. Dec. 1986 (1991). Harold Marvin Offutt was the president, secretary, director, and sole shareholder of M. Offutt Co., Inc., during the period it violated the PACA, and he was determined to be responsibly connected with the firm. Pursuant to section 8(b) of the PACA [(7 U.S.C. § 499h(b))], Mr. Offutt was barred from employment by a PACA licensee until August 26, 1992, with his employment from August 26, 1992, through August 26, 1993, permitted only under a bond approved by the Secretary of Agriculture. . . . Mr. Offutt was unlawfully employed by World Wide Consultants, Inc., from January 11, 1992, through August 26, 1993. [*In re World Wide Consultants, Inc.*, 54 Agric. Dec. 1462 (1995).]

9. Petitioner knew [Mr.] Offutt before December 1991 because both men had worked in the produce business in Dallas for the previous 15 to 20 years [(Tr. 27)]. Petitioner was aware that Ms. Volpe and Mr. Offutt were [acquainted (Tr. 28)]. Petitioner knew that Mr. Offutt was under employment restrictions as a result of the August 26, 1991, final decision and order [in *In re M. Offutt Co.*, 50 Agric.

Dec. 1986 (1991) (RX 8 at 2; Tr. 28, 87)]. Petitioner also knew that Mr. Offutt was then involved in two businesses: W.W. Trucking, a trucking company which was owned by World Wide Consultants, Inc., until December 1991; and Produce Services, a company that assisted produce firms when disputes arose [(RX 2 at 16; Tr. 29)]. Mr. Offutt ran his two businesses in office space in close proximity to World Wide Consultants, Inc. [(Tr. 34-35)].

10. On December 23, 1991, Ms. Volpe, the only stockholder of World Wide Consultants, Inc., [prior to December 23, 1991,] convened three meetings. One was a special meeting of the shareholders [of World Wide Consultants, Inc.,] in which it was agreed that World Wide Consultants, Inc., would issue 500 shares to Petitioner [(RX 2 at 17)]. Another was a special meeting of the directors which approved of the sale to Petitioner of the 500 shares [(RX 2 at 21)]. The third was [a] meeting of the directors in which World Wide Consultants, Inc., named Petitioner vice president, effective December 23, 1991 [(RX 2 at 20)]. Petitioner paid World Wide Consultants, Inc., \$60,000 for the stock [(Tr. 32)].

11. On December 24, 1991, World Wide Consultants, Inc., issued a corporate resolution which reads in part as follows:

RESOLVED that the following individuals will not be allowed to be employed by the corporation or any of its employees or officers as either an employee or as an independent consultant. This exclusion pertains to any involvement with the brokerage of produce:

Harold Marvin Offutt
Charles Offutt
Michael Offutt

This exclusion does not extend to activities that are not produce brokerage activities such as truck brokerage or other non-related activities.

[RX 2 at 23.]

12. World Wide Consultants, Inc.'s office facilities consisted of a large office, which was split by means of a screen, [and] two small offices [(Tr. 42)]. In the large office, the accounting staff inhabited the front portion and [the produce salespersons were] on the other side of the screen (Tr. 42)]. Behind the large office were [the] two small offices [(Tr. 42)]. . . . Most of World Wide Consultants, Inc.'s daily records were kept in filing cabinets in the front portion of the large office where everyone had [ac]cess to them, including Petitioner [(Tr. 42, 90)]. . . . [I]n

December 1991, Mr. Offutt shared office space with World Wide Consultants, Inc., [from which] he . . . operat[ed] Produce Services and W.W. Trucking [(Tr. 42)].

13. . . . [D]uring the first 6 months of Petitioner's association with World Wide Consultants, Inc., Petitioner bought and sold produce and was paid on a commission basis in the amount of approximately \$10,000 per month [(Tr. 84)]. After the first 6 months, Petitioner's work changed, as he was to focus on bringing in new customers [(Tr. 85)]. He no longer received a commission, but was paid a salary of \$10,000 to \$12,000 per month [(Tr. 84-85)].

14. Petitioner's investment of \$60,000 made him a one-third shareholder of World Wide Consultants, Inc. [(RX 2 at 21)]. Ms. Volpe retained the remaining two-thirds of the stock of World Wide Consultants, Inc. [(RX 2 at 21)]. Petitioner was given the title of vice president [(RX 2 at 20)]. Petitioner maintains, however, that he was not given any additional duties or paid additional compensation because of his status of vice president, but was simply given that title because of his \$60,000 investment [(Tr. 33, 49, 115)]. There is no evidence to suggest that any employees reported to [Petitioner] or that [Petitioner] had hiring [or] firing authority [(Tr. 75, 116, 136)]. However, the evidence does show that Petitioner made recommendations as to suitable salesmen to come to work at World Wide Consultants, Inc., and that they were hired by Ms. Volpe (Tr. 49-50). [Petitioner] also engaged in conversations with Ms. Volpe as to reducing the commissions, previously agreed upon, of two . . . salesmen (Tr. 94-96).

15. In February of 1992, John Lund, a marketing specialist with the PACA Branch, [Fruit and Vegetable Division, AMS, USDA,] then working out of the Arlington, Texas, office, met Petitioner at the place of business of World Wide Consultants, Inc. [(PX 2; Tr. 43-46, 92-94, 172-74)]. Mr. Lund had been instructed to inquire about several reparation complaints that had been filed against World Wide Consultants, Inc., by produce sellers [(Tr. 172)]. Petitioner maintains, but the evidence does not establish, that [prior to the February 1992] meeting at World Wide Consultants, Inc., Mr. Lund had called and [had a telephone conversation with] Petitioner [(Tr. 36)]. . . . [Petitioner alleges that d]uring that phone conversation, wherein Mr. Lund introduced himself, Mr. Lund acknowledged that he was aware that Petitioner was a one-third shareholder of World Wide Consultants, Inc., and Mr. Lund indicated that he was already aware that Mr. Offutt maintained offices of W.W. Trucking and Produce Services at the office of World Wide Consultants, Inc., and that there was nothing wrong with such arrangement [(Tr. 36-39)]. Even if such a conversation took place as Petitioner contends, it does not change the facts [relevant to this proceeding]. At the February 1992 meeting, Mr. Lund was accompanied by another PACA Branch investigator, Mr. McCloskey [(Tr. 172)]. During the course of the visit, Mr. Lund

spoke to Petitioner about [Mr. Lund's] desire to examine certain of World Wide Consultants, Inc.'s records [(Tr. 174)]. Mr. Lund believed Petitioner was refusing to provide the records and gave Petitioner a standard letter, explaining why World Wide Consultants, Inc., was required to turn over the records [(Tr. 174)]. A confrontational atmosphere developed between Mr. Lund and Petitioner over Mr. Lund's request to examine the records [(Tr. 174)]. Petitioner describes this meeting as one where Mr. Lund angrily demanded to review certain records and was generally hostile and confrontational with Petitioner [(Tr. 43-45)]. Petitioner believes that he in no way attempted to hinder Mr. Lund's investigation and fully complied with his request [(Tr. 44-46)].

16. Thereafter, Petitioner sent a letter dated February 26, 1992, to Mr. Lund's [supervisor, Mr. Byron White, Director, Southwestern Regional Office, PACA Branch,] and complained about Mr. Lund's alleged abusive conduct during the February 1992 meeting [(PX 2)]. Petitioner spoke with Mr. Lund approximately 2 weeks later, and [Petitioner described] Mr. Lund as angry and upset that Petitioner had written the letter [(Tr. 47)]. Mr. Lund made comments to Petitioner that Petitioner perceived as threats [(Tr. 47)].

17. Although Petitioner seeks to show that there was a telephone conversation . . . between Petitioner and Mr. Lund prior to the February 1992 meeting, the evidence of Respondent [that there was no such telephone conversation] is more convincing. [Petitioner's] letter dated February 26, 1992, to Mr. Lund's supervisor, Byron White, discussed Petitioner's confrontation with Mr. Lund during his February visit and among other things, states: "Mr. White, this is my first meeting, and discussion with John Lund. I take a very strong offense to the way Mr. Lund, has handled himself." [(PX 2 at 2.)] Petitioner's reference to an unconfirmed telephone conversation in January of 1992, with Mr. Lund, was for the purpose [of] trying to establish that Mr. Lund was aware that Petitioner was the one-third shareholder of World Wide Consultants, Inc., and that [Mr. Lund] was already aware that Mr. Offutt maintained offices of W.W. Trucking and Produce Services at the office of World Wide Consultants, Inc., and further that Mr. Lund had indicated that there was no problem with Mr. Offutt[s] operating his two separate businesses from World Wide Consultants, Inc.'s office as long as Mr. Offutt did not broker produce. Even if such a conversation took place, Mr. Lund's alleged "awareness" of [Petitioner's and Mr. Offutt's relationship with World Wide Consultants, Inc.,] . . . is overshadowed by the relevant and material evidence as related to the issues [in this proceeding]. However, it is noted that, if such a telephone conversation took place [prior to the February 1992 meeting between] Petitioner [and] Mr. Lund, by such actions Petitioner was representing himself as

a responsible person [with whom] to deal, [with respect to matters concerning World Wide Consultants, Inc.]

It is significant to note that Petitioner state[s], among other things, in [his] letter dated February [26], 199[2], to Mr. White:

I am sending you a letter on behalf of World Wide Consultants and myself, Steven J. Rodgers, concerning the past two days here at my office. *I am now, a current part owner of World Wide, and attempting to run this company in accordance with the rules and regulations of the P.A.C.A.*

....

... With total disregard, Mr. Lund, has for two days, disrupted my office, taken over the copy machine, phone lines, harassed customers, and drilled (questioned) to me and my employees, therefore I agree with World Wide's decision to hire counsel for myself and World Wide to protect certain rights to which I feel have been in violation.

[PX 2 (emphasis added).]

The expressions set forth in the [February 26, 1992,] letter from Petitioner reflect that Petitioner was "attempting to run this company" and that he was protesting Mr. Lund's [disruption of "my office" and] "my employees." [(PX 2.)]

18. World Wide Consultants, Inc., eventually agreed to provide access to its records, and Mr. Lund returned to World Wide Consultants, Inc., to examine these records about 10 days after the initial February 1992 visit [(Tr. 179)]. When Mr. Lund encountered Petitioner on this occasion, the relationship was friendly [(Tr. 179)]. Approximately 2 weeks after the February 1992 confrontation, Petitioner called Mr. Lund on the telephone, at which time Petitioner [stated] that he was sorry the confrontation had occurred [(Tr. 177)]. During all subsequent occasions when Petitioner had contact with Mr. Lund, the interchanges were friendly, and Petitioner's letter to Mr. White was never mentioned [(Tr. 178-81)].

19. In late 1992 Petitioner and his wife, Vicky, came to Mr. Lund's office in Arlington, Texas, and [stated] they wanted to fill out an application form for a PACA license for the company they owned, S&V Distributors, Inc. [(Tr. 180-81)]. Mr. Lund helped them fill out the application [(Tr. 180)].

20. Petitioner worked full time at World Wide Consultants, Inc., until approximately mid-September 1992 [(Tr. 52)]. From September 1992 through

mid-March 1993, Petitioner worked at World Wide Consultants, Inc., approximately 3 days a week for only a couple of hours a day [(Tr. 52-53)]. After mid-March 1993, Petitioner ceased working for World Wide Consultants, Inc., and sent a letter of resignation to Rose Volpe, dated June 2, 1993, in which Petitioner formally resigned from his employment at World Wide Consultants, Inc., and relinquished his stock [(PX 3; RX 4 at 1)]. Petitioner's contention that he was under the impression from December 1991 through June 1993 . . . that Mr. Offutt was not involved in the brokering of produce on behalf of World Wide Consultants, Inc., is not credible. Petitioner [contends] that when Mr. Offutt was at the office of World Wide Consultants, Inc., [Mr. Offutt's presence] was related to the business of Produce Services or W.W. Trucking or was a purely social visit with Ms. Volpe. Petitioner, being experienced and aware of PACA requirements knew, or should have known, of Mr. Offutt's activities as they related to World Wide Consultants, Inc. . . . Since Petitioner [owned 33.3 per centum of the outstanding stock of World Wide Consultants, Inc., and] was interested in buying [the remaining shares of] World Wide Consultants, Inc., he would have a strong incentive to acquaint himself with the activities of the company.

21. In November 1993, Mr. Lund and two other PACA Branch investigators, Jeffrey K. Spradlin and Donald P. Dutton, were instructed by Mr. White to investigate Mr. Offutt's involvement in World Wide Consultants, Inc. [(RX 6 at 1; Tr. 181)]. Mr. Lund was directed to interview four former employees of World Wide Consultants, Inc., then employed at Petitioner's business, S&V Distributors, Inc.: Rick Harkinson, Sandra LaBron, Mark Nelson, and Petitioner [(RX 6 at 3-7; Tr. 181)].

22. Mr. Dutton was directed to interview another former World Wide Consultants, Inc., employee, Mike Kennedy [(Tr. 231-32)]. The same questions were to be asked of all five persons interviewed [(Tr. 184-85)].

23. Mr. Lund and Mr. Dutton conducted the interviews of the former World Wide Consultants, Inc., employees during November 1993 [(RX 6; Tr. 181-86)]. When Mr. Lund and Mr. Dutton returned to the office, they set forth their findings in a report of personal investigation [(RX 6)]. The answers given by the five persons interviewed, including Petitioner, to the questions posed by Mr. Lund and Mr. Dutton showed that Mr. Offutt was very actively and openly involved in the business affairs of World Wide Consultants, Inc., during the period he was restricted from employment [(RX 6 at 1-7)]. None of the persons interviewed stated that Mr. Offutt's involvement was limited to his businesses of W.W. Trucking or Produce Services or social visits with Ms. Volpe [(RX 6; Tr. 190-91, 235-36)]. At the oral hearing [in this proceeding], . . . Petitioner, Mr. Nelson, and

Ms. LaBron attempted to "explain" these previous answers to the investigators' questions [(Tr. 60-61, 122-23, 145)]. [Petitioner's, Mr. Nelson's, and Ms. LaBron's testimony] as to what was meant by the answers to the [PACA Branch] investigators is not of sufficient credibility to overcome Respondent's evidence.

24. Petitioner signed nine confirmations of purchase orders or shipping orders on behalf of World Wide Consultants, Inc., in connection with produce transactions that took place between January 6, 1992, and February 20, 1992 [(RX 3)].

25. On March 19, 1992, Petitioner was added to the [Northeast National Bank's] signature card for World Wide Consultants, Inc. [(RX 15)]. . . . The addition of Petitioner to the signature card authorized Petitioner to: (1) open any deposit or checking accounts at Northeast National Bank in the name of World Wide Consultants, Inc.; (2) endorse checks and orders for the payment of money by World Wide Consultants, Inc., and withdraw funds on deposit by World Wide Consultants, Inc., with the Northeast National Bank; (3) borrow money on behalf of World Wide Consultants, Inc., and in the name of World Wide Consultants, Inc., sign, execute and deliver promissory notes or other evidence of indebtedness; (4) endorse, assign, transfer, mortgage or pledge bills receivable, warehouse receipts, bills of lading, stocks, bonds, real estate or other property owned by World Wide Consultants, Inc., as security for sums borrowed and discount the same, unconditionally guarantee payment of all bills received, negotiated or discounted and waive demand, presentment, protest, notice of protest and notice of nonpayment; and (5) enter into a written lease for the purpose of renting and maintaining a safe deposit box for World Wide Consultants, Inc., with Northeast National Bank (RX 15).] Ms. Volpe was the only other person on the signature card [(RX 15)].

26. Petitioner signed approximately 30 checks on behalf of World Wide Consultants, Inc. These checks, drawn on World Wide Consultants, Inc.'s account at Northeast National Bank, consisted of payment for payroll, utilities, and produce. Petitioner signed these checks when Ms. Volpe was not available [(Tr. 102)].

27. Petitioner was informed by Ms. Volpe that reparation complaints had been filed against World Wide Consultants, Inc., alleging the failure to pay for produce and [Petitioner discussed the reparation complaints] with her [(Tr. 106-08)]. . . .

28. On September 23, 1994, [the Deputy Director, Fruit and Vegetable Division, AMS, USDA,] filed a disciplinary complaint against World Wide Consultants, Inc., alleging that during the period . . . October 1991 through May 1993, World Wide Consultants, Inc., failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$117,017.92 for 36 lots

of perishable agricultural commodities, which World Wide Consultants, Inc., purchased, received, and accepted in interstate commerce, constituting willful, flagrant, and repeated violations of section 2(4) of the PACA [(7 U.S.C. § 499b(4); PX 6; RX 7 at 5, 8)]. The complaint also allege[s] that [AMS] had notified World Wide Consultants, Inc., in a certified letter received by World Wide Consultants, Inc., on December 11, 1991, that 30 days from its receipt of that letter, World Wide Consultants, Inc., would not be permitted to employ Mr. Offutt, pursuant to section 8(b) of the PACA [(7 U.S.C. § 499h(b); PX 6; RX 7 at 8)]. The complaint further allege[s] that after expiration of the 30-day period, from January 11, 1992, through August 16, 1993, World Wide Consultants, Inc., unlawfully employed Mr. Offutt, as the term "employed" is [defined in] section 1[(b)](10) of the PACA [(7 U.S.C. § 499a(b)(10))], in willful violation of section 8(b) of the PACA [(7 U.S.C. § 499h(b); PX 6; RX 7 at 8)]. A Decision [Without Hearing by Reason of Default was issued on September 13, 1995, in which the ALJ concludes that World Wide Consultants, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) as alleged in the complaint (RX 9; *In re World Wide Consultants, Inc.*, 54 Agric. Dec. 1462 (1995)). World Wide Consultants, Inc., did not appeal the September 13, 1995, Decision Without Hearing by Reason of Default].

.....

[Conclusions of Law]

1. At all times material to this proceeding World Wide Consultants, Inc., was a corporation.
2. Petitioner was a vice president and holder of more than 10 per centum of the outstanding stock of World Wide Consultants, Inc., during the time that World Wide Consultants, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and willful violations of section 8(b) of the PACA (7 U.S.C. § 499h(b)).
3. Petitioner was an owner of World Wide Consultants, Inc., during the time that World Wide Consultants, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and willful violations of section 8(b) of the PACA (7 U.S.C. § 499h(b)).
4. Petitioner was actively involved in activities resulting in World Wide Consultants, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 8(b) of the PACA (7 U.S.C. 499h(b)).

5. Petitioner was responsibly connected with World Wide Consultants, Inc., during the time that World Wide Consultants, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and willful violations of section 8(b) of the PACA (7 U.S.C. § 499h(b)).

[Discussion]

There are two reasons, each sufficient unto itself, for establishing Petitioner's responsible connection with World Wide Consultants, Inc.

The finding of [Respondent] that Petitioner was responsibly connected with World Wide Consultants, Inc., at the time [World Wide Consultants, Inc.] was found, in a decision entered September 1[3], 1995,¹ to have willfully, flagrantly, and repeatedly violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by failing to make full payment promptly for produce purchases, and [to] hav[e] willfully violated section 8(b) of the PACA [(7 U.S.C. § 499h(b))] by unlawfully employing Harold Marvin Offutt, is supported by the record and is . . . affirmed.

[Specifically, Respondent] correctly determined that Petitioner was responsibly connected with World Wide Consultants, Inc., as its vice president and [holder of] 33.3 [per centum of the outstanding stock of World Wide Consultants, Inc.,] during the time World Wide Consultants, Inc., was found to have violated the PACA.

Section 1[(b))(9) of the PACA (7 U.S.C. § 499a[(b))(9)) states that the term "responsibly connected" includes an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. The record shows, and Petitioner does not deny, that he became the vice president and [holder of] 33.3 [per centum of the outstanding stock] of World Wide Consultants, Inc., on December 23, 1991, and did not resign [his] position [as vice president and dispose

¹Included in th[e September 13, 1995.] decision were the findings:

(3) As more fully set forth in . . . the complaint, [World Wide Consultants, Inc.] willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to eight sellers of the agreed purchase prices totaling \$117,017.92 for 36 transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period October 1991 through May 1993.

(4) As more fully set forth in . . . the complaint, [World Wide Consultants, Inc.,] unlawfully employed Harold M. Offutt in willful violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)), from January 11, 1992, through August 26, 1993, after being notified by complainant in writing that such employment would be in violation of the PACA.

of his stock] until June 2, 1993 [(RX 2 at 17, 20-21, RX 4)]. World Wide Consultants, Inc.'s payment violations that occurred during the period of Petitioner's affiliation consisted of the failure to pay \$48,386.45 to five [produce] sellers as set forth in the disciplinary complaint [(PX 6)]. World Wide Consultants, Inc.'s employment violations, which began in January 11, 1992, extended throughout the [remaining] period of Petitioner's affiliation [with World Wide Consultants, Inc.]

Reasons advanced by Petitioner as to why he was not "responsibly connected" are not sufficient to overcome his actual involvement. Among Petitioner's contentions are that he had only [a 33.3 per cent] interest in the company of which Ms. Volpe was the alter ego; that he had no employees reporting to him; that he had no policy making authority, including the hiring and firing of employees; that there was never any meeting of the officers or shareholders; and, that he became a signatory on the company's checking account for the convenience of Ms. Volpe. Subsequent investigation by Petitioner revealed to him that Ms. Volpe was misusing company assets and funds.

Respondent has advanced reasons and evidence why Petitioner was more than a nominal officer and shareholder.

The contentions of Petitioner are not supported by the record. Petitioner maintains his positions with World Wide Consultants, Inc. [, as vice president and holder of 33.3 per centum of the stock] were nominal and asserts that the corporation was the alter ego of its president and [holder of 66.6 per centum of the stock], Rose Volpe. However, the record [establishes] that Petitioner was actively involved in the activities resulting in World Wide Consultants, Inc.'s violations and thus responsibly connected on that basis alone. . . . In addition, Petitioner engaged in important corporate activities such as signing corporate checks [(Tr. 102)], which contradict any claim that his role was nominal. He also considered himself as "a current part owner of World Wide, and attempting to run [the] company," in his letter to Mr. White [(PX 2)]; and he recommended salespersons to hire [(Tr. 49-50)] and participated in conversations relating to their compensation [(Tr. 94-96)].

Petitioner's active involvement in the activities resulting in World Wide Consultants, Inc.'s violations renders [Petitioner] responsibly connected. Section 1[(b)](9) of the PACA provides an opportunity for a person to show by a preponderance of the evidence that he [or she] was not responsibly connected, even though the [person] may fit within one of the responsibly connected categories . . . in that section. The person denying . . . responsibly connected status must show that h[e or she] was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating

licensee or entity subject to license which was the alter ego of its owners]. However, as section 1[(b)](9) clearly states, only a person "not actively involved in the activities resulting in a violation of this chapter" may make such a showing (7 U.S.C. § 499a(b)(9)).

Petitioner argues that he was not actively involved in the activities resulting in World Wide Consultants, Inc.'s employment violation, as he "denies that Mr. Offutt was ever employed, as that term is defined under PACA, by World Wide during Mr. Rodgers' association with World Wide." [(Post-Hearing Brief of Petitioner Steven J. Rodgers at 12.)] Petitioner contends that the evidence is insufficient to establish his active involvement in World Wide Consultants, Inc.'s unlawful employment of Mr. Offutt. However, that Mr. Offutt was unlawfully employed by World Wide Consultants, Inc., from January 11, 1992, through August 16, 1993, was conclusively established by the issuance of the September 1[3], 1995, decision and order, which was never appealed. [*In re World Wide Consultants, Inc.*, 54 Agric. Dec. 1462 (1995).] Petitioner does not dispute that he was vice president and [a holder of] 33.3 [per centum of the outstanding stock] of World Wide Consultants, Inc., from December 23, 1991, through June 2, 1993. Therefore, Petitioner's denial that Mr. Offutt was unlawfully employed by World Wide Consultants, Inc., while Petitioner was associated with it, is contrary to the facts and must be rejected.

There was a great deal of evidence introduced . . . showing that Mr. Offutt's employment by World Wide Consultants, Inc., was blatant and that Petitioner was aware, or should have been aware, of [Mr. Offutt's employment]. Respondent's investigators, John Lund and Donald Dutton, testified that they interviewed several employees of World Wide Consultants, Inc., about Mr. Offutt's involvement [with World Wide Consultants, Inc.] and prepared an investigation report, stating their findings [(RX 6; Tr. 181-87, 231-34)]. All persons interviewed described Mr. Offutt as being very active in the daily activities of World Wide Consultants, Inc., and constantly making important business decisions. These employees included Mike Kennedy, Mark Nelson, Sandra LaBron, and Rick Harkinson, as well as Petitioner.

Mr. Kennedy [answered questions as follows:

Q 3. What was your understanding of Marvin Offutt's involvement with World Wide Consultants?

A Marvin Offutt handled all PACA claims and all problems that came up. He [Offutt] [brackets added by PACA Branch investigators] attended all staff meetings and if there were any sales problems, I went to Marvin

for advice. I was hired by Charlie Offutt, but Marvin was present at my interview and explained my salary and how the company worked. Marvin was known to be a hidden partner and was paid 5% of all sales through Produce Services.

Q 4. What were Marvin Offutt's day to day activities?

A Marvin handled all Gurda Gardens and Kaleck Brothers sales. He maintained a separate office, but had a desk at World Wide Consultants. Marvin dealt directly with the trade and wrote all damage calculations on the front of the folders. Marvin never signed anything, but would bring things to the salesmen to sign.

RX 6 at 2.]

Mr. Nelson described . . . Mr. Offutt[']s participation in World Wide Consultants, Inc., meetings as follows:

Q 5. Did Marvin Offutt conduct weekly meetings?

A He was an active participant in sales meetings. Gave sales talks, pep-talks. Marvin wanted to get sales up because it was his benefit. Marvin was paid on a percentage of all sales. (Steve Rodgers) - He was paid on the basis of five percent and was paid through Produce Services.

RX 6 at 5.]

Ms. LaBron [described] . . . Mr. Offutt[']s involvement with World Wide Consultants, Inc., variously as follows:

Q 3. What was your understanding of Marvin Offutt's involvement with World Wide Consultants?

A As an advisor to Rose Volpe

Q 4. What were Marvin Offutt's Day to day activities?

A Marvin checked invoices, out going letters, and gave me instructions. Ex. He would change wordings on confirmations or add to them. Fob or del.

.....

Q 6. Who authorized adjustments on payments regarding the buyers and sellers?

A Marvin did make and authorize adjustments on onions. Marvin would write on a piece of paper what the corrections on invoices and confirmations and I would issue corrected documents.

Q 7. Did Marvin Offutt use any other names?

A He used the name Jack Taylor. He would call the trade to collect money and that he was the controller of World Wide. He would also talk to creditors who were collecting monies. This would happen on several occasions, he would also use the names of Mike Kennedy, Greg Chancey, and Paul Smith.

Q 8. Did Marvin Offutt interact with the trade via phone regarding produce?

A Yes, but only when using someone else name. I never heard the other end of the calls but it sounded like the calls were made to a seller or buyer. Marvin trained Greg Chancy to buy and sell onions. He would get on the phone with Greg or call himself Greg.

RX 6 at 6-7.]

Mr. Harkinson [described] . . . Mr. Offutt's activities at World Wide Consultants, Inc., as follows:

Q 3. What was your understanding of Marvin Offutt's involvement with World Wide Consultants?

A His job was to review all paper work to see if it was correct. If any problems on a load came up, we were to contact Marvin.

Q 4. What were Marvin Offutt's Day to day activities?

A Marvin would be in on sales meetings, once every three weeks. Marvin would give a pep-talk at sales

meetings. Would tell us how we could improve business.

Q 5. Did Marvin Offutt conduct weekly meetings?

A No. He would control paper flow and approve invoices and payments before they were sent out.

....

Q 8. Did Marvin Offutt interact with the trade via phone regarding produce?

A Yes. He would talk to some of the east coast trade concerning claims.

RX 6 at 4.]

Petitioner himself told the [PACA Branch] investigator that [Mr. Offutt was actively involved with] . . . World Wide [Consultants, Inc., as follows:

Q 3. What was your understanding of Marvin Offutt's involvement with World Wide Consultants?

A If Vicky (Steve's wife) or I ran into any problems (referring to produce shipments) we would have to run it by Marvin; run the paper work by him to direct how to handle the matter.

Q 4. What were Marvin Offutt's day to day activities?

A Marvin coached onion buyers. Greg Chancey and Mike Kennedy. Marvin forcibly directed the operations at World Wide.

Q 5. Did Marvin Offutt conduct weekly meetings?

A No, but he was present. Marvin gave pep-talks to increase sales and who to call.

Q 6. Who authorized adjustments on payments regarding the buyers and sellers?

A Greg Chancey, Paul Smith and Mike Kennedy were the only salesmen that went through Marvin.

- Q 7. Did Marvin Offutt use any other names?
A Yes. He would use Greg Chancey, Mike Kennedy, Angie Ross, and Jack Taylor. He would use these names to sign confirmations, trouble reports, and correspondents [sic]. He would also use these names to call shippers and receivers.
- Q 8. Did Marvin Offutt interact with the trade via phone regarding produce?
A Yes. Marvin would call the trade to discuss if loads would be shipped or how they were received.

RX 6 at 3-4.]

Mr. Nelson and Ms. LaBron testified at the hearing and did not deny that they made the statements attributed to them [in RX 6], although they "explained" that their statements were meant to apply to Mr. Offutt's trucking company and produce services business [(Tr. 122-23, 145)], an irrelevant distinction in view of the PACA's broad definition of [the term] "employment" as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment" (7 U.S.C. § 499a(b)(10)). Moreover, I have not attached the same degree of credibility to their "explanations" as I do to their prior statements to the investigators. Petitioner denied many of the statements claimed by [PACA Branch] investigator, Mr. Lund, but did not deny having said that three World Wide Consultants, Inc., salesmen "went through Marvin."

The obvious nature of Mr. Offutt's unlawful employment by World Wide Consultants, Inc., was something of which Petitioner was aware, or should have been [aware], particularly in light of his intent to buy the [remainder of the] company. Petitioner, as vice president and [holder of] 33.3 [per centum of the outstanding stock], had an obligation to World Wide Consultants, Inc., to take action to prevent [World Wide Consultants, Inc.,] from continuing these violations. However, the only effort made by Petitioner was a December 24, 1991, corporate resolution at the time he began his association with World Wide Consultants, Inc., which restricted Mr. Offutt's employment only with respect to "produce brokerage activities" [(RX 2 at 23)], which left open the possibility that Mr. Offutt could still be present and [engage in] other produce related activities. Moreover, as made clear by the statements of World Wide Consultants, Inc.'s employees, including Petitioner, Mr. Offutt ignored the modest restrictions placed upon him by the December 24, 1991, corporat[e] resolution and did engage in the buying and selling of produce. Petitioner was aware of these unlawful activities and made no

real effort to stop them. Th[ese facts] demonstrate that [Petitioner] was "actively involved in the activities resulting in a violation" of the PACA.

....

The record in this case reveals that Petitioner was actively involved in activities resulting in the nonpayment and employment violations committed by World Wide Consultants, Inc. Therefore, Petitioner must be considered responsibly connected without consideration of any of the other factors set forth in section 1[(b)](9) [of the PACA].

Moreover, case law substantiates Petitioner's responsibly connected status. . . . *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975) established the principle that a person should be given an opportunity to rebut the presumption of responsible connection based upon his [or her] position with the violating entity, and the [United States] Court of Appeals [for the District of Columbia Circuit] has stated on several occasions that [ownership of] approximately 20 [per centum or more of the stock of a corporation] is enough to support a finding of responsible connection. In *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1986), the court held that [ownership of] 22.2 [per centum of the] stock and the fact that the petitioner was neither enticed nor coerced into the position that rendered him responsibly connected formed a sufficient nexus to establish the petitioner's responsible connection.

In *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), the court [relying on] its decision in *Martino*, stat[es]: "In *Martino* we found that ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection." This principle was restated in *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) as follows: "Most clearly in *Martino*, this Court held that approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management." . . . [While a petitioner who owns stock may demonstrate that he or she was only nominally a shareholder of a corporation or association, it is extremely difficult to do so when the petitioner owns a substantial per centum of the outstanding stock of the corporation or association. Petitioner does not deny that he held 33.3 per centum of the outstanding stock of World Wide Consultants, Inc. Petitioner's ownership of a substantial per centum of the outstanding stock of World Wide Consultants, Inc., alone is very strong evidence that he was responsibly connected with World Wide Consultants, Inc., which Petitioner has failed to rebut.]

There are additional factors which indicate that Petitioner was not a nominal officer and shareholder. The [United States] Court of Appeals for the District of Columbia Circuit . . . in *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir.

1994) remanded the case back to the Department of Agriculture for a responsibly connected determination based on the standards it set forth in *Quinn*. In the course of that decision, the court summarized the factors in *Quinn* which indicate that a corporate officer and director is nominal (*Bell v. Department of Agric., supra*, 39 F.3d at 1202):

Quinn was indisputably a vice-president on paper. After the sole proprietorship for which he worked was incorporated, he became its vice-president, but his duties did not change, he was paid no additional salary, and he never had anything to do with policy or business decisions. Nor did he have access to company records or any knowledge of the company's financial difficulties. We said that these circumstances "would demonstrate not only that Quinn did not to any extent participate in the management of the company's affairs, but also that he was totally without power to do so; in other words, that Quinn did not bear any responsible connection with the company." *Quinn*, 510 F.2d at 753.

The court also noted (*Bell v. Department of Agric., supra*, 39 F.3d at 1200) that the circumstances in the case before it were similar to those of *Quinn*:

In 1983 or 1984 William Mailley, Jr. bought Rock's share of Sunrise and, soon thereafter, Stalling's. Mailley became president and made Bell the vice-president. Whatever Bell's duties under Stalling and Rock, he performed none under Mailley that can be specifically attributed to his being vice-president. He never signed checks or agreements; he never filed PACA license renewals; he had no access to Sunrise books or records. He just sold produce.

However, Petitioner's status in this case differs greatly from [the status of petitioners in] *Bell* [and] *Quinn*. Unlike those individuals, Petitioner was vice president and [holder of] 33.3 [per centum of the outstanding stock] of World Wide Consultants, Inc., from the start of his association with it [(RX 2 at 20-21)]. Petitioner was not a mere salesman whose duties never changed, but was an experienced businessman who became associated with World Wide Consultants, Inc., in order to purchase the company [(Tr. 24-27)]. Petitioner did not lack knowledge of the corporation's financial difficulties, as in *Quinn*, because Petitioner admittedly knew that reparation complaints were . . . filed against World Wide Consultants, Inc., and discussed them with Ms. Volpe [(Tr. 106-08)]. In contrast to the [petitioners] in *Bell* and *Quinn*, Petitioner had access to corporate

financial records, as they were kept in filing cabinets in the portion of the office accessible to him [(Tr. 42, 90)]. Further, Petitioner was very active in important business decisions. When Ms. Volpe was not present, Petitioner was responsible for writing checks [(Tr. 102)]. Petitioner and Ms. Volpe were the only two authorized signatories on World Wide Consultants, Inc.'s bank account with Northeast National Bank [(RX 15), and Petitioner] signed approximately 30 checks on behalf of World Wide Consultants, Inc., consisting of payments for payroll, utilities, and produce [(Tr. 102)]. As the court in *Bell* pointed out, petitioner Bell never signed any checks. The fact that a person signs corporate checks should be considered one of the strongest indications of that person's close involvement in the financial affairs of the corporation. In addition, in [Petitioner's] letter [dated February 26, 1992, to Mr. Byron White, Petitioner stated that] he was [attempting to run World Wide Consultants, Inc., and referred to Mr. Lund's activities as disruptive to "my office" and "my employees" (PX 2)].

Petitioner's contention that World Wide Consultants, Inc., was the alter ego of Ms. Volpe is without merit. . . .

. . . In this case, Ms. Volpe was not the sole stockholder. In addition, evidence shows that persons other than Ms. Volpe exercised decision-making authority. Petitioner[, along with Ms. Volpe,] was [authorized to sign checks drawn on World Wide Consultants, Inc.'s account with Northeast National Bank (RX 15),] and [Petitioner] signed about 30 checks when Ms. Volpe was not present [(Tr. 102)]. Mr. Offutt also played a major role in making corporate decisions, according to the statements of four former employees of World Wide Consultants, Inc., and Petitioner. Mr. Kennedy characterized Mr. Offutt as "a hidden partner" [(RX 6 at 2)]. Mr. Nelson said Mr. Offutt was "paid on a percentage of all sales" [(RX 6 at 5)]. Ms. LaBron asserted that Mr. Offutt "did make and authorize adjustments on onions" [(RX 6 at 6)]. Mr. Harkinson stated that Mr. Offutt "would control paper flow and approve invoices and payments" [(RX 6 at 4)]. Even Petitioner acknowledged that three World Wide Consultants, Inc., salesmen "went through Marvin" [(RX 6 at 3)], thus recognizing that Mr. Offutt had supervisory responsibility. Therefore, in view of the supervisory authority in World Wide Consultants, Inc., exercised by Petitioner and Mr. Offutt, World Wide Consultants, Inc., was not Ms. Volpe's alter ego. . . .

. . . .

ADDITIONAL CONCLUSIONS OF THE JUDICIAL OFFICER

On September 26, 1997, Petitioner filed Appeal Petition, which states in its entirety as follows:

APPEAL PETITION

Petitioner Steven J. Rodgers files his Appeal Petition in accordance with 7 CFR 1.145 and respectfully states:

Preliminary Statement

Petitioner Steven J. Rodgers files this Appeal Petition to the decision and order rendered by the Honorable Administrative Law Judge Dorothea A. Baker ("ALJ") on August 22, 1997. The ALJ erred in determining that Mr. Rodgers was responsibly connected to World Wide Consultants, Inc. ("World Wide") because:

- (i) Mr. Rodgers was not actively involved in the thirty-six non-pay transactions involving World Wide;
- (ii) Mr. Rodgers was not actively involved in World Wide's employment of Marvin Offutt;
- (iii) Mr. Rodgers was a nominal officer and shareholder of World Wide; and
- (iv) World Wide was the alter ego of Rose Volpe.

Points of Error

1. The ALJ erred in determining that Mr. Rodgers was actively involved in the non-pay transactions involving World Wide (Tr. 70-74; 107-08; 115-16; 134-35; Petitioner's Exhibit 6; Respondent's Exhibits 7 and 9).
2. The ALJ erred in determining that Mr. Rodgers was actively involved in World Wide's employment of Marvin Offutt. (Tr. 22-31; 37-40; 54-56; 118-25; 141-50; 188-89; 199-203; Petitioner's Exhibit 1 and 5).

3. The ALJ erred in determining that Mr. Rodgers was not a nominal officer and shareholder of World Wide. (Tr. 22-33; 48-49; 75-85; 102; 115-17; 127-28; 136-37; 142; Petitioner's Exhibits 4 and 6; Respondent's Exhibits 2, 4 and 6).
4. The ALJ erred in finding that World Wide was not the alter ego of Rose Volpe. (Tr. 24-34; 52-53; 75-82; 115-17; 136-37; 142; 150-52; 161-63; Petitioner's Exhibit 4, 7 and 8; Respondent's Exhibits 2, 4 and 6).

Authorities

The authorities relied upon by Mr. Rodgers in support of his appeal petition are listed below:

Cases

Bell v. U.S. Dept. of Agric., 39 F.3d 1199 (D.C. Cir. 1994).

Martino v. U.S. Dept of Agric. 801 F.2d 1410 (D.C. Cir. 1986)

Minotto v. U.S. Dept. of Agric. 711 F.2d 406 (D.C. Cir. 1983)

Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975)

Siegel v. Lyng 851 F.2d 412 (D.C. Cir. 1988)

Statutes

7 U.S.C. § 499a

Texas Business and Corporation Act articles 4.02, 5.03, 5.10, and 6.03

Request for Relief

Petitioner Steven J. Rodger [sic] respectfully requests that the Judicial Officer reverse the decision and order rendered by the ALJ and enter an order finding that Mr. Rodgers was not responsibly connected to World Wide because:

- (i) Mr. Rodgers was not actively involved in any violations of PACA that may have been committed by World Wide;
- (ii) Mr. Rodgers was only a nominal officer and shareholder of World Wide; and
- (iii) World Wide was the alter ego of Rose Volpe who was President, sole director and controlling owner of World Wide.

Respondent requests dismissal of Petitioner's Appeal Petition on the ground that Petitioner's Appeal Petition is not an appeal petition under the Rules of Practice as follows:

Petitioner's Appeal Petition does not comply with the requirements of section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) and should not be granted for that reason alone. Section 1.145(a) describes what an Appeal Petition should contain as follows: "Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof." Section 1.145(a) presumes that an Appeal Petition filed with the Judicial Officer will contain an explanation of how the citations of the record, statutes, regulations or authorities being relied on support the issues set forth therein. However, Petitioner has not offered any explanation of how the portions of the evidentiary record cited in the Appeal Petition allegedly support his claims of error, and it cannot be determined from Petitioner's citations what such explanation might be. Therefore, the Appeal Petition does not meet the requirements of section 1.145(a) and should be rejected solely for that reason.

Respondent's Response to Appeal Petition at 3.

Section 1.145(a) of the Rules of Practice addresses the content of appeal petitions as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* . . . As provided in § 1.41(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 petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

I find that Petitioner has raised issues in his Appeal Petition and has cited those portions of the record and those cases and statutes which Petitioner contends support his position that the ALJ erred. While I agree with Respondent that Petitioner's Appeal Petition does not "offer any explanation" of the relationship between the portions of the record and authority cited by Petitioner and the issues raised by Petitioner and I further find that Petitioner's Appeal Petition does not contain any argument, I do not find that Petitioner's Appeal Petition is so defective that it should be dismissed because it does not meet the requirements of section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

However, I have reviewed the entire record in this proceeding, including the portions of the record cited by Petitioner in his Appeal Petition, and I do not find that the ALJ erred, as Petitioner contends. Rather, based on the record in this proceeding and relevant authorities, I have adopted, with only slight modification, the ALJ's Initial Decision and Order as the final decision and order. Further, a review of the authorities cited by Petitioner reveals that the Texas Business and Corporation Act, articles 4.02, 5.03, 5.10, and 6.03, is not applicable to the issues in this proceeding. Further still, 7 U.S.C. § 499a, cited by Petitioner in support of his Appeal Petition, supports Respondent's position in this proceeding because Petitioner admits that, at all times material to this proceeding, he was a vice president and a holder of 33.3 per centum of the outstanding stock of World Wide Consultants, Inc. This admission places Petitioner within the statutory categories of responsibly connected, and under 7 U.S.C. § 499a(b)(9), Petitioner bears the burden of proof in this proceeding to avoid responsibly connected status.

Moreover, the cases cited by Petitioner in his Appeal Petition² do not support Petitioner, but rather, as discussed in this Decision and Order, *supra*, pp. 33-36,³ support Respondent's position in this proceeding.

As originally enacted in 1930, section 8 of the PACA empowered the Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who violated section 2 of the PACA, but the Secretary of Agriculture had no authority to impose any employment restrictions on individuals who were responsibly connected with the violator and actively involved in the activities resulting in the violation.⁴ Amendments to the PACA in 1934 empowered the Secretary of Agriculture to revoke the PACA license of any commission merchant, dealer, or broker, who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership,

²*Bell v. United States Dep't of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng*, 851 F.2d 412 (D.C. Cir. 1988); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1986); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975).

³The only case which Petitioner cites in his Appeal Petition which is not specifically addressed in this Decision and Order, *supra*, pp. 33-36, is *Minotto v. United States Dep't of Agric.*, 711 F.2d 406 (D.C. Cir. 1983). In *Minotto*, the United States Court of Appeals for the District of Columbia Circuit found that Lilly Minotto was not responsibly connected with Conte, Inc., an agricultural products marketing company, that violated the PACA. However, Lilly Minotto's relationship to Conte, Inc., is not similar to Petitioner's relationship to World Wide Consultants, Inc.; and therefore, *Minotto* does not support Petitioner's position in this proceeding. (In *Minotto*, the court explained that Lilly Minotto, a director of Conte, Inc., who attended nine corporate board meetings, was only a nominal director because she lacked training and experience to be an active director, and she had no real authority within the company. She simply acquiesced in decisions made by the company president who was her boss. The court also noted she had no policy or decision making role and was essentially a clerical employee. *Minotto v. United States Dep't of Agric.*, *supra*, 711 F.2d at 409.)

⁴The Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 8, 46 Stat. 535, provides:

Sec. 8. Whenever the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, he 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 a flagrant or repeated violation of such provisions, the Secretary may, by order, revoke the license of the offender.

association, or corporation whose license had been revoked,⁵ and 1956 amendments to the PACA authorized the Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been suspended or revoked.⁶ However, until 1962, the PACA did not define the term *responsibly connected*. In order to give the term *responsibly connected* "specific

⁵The Act of April 13, 1934, Pub. L. No. 159, ch. 120, § 5, 48 Stat. 586, provides:

Sec. 5. That a new paragraph lettered (c) and reading as follows is hereby added to section 4 of the Perishable Agricultural Commodities Act, 1930:

"(c) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker, who after the date given in such notice continues to employ in any responsible position any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year prior to the date of such notice. Employment of such individual by a licensee in any responsible position after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond or other satisfactory assurance that its business will be conducted in accordance with the provisions of [the PACA.]"

⁶The Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 5, 70 Stat. 727, provides:

Sec. 5. Section 8(b) of [the PACA] (7 U.S.C., sec. 499h(b)) is amended to read as follows:

"(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of [the PACA.]"

meaning" and avoid "possible confusion as to interpretations,"⁷ section 1 of the PACA (7 U.S.C. § 499a) was amended by adding a definition of the term *responsibly connected* to read as follows:

The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association[.]

Act of October 1, 1962, Pub. L. No. 87-725, § 2, 76 Stat. 673.

The applicable House of Representatives Report and Senate Report each state that the definition of the term *responsibly connected* "[i]mprove[s] and clarif[ies] provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated with them[.]"⁸ Further, both reports state that:

Responsible connection by the applicant (or one of the applicant's officers, directors, or members, or a holder of more than 10 percent of the applicant's stock) with a person guilty of the specified conduct would require a refusal of a license, without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct.

H.R. Rep. No. 1546, 87th Cong., 2d Sess. 6 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2753; S. Rep. No. 750, 87th Cong., 1st Sess. 5 (1961).

Until 1975, an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered *per se* responsibly connected and subject to the licensing and employment restrictions in the PACA.

The *per se* standard was first enunciated in *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966). The court held that the 1962 amendment to the PACA adding a definition of the term *responsibly connected* was intended to establish a *per se* exclusionary standard whereby an individual who was a partner in a

⁷H.R. Rep. No. 1546, 87th Cong., 2d Sess. 4 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2751; S. Rep. No. 750, 87th Cong., 1st Sess. 2 (1961).

⁸H.R. Rep. No. 1546, 87th Cong., 2d Sess. 2 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2750; S. Rep. No. 750, 87th Cong., 1st Sess. 1 (1961).

partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be subject to the Secretary of Agriculture's authority to prohibit employment under section 8(b) of the PACA (7 U.S.C. § 499h(b)) and that no defense, such as lack of real authority within the corporation or partnership, would be available to individuals who fell within the definition of the term *responsibly connected*.

This *per se* exclusionary rule was followed in other circuits.⁹ However, in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), a court determined, for the first time, that the presumption that an individual who was a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was responsibly connected is a rebuttable presumption. The court found that an individual who held the title of vice president was not *responsibly connected* to a corporation that had committed flagrant and repeated violations of the PACA because he neither participated in the management of the corporation nor had the power to participate.

The United States Court of Appeals for the District of Columbia Circuit continued to adhere to the doctrine that a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a

⁹See *Conforti v. United States*, 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term *responsibly connected* in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied*, 117 S. Ct. 49 (1996); *Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1130 (5th Cir. 1993) (holding that the definition of *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) commands the application of a *per se* rule); *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (holding that if a person is an officer, director, or holds over 10 per centum of the outstanding stock of a corporation that has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b, that person is considered *responsibly connected* and subject to sanctions under the PACA; PACA does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected); *Pupillo v. United States*, 755 F.2d 638, 644 (8th Cir. 1985) (stating that a *per se* analysis of the definition of *responsibly connected* in section 1 of the PACA accomplishes Congress' objective of providing a clear definition of *responsibly connected*, and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator). See also *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing with approval the *per se* approach taken by the court in *Birkenfield*), *cert. denied*, 389 U.S. 835 (1967).

corporation could rebut the presumption that he or she was *responsibly connected* as defined in section 1 of the PACA (7 U.S.C. § 499a).¹⁰

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation to rebut his or her status as responsibly connected with a violator. Specifically, section 12(a) of the PACAA-1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

¹⁰See *Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997) (stating that this court has held that the presumption that an officer, director, or holder of more than 10 per centum of the stock of a corporation is responsibly connected is a rebuttable presumption); *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating that this circuit has consistently read 7 U.S.C. § 499a and 499h(b) as establishing only a rebuttable presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected with the violator; and that a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder); *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating that, as construed by this court, characterization as *responsibly connected*, as defined in the PACA, is rebuttable, not absolute); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating that the definition of the term *responsibly connected* in section 1 of the PACA establishes only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1413 (D.C. Cir. 1986) (stating that PACA's provisions on responsible connection establish, not an incontrovertible rule, but rather a rebuttable presumption); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (stating that the court had established in *Quinn* that being a director, officer, or 10 percent stockholder is only prima facie evidence that one is *responsibly connected* to a company that has violated the PACA and that a finding of liability under 7 U.S.C. § 499h must be premised upon personal fault or failure to counteract or obviate the fault of others).

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."¹¹ The House Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation."¹²

Petitioner does not deny that he was the vice president and a holder of 33.3 per centum of the outstanding stock of World Wide Consultants, Inc., at all times material to this proceeding. Petitioner therefore falls within the statutory categories of responsible connection. Petitioner would only be deemed not to be responsibly connected if he demonstrates by a preponderance of the evidence that he was not actively involved in the activities resulting in a violation of the PACA and that he either was only nominally an officer or shareholder of World Wide Consultants, Inc., or was not an owner of World Wide Consultants, Inc., which was the alter ego of its owners.

I have reviewed the entire record in this proceeding, including those parts of the record cited in Petitioner's Appeal Petition. Petitioner has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in World Wide Consultants, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 8(b) of the PACA (7 U.S.C. § 499h(b)). In fact, as discussed in this Decision and Order, *supra*, pp. 24-32, the evidence clearly establishes that Petitioner was actively involved in the activities resulting in World Wide Consultants, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 8(b) of the PACA (7 U.S.C. § 499h(b)).

Since Petitioner, who admits that he was an officer of World Wide Consultants, Inc., and a holder of 33.3 per centum of the outstanding stock of World Wide Consultants, Inc., has failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in World Wide Consultants, Inc.'s violations of the PACA, Petitioner at all times material to this proceeding

¹¹H.R. Rep. No. 104-207, at 11 (1995), reprinted in 1995 U.S.C.C.A.N. 453, 458.

¹²H.R. Rep. No. 104-207, at 18-19 (1995), reprinted in 1995 U.S.C.C.A.N. 453, 465-66.

was responsibly connected with World Wide Consultants, Inc., within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

The issue of whether Petitioner was only nominally an officer of World Wide Consultants, Inc., or holder of 33.3 per centum of the outstanding stock of World Wide Consultants, Inc., and whether World Wide Consultants, Inc., is the alter ego of Rose Volpe is not dispositive of this case because Petitioner admits that he is a nominal officer and nominal holder of more than 10 per centum of the outstanding stock of World Wide Consultants, Inc., and as discussed in this Decision and Order, *supra*, pp. 24-32, Petitioner was actively involved in activities resulting in World Wide Consultants, Inc.'s violations of the PACA. These findings alone are sufficient to conclude that Petitioner was responsibly connected with World Wide Consultants, Inc.¹³

Nonetheless, I note my agreement with the ALJ that Petitioner has not proven by a preponderance of the evidence that he was only nominally an officer and stockholder of World Wide Consultants, Inc. Moreover, I agree with the ALJ that Petitioner has not proven by a preponderance of the evidence that World Wide Consultants, Inc., was the alter ego of Rose Volpe. In fact, as discussed in this Decision and Order, *supra*, pp. 33-36, the evidence clearly establishes that Petitioner was much more than a nominal officer of, and stockholder of, World Wide Consultants, Inc., and that World Wide Consultants, Inc., was not the alter ego of Rose Volpe.

Moreover, Petitioner cannot avail himself of the defense that World Wide Consultants, Inc., was Ms. Volpe's alter ego. Petitioner at all times material to this proceeding held 33.3 per centum of the outstanding stock of World Wide Consultants, Inc. Consequently, Petitioner was an owner of World Wide Consultants, Inc. In order to avoid *responsibly connected* status, a petitioner must prove not only that the violating licensee or entity subject to the license is the alter ego of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license.¹⁴ As Petitioner was an owner of World Wide Consultants, Inc., during the time that World Wide Consultants, Inc., violated the PACA, the defense that World Wide Consultants, Inc., was the alter ego of Rose Volpe is not available to Petitioner.

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

¹³See *In re Michael Norinsberg*, 56 Agric. Dec. ___, slip op. at 26 (Oct. 21, 1997).

¹⁴*In re Michael Norinsberg*, 56 Agric. Dec. ___, slip op. at 34 (Oct. 21, 1997).

Order

The determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the PACA, is affirmed.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

RICH-SEAPAK CORPORATION v. PRO-AG, INC.

PACA Docket No. R-96-0019.

Decision and Order filed August 18, 1997.

Contracts - Failure to make timely payments for some loads purchased under an installment contract is not justification, in itself, for cancellation of the contract.

Purchase After Inspection - Parties were found to have not contemplated a purchase after inspection where term was not used.

Parties entered into a written installment contract whereby respondent was to supply complainant with 22 loads of onions that were to have no more than 20 percent double hearts above one inch in diameter. Respondent cancelled the contract after complainant made late payments as to several loads. It was found that although the late payments were a violation of the contract, the Regulations and the Act, they did not furnish grounds for cancellation of the contract. Respondent, under section 2-609 of the UCC could have taken the late payments as reasonable grounds for insecurity, asked for adequate assurance of due performance, and suspended performance until receipt of such assurance, but cancellation prior to a failure to receive requested assurance was not an option. Complainant's rejection at destination of two loads, shown by federal inspections at destination to exceed the contract specifications as to double hearts, was not wrongful even though a private inspection, performed by complainant's agent at shipping point, had shown the loads to conform to the contract. Such rejections were found to not constitute grounds for complainant's cancellation of the contract.

George S. Whitten, Presiding Officer.

James A. Bishop, Brunswick, GA, for Complainant.

Respondent, Pro se.

Decision and Order issued by William G. Jensen, Judicial Officer.

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$22,833.00 in connection with a contract for the supply of onions in interstate commerce.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent

which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim arising out of the same contract in the amount of \$17,562.60. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amounts claimed in the formal complaint and counterclaim exceed \$15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

Findings of Fact

1. Complainant, Rich-SeaPak Corporation, is a corporation whose address is [REDACTED], Georgia. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Pro-Ag, Inc., is a corporation whose address is [REDACTED] Idaho. At the time of the transactions involved herein respondent was licensed under the Act.

3. Complainant and respondent entered into a written contract, dated May 25, 1994, for the supply, by respondent to complainant, of 22 truckloads of onions. Belinda C. Tucker d/b/a Twilight Agro Sales, Inc., who acted as a broker, was also a party to the contract. The contract was signed by Gary R. Bunn for complainant on July 1, 1994, by Belinda C. Tucker for Twilight Agro Sales, Inc. on June 24, 1994, and by Ray Phillips for Pro-Ag, Inc. on July 24, 1994. The contract provided in relevant part as follows:

This agreement is based on the following terms:

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

1. The truckloads of onions (with 850 50# sacks composing a load) will be shipped per mutual agreement and schedule as stated in Item 4 from September 1, 1994, through March 15, 1995.

2. Onions shipped will be U.S. No. 1. All trucks will carry the U.S.D.A. Certificate, Rich Seapak's purchase order number, and bill of lading.

3. The onion size will be 3" - 4" (unless otherwise specified by Purchaser), with a minimum of 70% ringing quality, allowing 20% of said onions with double hearts defined as two hearts combined over 1" in diameter. (Size preference is 3 3/4"--see Specification No. 1012 dated 12/06/93.)

4. The cost to Purchaser shall be sold per 50# sack on a delivered price as follows:

| | <u>Delivered</u> <u>Price</u> | |
|---|----------------------------------|-----------|
| September 1, 1994 to September 30, 1994 - | \$ 7.00 | - 3 Loads |
| October 1, 1994 to October 31, 1994 - | \$ 7.55 | - 4 Loads |
| November 1, 1994 to November 30, 1994 - | \$ 7.80 | - 3 Loads |
| December 1, 1994 to December 31, 1994 - | \$ 7.80 | - 3 Loads |
| January 1, 1994 to January 31, 1995 - | \$ 8.00 | - 3 Loads |
| February 1, 1994 to February 28, 1995 - | \$ 8.15 | - 4 Loads |
| March 1, 1994 to March 15, 1995 - | \$ 10.00 | - 2 Loads |

5. Shipper will plant sufficient onions so that given proper weather conditions onions will equal of (sic) exceed the minimum quantities of onions herein specified. Each field, at (sic) it is planted will be so designated and location disclosed to Twilight Agro Sales, Inc. and Purchaser or their designated agents. Shipper's obligation to ship the minimum quantities of onions will be excused because of weather conditions, acts of God, or other similar unforeseen seasons (sic). Any obligations of Twilight Agro Sales, Inc. and Purchaser to purchase said onions is also excused because of strikes, acts of God, transportation availability of (sic) other similar unforeseen reasons.

6. Purchaser agrees to maintain prompt pay of 30 days from date of shipment to shipper. Shipper will promptly pay Twilight Agro Sales, Inc. \$.25 per sack brokerage upon receipt of payment from Purchaser.

...

4. The table below details 8 shipments made by respondent to complainant under the contract. All of the loads were shipped from Idaho to Brownsville, Texas.

| | | |
|-----------------------------------|------------------|---|
| Invoice # 95191 P.O. # K-38495 | Shipped 9/20/94 | Paid 10/17/94 |
| Invoice # 95224 P.O. # K-38497 | Shipped 9/30/94 | Paid 11/01/94 |
| Invoice # 95232 P.O. # K-38498 | Shipped 10/04/94 | Paid 11/21/94 |
| Invoice # 95255 P.O. # K-38501 | Shipped 10/11/94 | Rejected 10/18/94 due to presence of 44% double hearts in excess of 1 inch as shown by federal inspection at destination. |
| Invoice # 95276 P.O. # K-38504 | Shipped 10/17/94 | Paid 11/21/94 |
| Invoice # 95301 P.O. # K-38507 | Shipped 10/25/94 | Not paid |
| Invoice # 95309 P.O. # K-38508 | Shipped 10/27/94 | Not paid |
| Invoice # 95331 P.O. # K-38510 | Shipped 11/09/94 | Rejected 11/14/94 due to presence of 58% double hearts in excess of 1 inch as shown by federal inspection at destination. |

5. On October 26, 1994, Belinda Tucker of Twilight Agro Sales, Inc., sent a letter by fax to Gary Bunn of complainant which stated in relevant part as follows:

A trip was made this week to Pro-Ag in Weiser, Idaho, to review the bins of onions in storage targeted for your contract.

The onion variety is B-2 of which nine (9) loads will be shipped to you. Bob Hertz at Pro-Ag and I cut 40 onions total, with the following results:

| | | |
|--|---|--------------|
| 23 Single centers and tight doubles under 1 inch | = | 57.5% |
| 9 Tight doubles between 1 inch to 1 ½ inches | = | 22.5% |
| 8 Blows | = | <u>20.0%</u> |
| | | 100.0% |

On your Purchase Order No. K-38508, the Winner variety will be shipped. Pro-Ag has two (2) loads of this lot available for shipment.

The balance of five (5) loads to be shipped will be from lots that were not accessible to us at this time.

Pro-Ag, Inc. and Twilight Agro Sales, Inc. want to confirm that Rich Seapak will accept the nine loads of the B-2 variety onion. Please advise as soon as possible.

6. On October 26, 1994 Gary Bunn sent the following reply, in relevant part, to Belinda Tucker, by fax:

In response to your October 26 memorandum attached, we want our contract onions at our agreed upon specification of 1" or under on double hearts. On five out of the first six shipments, the quality level was acceptable.

We have fifteen (15) loads remaining on our contract and we look forward to receiving these at the agreed upon quality level. We will work with you as much as we possibly can and still remain within our specification #1019 which has accompanied all our combined correspondence.

7. On November 17, 1994, Gary Bunn of complainant sent a letter to respondent, by fax, which, in part, summarized the results of inspections performed

on the eight loads referred to in finding of fact 4, and offered to assist complainant in meeting contract requirements by sending some of complainant's quality assurance personal to Idaho to assist in training of respondent's personal. On November 17, 1994 respondent sent the following reply to complainant:

In reviewing the inspections that were done on the onions you chose to accept from our storage this fall, it is apparent that these have too large a variance in quality from the field to fit your needs. With this in mind, we have chosen to enforce the act of God clause in your contract.

The other part of your contract calls for prompt payment within 30 days of shipment. At this point, you are delinquent over 30 days on the following two loads:

- | | | |
|--------------|-----------------|------------------|
| 1. po K38498 | our file #95232 | shipped 10-04-94 |
| 2. po K38504 | our file #95276 | shipped 10-17-94 |

This in effect, gives us no choice but to cancel our contract and request that you pay in full all outstanding invoices within 30 days of this letter.

8. On November 22, 1994, complainant's Gary Bunn sent a letter in response to respondent's November 17, 1994 letter. Mr. Bunn affirmed that respondent did not have the privilege of canceling the contract, that contrary to respondent's assertion all payments currently due had been paid,² and stated that Bunn planned to travel to Idaho "in order to establish a procedure for continued inspections of onions prior to loading on trucks for delivery to Rich-SeaPak." Mr. Bunn also stated that respondent should understand that "we expect full and complete compliance with the terms of our supply contract." On November 23, 1994, respondent replied to complainant's letter. Respondent complained of the expense caused by the two rejections, and pointed out that invoice # 95232 had been paid 18 days late, invoice # 995276 had been paid 6 days late, invoice # 95301 was now due, and invoice # 95309 would be past due on Monday (five days from the writing of the letter). Respondent further stated: "We also expected full and complete compliance with the terms of the supply agreement, but feel your Company's

²This assertion, while true on November 22, was not true when respondent's November 17, 1994, letter was written.

financial position must be in jeopardy, to create such a slowness in your pay practices."

9. Near the end of November, 1994, Gary Bunn and Tavo Saenz (apparently one of complainant's quality assurance people) visited respondent's place of business in Idaho. After viewing the onions in storage all parties agreed that there was a wide variance in the quality of the onions. Complainant offered assistance in training respondent's staff in the selection of onions that would meet complainant's specifications. However, when respondent requested a guarantee that onions shipped would be accepted on arrival, complainant refused to grant such a guarantee. No more onions were shipped under the contract.

10. On December 9, 1994, complainant's attorney wrote to respondent informing it that respondent was in default of the supply contract, and that purchases had been, and would continue to be, made against the contract. Respondent was also informed that complainant was holding payment on purchase orders K-38508 and K-38509 in the total amount of \$13,531.25 as an off-set against the cost of cover. On December 15, 1994, respondent sent complainant's attorney the following reply:

We are in receipt of your letter dated December 9, 1994. In regards to the contents of that letter; we are writing to inform you that the basis of our terminating the contract with Rich Sea-Pak Corporation is as follows:

Pursuant to the contract between Pro-Ag, Inc. and Rich Sea-Pak Corporation dated May 24, 1994, page 2, paragraph 6 (Purchaser agrees to maintain prompt pay of 30 days from date of shipment to shipper. Shipper will promptly pay Twilight Agro Sales, Inc. \$.25 per sack brokerage upon receipt of payment from Buyer.)

Therefore we feel that Rich Sea-Pak Corporation is in default of the contract and have canceled the same.

11. Complainant made cover purchases as to 15 loads of onions not shipped. The total cost of cover was \$31,237.50.

12. An informal complaint was filed on December 5, 1994, which was within nine months after the causes of action therein accrued. An informal counterclaim was filed on November 30, 1994, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant alleges that respondent breached the May 25, 1994, supply contract set forth in finding of fact 3 by wrongfully refusing to ship fifteen loads of onions, and seeks to recover from respondent the net cost of cover, namely \$17,756.25, over the amount it admits is due to respondent for two of eight loads which respondent shipped, namely \$13,531.25. Complainant also seeks to recover from respondent \$5,076.75 in expenses incurred in traveling to Weiser, Idaho to aid respondent in selecting onions suitable to ship under the contract.

Respondent answered by asserting that it rightfully canceled the supply contract, and also filed a counterclaim for the \$13,531.25 due for the two unpaid loads, and also sought recovery of the costs allegedly incurred due to complainant's rejection of the load represented by invoice 95255 (\$3,031.75), and the load represented by invoice 95331 (\$999.60).

Since the \$13,531.25 purchase price is admittedly due for the loads represented by invoice numbers 95301 and 95309, the crucial question for our determination is whether respondent was justified in its cancellation of the supply contract. Respondent, in its letter of October 26, 1994, to complainant, initially based its cancellation of the supply contract on two grounds. First was the act of God clause in the contract. Respondent subsequently ceased to mention this reason for cancellation of the contract, and with good reason. Respondent never advanced any reason which would remotely furnish cause for invocation of the act of God clause, and the facts of the case disclose no such cause. The second justification for cancellation of the contract was complainant's late payments for loads of onions received under the contract. Respondent is certainly correct in pointing out that the contract called for payment within thirty days, and that complainant failed to make payment within this time frame on several occasions. Respondent is also correct in pointing out that such late payment is a violation of the Act and of this Department's Regulations.³ Respondent is incorrect, however, in thinking that this constituted justification for its cancellation of the contract. Nothing in the Act or Regulations gives respondent such a right as a consequence of failure to pay promptly. In *Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991), we stated:

The Uniform Commercial Code as embodied in the law of the several states is applicable in these proceedings *as modified by the Federal Act and Regulations issued thereunder*. However, this reparation forum does not

³See 7 U.S.C. § 499b(4), and 7 C.F.R. § 47.2(aa)(11).

directly apply State law as is done in diversity cases. Rather the Act is viewed as subsuming relevant State law. The last sentence of section 15 of the Act states:

This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects of this Act; but it is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto.

The last sentence of section 15 has been interpreted by many U. S. Courts of Appeals to mean that the basic substrata of law governing perishable transactions is the law of sales as established by statute, and under the common law, in applicable State jurisdictions. The PACA prevails only where State law is inconsistent therewith. However, State law is applicable where the Federal law and regulations issued thereunder are silent. Accordingly, when section 2 says that "it shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... for any commission merchant, dealer, or broker 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 ...," the nature of the duty, express or implied, as well as the reasonableness of the cause for failure to perform the duty is to be informed by the underlying State law of sales, to the extent the Act or Regulations have not spoken on the point in a contrary manner. The case which has dealt with this and ancillary issues in the most thoughtful and extensive manner is *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 21 A.L.R. 2d 832 (3rd Cir. 1950).

Accordingly, we must look to the UCC for an explication of respondent's rights consequent upon complainant's admittedly late payment of several of the loads shipped pursuant to the supply contract. UCC section 2-609 provides:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable

suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of ground for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

Respondent notified complainant on November 17, 1994, that it was enforcing the act of God clause in the contract, and canceling the contract due to the late payments. On November 23, 1994, respondent wrote to complainant justifying its cancellation of the contract on the ground of the late payments, and asserting that "[we] feel your Company's financial position must be in jeopardy, to create such a slowness in your pay practices." Slow payment practices certainly constitute "reasonable grounds for insecurity." However, at no time did respondent "in writing demand adequate assurance of due performance." Respondent could have suspended performance while awaiting adequate assurance, if it had requested such assurance. Instead, respondent simply canceled the contract. This it had no right to do.

In May of 1995, in a letter to this Department, respondent advanced a new ground for its cancellation of the supply contract. For the first time respondent asserted that the rejection by complainant of two loads was wrongful because such loads had been accepted by complainant prior to shipment. The acceptance referred to by respondent is alleged to have occurred as a consequence of inspections of the two loads at shipping point conducted by Twilight Agro Sales, Inc. It is certainly true that all the loads shipped were inspected at shipping point by an agent of Twilight Agro Sales, Inc. However, assertions by respondent that this amounted to an acceptance at shipping point cannot be credited for the following reasons. First, there is nothing in the written contract that so provides. Second, the contract called for the sales to be on a delivered basis, and delivered terms contemplate that the goods will conform at destination. Third, the first rejection was of a load shipped October 11, 1994. Twilight had inspected these onions and passed them. Respondent took back the rejected onions and resold them, and did not refer to this

rejection, or the later rejection (of a load shipped November 9, 1994), as a basis for cancellation of the contract when it gave notice that it was canceling the contract on November 17, 1994. Fourth, on November 30, 1994, respondent filed an informal complaint as to two loads shipped October 25, and 27, 1994, and not paid by complainant. No complaint was made at this time concerning the rejections of the loads shipped October 11, and November 9, 1994. Fifth, on December 15, 1994, respondent, in a letter to complainant's attorney, gave only the failure of complainant to comply with the 30 day payment provision of the contract as "the basis of our terminating the contract with Rich Sea-Pak Corporation" Sixth, the first intimation from respondent that it considered the rejections wrongful due to a prior acceptance by the inspection of Twilight was in an undated letter to the Department received May 5, 1995. If the parties contemplated from the outset that the inspections by Twilight at shipping point would constitute an acceptance one would have expected that respondent would have raised the point at the time of the first rejection made on the basis of inspection at destination. Seventh, the failure of the parties to use the terms specified by the Regulations for a "purchase after inspection" (see 7 C.F.R. §46.43(ff)) is also significant.⁴

We must conclude that the provision for an inspection by Twilight at shipping point was merely for the purpose of keeping down trouble by endeavoring to assure shipment of conforming goods, and that it did not preclude later inspections which might or might not confirm the results of Twilight's inspections. The fact that it may have been the practice for goods not to ship without Twilight's permission does not alter this conclusion.

We conclude that there was no justification for respondent's cancellation of the supply contract, and that the failure to ship under the contract was a breach thereof for which complainant was entitled to make cover purchases. Complainant's cover purchases were applied to 15 loads, although cover might have been made for 16 loads. The average cost of cover was \$2.45 per 50 lb. sack of potatoes not shipped, or a total of \$31,237.50. After deduction of the \$13,531.25 due from complainant to respondent on two of the loads for which complainant withheld payment, a balance of \$17,756.25 remains due from

⁴See *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); *Jim Hronis & Sons v. Luna Co., Inc.*, 47 Agric. Dec. 1497 (1988); *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970) and *Goldstein Fruit & Produce v. East Coast Distributors*, 18 Agric. Dec. 493 (1959). See also *Primary Export International v. Blue Anchor, Inc.*, R-95-037 decided February 11, 1997, 56 Agric. Dec. ___ (1997). UCC § 2-316(3)(b) does not apply because the applicable warranty as to percentage of onions that would be of "ringing quality" was expressly spelled out in the contract, and not an implied warranty.

respondent to complainant. Complainant has also requested reparation in the amount of \$5,076.75 for its expenses in traveling to Idaho to undertake training of respondent's personnel in selection of onions for shipment. However, this was a purely gratuitous undertaking by complainant, and there is no legal justification for an award in complainant's favor for such amount.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.⁵ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.⁶ We have determined that a reasonable rate is 10 percent per annum.

Respondent's counterclaim for wrongful rejection was premised on the alleged prior acceptance, and has been dealt with above. Accordingly, the counterclaim should be dismissed.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$17,756.25, with interest thereon at the rate of 10% per annum from June 1, 1995, until paid.

Copies of this order shall be served upon the parties.

ROBERT VILLALOBOS, d/b/a CAL/MEX SALES v. AMERICAN BANANA CO.

PACA Docket No. R-93-0352.

Decision and Order filed December 10, 1997.

F.o.b. inspection and acceptance arrival.

⁵*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

⁶*See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

A transaction, which the parties described as "f.o.b. as to price but U.S. No. 2 on delivery as to condition," where the buyer provided the transportation, but the seller assumes all risk of loss and damage in transit, and the buyer may reject if upon inspection the goods do not meet the stated contract terms upon delivery, is considered an "f.o.b. inspection and acceptance arrival" transaction.

Patrice Harps, Presiding Officer.

Gino V. Mazzanti, San Diego, CA, for Complainant.

Paul Gentile, New York, NY, for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

Decision and Order

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). The complainant timely filed a formal complaint on March 23, 1993. Complainant seeks an award of reparation against respondent in the amount of \$30,395.90 in connection with five shipments of mixed vegetables in foreign and interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer and counterclaim on July 14, 1993, denying the allegations of the complaint and demanding damages from complainant in the amount of \$3,023.30. Complainant did not respond to the counterclaim.

The amount claimed exceeds \$15,000.00¹ and respondent requested that an oral hearing be held. An oral hearing was held on July 11, 1995 in New York, New York. Complainant was represented by Gino V. Mazzanti, Esquire, San Diego, California. Respondent was represented by Paul T. Gentile, Esq., Gentile & Dickle, New York, New York.

At the hearing, one witness for complainant was examined. No evidence was entered which was not already a part of the record in this proceeding.

A post-hearing deposition of a witness for respondent was taken with the consent of both parties, on August 30, 1995, in the offices of Gentile & Dickle. Respondent's counsel was physically present, while complainant's counsel appeared telephonically. The deposition was then made a part of the record in this proceeding.

¹ Effective November 15, 1995, the threshold for holding oral hearings was raised from \$15,000.00 to \$30,000.00 by Public Law 104-48.

Both parties subsequently filed briefs and claims for fees and expenses.

FINDINGS OF FACT

1. Complainant, Robert Villalobos d/b/a Cal/Mex Sales ("Cal/Mex") is a corporation whose business address is [REDACTED] CA [REDACTED]. At the time of the transactions involved herein, Cal/Mex was licensed under the Act.

2. Respondent, American Banana Co. ("American Banana") is a corporation whose business address is [REDACTED] NY [REDACTED]. At the time of the transactions involved herein, American Banana was licensed under the Act.

3. On or about the dates August 4, 1992 to August 21, 1992, Cal/Mex and American Banana entered into oral contracts for the shipment of mixed vegetables as follows:

| <u>Bill of Lading</u> | <u>Invoice</u> | <u>Ship Date</u> | <u>Quantity</u> | <u>Product</u> | <u>Invoice Total</u> |
|-----------------------|----------------|------------------|-----------------|----------------|----------------------|
| 22389 | 5622 | 08/04/92 | 1716 flats | Tomatoes | \$6,887.50 |
| 22427 | 5604 | 08/11/92 | 1716 flats | Tomatoes | \$6,630.10 |
| 22439 | 5613 | 08/14/92 | 1716 flats | Tomatoes | \$6,630.10 |
| 22450 | 5628 | 08/18/92 | 1716 flats | Tomatoes | |
| | | | 30 cartons | Jalapenos | \$5,094.10 |
| 22469 | 5635 | 08/21/92 | 1716 flats | Tomatoes | |
| | | | 40 cartons | Jalapenos | \$5,154.10 |
| | | | Total | | \$30,755.90 |

4. On August 10, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 4, 1992 was federally inspected at destination. Inspection Certificate No. M-497776-5 provides in pertinent part:

Product: Tomatoes

Quantity: 1716

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|-------------------------|
| 07 | 00 | 00 | Quality |
| 01 | 00 | 00 | Sunken Discolored Areas |
| 02 | 02 | 02 | Soft |
| 06 | 06 | 06 | Decay |
| 16 | 08 | 08 | Checksum |

5. On August 17, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 11, 1992 was federally inspected at destination. Inspection Certificate No. M-497792-2 provides in pertinent part:

Product: Tomatoes

Quantity: 1716

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|-------------------------|
| 03 | 00 | 00 | Quality |
| 01 | 00 | 00 | Sunken Discolored Areas |
| 03 | 03 | 03 | Soft |
| 07 | 07 | 07 | Decay |
| 14 | 10 | 10 | Checksum |

6. On August 21, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 14, 1992 was federally inspected at destination. Inspection Certificate No. M-501584-7 provides in pertinent part:

Product: Tomatoes
Quantity: 1716

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|-------------------------|
| 01 | | 00 | Quality |
| 05 | | 05 | Soft |
| 03 | | 00 | Sunken Discolored Areas |
| 01 | | 00 | Bruising |
| 05 | | 05 | Decay |
| 15 | | 10 | Checksum |

Other: Inspection based on U.S. No. 2 standards.

7. On August 21, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 11, 1992 was federally reinspected at destination. Inspection Certificate No. M-501567-2 provides in pertinent part:

Product: Tomatoes
Quantity: 600 cartons

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|-------------------------|
| 01 | | 00 | Quality |
| 04 | | 00 | Bruising |
| 03 | | 00 | Sunken Discolored Areas |
| 11 | | 11 | Soft |
| 07 | | 07 | Decay |

26

18

Checksum

Other: Inspection based on U.S. No. 2 standards.

8. On August 24, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 18, 1992 was federally inspected at destination. Inspection Certificate No. M-501661-3 provides in pertinent part:

Product: Tomatoes 4x5

Quantity: 858

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|----------|
| 02 | | | Quality |
| 05 | | | Soft |
| 02 | | | Decay |
| 10 | | | Checksum |

Product: Tomatoes 4x4

Quantity: 858

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|----------|
| 02 | | | Quality |
| 07 | | | Soft |
| 05 | | | Decay |
| 14 | | | Checksum |

Other: Inspection based on U.S. No. 2 standards.

9. On August 26, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 14, 1992 was federally reinspected at destination. Inspection Certificate No. M-501934-4 provides in pertinent part:

Product: Tomatoes
Quantity: 960

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|----------|
| 13 | 13 | 13 | Soft |
| 34 | 34 | 34 | Decay |
| 47 | 47 | 47 | Checksum |

Other: Inspection based on condition only.

10. On August 31, 1992, the lot of mixed vegetables corresponding to the purchase and shipment of August 21, 1992 was federally inspected at destination. Inspection Certificate No. M-501988-0 provides in pertinent part:

Product: Tomatoes
Quantity: 1600

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|----------|
| 25 | | 25 | Decay |
| 25 | | 25 | Checksum |

Product: Jalapeno Peppers
Quantity: 40

| Average Defects | Serious Damage | Very Ser. Damage | |
|-----------------|----------------|------------------|------------|
| 28 | | | Skin Check |

| | |
|----|------------|
| 15 | Shriveling |
| 01 | Decay |
| 44 | Checksum |

Other: Inspection based on U.S. No. 2 standards.

11. A formal complaint was filed on March 23, 1993, which was within nine months of when the alleged causes of action accrued.

CONCLUSIONS

The main issue in dispute is the terms of the contract. Cal/Mex asserts that the vegetables were sold to American Banana on purely f.o.b. terms. American Banana claims the transactions were "f.o.b. as to price but U.S. No. 2 on delivery as to condition." Both parties agree that the initial sale between Cal/Mex and American Banana contemplated pure f.o.b. terms. American Banana, however, alleges that the terms of sale were changed when its California vegetable purchases were temporarily handled through Ignazio Ugenti, of the California-based brokerage Quality First Marketing, Inc. American Banana offers Ugenti's faxes to Cal/Mex as proof of the beginning of a course of dealing contemplating transactions under the modified shipping terms.

The party which claims the contract was modified has the burden to prove such modification. *Regency Packing Co. v. Auster Co.*, 42 Agric. Dec. 2042, 2045-46 (1983). *F. H. Hogue Produce Co. v. M. Singer's Sons*, 33 Agric. Dec. 451, 454 (1974). That burden is met by a preponderance of the evidence. *Regency*, 42 Agric. Dec. at 2045. Cal/Mex contends its telephonic communications with broker Ugenti were minimal, and that there was never any modification of contract discussed or allowed. American Banana and broker Ugenti claim the communications were substantive and changed the terms of the contract. American Banana and broker Ugenti offer faxes allegedly confirming the modification (Rx. 9). Cal/Mex admits receiving the faxes, and admits that it did not respond to them (Tr. 45). Cal/Mex further denies that broker Ugenti was ever party to any of the five sales concerned herein (Tr. 35). A broker's statement is entitled to great weight. *Homestead Tomato Packing Co. v. Mim's Produce, Inc.*, 43 Agric. Dec. 173 (1984). Although it is noted that the broker in this case was acting as

American Banana's agent, the fact that Ugenti is a third party is significant, and his statements shall be weighted accordingly.

There is evidence that Cal/Mex knowingly submitted altered documents to the Presiding Officer in support of its claim. Complainant's exhibits 2.1 and 5.1, corresponding to bills of lading 22427 and 22469, are shown by copies of the same documents submitted by broker Ugenti, to have had references to Ugenti's involvement in the transactions (the words "Quality Dist. .15" and "Quality 15 Brokerage," respectively) erased from the documents before the hearing. Complainant's exhibit 4.1, corresponding to bill of lading 22450, was blacked out in part to obscure relevant words ("Quality .15 Brokerage"). A close examination of these exhibits reveals telling signs of the alteration, such as the remnant of the down-stroke of the "y" in "Quality" still visible on complainant's exhibit 5.1 in the exact place it is on broker Ugenti's copy of the document. Cal/Mex's alteration of these documents calls into question, and in fact significantly undermines, the credibility that can be afforded to statements and documents offered by Cal/Mex.

Finally, we have previously held that, where respondent testified that a modification occurred and complainant testified that such did not happen, confirming wires sent by respondent and not objected to by complainant decided the issue in favor of respondent. See *Dan Hart & Son v. Pellegrino & Son*, 28 Agric. Dec. 211 (1969). The facts in the present case are virtually identical.

For the above reasons, we conclude that American Banana has upheld its burden of proof, and has proven by a preponderance of the evidence that the contracts of sale in the five transactions concerned herein contemplated the terms "f.o.b. as to price but U.S. No. 2 on delivery as to condition." The differences between shipment terms shall be examined to determine the outcome in the case at hand.

The Regulations define, in pertinent part, "f.o.b." as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of transportation at shipping point, *in suitable shipping condition* . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." 7 C.F.R. § 46.43(i)(emphasis added). "Suitable shipping" is defined as meaning, in relation to direct shipments, "that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." 7 C.F.R. § 46.43(j).

The suitable shipping condition provisions of the Regulations which require delivery to contract destination "without *abnormal* deterioration," or what is

elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations.² Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 2 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. See *Pinnacle Produce, Ltd. v. Produce Prods., Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). This is true because under the f.o.b. terms the trade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination.³ If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See, e.g., *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980) (judicial determination of what constitutes "good delivery" for potatoes). Accordingly, the standards for what constitutes good delivery of tomatoes and jalapeno peppers would be judicially determined.

The regulations define a "delivered sale" as meaning "that the produce is to be delivered by the seller . . . at the market in which the buyer is located . . . free of any and all charges for transportation or protective service. The seller assumes all

²See Williston, *Sales* § 245 (rev. ed. 1948).

³As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with one percent decay at shipping point or three percent decay at destination. The good delivery standards, however, allow an additional "two percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce."

risks of loss and damage in transit not caused by the buyer." 7 C.F.R. § 46.43(p). Under a delivered contract, the goods are required to meet contract requirements at the time and place specified in the contract for delivery. The suitable shipping warranty has no relevance in a delivered sale contract. *Sidney Newman & Co. v. Wallace Fruit & Vegetable Co.*, 21 Agric. Dec. 1048 (1962). However, something analogous to the suitable shipping condition concept may be utilized to ascertain whether goods met contract requirements at time of delivery. This occurs when inspection is delayed, or goods may have been diverted from the original destination by the receiver. The delay or diversion is attributable to the buyer, and the contractual obligation then extends only to the contract destination point and/or time.

Since the seller in this case, Cal/Mex, did not provide the transportation, the transactions in the present case cannot technically be considered delivered sales. Relevant is the wording "f.o.b. as to price but U.S. No. 2 on delivery as to condition." The regulations define a "f.o.b. inspection and acceptance arrival" sale as meaning that:

[T]he produce quoted or sold is to be placed free on board car or other agency of through transportation at shipping point, the cost of transportation to be borne by the buyer, but the seller to assume all risks of loss and damage in transit not caused by the buyer, who has the right to inspect the goods upon arrival and to reject them if, upon such inspection, they are found not to meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. *Such a sale is f.o.b. only as to price and is on a delivered basis as to grade, quality, and condition.*

7 C.F.R. § 46.43(dd) (emphasis added). Since the relevant price and condition terms of this type of sale match those in the present case, and the buyer provided the transportation, the transactions in question here shall be regarded as "f.o.b. inspection and acceptance arrival" sales.

There is no question raised by the parties whether American Banana accepted the vegetable shipments, so it shall be deemed admitted by the parties. There is also no question raised by the parties as to whether there was a consignment agreement between the parties, so it shall be assumed there was none. Therefore, since the produce was accepted without consignment agreements, the only way American Banana can escape liability for the full contract prices of the transactions is by proving the existence of breaches of contract by Cal/Mex.

An "f.o.b. inspection and acceptance arrival" sale is f.o.b. only as to price and on a delivered basis as to grade, quality and condition. Accordingly, as in a standard delivered sale, there is no suitable shipping condition warranty as such. The produce either makes grade on delivery or it does not. Inspections by a neutral party are required to prove any breach of contract by seller. *Gordon Tantum, Inc. v. Phillip R. Weller*, 41 Agric. Dec. 2456, 2457 (1982), *O. D. Huff, Jr., Inc. v. M. Pagano & Sons, Inc.*, 21 Agric. Dec. 385, 387 (1962). However, there is the delivered sale analogy to suitable shipping warranty. *Infra*.

In an "f.o.b. inspection and acceptance arrival" sale, the buyer is responsible for all transit delays and problems not caused by the seller. In a truck shipment from California to New York, it is our finding that four or five days is reasonable time for transportation. Any additional time taken is the responsibility of the buyer in an "f.o.b. inspection and acceptance arrival" sale. Therefore, the produce in the subject transactions must grade U. S. No. 2 upon arrival.

American Banana has provided no evidence of the arrival dates of the produce at destination point, only the inspection dates. Accordingly, it shall be assumed that the produce arrived five days after shipment. This presumption is significant because inspections must not be too remote in time to accurately reflect condition upon arrival. *See, e.g., Bruce Newlon Co. v. Richardson Produce Co.*, 37 Agric. Dec. 897 (1975) and *D. L. Piazza Co. v. Stacy Distrib. Co.*, 18 Agric. Dec. 307 (1959) (holding that inspection two days after arrival is usually considered acceptable for demonstrating the condition of the goods the day of arrival, but that three days is often not acceptable, and more than three days is almost never acceptable). As a result, a two-part test shall be used on a sale-by-sale analysis to determine whether there was a breach by Cal/Mex: 1) Was the inspection timely?; and 2) If so, did the results of the inspection prove by a preponderance of the evidence that the produce could not have been U. S. No. 2 upon arrival?

The Regulations (7 C.F.R. § 51) define tolerance statistics of produce. Tolerances for tomatoes which are to be U. S. No. 2 on delivery allow for a total of fifteen percent (15%) total serious damage to the tomatoes, provided that not more than five percent (5%) can be damage from decay or softness combined. 7 C.F.R. § 51.1681(c)(2).

1. Invoice number 5622 The shipment dated August 4, 1992, was inspected at destination on August 10, 1992, or one day after the presumed arrival. This inspection is timely. Inspection certificate M-497776-5, performed according to U. S. No. 1 standards, shows eight percent (8%) combined damage from softness and decay. The damage is substantially higher than what is allowed for U. S. No. 2. Since the inspection was performed one day after the allowed time for arrival, and the defects were greatly in excess of grade, we find that American Banana has

proved by a preponderance of the evidence that Cal/Mex breached the contract of sale in this instance.

Where goods have been accepted, the buyer is liable for the full contract price minus the damages resulting from the breach by the seller. U.C.C. § 2-607(1). Damages are measured as the difference at the time and place accepted between the value of the goods accepted and the value they would have had if they had been as warranted. U.C.C. § 2-714(2).

The U.S.D.A. Market News report, Hunt's Point Terminal, N.Y. for August 10, 1992 does not list Mexican tomatoes. The listed product which most closely resembles Mexican tomatoes are California tomatoes, which show an average price of \$10.50 per flat. The August 11, 1992 report, quoting the tomatoes market prices as steady, shows Mexican vine-ripened 4x4's at an average price of \$10.00 per flat. In the absence of any evidence to the contrary, the average price of Mexican tomatoes at the Hunt's Point Market on August 10, 1992 shall be regarded as \$10.50 for all sizes.

American Banana purchased 858 flats of 4x5's, which would have had a warranted value of $858 \times \$10.50 = \$9,009.00$, and 858 flats of 4x4's, which would have had a warranted value of $858 \times \$10.50 = \$9,009.00$, for a total warranted value of \$18,018.00.

American Banana, which provides documentary evidence of its dispositions of the breached lots of tomatoes (Ex. 6b, 6c, 6h, 6i, 6n, 6o, 6u, 6v, 6y, 6aa, 6bb, 6dd) recovered a total of \$7,381.00. American Banana's good faith effort to mitigate damages in any of the transactions was not disputed by Cal/Mex. The damage, therefore, is $\$18,018.00 - \$7,381.00 = \$10,637.00$, + \$62.00 federal inspection cost, for a damage total of \$10,699.00.

American Banana is liable for the contract price minus damages caused by Cal/Mex's breach. The contract price was \$6,887.50, minus the damages amounting to \$10,699.00, leaving Cal/Mex liable to American Banana for a \$3,811.50 credit for the sale of August 4, 1992.

2. Invoice number 5604 The shipment dated August 11, 1992, was inspected at destination on August 17, 1992, or one day after the presumed arrival. This inspection is timely. Inspection certificate M-497792-2, performed according to U. S. No. 1 standards, shows ten percent (10%) combined damage from softness and decay. The damage is substantially higher than what is allowed for U. S. No. 2. Since the inspection was performed only one day after the allowed time for arrival, and the defects were substantially in excess of grade, we find that American Banana has proved by a preponderance of the evidence that Cal/Mex breached the contract of sale in this instance.

The U.S.D.A. Market News report, Hunt's Point Terminal, N.Y. for August 17, 1992 shows Mexican vine-ripened 4x5's at an average price of \$5.25 per flat and Mexican vine-ripened 4x4's at an average price of \$6.00 per flat. American Banana purchased 858 flats of 4x5's, which would have had a warranted value of $858 \times \$5.25 = \$4,504.50$, and 858 flats of 4x4's, which would have had a warranted value of $858 \times \$6.00 = \$5,148.00$, for a total warranted value of \$9,652.50.

American Banana recovered a total of \$6,690.50. American Banana's good faith effort to mitigate damages in any of the transactions was not disputed by Cal/Mex. The damage, therefore, is $\$9,652.50 - \$6,690.50 = \$2,962.00$, + \$62.00 federal inspection cost, for a damage total of \$3,024.00.

American Banana is liable for the contract price minus damages caused by Cal/Mex's breach. The contract price was \$6,630.10, minus the damages amounting to \$3,024.00, leaving American Banana liable to Cal/Mex for \$3,606.10 for the sale of August 11, 1992.

3. Invoice number 5613 The shipment dated August 14, 1992, was inspected at destination on August 21, 1992, or two days after the presumed arrival. This inspection is timely. Inspection certificate M-501584-7, this time performed according to U. S. No. 2 standards, shows ten percent (10%) combined damage from softness and decay. The damage is substantially high. Since the inspection was performed only two days after the allowed time for arrival, and the defects were greatly in excess of grade, we find that American Banana has proved by a preponderance of the evidence that Cal/Mex breached the contract of sale in this instance.

The U.S.D.A. Market News report, Hunt's Point Terminal, N.Y. for August 19, 1992, the presumed date of arrival, shows Mexican vine-ripened 4x5's at an average price of \$5.25 per flat and Mexican vine-ripened 4x4's at an average price of \$9.50 per flat. American Banana purchased 858 flats of 4x5's, which would have had a warranted value of $858 \times \$5.25 = \$4,504.50$, and 858 flats of 4x4's, which would have had a warranted value of $858 \times \$9.50 = \$8,151.00$, for a total warranted value of \$12,655.50.

American Banana recovered a total of \$5,390.00. The damage, therefore, is $\$12,655.50 - \$5,390.00 = \$7,265.50$, + \$62.00 federal inspection cost, for a damage total of \$7,327.50.

American Banana is liable for the contract price minus damages caused by Cal/Mex's breach. The contract price was \$6,630.10, minus the damages amounting to \$7,327.50, leaving Cal/Mex liable to American Banana for a credit of \$697.40 for the sale of August 14, 1992.

4. Invoice number 5628 The shipment dated August 18, 1992, was inspected at destination on August 24, 1992, or one day after the presumed arrival.

This inspection is timely. Inspection certificate M-501661-3, performed according to U. S. No. 2 standards, shows seven percent (7%) combined damage from softness and decay on the 4x5 tomatoes. The damage is marginally higher than what is allowable for U. S. No. 2. Total damage was only ten percent (10%) average defects, substantially lower than the fifteen percent (15%) serious damage allowed for U. S. No. 2. Since the inspection was performed one day after the estimated time for arrival, and the defects were not greatly in excess of grade, we find that American Banana has not proven by a preponderance of the evidence that Cal/Mex breached the contract of sale on the 4x5 tomatoes in this instance.

Inspection certificate M-501661-3 also shows twelve percent (12%) combined damage from softness and decay on the 4x4 tomatoes. This is substantially higher than what would be allowed for U. S. No. 2. Since the inspection was performed one day after the allowed time for arrival, and the defects were greatly in excess of grade, we find that American Banana has proved by a preponderance of the evidence that Cal/Mex breached the contract of sale with regards to the 4x4 tomatoes, but not the 4x5 tomatoes, in this instance.

The U.S.D.A. Market News report, Hunt's Point Terminal, N.Y. for Monday, August 24, 1992 shows Mexican vine-ripened 4x4's at an average price of \$8.00 per flat. American Banana purchased 858 flats of 4x4's, which would have had a warranted value of $858 \times \$8.00 = \$6,864.00$.

American Banana recovered a total of \$2,501.00 for the 4x4's. The damage, therefore, is $\$6,864.00 - \$2,501.00 = \$4,183.00$, + \$72.00 federal inspection, cost for a damage total of \$4,255.00.

American Banana is liable for the contract price minus damages caused by Cal/Mex's breach. The contract price for both sizes of tomatoes was \$5,094.10, minus the damages amounting to \$4,255.00, leaving American Banana liable to Cal/Mex for \$839.10 for the sale of August 18, 1992.

5. Invoice number 5635 The shipment dated August 21, 1992, was inspected at destination on August 31, 1992, or five days after the presumed arrival. This inspection is not timely. Since the inspection was not performed in a timely fashion, we find that American Banana has not proven by a preponderance of the evidence that Cal/Mex has breached the contract of sale in this instance. Accordingly, American Banana is liable to Cal/Mex for the full contract price of \$5,154.10 for the sale of August 21, 1992.

6. The remaining inspections dated August 21, 1992 and August 26, 1992, certificate numbers M-501567-2 and M-501934-4, respectively, are re-inspections of previously inspected lots. They are both performed too late in time on their

respective shipments and on quantities too small to be meaningful to the case at hand. The costs of these inspections are not recoverable by American Banana.

7. Little is said by either party in the pleadings of the thirty (30) and forty (40) cartons of jalapeno peppers that were part of the transactions of August 18, 1992 and August 21, 1992, respectively. There are no established grade standards for jalapeno peppers, so the "f.o.b. inspection and acceptance arrival" terms cannot apply to the peppers. Rather, they must be considered as straight f.o.b. transactions. Since the peppers were accepted, the only way American Banana can avoid liability for the full invoice price of the jalapeno peppers is by alleging and proving a breach of the suitable shipping condition warranty. Since American Banana made no such allegation in the pleadings, it shall be deemed as having admitted the jalapeno peppers made good delivery. The amounts owed for the jalapeno peppers are already reflected in the full invoice prices in the damage calculations above.

As a result of subsections 1 through 8 above, the amounts owed to Cal/Mex by American Banana are as follows:

| Transaction dated | Amount Due |
|--------------------------|-------------------|
| August 4, 1992 | -\$3811.50 |
| August 11, 1992 | \$3606.10 |
| August 14, 1992 | -\$697.40 |
| August 18, 1992 | \$839.10 |
| August 21, 1992 | \$5154.10 |
| Total: | \$5090.40 |

American Banana's failure to pay Cal/Mex \$5,090.40 for the mixed vegetable shipments is in violation of Section 2(4) of the Act (7 U.S.C. §499b(4)). Section 5(a) of the Act (7 U.S.C. § 499e) requires a party that is injured by a violation of Section 2 of the Act to be awarded "the full amount of damages sustained in consequence of such violations." *Louisville & Nashville R.R. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925). *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. See *Perl Grange Fruit Exchange, Inc. v.*

Mark Bernstein Co., 29 Agric Dec. 978 (1970), *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970), and *W. D. Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66 (1963). As a result of its violation of Section 2(4) of the Act, American Banana must pay Cal/Mex a reparation award of \$5,090.40, plus interest.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in relevant part, that "the Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation, reasonable fees and expenses incurred in connection with any [oral] hearing." See, e.g., *Newbern Groves, Inc. v. C. H. Robinson Co.*, 53 Agric. Dec. 1766, 1855 (1994) (complainant recovered approximately one-fourth (1/4) of the amounts claimed, but was determined not to be the prevailing party with respect to any of the respondents). Cal/Mex prevailed on approximately one-sixth (1/6) of its claim. Another way to view the result is that American Banana successfully defended against approximately five-sixths (5/6) of the claim against it. We find that American Banana is the prevailing party and Cal/Mex is the losing party. Cal/Mex's apparent alteration of documents is pertinent to this finding.

In accordance with the applicable provisions of the Rules of Practice (7 C.F.R. § 47.19(d)), American Banana filed a claim for fees and expenses in the total amount of \$2,868.12. Cal/Mex did not object to this claim. In hearing cases it is the province to the Secretary to determine what are reasonable fees and expenses. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989). We find the amount claimed by American Banana for attorney's fees and expenses to be reasonable and award American Banana fees and expenses in the amount of \$2,868.12.

Fees and expenses are, under the Act, not awarded to the party's attorney but as additional or counter reparation to the party. *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990). Therefore, a fee and expense reparation award is to be set off against an award to the opposing party. The \$5,090.40 reparation awarded to Cal/Mex is to be set off by the \$2,868.12 fees and expenses awarded to American Banana. Accordingly, we hold that the net amount American Banana must pay as reparation to Cal/Mex is \$2,222.28, plus interest.

ORDER

Within thirty (30) days from the date of this Order, respondent American Banana shall pay complainant Cal/Mex a reparation in the amount of \$2,222.28,

plus interest, calculated at the rate of ten (10) percent per annum from September 1, 1992 until the date paid.

Copies of this order shall be served on the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.

PACA Docket No. D-95-0502.

Ruling on Respondent's Motion to Dismiss Appeal filed September 18, 1996.

The Judicial Officer ruled that the Office of the Hearing Clerk's practice of sending Complainant's counsel Initial Decisions and Orders through the Department's interoffice mail system does not constitute service by *mail*, as that word is defined in section 1.132 of the Rules of Practice. Instead, Complainant was served by delivery to a responsible individual at the last known principal place of business of Complainant's counsel in accordance with 7 C.F.R. § 1.147(c)(3)(i) on the day that Complainant's counsel verified receipt of the Initial Decision and Order by signing and dating the Office of the Hearing Clerk's cover letter transmitting the Initial Decision and Order.

Kimberly D. Hart, for Complainant.

Michael J. Keaton, Naples, FL, for Respondent.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Ruling issued by William G. Jenson, Judicial Officer.

On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely Under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of This Motion (hereinafter Respondent's Motion to Dismiss Appeal). On August 22, 1996, I issued an Informal Order extending the time for Respondent to file Respondent's response to Complainant's Notice of Petition of Appeal and Appeal Brief (hereinafter Complainant's Appeal Petition) to 21 days after entry of a Ruling on Respondent's Motion to Dismiss Appeal. On September 10, 1996, Complainant filed Complainant's Response to Respondent's Motion to Dismiss Complainant's Appeal as Untimely Filed (hereinafter Complainant's Response).

Respondent contends that Complainant was served with the Initial Decision and Order issued in this proceeding on June 21, 1996, and that Complainant's Appeal Petition, filed July 24, 1996, should be dismissed as it was not filed within 30 days after service on Complainant of the Initial Decision and Order. (Respondent's Motion to Dismiss Appeal, ¶¶ 4, 8, 10, pp. 1-3.)

Complainant's counsel concedes that on June 21, 1996, her "main office" received a copy of the Initial Decision and Order sent to Complainant's counsel by the Office of the Hearing Clerk through the United States Department of Agriculture's "inter-office mail system," and that the date of that receipt by

Complainant's counsel's main office is stamped on the Office of the Hearing Clerk's cover letter transmitting the Initial Decision and Order. (Complainant's Response, pp. 3-4.) Complainant contends, however, that receipt by Complainant's counsel's main office does not constitute service and that Complainant was served with the Initial Decision and Order on June 25, 1996, when Complainant's counsel verified receipt of the Initial Decision and Order by signing and dating the Office of the Hearing Clerk's cover letter transmitting the Initial Decision and Order. (Complainant's Response, p. 4.)

Complainant's position is that Complainant's counsel was served in accordance with section 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.147(c)(1)), as modified by a practice established by the Office of the Hearing Clerk. Section 1.147(c)(1) of the Rules of Practice provides:

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

....

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

Complainant describes the Office of the Hearing Clerk's method of serving Complainant with an Initial Decision and Order in accordance with section 1.147(c)(1) of the Rules of Practice, (7 C.F.R. § 1.147(c)(1)), as follows:

[S]ection [1.147(c)(1) of the Rules of Practice] requires a decision and order to be served upon the parties by certified or registered mail. Since the complainant's attorney is located in the same building as the Hearing Clerk's office, it would be absurd to require the Hearing Clerk's office to effect service upon the complainant by actually placing a certified or registered copy of the decision and order in regular mail. Instead, the practice has been established by the Hearing Clerk's office of placing a copy of the decision and order and the appropriate cover letter in the Departmental inter-office mail system and requiring the complainant's attorney to affix his or her signature and the date received on said cover letter verifying receipt and service of the decision and order as would occur if the decision and order had been sent via certified or registered mail. Complainant's attorney is then required to return the signed cover letter which verifies service of the decision and order on a particular date to the Hearing Clerk's office.

Section 1.147(c)(1) [of the Rules of Practice] specifically requires service by certified or registered mail. Both certified and registered mail require a signature to indicate receipt and the section contemplates that effective service be established by requiring verification of receipt and service of the decision and order by affixing a signature and date received. In practice, this acknowledgment of receipt is accomplished by respondent's (or respondent's agent's) signature on a certified return receipt card; and in complainant's case, by the signature in the appropriate signature block affixed on the cover letter accompanying the decision and order.

Complainant's Response, pp. 2-3.

The Hearing Clerk's Office Procedures Manual provides:

ALJ's DECISION AND ORDER (INITIAL DECISION)

Instructions

1. Serve Decision giving the parties 30 days to file an appeal and advising them how many copies of the appeal will be needed. Parties should submit an original and two copies. If there are more than two

parties, an additional copy should be submitted for each additional party. (See **SAMPLE LETTER**)

- The Decision should be served on the Respondent's Attorney by **certified mail**. If Respondent does not have an attorney, serve on Respondent by **certified mail**.
- Make an extra copy of the service letter and put this stamp on it.

COPY OF THIS LETTER AND/OR ATTACHMENT
RECEIVED THIS DATE _____
Month Day Year

SIGNATURE OF/FOR GOVERNMENT ATTORNEY

When internal distribution is made to the OGC attorney, the extra copy should be dated, signed and returned to this office for computation of the due date for complainant's appeal.

Hearing Clerk's Office Procedures Manual § 14 (Aug. 1995). (Emphasis in the original.)

The Rules of Practice define the word "mail" as follows:

§ 1.132 Definitions.

As used in this subpart, [7 C.F.R., pt. 1, subpart H, (7 C.F.R. §§ 1.130-.151)], the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....

Mail means to deposit an item in the United States Mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified or registered mail if specified.

7 C.F.R. § 1.132.

The Office of the Hearing Clerk's practice of sending Complainant's counsel Initial Decisions and Orders through the Department's inter-office mail system does not constitute service by *mail* as that term is defined in section 1.132 in the Rules of Practice, (7 C.F.R. § 1.132).¹ Therefore, I find that Complainant was not served with the Initial Decision and Order in this proceeding in accordance with section 1.147(c)(1) of the Rules of Practice, (7 C.F.R. § 1.147(c)(1)). Instead, Complainant was served with the Initial Decision and Order in accordance with section 1.147(c)(3)(i) of the Rules of Practice, (7 C.F.R. § 1.147(c)(3)(i)), which provides, as follows:

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

....

(c) *Service on party other than the Secretary.*

....

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]

7 C.F.R. § 1.147(c)(3)(i).

No signature is necessary to perfect service in accordance with section 1.147(c)(3)(i) of the Rules of Practice, (7 C.F.R. § 1.147(c)(3)(i)). I find the notation of two different dates, one indicating receipt of the Initial Decision and

¹The Hearing Clerk's Office Procedures Manual describes the manner of service on Respondent's counsel and Respondent as service by certified *mail* and service on the OGC attorney or government attorney as *internal distribution*. (Hearing Clerk's Office Procedures Manual § 14 (Aug. 1995).)

Order by Complainant's counsel's "main office" and the other indicating receipt of the Initial Decision and Order by Complainant's counsel, troubling. However, I find, under the circumstances in this case, that delivery of the Initial Decision and Order to a responsible individual at the last known principal place of business of Complainant's attorney of record, in accordance with section 1.147(c)(3)(i) of the Rules of Practice, (7 C.F.R. § 1.147(c)(3)(i), did not occur until June 25, 1996, and that Complainant's Appeal Petition, filed July 24, 1996, was timely filed.

Moreover, even if I had found that Complainant was served with the Initial Decision and Order on June 21, 1996, I would not have granted Respondent's Motion to Dismiss Appeal because Complainant's Appeal Petition was filed before the Initial Decision and Order became effective. Section 1.145(a) of the Rules of Practice provides:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

A late-filed appeal could be denied. However, section 1.142(c)(4) of the Rules of Practice provides:

§ 1.142 Post-hearing procedure.

. . . .

(c) *Judge's decision.*

. . . .

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145[, (7 C.F.R. § 1.145).]

7 C.F.R. § 1.142(c)(4).

The written Initial Decision and Order was served on Respondent on June 25, 1996, and, in accordance with section 1.142(c)(4) of the Rules of Practice, (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order was to become effective 35 days later, July 30, 1996.²

The Judicial Officer may grant extensions of time to allow parties to file appeals before the Judge's Initial Decision and Order becomes effective.³ The Initial Decision and Order in the instant proceeding had not become effective on July 24, 1996, when Complainant filed Complainant's Appeal Petition. Therefore, even if I had found that Complainant was served with the Initial Decision and Order on June 21, 1996, (rather than June 25, 1996, which was the date the Initial Decision and Order was served on Complainant), and Complainant had filed Complainant's Appeal Petition 33 days after receiving service of the Judge's decision, I would have granted a 3-day extension of time to Complainant to file Complainant's Appeal Petition.

²Moreover, the Initial Decision and Order specifically provides:

This decision and order shall become final and effective thirty-five days after Respondent receives service of it, subject to the right of either party to appeal it to the Judicial Officer as provided in 7 C.F.R. § 1.145.

Initial Decision and Order, p. 17.

³*In re Sandra L. Reid*, 55 Agric. Dec. ___, slip op. at 5 (July 17, 1996) (2-day extension of time granted to Respondent for filing an appeal 32 days after service of the Default Decision on Respondent but prior to the effective date of the Default Decision); *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985) (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985) (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985) (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984) (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Miguel A. Machado* (Decision as to Respondent Cozzi), 42 Agric. Dec. 1454, 1455 n.3 (1983) (in accordance with the practice of this Department, Complainant's appeal of an Initial Decision and Order, 32 days after service of the Initial Decision and Order on Complainant, accepted late since it was filed before the Initial Decision and Order became final), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

For the foregoing reasons, Respondent's Motion to Dismiss Appeal is denied, and, in accordance with my Informal Order of August 22, 1996, the time for filing Respondent's response to Complainant's Appeal Petition shall be extended to October 9, 1996.

In re: RUMA FRUIT and PRODUCE CO., INC.

PACA Docket No. D-94-0565.

Order Lifting Stay Order and Modifying Order filed September 24, 1997.

Andrew Stanton, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Order issued by William Jenson, Judicial Officer.

On February 6, 1997, I issued a Decision and Order on Remand in which I assessed Ruma Fruit and Produce Co., Inc. [hereinafter Respondent], a civil penalty of \$12,400 to be paid within 60 days after the date of service of the Decision and Order on Remand on Respondent. The Decision and Order on Remand further provides that in the event that the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, does not receive a certified check or money order for the assessed civil penalty in accordance with the Order in the Decision and Order on Remand, a 45-day suspension of Respondent's license issued under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter PACA], shall take effect beginning 61 days after the date of service of the Order on Respondent.¹ The Order was served on Respondent on February 10, 1997.

On April 21, 1997, Respondent filed a Petition for Review of the Decision and Order on Remand with the United States Court of Appeals for the District of Columbia Circuit and a Request for Stay of the Judicial Officer's Decision and Order on Remand with the Judicial Officer.

On May 5, 1997, Complainant filed Complainant's Response to Request for Stay stating that "Complainant has no objection to the issuance of an order staying this proceeding until resolution of the matter on appeal, with the understanding that the civil penalty has not been paid and that no part of the 45 day license suspension has been served." On May 5, 1997, the case was referred to the Judicial Officer

¹In re *Ruma Fruit & Produce Co.*, 56 Agric. Dec. ____, slip op. At 19-20 (Feb. 6, 1997).

for a ruling on Respondent's Request for Stay, and on May 6, 1997, I granted Respondent's Request for Stay.²

On September 9, 1997, the United States Court of Appeals for the District of Columbia Circuit issued an Order dismissing Respondent's appeal.³ On September 23, 1997, Complainant filed Motion to Lift Stay Order, and the case was referred to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

On September 24, 1997, Respondent's counsel, Stephen P. McCarron, informed me that Respondent did not oppose Complainant's Motion to Lift Stay Order and requested that the Order issued February 6, 1997, be modified to begin a 45-day suspension of Respondent's PACA license on October 1, 1997. Complainant's counsel Andrew Y. Stanton, agreed to the modification requested by Respondent.

Complainant's Motion to Lift Stay Order is granted and the Order issued February 6, 1997, is modified as requested by Respondent and agreed to by Complainant to read as follows:

Order

Respondent's PACA license is hereby suspended for 45 days. This 45-day suspension of Respondent's PACA license shall take effect beginning October 1, 1997.

In re: BAMA TOMATO CO., INC.
PACA Docket No. D-94-0554.
Order Lifting Stay filed October 1, 1997.

Mary Hobbie, for Complainant.
Joseph P. McCafferty, Cleveland, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 17, 1995, the Judicial Officer issued a Decision and Order suspending Bama Tomato Co., Inc.'s [hereinafter Respondent] license under the

²In re *Ruma Fruit & Produce Co.*, 56 Agric. Dec. ____ (May 6, 1997) (Stay Order).

³*Ruma Fruit & Produce v. Department of Agric.*, No. 97-1192 (Sept. 1997).

Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter PACA], for 30 days. *In re Bama Tomato Co., Inc.*, 54 Agric. Dec. 1334 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997). Respondent filed a Motion for Stay pending the outcome of proceedings for judicial review, which the Judicial Officer granted on September 25, 1995. *In re Bama Tomato Co., Inc.*, 54 Agric. Dec. 1366 (1995) (Stay Order).

On August 15, 1997, Complainant filed a Motion for Order Lifting Stay which states as follows:

The Eleventh Circuit affirmed the Judicial Officer's Decision and Order on May 29, 1997. Respondent's counsel has not sought further judicial review, therefore, Complainant requests that the September 25, 1995, Stay Order be lifted.

Complainant's Motion for Order Lifting Stay was served on Respondent on September 9, 1997. Section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.143(d)) provides that, within 20 days after service of any written motion, an opposing party may file a response to the motion. Respondent has not filed a response to Complainant's Motion for Order Lifting Stay.

Complainant's Motion for Order Lifting Stay filed August 15, 1997, is granted. The Stay Order issued September 25, 1995, *In re Bama Tomato Co., Inc.*, 54 Agric. Dec. 1366 (1995), is lifted, and the Order issued in *In re Bama Tomato Co., Inc.*, 54 Agric. Dec. 1334 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997), suspending Respondent's PACA license for 30 days, is effective on the 30th day after service on Respondent of this Order Lifting Stay.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

**In re: EAST HILL PRODUCE ASSOCIATES, INC. d/b/a FEINBERG
FRUIT & PRODUCE CO.
PACA Docket No. D-97-0005.
Decision and Order filed June 4, 1997.**

Failure to file an answer - Failure to make full payment promptly - Willful, flagrant, and repeated violations - Publication.

Andre Vitale, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (PACA), instituted on October 30, 1996 by a complaint filed by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period September 1994 through December 1995, Respondent failed to fully and promptly pay net proceeds in the total amount of \$8,851.84 derived from the sale 39 lots of perishable agricultural commodities that it received and accepted from 6 consignors in interstate commerce. The complaint also alleges that during the period May 1994 through November 1995, Respondent failed to make full payment promptly to 36 sellers in the total amount of \$532,604.34 for 228 lots of fruits and vegetables that it received and accepted in interstate commerce.

Respondent was served with the complaint on November 4, 1996. On November 22, 1996, a letter was received by the Hearing Clerk which stated that Respondent had been petitioned into receivership by court order on March 26, 1995 and that a permanent receiver had been appointed. This letter does not meet the requirements of section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) for the filing of an answer. No answer was filed by or on behalf of Respondent within the time period prescribed by the Rules of Practice for the filing an answer. After

the time period for filing an answer expired, Complainant moved for the issuance of a decision without hearing by reason default.

As a result of Respondent's failure to file an answer within the time period prescribed by the Rules of Practice, the material facts alleged in the complaint are deemed admitted and are adopted as set forth below in the findings of fact below. This Decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, East Hill Produce Associates, Inc., doing business as Feinberg Fruit & Produce Co., was a corporation that was organized and existed under the laws of the State of Rhode Island with a business mailing address of [REDACTED] Rhode Island [REDACTED].

2. At all times material herein, Respondent was licensed under or operated subject to the provisions of the PACA. PACA license number [REDACTED] was issued to Respondent on June 9, 1994. Respondent's license was suspended on June 21, 1995, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g), because it failed to pay a reparation award and was terminated on June 9, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent failed to make full payment promptly for net proceeds in the total amount of \$8,851.84 derived from the sale of 39 lots of perishable agricultural commodities that it received and accepted from 6 consignors on consignment in interstate commerce during the period September 1994 through December 1995. Respondent also failed to make full payment promptly in the total amount of \$532,604.34 to 36 sellers for 228 lots of perishable agricultural commodities that it received and accepted in interstate commerce during the period May 1994 through November 1995.

Conclusion

Respondent's failures to make full payment promptly set forth above in finding of fact number 3, constitute wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). These findings are ordered published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final July 14, 1997.-Editor]

In re: D & D PRODUCE, INC.
PACA Docket No. D-97-0002.
Decision and Order filed April 18, 1997.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant, and repeated violations - Publication.

Andre Vitale, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), instituted by a complaint filed on October 9, 1996, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent committed wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b) by its failure to make full payment promptly to 13 sellers from 184 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate commerce, in the amount of \$476,600.34 during the period September 1994 through February 1996. The complaint noted that on January 26, 1996, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Pennsylvania (Case No. 96-10658-DWS.). Complainant requested that Respondent be found to have committed wilful, flagrant and

repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that the publication of such violations be ordered.

The complaint was served on the respondent on October 21, 1996. On November 14, 1996, Respondent submitted a letter in which it sought to explain the factors that led to its financial problems. In Schedule F - Creditors Holding Unsecured Claims of its bankruptcy petition, hereinafter referred to as "bankruptcy schedule" (attached as Exhibit 1), Respondent admitted that it owes five of the thirteen sellers at least \$225,082.00 out of the \$476,600.34 which the complaint alleged it had failed to fully and promptly pay. These admissions warrant the immediate issuance of a decision without hearing, finding Respondent has committed wilful, flagrant and repeated violations of Section 2(4) of the PACA and ordering the publication of this finding. On motion of Complainant for the issuance of a decision without hearing by reason of admissions, the following decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, D&D Produce, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania, with a business mailing address of [REDACTED] Pennsylvania [REDACTED]

2. PACA license number [REDACTED] was issued to Respondent on June 22, 1996. This license was terminated on June 22, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), as a result of Respondent's failure to pay the required annual renewal fee. At all times material herein, Respondent operated subject to the Act.

3. On January 26, 1996, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Pennsylvania, listing D&D Produce, Inc. as the debtor. The bankruptcy petition was designated Case No. 96-10658-DWS. and on April 30, 1996, was converted to a Chapter 7 petition.

4. As set forth in Complainant's Motion for Decision Without Hearing by Reason of Admissions and Supporting Memorandum, Respondent admitted in its bankruptcy schedule that it failed to pay five sellers at least \$225,082.00 of the \$476,600.34 which the complaint alleged Respondent had failed to fully and promptly pay for numerous lots of perishable agricultural commodities that it purchased in interstate commerce from January 1995 to February 1996.

Conclusions

Respondent admitted that it failed to make full payment promptly for numerous loads of produce that it purchased and owes at least \$225,082.00 of the amount alleged in the complaint. The failure to make full payment promptly for these purchases constitute wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent is found to have committed wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b (4)).

These findings are ordered published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final July 18, 1997.-Editor]

**In re: ARP TRADING, INC., d/b/a AAA PRODUCE DISTRIBUTORS.
PACA Docket D-97-0009.
Decision and Order filed July 14, 1997.**

Failure to file an answer - Failure to make full payment promptly - Willful, flagrant and repeated violations - License revocation.

Andre Vitale, for Complainant.
Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act (7 U.S.C. § 499 et seq.) (PACA) instituted by a complaint filed on November 19, 1996 by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that from June 30, 1995 to April 29, 1996 Respondent purchased,

received, and accepted 102 lots of fruits and vegetables in interstate and foreign commerce from 22 sellers, but failed to fully and promptly pay the agreed purchase prices or balances thereof in the total amount of \$151,240.88. Respondent was served with the complaint on November 27, 1996 and failed to file an answer within the time prescribed by the Rules of Practice (7 C.F.R. § 1.136) for that purpose. As a result of Respondent's failure to file an answer, the material facts alleged in the complaint are deemed admitted and are adopted as set forth below in the findings of fact.

Complainant moved for the issuance of a decision without hearing by reason of default and this Decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, ARP Trading, Inc., doing business as AAA Produce Distributors is a corporation organized and existing under the laws of the State of California with a business mailing address of [REDACTED] California [REDACTED].

2. At all times material herein, Respondent was licensed under the provisions of PACA. License number [REDACTED] was issued to Respondent on August 10, 1993. It has been renewed annually and is next subject to renewal on or before August 10, 1997.

3. On April 22, 1996, Respondent filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 et seq.) in the United States Bankruptcy Court for the Central District of California which was designated case no. LA 96-22727-ES.

4. As set forth in paragraph IV of the complaint, Respondent purchased, received, and accepted 102 lots of fruits and vegetables in interstate and foreign commerce from 22 sellers during the period June 1995 to April 1996, but failed to fully and promptly pay the agreed purchase prices or balances thereof in the total amount of \$151,240.88.

Conclusion

Respondent's failures to make full payment promptly for the perishable agricultural commodities that it purchased, as set forth above in Finding of Fact No. 4, constitute wilful, flagrant and repeated violations of Section 2(4) of PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Respondent's license shall be revoked.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty (30) days after service, as provided by sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final August 27, 1997.-Editor]

In re: CENTRO PARAISO TROPICAL, INC.
PACA Docket No. D-97-0007.
Decision and Order filed August 19, 1997.

Failure to file an answer - Failure to satisfy reparation award - Failure to pay required annual renewal fee - Failure to make full payment promptly - Willful, flagrant, and repeated violations - Publication.

Andre Vitale, for Complainant.
Sanford B. Goldberg, New York, NY, for Respondent.
Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), instituted by a complaint filed on November 7, 1996 by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture which alleges that during the period October 1992 through August 1995, Respondent purchased, received, and accepted 125 lots of perishable agricultural commodities in interstate and foreign commerce from 21 sellers for which it failed to fully and promptly pay the agreed purchase prices or balances thereof in the total amount of \$360,253.51. The complaint also notes that on September 14, 1995 Centro Paraiso Tropical, Inc. filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Southern District of New York. Complainant requests that as a result of Respondent's failures to make full payment

promptly for the perishable agricultural commodities it purchased, it be found to have committed wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that this finding be ordered published.

Respondent was served with the complaint on November 13, 1996. Upon its request, Respondent was granted an extension of time until December 23, 1996 in which to file an answer to the complaint. Respondent failed to file an answer to the complaint on or before December 23, 1996 after which Complainant moved for the issuance of a decision by reason of default. As a result of Respondent's failure to file an answer, the following Decision and Order shall be issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Centro Paraiso Tropical, Inc., was a corporation that was organized and existed under the laws of the State of New York with a business mailing address of [REDACTED] New York [REDACTED].

2. PACA license number [REDACTED] was issued to Respondent on April 6, 1992. Respondent's license was suspended on March 9, 1995, in accordance with Section 7(d) of the PACA (7 U.S.C. § 499g), because it failed to satisfy a reparation award that had been issued against it and was terminated on April 6, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d), because it failed to pay the required annual renewal fee.

3. On September 14, 1995, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Southern District of New York. Centro Paraiso Tropical, Inc. was listed as debtor and the case was designated no. 95-44050.

4. As more fully set forth in paragraph III of the complaint, Respondent failed to fully and promptly pay 21 sellers the agreed purchase prices or balances thereof, in the total amount of \$360,253.51, for 125 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce during the period October 1992 through August 1995.

Conclusion

Respondent's failures to make full payment promptly for the produce that it purchased, as set forth above in Finding of Fact No. 4, constitute wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

This finding is shall be published.

This Decision shall become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to this proceeding within thirty (30) days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 26, 1997.-Editor]

In re: JAMES PRODUCE, INC.
PACA Docket No. D-97-0019.
Decision and Order filed August 5, 1997.

Failure to file an answer - Failure to pay reparation award - Failure to pay annual renewal fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andrew Stanton, for Complainant.
Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), instituted by a complaint filed on March 20, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to eight sellers the agreed purchase prices totaling \$1,461,943.29 in connection with 135 lots of perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period April 30, 1995, through November 30, 1995.

The complaint requested that the Administrative Law Judge issue a finding that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order such finding published.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of complainant for the issuance of a decision without hearing by reason of default, the following decision and order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

(1) James Produce, Inc. (hereinafter, "respondent"), is a corporation whose mailing address is [REDACTED] Massachusetts [REDACTED]

(2) PACA license number [REDACTED] was issued to respondent on August 14, 1989. This license was suspended on March 29, 1996, as a result of respondent's failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)) and subsequently terminated on August 14, 1996, when the firm failed to pay the required annual renewal fee pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)).

(3) As more fully set forth in paragraph III of the complaint, respondent failed to make full payment promptly to eight sellers the agreed purchase prices totaling \$1,461,943.29 in connection with 135 lots of perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period April 30, 1995, through November 30, 1995.

Conclusions

Respondent's actions, as set forth in Finding of Fact 3 above, were in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent, James Produce, Inc., is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

This Order shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty

days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 29, 1997.-Editor]

**In re: TUCHTEN-ALTMAN COMPANY.
PACA Docket No. D-96-0535.
Decision and Order filed August 14, 1997.**

Failure to file an answer - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Donald Tracy, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "PACA", instituted by a Complaint filed on September 12, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that, during the period of February through August 1994, respondent purchased, received, and accepted, in interstate commerce from 33 sellers, 175 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$926,873.59. In April 1995, a pro-rata distribution of respondent's trust assets was made to eligible creditors which reduced the amount past due and unpaid to \$638,638.89.

The Hearing Clerk served a copy of the Complaint upon Respondent, which did not answer. Therefore, upon complainant's motion for a default order, the following Decision and Order shall be issued without further proceedings, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Tuchten-Altman Company, was a corporation organized and existing under the laws of the State of Illinois. Its business and mailing address was [REDACTED] Illinois [REDACTED]

2. At all times material herein, respondent was licensed under the provisions, or operating subject to the provisions, of the PACA. License number [REDACTED] was issued to respondent on October 25, 1972. This license terminated on October 25, 1994, pursuant to Section 4(d) of the PACA (7 U.S.C. § 499g), when the firm failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period of February through August 1994, respondent purchased, received and accepted, in interstate commerce from 33 sellers, 175 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$926,873.59. In April 1995 a pro-rata distribution of respondents trust assets was made to eligible creditors which reduced the amount past due and unpaid to \$638,638.89.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PAC, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 2, 1997.-Editor]

**In re: EAGLE PRODUCE, INC.
PACA Docket No. D-97-0021.
Decision and Order filed September 5, 1997.**

Failure to file an answer - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Mary Hobbie, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on April 25, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of December 1995 through March 1996, respondent purchased, received and accepted, in interstate commerce from 4 sellers, 51 shipments of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$473,419.05.

A copy of the Complaint was served upon respondent on May 7, 1997, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Eagle Produce, Inc., was a corporation organized and existed under the laws of the State of Washington. Its business mailing address was [REDACTED] Washington [REDACTED]

2. At all times material herein, respondent was licensed under the provisions of PACA. License number [REDACTED] was issued to respondent on September 29, 1994. This license terminated on September 29, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1995 through March 1996, respondent purchased, received and accepted, in interstate commerce from 4 sellers, 51 shipments of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$473,419.05.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and such violations shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 31, 1997.-Editor]

In re: WAYNE L. BOWMAN CO., INC.
PACA Docket No. D-97-0018.
Decision and Order filed September 11, 1997.

Failure to file an answer - Failure to satisfy reparation award - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andre Vitale, for Complainant.
Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (PACA), instituted by a complaint filed on March 20, 1997 by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, which alleges that Respondent purchased, received, and accepted 241 lots of perishable agricultural commodities in interstate and foreign commerce from 38 sellers during the period May through August 1996, but failed to fully and promptly pay \$592,294.16, for the agreed purchase prices or balances thereof. Complainant requested Respondent be found to have wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that an Order be issued revoking Respondent's license.

A copy of the complaint was served on Respondent on May 8, 1997. Respondent did not file an answer. The time for filing an answer has expired (7 C.F.R. § 1.136(a)). On motion of Complainant, the following Decision and Order is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Wayne L. Bowman Co., Inc., is a corporation organized and existing under the laws of the State of Tennessee with a business mailing address of [REDACTED] Tennessee [REDACTED].

2. License number 185914 was issued to Respondent on April 21, 1960. Respondent's license was suspended on December 13, 1996, in accordance with Section 7(d) of the PACA (7 U.S.C. § 499g), because it failed to satisfy a reparation award that had been entered against it. Respondent's license was terminated on April 21, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d), because it failed to pay the required annual license renewal fee.

3. As set forth in section III of the complaint, Respondent purchased, received, and accepted 241 lots of perishable agricultural commodities in interstate and foreign commerce from 38 sellers between May and August 1996, but failed to promptly pay \$592,294.16 for the agreed purchase prices or balances thereof.

Conclusions

Respondent's failures to make full payment promptly for its produce purchases, as set forth in Finding of Fact No. 3 above, constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

This finding shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 3, 1997.-Editor]

PERISHABLE AGRICULTURAL COMMODITIES ACT

CONSENT DECISIONS

(Not published herein-Editor)

T. M. Kovacevich, Inc. PACA Docket No. D-97-0016. 8/8/97.

Potato Specialities, Inc. PACA Docket No. D-97-0029. 8/12/97.

Kropf Fruit Company. PACA Docket No. D-98-0005. 12/22/97.

Serra Bros. Inc. PACA Docket No. D-97-0031. 12/24/97.

Schaffer Food Service Corp. PACA Docket No. D-97-0030. 12/30/97.

Freshway Produce Corp. PACA Docket No. D-97-0022. 12/31/97.