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AGRICULTURE DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

**MIDLAND BANANA & TOMATO COMPANY, INC. v. UNITED STATES
DEPARTMENT AGRICULTURE.**

No. 95-3552.

Decided January 7, 1997.

(Cite as: 104 F.3d 139).

Failure to make full payment promptly - Making false and misleading statements on a PACA application - Evidence of prior misdeeds admissible.

The court affirmed the decision of the Secretary which found that the petitioner Robert Heimann violated the PACA by failing to make full payment promptly for purchases of agricultural commodities and by making false and misleading statements on a PACA application. Petitioner challenged the Secretary's decision on the ground that the ALJ improperly admitted evidence of prior misdeeds. The court rejected the argument, finding that the admission of the evidence did not prejudice the ALJ or Judicial Officer so as to deny petitioner due process. The court was satisfied that the Secretary's decision was supported by substantial evidence and believed that the challenged evidence was admissible, at least to show motivation.

Before: RICHARD S. ARNOLD, Chief Judge, MAGILL, Circuit Judge, and SACHS, District Judge.*

**UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT**

SACHS, District Judge.

This petition for review stems from consolidated Department of Agriculture disciplinary proceedings under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* (PACA), as amended, in which petitioner Robert Heimann was found to have committed repeated violations of the Act by failing to make full and prompt payment for purchases of agricultural commodities and by making false and misleading statements on a PACA application. Heimann asserts that he was deprived of due process because the Department procedures, were tainted by irrelevant, prejudicial evidence which biased the decisionmakers and because there was blanket adoption of adverse claims, unsupported by evidence. We conclude that Heimann's contentions are lacking in support, and we affirm.

*The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri, sitting by designation.

I.

The Perishable Agricultural Commodities Act, was enacted to regulate the marketing of fresh and frozen fruits and vegetables in interstate commerce. *See* H.R. Rep. No. 87-1546 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749. Under the Act, all commission merchants, dealers and brokers in the perishable commodities industry are required to be licensed by the Department. 7 U.S.C. § 499c. All are subject to the Act, which declare certain conduct by commission merchants, dealers and brokers to be unlawful.

On August 25, 1993, the Director of the Fruit and Vegetable Division of Agricultural Marketing Service, an agency within the Department of Agriculture, commenced a disciplinary proceeding against Royal Fruit Co., Inc. ("Royal") for alleged willful, repeated and flagrant violations of Section 2(4) of the Act, 7 U.S.C. § 499b(4), which makes it unlawful for any commission merchant, dealer or broker licensed under the Act to fail to make full and prompt payment in connection with any transaction in interstate commerce involving perishable agricultural commodities. On the same day, the Director commenced a disciplinary proceeding against Midland Banana & Tomato Co., Inc. ("Midland"), alleging that Midland violated Section 8(c) of the Act, 7 U.S.C. § 499h(c), which makes it unlawful for a PACA license applicant to make any false or misleading statements in a license application. The complaints against both companies alleged that both entities were "alter egos" of Robert Heimann, making Heimann individually responsible for the alleged violations.

The Royal and Midland cases were consolidated and on July 26, 1994, following a hearing, an administrative law judge (ALJ) found that Royal committed willful, flagrant, and repeated violations of the Act by failing to make full and prompt payment of over \$500,000; that Royal was the alter ego of Heimann; that Midland had violated the Act by making false and misleading statements in the application for a PACA license; and that Midland was Heimann's alter ego.

Heimann (the only party now before us) appealed to the Department's Judicial Officer,¹ challenging the alter ego determinations in both cases. On August 16, 1995, in a lengthy and thorough opinion, Judicial Officer Donald A. Campbell adopted, with modifications, the ALJ's decision. This appeal followed.

¹The Secretary has delegated final administrative authority to the Judicial Officer to decide cases subject to 5 U.S.C. §§ 556 and 557. 7 C.F.R. § 2.35.

II.

In 1988, Robert Heimann purchased Royal, then a sole proprietorship, in an agreement that provided for Jeffrey Heimann, Robert's son, and Joseph Cali to manage the business.² Robert Heimann and his wife Beverly signed the contract for Royal's sale as purchasers. There is no evidence Robert Heimann ever gave or sold the business to Jeffrey Heimann or Joseph Cali.

Royal was licensed by PACA, however, as a partnership whose partners were identified as Joseph Cali, Jeffrey Heimann and Beverly Heimann. On November 21, 1988, Royal was incorporated and issued a new PACA license reflecting its corporate status. The listed directors, officers and shareholders were Cali, Jeffrey Heimann and Beverly Heimann. The license was terminated on December 1, 1992, due to Royal's failure to pay the required annual renewal fee.

In May 1989, Robert Heimann became a consultant for Royal. Heimann's \$10,000 per month fee was paid to Continental Oil & Gas Corp. ("Continental"), a non-operating entity Robert Heimann owned. After Robert Heimann formally joined the firm, Royal's business increased substantially. In December 1989, Royal purchased a new, larger location. The funds for this purchase and for improvements to the property were provided through a Small Business Administration loan secured by a mortgage on Robert and Beverly Heimann's personal residence. The lenders took Robert Heimann's management experience into account when deciding to approve the loan.

Robert Heimann was actively involved in Royal's management. He negotiated the purchase and sale of produce and arranged for its transportation. He appeared, to individuals dealing with the company, to be the person in charge of Royal's operations. Royal carried a "key man" life insurance policy on Robert Heimann and not on any other Royal employees.

When Royal began experiencing financial difficulties at the end of 1991, Robert Heimann allowed Royal to reduce his consulting fee to help keep the business solvent. During the first few months of 1992, Robert Heimann, through checks from Continental, provided Royal with a number of short-term, interest-free loans to cover Royal's checking account when Royal needed to pay suppliers quickly.

Between July 1992 and November 1992, Royal failed to make prompt payment to 21 sellers for produce purchased in the amount of \$500,370.54. Royal

²Cali's role at Royal is referred to in related litigation. *Conforti v. United States*, 74 F.3d 838, 840-1 (8th Cir. 1996).

ceased operations on November 17, 1992. That same day, Midland was incorporated. Midland's PACA license application identified Susan Heimann, Robert's daughter, an inexperienced college student, as its sole officer, director and shareholder. The funds used for Midland's initial capitalization came primarily from two of Robert Heimann's friends. Susan Heimann invested \$500 in the firm. Robert Heimann served as general manager and was essentially responsible for all aspects of the operation.

Midland and Royal had almost identical operations. Midland had the same address, telephone and facsimile numbers as Royal. It used Royal's office and warehouse equipment. It had the same customers as Royal and retained approximately one-third of Royal's employees.

Midland's PACA application asserted that Midland was not a successor to another firm. The Judicial Officer found, however, that Midland had succeeded Royal. He further found that Midland, in its application, had falsely denied that any employee had been the owner of a firm whose license is under suspension. The Judicial Officer found that the license of Gilbert Brokerage Co., a company Robert Heimann had owned and operated in the 1970s, was under "ongoing suspension." He additionally found the Midland application to be misleading because it concealed the identity of the true principal of the firm, Robert Heimann.

In concluding that Royal and Midland were alter egos of Robert Heimann, the Judicial Officer considered the witnesses' credibility to be critical. He found that the testimony of Robert, his family members, and Joseph Cali, was not credible. In so finding, he pointed to the fact that each of these individuals had misled authorities during the Department's investigation of the case. He concluded that Robert Heimann had the least credibility. To support this determination, he noted that Heimann had walked away from Gilbert Brokerage's disciplinary proceedings without producing required documents, had signed a number of fraudulent "State of Kansas Inspection Forms" while associated with another produce company, United KC, in the 1980s, and had structured a number transactions in a misleading manner, apparently in order to avoid financial responsibility. The Judicial Officer also found that Heimann's malfeasance prior to his involvement with Royal and Midland was relevant to the proceedings because it provided a motive for Heimann to disguise his true role in Royal's and Midland's operations.

Heimann asserts that consideration of these misdeeds was improper and tainted the opinions so that the ALJ and Judicial Officer were no longer neutral, unbiased decisionmakers. In support of this claim, Heimann contends the Judicial Officer uniformly credited the Agricultural Marketing Service position, even where the Department's findings were, he alleges, unsupported by or inconsistent

with the evidence.³ As a result, Heimann argues, he was not afforded the fundamental due process to which he is entitled.

III.

We review federal constitutional questions de novo. *United States v. Bates*, 77 F.3d 1101, 1104 (8th Cir. 1996). Our determination is limited to whether introduction of the allegedly irrelevant evidence so prejudiced the Secretary that Heimann was denied the fundamental fairness required in administrative hearings by the due process clause of the Fifth Amendment. See *Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 719 (8th Cir. 1986), quoting *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977).

This court has recognized the right to "a fair, unbiased, and impartial" administrative hearing. *Local No. 3, United Packinghouse Workers v. NLRB*, 210 F.2d 325, 330 (8th Cir. 1954), cert. denied, 348 U.S. 822, 75 S. Ct. 36, 99 L. Ed 648 (1954). Heimann considerably overplays his hand by suggesting that any uniform adoption of one party's proposed findings signifies "bias" and supports a conclusion that there has been a due process violation.⁴ Heimann's argument relies on *NLRB v. Miami Coca-Cola Bottling Co.* 222 F.2d 341, 345 (5th Cir. 1955), in which the court stated that such a practice by a trial judge or hearing examiner "deprives his credibility findings of the weight usually afforded them." We agree that signs of superficial analysis invite closer scrutiny of the proceedings below; but this does not routinely or usually result in a reversal, much less a conclusion that there has been a violation of constitutionally mandated procedures.

There are occasions when the correct result is so obvious that a trial judge or hearing examiner may be less than completely thorough in express analysis. As we have observed, this did not occur here.

We are not compelled by petitioner's briefing to address whether the challenged evidence was properly admitted. Heimann simply assumes, without citation, that the evidence was inadmissible. Additionally, because Heimann's sole argument on appeal is that he was denied due process, we need not analyze the Secretary's findings under the "substantial evidence" test. We note, however, that

³The contention is unsound. For example, there was a rejection of contention that Jeffrey B. Heimann was the alter ego of Midland and that the payment of bills through Continental amounted to check-kiting.

⁴Occasional wording in the 122-page opinion that suggest irritation was fairly induced by the evidence.

we are satisfied the Secretary's decision was well supported by substantial evidence and believe the challenged evidence was admissible at least to show motivation. Fed. R. Evid. 404(b).

While it is thus not necessary to determine whether the proceedings before the Department were error-free, we note that the Department successfully responds to two claims of error that are emphasized before us. With respect to whether Heimann was still under a cloud because of the Gilbert Brokerage affair in the 1970s he contends there was a two-year limit on the suspension because of the failure to pay suppliers. The Department contends, however, that there was an "ongoing suspension" pursuant to 7 U.S.C. § 499m(b) (last sentence) because Heimann never produced that company's records, and that such a suspension remains until and unless the records are produced. As the Judicial Officer concluded, Heimann had "good reason to worry" that the Gilbert Brokerage experience would prejudice a new application in his own name.

With respect to his personal falsification of inspection certificates during the United KC activities, proof of such conduct was made in this case and Heimann simply declined to meet the issue, although he could have done so without waiving his claim of irrelevance.

Nothing has been presented that would approach a denial of Heimann's right to due process.

Accordingly, we affirm the decision of the Secretary.

Affirmed.

COUNTY PRODUCE, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE

No. 119, Docket 96-4027.

Decided January 10, 1997.

(Cite as: 103 F.3d 263).

Responsible connection - Employment of a restricted individual - Sanctions.

The court affirmed the decision of the Secretary which revoked petitioner's license for employing a restricted person. Petitioner did not contest the Secretary's finding that it violated the PACA by employing a restricted individual; it only challenged the decision to revoke its license. Petitioner argued that the decision to revoke was an abuse of discretion because the Secretary failed to consider that it did not fail to pay its bills. The court rejected that argument finding that the Secretary did consider these circumstances and that good financial standing does not compel a reduced sanction.

*Before: MINER and PARKER, Circuit Judges, and RESTANI, JUDGE.**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

PARKER, Circuit Judge.

Petitioner County Produce, Inc. ("County Produce") petitioned for review of the final order of the Secretary of Agriculture, which upheld the Administrative Law Judge's Initial Decision and Order revoking County Produce's license under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s. The issue is whether the Secretary's decision to uphold the revocation of County Produce's license was supported by substantial evidence. We deny the petition for review and affirm the Secretary's order.

I. BACKGROUND

A. PACA

Congress enacted PACA for the purpose of ensuring that produce growers and shippers receive payment for their perishable goods. To this end, PACA requires produce merchants, dealers, and brokers to obtain a license from the United States Department of Agriculture ("USDA"), and it provides penalties for PACA violations. *See George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 990 (2d Cir. 1974). Section 8(b) of PACA provides, in relevant part.

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

7 U.S.C. § 499h(b). Pursuant to section 8(b), "[t]he Secretary may, after thirty

*The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

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." *Id.* Congress felt that by barring "responsibly connected" individuals from employment with other licensed produce companies, those individuals would be prevented from causing further harm within the produce industry. *See Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir. 1967).

The term "employment" is defined by PACA 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). The USDA has defined the term "any affiliation" to include "all kinds of affiliation-- whether minimum or maximum; whether deliberate or not." *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 (1986).

B. Facts

County Produce, a produce dealer licensed under PACA, was formed by David Nyden in June 1992. Nyden owns eighty percent of County Produce and serves as its president.

Several years earlier, in 1988, Nyden made an offer to Linda Wright to work for him at a produce company called L. Bernstein and Sons ("L. Bernstein"). Wright accepted this offer. In 1989, Nyden sold his fifty-percent interest in L. Bernstein to Arthur Stollman, who acquired full ownership of the company. Stollman sold Wright fifty percent of the company; in return, she assured half of L. Bernstein's debts.

Initially, Wright only performed clerical duties at L. Bernstein. After receiving several complaints about Stollman's abusive personality, however, she became more active in the company's operations, eventually handling all of L. Bernstein's Connecticut customers. Stollman's customer-relations problems continued, and he began issuing bad checks to produce suppliers. L. Bernstein closed and filed for bankruptcy in November 1991.

In August 1992, Wright received a formal complaint from the USDA alleging that L. Bernstein had committed repeated and flagrant violations of PACA by failing to pay \$185,909.00 to sixteen produce sellers between January 1991 and August 1991. In June 1993, Wright agreed to sign a consent order wherein L. Bernstein admitted to these violations of PACA. As a result, any licensed produce company was barred from having "any affiliation" with Wright for at least one year. *See* 7 U.S.C. §§ 499a(b)(10), h(b).

Sometime during the summer of 1993--around the same time that Wright signed the consent order--she began helping Nyden set up his new company,

County Produce. According to Wright, she spent between two and twenty hours a week at County Produce doing clerical work. She claims that she was not paid for this work. Although Wright admits that she and her husband guaranteed a loan to County Produce on March 9, 1993, she asserts that this was done merely as a favor to Nyden.

Other evidence indicates that Wright's activities at County Produce included selling produce and serving customers. For example, two separate food purchasers testified that they had been dealing with Wright in making produce purchases from County Produce since November 1993. The chief executive officer for Emerald Financial Corporation, the bank making the loan to County Produce that Wright and her husband guaranteed, testified that it was his "perception" that Wright operated County Produce.

On August 8, 1993, PACA officially notified Wright by letter that because she had been an officer and stockholder in L. Bernstein, she could "not be employed by or affiliated with another licensee, in any capacity, until July 19, 1994."

On October 12, 1993, Nyden also received official notification of Wright's status as a "restricted individual". By letter, a PACA official informed Nyden that Wright was ineligible to be employed by or affiliated in any capacity with a PACA licensee until July 19, 1994. The letter explained that the terms "employ" and "employment" are defined by PACA to mean *any* affiliation, regardless of compensation. In addition, the letter stated:

Pursuant to Section 8(b) of the Act, copy enclosed, notice is hereby given that after 30 days from the receipt of this letter, Ms. Linda Wright cannot continue her affiliation with County Produce, Inc. To continue such affiliation after that date will result in the suspension or revocation of its license.

On October 30, 1993, Nyden responded to the USDA with the following: "Ms. Linda Wright is not currently employed by County Produce, nor is she affiliated with this company through any form of ownership or self-employment, per section 8(b) of your act."

C. *Administrative Proceedings*

On June 13, 1994, the USDA filed a complaint against County Produce, which alleged the County Produce violated section 8(b) of PACA by continuing to employ Wright after being notified that Wright's continued employment was prohibited. A hearing was held on March 14, 1996. At the hearing, a USDA

official, Clare G. Jervis, recommended to the Administrative Law Judge ("ALJ") that County Produce's license be revoked. The ALJ filed an Initial Decision and Order, on July 17, 1995, revoking County Produce's license. In his Initial Decision and Order, the ALJ found that Wright continued to work for County Produce after Nyden was notified on October 12, 1993, that her affiliation with County Produce was prohibited. The ALJ found that Wright's affiliation with County Produce continued until at least February 1994.¹ As a result, the ALJ concluded that County Produce willfully and flagrantly violated section 8(b) of PACA.

County Produce appealed the ALJ's decision to the Judicial Officer ("JO") on August 24, 1995. The JO upheld the ALJ's decision to revoke County Produce's license. The JO's Decision and Order constitutes the final order of the Secretary of Agriculture. *See* 7 C.F.R. § 2.35.

II. DISCUSSION

County Produce does not challenge the Secretary's conclusion that by employing Wright beyond October 12, 1993--the date that Nyden was informed of Wright's status as a "restricted individual"--County Produce willfully and flagrantly violated section 8(b) of PACA. Rather, County Produce challenges the Secretary's decision to uphold the ALJ's revocation of County Produce's license.

This Court may not overturn the Secretary's choice of sanction unless it is "unwarranted in law or . . . without justification in fact." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186, 93 S. Ct. 1455, 1458, 36 L. Ed.2d 142 (1973) (alteration *Butz*) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13, 67 S. Ct. 133, 146, 91 L. Ed. 103 (1946)); *see Harry Klein Produce Corp. v. United States Department of Agriculture.*, 831 F.2d 403, 406 (2d Cir. 1987). County Produce does not contend that the Secretary's choice of sanction is "unwarranted in law."² Therefore, as long as the Secretary's choice is not "so `without justification in fact` as to constitute an abuse of [the Secretary's] discretion," the Secretary's final order must be affirmed. *Butz*, 411 U.S. at 188, 93 S. Ct. at 1459 (alteration in *Butz*) (quoting *American Power & Light Co.* 329

¹The ALJ noted that there was evidence indicating that Wright still worked for County Produce at the time of the March 15, 1995 hearing.

²Section 8(b) of PACA expressly grants the Secretary the authority to "suspend or revoke the license of any licensee" who continues to employ "any person" in violation of PACA. 7 U.S.C. § 499h(b).

U.S. at 115, 67 S. Ct. at 147); see *Harry Klein Produce Corp.* 831 F.2d at 406-07.

County Produce argues that the Secretary's choice of sanction constitutes an abuse of discretion because the Secretary failed to consider all of the relevant mitigating facts and circumstances. Specifically, County Produce contends that the Secretary failed to consider that none of County Produce's bills went unpaid; therefore, nobody suffered the harm that PACA was designed to prevent.

At the outset, we disagree with County Produce's contention that the Secretary "failed to consider" these circumstances. The record indicates that these circumstances were in fact considered although ultimately rejected by the Secretary. Cf. *Norinsberg Corp. v. United States Department of Agriculture*, 47 F.3d 1224, 1227 (D.C. Cir.), cert. denied, -- U.S. --, 116 S. Ct. 474, 133 L. Ed. 2d 403 (1995).

In support of its argument that the good financial standing of County Produce compels a reduced sanction, County Produce relies on *Conforti v. United States*, 69 F.3d 897 (8th Cir. 1995), amended and superseded upon denial of reh'g, 74 F.3d 838 (8th Cir.), cert. denied, -- U.S. --, 117 S.Ct. 49, 136 L.Ed.2d 14 (1996), and *ABL Produce, Inc. v. United States Department of Agriculture*, 25 F.3d 641 (8th Cir. 1994). In both cases, the Eighth Circuit held that in light of PACA's purpose to protect produce suppliers, the Secretary erred by refusing to consider the good financial standing of the produce dealers. See *Conforti*, 74 F.3d at 842; *ABL Produce*, 25 F.3d at 646-47.

As the Secretary correctly noted, however, County Produce's reliance on *Conforti* and *ABL Produce* is misplaced. Both cases are factually distinguishable from the instant case. For example, once the produce dealer in *Conforti*, received notification that the USDA could suspend the company's license for continuing to employ a restricted individual, the dealer diligently tried to obtain a bond securing that individual's employment.³ See 74 F.3d at 841, 843. Once the produce dealer in *ABL Produce* was notified that he was employing a "restricted individual", he immediately tried to prevent that individual from involving himself in the company's activities. See 25 F.3d at 646. In addition the *ABL Produce* Court considered it to be a "most compelling and unique circumstances" that the "restricted individual" engaged in deceptive acts to hide his activities from the produce dealer. See *id.*

³Section 8(b) of PACA provides that the Secretary may approve the employment of a restricted individual "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." 7 U.S.C. § 499h(b).

In contrast, although Nyden was warned that he would lose his license if he continued to employ Wright, he never attempted to limit Wright's involvement in County Produce. Nor was Nyden unaware of the extent of Wright's involvement with the company. On the contrary, Wright testified that she took her instructions while at County Produce directly from Nyden.

Moreover, in arguing that the *Conforti* and *ABL Produce* decisions compel a conclusion that the Secretary's choice of sanction was unwarranted, County Produce ignores the fundamental principle that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] the relation of remedy to policy is peculiarly a matter for administrative competence," *Butz*, 411 U.S. at 185, 93 S. Ct. at 1458 (quoting *American Power & Light Co.* 329 U.S. at 112, 67 S. Ct. at 145) (internal quotation omitted). In the instant case, Clare G. Jervis, a USDA official, testified that revocation of County Produce's license would be the only meaningful sanction. She reasoned that this sanction was warranted in light of the serious nature of County Produce's PACA violation, and also because of the deterrent effect that this sanction would have on County Produce and the produce industry.

The Secretary agreed with this reasoning stating:

It is unfortunate, and I believe incorrect, that the *ABL Produce* Court used as relevant and mitigating circumstances that there were no unpaid bills and no apparent harm to anybody, as reason to lessen the sanction against [petitioner], because such an interpretation contains the potential for great harm to the PACA's deterrent effect envisioned by Congress.

We must defer to the agency's judgment as to the appropriate sanctions for PACA violations. See *Butz*, 411 U.S. at 185-86, 93 S.Ct. at 1457-58; *American Power & Light Co.* 329 U.S. at 112-13, 67 S.Ct. at 145-46; *Harry Klein Produce Corp.*, 831 F.2d at 406-07. The USDA is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to be requirements of PACA. See *American Power & Light Co.*, 329 U.S. at 112, 67 S.Ct. at 145-46. We may not substitute our judgment for that of the agency with respect to what sanction will best further the policies of PACA. See *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373 (5th Cir. 1980).

In light of the deference that we must give to the agency's expertise in determining appropriate sanctions, and the fact that the Secretary appropriately considered the relevant evidence, we may not say that the Secretary erred in rejecting County Produce's argument that certain "mitigating" circumstances

compelled a reduction in sanction.

III. CONCLUSION

We conclude that the Secretary's decision to uphold the ALJ's revocation of County Produce's license was not an abuse of discretion. In continuing to employ Wright beyond October 12, 1993--the date that Nyden was informed that Wright's employment was prohibited--County Produce willfully and flagrantly violated section 8(b) of PACA. The Secretary did not err when he failed to reduce this penalty on the basis of County Produce's good financial standing. Accordingly, the petition for the review is denied, and the Secretary's final order is affirmed.

PRODUCE PLACE v. DEPARTMENT OF AGRICULTURE, et al.
No. 96-973.
Decided February 18, 1997.

(Cite as: 117 S. Ct. 959).

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

PEGGY A. HART v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 96-1187.
Decided May 16, 1997.

(Cite as: 112 F.3d 1228).

Responsibly connected - Rebuttable presumption - Alter ego - Remand.

Petitioner appealed the Secretary's determination that she was responsibly connected to a corporation which had flagrantly and repeatedly violated the PACA, and was, therefore, subject to employment restrictions under the PACA. The United States Court of Appeals for the District of Columbia Circuit granted the petition for review and remanded the case for further proceedings. There is a rebuttable presumption that an officer, director, or holder of more than ten percent of the stock of a corporation licensed under the PACA is responsibly connected to that corporation. Petitioner argued that the Presiding Officer incorrectly applied a per se standard and failed to consider evidence she submitted in rebuttal. The court could not determine

from the record whether the Presiding Officer applied the correct legal standard in reaching his decision. Accordingly, the case was remanded for the Presiding Officer to articulate his findings and explain his conclusions.

Before GINSBURG, SENTELLE, and HENDERSON.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

GINSBURG, Circuit Judge:

Peggy A. Hart petitions for review of the Secretary of Agriculture's determination that she was "responsibly connected" to the M&M Banana Company as an officer and director when that company violated the Perishable Agricultural Commodities Act of 1930. 7 U.S.C. §§ 499a-499s. Hart contends that the Secretary did not apply the correct legal standard to her case and that she in fact rebutted the statutory presumption that she was responsibly connected to M&M Banana. Because we cannot determine from the present record whether the Secretary applied the correct legal standard, we grant the petition for review and remand this matter for further proceedings consistent with this opinion.

I. BACKGROUND

In June 1993 the Deputy Director of the Fruit and Vegetable Division of the Agricultural Marketing Service filed a complaint alleging that M&M Banana had flagrantly and repeatedly violated the PACA by failing to pay for produce purchased in 1992 and 1993. At the same time the Chief of the PACA Branch of the Fruit and Vegetable Division informed Hart that, as an officer and director of M&M Banana, she was a responsibly connected individual subject to the employment restrictions of the PACA; as a result she would be prohibited from working for any PACA licensee for a period of at least one year. *See* 7 U.S.C. § 499h(b).

Hart responded by letter that she could not be deemed responsibly connected to the company because she was only a nominal director and officer of the corporation: he had "made no policy decisions," and had "merely [done] as [she] was instructed by the company's owner," who was also her father. The Branch Chief treated Hart's response as a formal request for a determination of her status and in December 1993 informed Hart that she had been found responsibly connected and would be subject to the employment restrictions of the PACA. Hart petitioned the Administrator of the AMS for review of that decision and requested

a hearing.

The Administrator designated a Presiding Officer, who held a hearing in July 1994. Because the transcript of that hearing disappeared under circumstances that remain a mystery, a second hearing was held in May 1995. Both sides put on witnesses and the agency also put into evidence a variety of corporate records.

The PO issued his decision in January 1996. He found, among other things, that: (1) Hart alone signed the "1991 Domestic Corporation Annual Report," which is required by state law to be signed "by one officer or two directors"; (2) Hart was authorized by the Board in her capacity as Treasurer to deal with the corporation's bank; (3) Hart attended monthly meetings of the Board of Directors at which were discussed a credit approval made by Hart, a corporate name change, the possibility of obtaining loans for new trucks, a new computer system, a reduction in the amount of M&M's debt, reduction of overtime and salaries, the effect of bankruptcy on the company, and a reorganization plan. The PO also observed that Hart's sister, Patrice McCoy, had testified that, at board meetings: "we would all bring up issues, things that were going on. And of course, we would discuss them. You know, we are his daughters; we had opinions about what was going on. But the ultimate decision was always made by him."

Based upon these findings the PO concluded that Hart had been responsibly connected to M&M Banana during the relevant period. The PO supported his decision for the most part with references to the case law of circuits that apply a per se rule that has been expressly rejected by this Circuit. He did go on to acknowledge, however, that this court had held in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), that an officer or director "should be afforded the opportunity to rebut the Agency determination" that she is responsibly connected to the violator, "but clearly placed the burden of proof on the petitioner." The PO then concluded that Hart had:

failed to sustain that burden. The official file and testimony indicate that [Hart and McCoy] were officers and directors of M&M Banana Co., Inc. during the period material to these issues . . . and that M&M Banana Company, Inc., was a valid corporation . . . [and] that [Hart and McCoy] had an actual significant nexus with M&M Banana Co., Inc. during the period of April 1992 through February 1993.

Thereafter the Administrator of the AMS issued a final order on behalf of the Secretary affirming the PO's decision. Hart then filed her petition for review with this Court.

II. ANALYSIS

An officer, director, or holder of more than ten percent of the stock of a corporation licensed under the PACA is presumed, pursuant to § 499a(b)(9) of the PACA, to be "responsibly connected" to that corporation. 7 U.S.C. § 499a(b)(9). For many years the circuits were divided over whether the presumption of § 499a(b)(9) is irrebuttable, *see Birkenfeld v. U.S.*, 369 F.2d 491 (3d Cir. 1996); *Pupillo v. U.S.*, 755 F.2d 638 (8th Cir. 1985); *Faour v. USDA*, 985 F.2d 217 (5th Cir. 1993), or, as we held, rebuttable. *See Quinn v. Butz*, 510 F.2d, at 757. In 1995 the Congress amended § 499a(b)(9) to make it clear that the presumption is rebuttable:

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.

7 U.S.C. § 499a(b)(9), *as amended* by Pub. L. No. 104-408, § 12(a), 109 Stat. 430 (Nov. 15 1995).

Prior to the amendment of § 499a(b)(9) we held that an officer, director, or ten percent shareholder could rebut the presumption against her by showing either that the corporate violator is nothing more than the alter ego of its owner or that she was only a nominal officer, director, or shareholder of that corporation. *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). In order to prove that the corporation is the alter ego of its owner one must show that the owner so dominated the corporation as "to negate its separate personality." *Quinn*, 510 F.2d, at 758. In order to prove that one was only a nominal officer or director, one must establish that one lacked any "actual, significant nexus with the violating company" and, therefore, neither "knew [n]or should have known of the [c]ompany's misdeeds." *Minotta v. USDA*, 711 F.2d 406, 408-409 (D.C. Cir. 1983). *See Also Quinn*, 510 F.2d, at 756, n. 84 (observing that situation in which "the affiliation is purely nominal and the so-called officer had no powers at all" is "radically different" from one in which a genuine officer simply "does not use the powers of his office.")

Hart argues that the AMS failed to apply the correct legal standard when assessing the evidence and testimony that she offered in order to rebut the

presumption that she was responsibly connected to M&M. The PO, according to Hart, failed even to consider whether she proved that she was only a nominal officer because he applied the per se rule followed in other circuits. Hart maintains that the PO required her to show not merely that she was an officer and director on paper only, but rather that she was not an officer or director even on paper--contrary to the law of this circuit and, in light of the recent amendment to the PACA, contrary to the law of the land.

The AMS responds, first, that the Congress did not intend that the PACA amendment be applied retroactively; in the alternative, the AMS maintains that the PO fully conformed to the amendment because he afforded Hart the opportunity to rebut the presumption against her. For the same reason, the agency contends that the PO applied the law of this Circuit as stated in *Quinn*: Hart was given a hearing at which she was allowed to present her case. Hart's problem, according to the Government, is not that the PO applied the per se rule but that when he weighed the evidence he concluded that Hart had not rebutted the presumption against her.

We do not think the decision of the PO is as clear as either party would have us believe. In response to Hart's contention that she was but a nominal officer, the PO did no more than to note that "[t]he official file and testimony indicate that [Hart and McCoy] were officers and directors of M&M Banana Co., Inc. during the period material to these issues." This conclusory statement does not reveal whether the PO understood that Hart had the burden of proving only that she was a nominal officer and director, not the burden of proving that she was not even formally an officer and director. On remand, therefore, the PO should explain his reason for concluding--if he did so conclude--that Hart was more than a nominal officer or director of M&M.

We find the PO's determination that M&M was not the alter ego of its owner to be similarly lacking in reasoned analysis. In announcing his decision, the PO stated only that M&M "was a valid corporation, having been incorporated in 1956, and corporate records support that conclusion." This is not enough. Even a "valid corporation" may be so dominated by its principal shareholder as to lose its separate personality. *Bell*, 39 F.3d at 1201. Does M&M fit that description? The PO will have another opportunity not only to answer yea or nay but, more important, to say why.

III. CONCLUSION

The Presiding Officer did not adequately explain his determination that the petitioner failed to rebut the presumption that she was responsibly connected to

M&M Banana. We therefore grant the petition for review and remand this matter for the AMS to explain its decision.

BAMA TOMATO COMPANY v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 95-6778.

Decided May 29, 1997.

(Cite as: 112 F.3d 1542).

Violation of employment restriction - Responsible connection - License suspension.

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the Secretary which found that Petitioner violated the employment bar provision of the PACA, and suspended its license for thirty days. The court found that the employment bar provision of PACA is not unconstitutionally vague or overbroad; Petitioner was not entitled to challenge the Secretary's determination of responsible connection because the finding was not previously contested by the employee; and the thirty-day suspension imposed by the Secretary was warranted in law and fact.

Before BIRCH, BLACK and CARNES, Circuit Judges.

**UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

BIRCH, Circuit Judge:

In this appeal from a decision and order of the Secretary of Agriculture, we decide three issues related to the employment bar provision of the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. § 499h(b): (1) whether the employment bar provision is unconstitutionally vague and overbroad; (2) whether a licensed employer can challenge a previous determination that an employee is barred from employment by a licensee; and (3) whether a thirty-day suspension of the employer's license was legally warranted and factually justified. The Secretary, through a judicial officer, approved the administrative law judge's conclusion that Bama Tomato Company had violated the employment bar provision but increased the fourteen-day suspension imposed by the administrative law judge to a thirty-day suspension. We affirm.

I. BACKGROUND

The Secretary of Agriculture ("Secretary"), through a judicial officer, issued a decision and order in October 1992 in which he determined that Mims Produce, Inc. had failed to make full payment promptly to sellers and brokers as required by the Perishable Agricultural Commodities Act, 1930 ("PACA"), 7 U.S.C. §§ 499s. The judicial officer found repeated and flagrant violations of 7 U.S.C. § 499b and revoked the license of Mims Produce. Jimmy Mims ("Mims") subsequently was notified that the Secretary had determined him to be "responsibly connected"¹ with Mims Produce during the relevant violations. The United States Department of Agriculture ("USDA") further informed Mims that he was barred from employment in any capacity by another licensee until November 1993 and thereafter only with prior approval of the Secretary and the posting of a satisfactory bond.² Neither Jimmy Mims nor Mims Produce challenged these employment restrictions.³

In 1992, Mims began working for Bama Tomato Company ("Bama"), an Alabama produce dealer and a PACA licensee,⁴ as the supervisor of its repacking crew. In January 1993, the USDA first notified Bama that Mims could not

¹"Responsibly connected" is defined by statute as "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." 7 U.S.C. § 499a(b)(9).

²The parties agree that Mims was notified of his employment restrictions. The parties disagree, however, as to Mims' status as "responsibly connected." See 7 U.S.C. § 499a(b)(9). Although Mims was listed as a vice president and director of Mims Produce on license renewal applications, Mims contends that he was not responsibly connected with Mims Produce because it was run as a sole proprietorship by his father.

³In a notification letter dated May 1991, the USDA informed Mims that he was deemed to be a vice president and director of Mims Produce and that a disciplinary complaint was filed against the company. The letter further explained that he could be subject to employment restrictions because he was responsibly connected with the company but that he could challenge the determination within 30 days of receipt of the letter.

⁴Randy Griffin, the president of Bama, is Mims' cousin.

continue to be employed by Bama after February 1993.⁵ The parties stipulated that Bama removed Mims from the payroll but that, during the period from February 1993 until March 1994, he continued to work, at least sporadically, with Bama's repacking and shipping operations.⁶ Also during that period, Mims signed, in the absence of Bama's president, at least twenty-two checks for Bama and executed a lease renewal for Bama's business premises. In July 1994, the USDA filed a complaint against Bama, which alleged that bama was violating section 499h(b) by continuing to employ Jimmy Mims from February 1993 to March 1994.⁷

An administrative law judge ("ALJ") concluded that Bama had violated the employment bar provisions and assessed a fourteen-day suspension of Bama's license as a sanction for the violation. Although the ALJ noted that a thirty-day suspension would be appropriate, he considered several mitigating factors, including Bama's record as a financially responsible company and the effect of a suspension on Bama's employees, and reduced the suspension to fourteen days. The USDA appealed the ALJ's ruling to the Secretary and Bama cross-appealed. The Secretary, through a judicial officer, affirmed the ALJ's determination that Bama had violated section 499h(b) by continuing to employ Mims after notification that his employment was illegal.⁸ The judicial officer, however, rejected the ALJ's consideration of mitigating factors and increased Bama's

⁵In the letter of notification, the USDA provided a 30-day grace period for the last day that Jimmy Mims could be employed by Bama. The notification also addressed the status of Mims' brother, Michael Mims, as an officer, director, and 50-percent shareholder of Bama. Michael Mims subsequently sold his stock in Bama to Rebecca Mims, Jimmy Mims' wife. Since the Secretary does not argue that the stock transaction was inappropriate in view of Jimmy Mims' employment restriction, we do not address the issue here.

⁶Bama made unsuccessful efforts during that time to secure a bond that would allow Mims to work for the company after November 1993. Bama also claims that Randy Griffin repeatedly told Mims to leave the premises until his period of ineligibility was over.

⁷Before filing the complaint, the USDA sent a total of four notification letters to Bama informing Bama of the possibility that continuing to employ Mims could result in suspension or revocation of its license.

⁸The judicial officer noted that the ALJ incorrectly determined that the violation ended on November 8, 1993. Although Mims was eligible for employment by a licensee on November 8, 1993 with approval and a bond, Bama continued to employ Mims without approval or bond until March 4, 1994. Thus, the judicial officer determined the period of violation to be from February 1993 until March 1994.

suspension of thirty days.⁹ Bama appeals the decision and order of the judicial officer.

II. DISCUSSION

Congress enacted the PACA in 1930 to prevent unfair business practices and promote financial responsibility in the interstate commerce of shipping and handling of perishable agricultural commodities, like fresh fruits and vegetables. *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988, 990 (2d Cir. 1974). The statute requires that brokers and dealers be licensed by the Secretary, 7 U.S.C. §§ 499c-499d, and that licensees refrain from unfair business conduct, 7 U.S.C. § 499b(4). The PACA also provides a system of penalties for these violations. The Secretary may revoke or suspend the license of a licensee who fails to "make full payment promptly" for perishable shipments. 7 U.S.C. § 499b(4); *see* 7 U.S.C. § 499h(a). Furthermore, section 499h(b) empowers the Secretary to restrict employment within the industry of "any person who is or has been responsibly connected with" such a violator. "Employment" is defined broadly 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).

We uphold a USDA decision under the PACA unless we find the decision to be unconstitutional, arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 5 U.S.C. § 706(2). We uphold the USDA's factual findings if they are supported by substantial evidence. *See Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2015-16, 90 L.Ed.2d 445 (1986). 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, 217, 83 L.Ed. 126 (1938). We review legal issues *de novo* but "even in judgment." *Indiana Fed'n of Dentists*, 476 U.S. at 454, 106 S.Ct. at 2015.

Bama voices three challenges to the Secretary's decision. First, Bama contends that section 499h(b) is unconstitutional on its face. Second, Bama argues that Mims was not responsibly connected with Mims Produce and, therefore, should not be subject to employment restrictions. Third, Bama argues that the Secretary erred in ignoring mitigating factors and imposing a disproportionately

⁹The judicial officer based his decision to suspend Bama's license for 30 days on the numerous warnings that Bama received from the USDA, the duration of Bama's violative conduct, and the fact that Mims was employed by Bama during the period he was ineligible to work even with a bond. He further reasoned that considering hardship to the employees was inappropriate in view of the broader public interest in deterring future violations.

harsh sanction.

A. Constitutionality of the Employment Bar Provision

The employment bar provision of the PACA has survived numerous constitutional challenges. *See, e.g., Siegel v. Lyng*, 851 F.2d 412, 416-18 & n. 12 (D.C. Cir. 1988) (rejecting claims that the employment bar provision violates the Due Process Clause or the prohibition of bills of attainder); *Zwick v. Freeman*, 373 F.2d 110, 117-20 (2d Cir. 1967) (finding no violation of the Fifth Amendment right to earn a livelihood or the Eighth Amendment right to be free from cruel and unusual punishment and rejected the claim that the employment bar is a bill of attainder); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (finding no violation of the Due Process Clause when a person, falling within the statutory definition of "responsibly connected," is barred from employment without a hearing). *Bama*, however, raises an issue of first impression by alleging that the provision is unconstitutionally vague and overboard on its face. Specifically, *Bama* contends that the statutory definition of "employment" as "any affiliation" implicates First Amendment rights of free speech and association and should be found unconstitutional.

The Supreme Court set forth the proper analysis for such a facial challenge in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982):

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Id. at 494-95, 102 S.Ct. at 1191 (footnotes omitted). Thus, we first determine whether the employment bar provision reaches First Amendment rights.

To determine whether the employment bar provision reaches "a substantial amount of constitutionally protected activity," we consider both the ambiguous and unambiguous scope of the provision. *See id.* at 494 n. 6, 102 S. Ct., at 1191 n. 6. The Secretary argues that the provision does not implicate the First Amendment at all and instead regulates employment practices that are outside the reach of the First Amendment. The challenged provision defines "employment" as "any

affiliation . . . with the business operations of a licensee, with or without compensation, including ownership or self employment." 7 U.S.C. § 499a(b)(10) (emphasis added). Thus, employment and employment-like activity are unambiguously prohibited because they involve affiliation with "business operations." We find this unambiguous restriction to be constitutional. See *Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 512, 78 L.Ed. 940 (1934) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.").

Bama argues that the employment bar provision, because of its ambiguity, chills free speech and association because a licensee and a person who is barred from employment could be found to violate the provision by simply "affiliating"¹⁰ with each other.¹¹ In making this argument, Bama overlooks the language in the statute that restricts the definition of "employment" to "any affiliation . . . with the business operations of a licensee." 7 U.S.C. § 499a(b)(10) (emphasis added). "Any affiliation . . . with the business operations of a licensee" is less ambiguous than "any affiliation . . . with . . . a licensee," the language upon which Bama seems to base its argument. A person barred from employment could still affiliate with Bama and Bama employees so long as he did not affiliate himself with Bama's "business operations." The term "business operations," in laymen's terms means the day-to-day activities of a business. "Any affiliation . . . with the business operations of a licensee" could include owning the business, working for the business, managing the business, selling to the business, buying from the business, negotiating for the business, or consulting with the business--with or without compensation. Thus, based on the restrictive language of the provision, the definition of "employment" arguably extends as far as to cover the relationship between a customer and a licensee. Restricting affiliation with the business operations, even if such restriction includes customers of a business, does not implicate substantial First Amendment rights. Thus, we find employment bar provision fails to implicate "a substantial amount of constitutionally protected conduct" under the First Amendment. See *Village of Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. at 1191.

¹⁰A broad definition of "affiliate" is "to associate oneself." Random House Dictionary of the English Language 33 (2d ed. unabridged 1983).

¹¹Bama suggests that speech and association with family members and friends could be reached. For example, Bama contends that Mims might be found to be "affiliating" with Bama if he asked his cousin, Randy Griffin, at a family gathering, "How is business?" or if he visited Bama's business premises for social reasons.

Because we find that the employment bar provision fails to "reach[] a substantial amount of constitutionally protected conduct," *id.*, we summarily reject the overbreadth challenge and examine only Bama's vagueness challenge. Bama argues that the broad definition of employment as "any affiliation" is vague because it is unclear what type of activities are prohibited. A statute is vague if it fails to afford a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). Thus, "[v]ague laws are objectionable as transgressions of due process guarantees on two grounds: (1) they fail to provide fair warning to citizens charged with their observance, and (2) by failing to provide clear guidelines, they led themselves to arbitrary applications by those charged with their enforcement." *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 n. 8 (5th Cir. 1980) (citing *Grayned*, 408 U.S., at 108-09, 92 S. Ct., at 2298-99). Were "employment" defined as merely "any affiliation with a licensee," it indeed might have been too vague to put licensees on notice as to prohibited conduct or to provide sufficient direction to the USDA; however, the statutory definition, "any affiliation . . . with the business operations of a licensee," refers to an actual involvement with those operations. Restricting such involvement is a clear application of the statute. Consequently, we cannot say that the employment bar provision "is impermissibly vague in all of its applications," *Village of Hoffman Estates*, 455 U.S. at 495, 102 S. Ct. at 1191.

We further note that, in the absence of the implication of constitutionally protected conduct, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it [facially] for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L.Ed.2d 439 (1974). We find that the definition of "employment" is sufficiently precise to preclude the type of activities that Mims performed at Bama—including working in the repacking operation and signing business checks and leases. Because Mims' activities fall squarely within the conduct precluded by the statute and because the employment bar is not vague in all its applications, we reject Bama's vagueness of the employment bar provision of the PACA.

B. Challenge of Mims' Status as "Responsibly Connected" with Mims Produce

The Secretary had determined previously that Mims Produce violated the PACA and that Mims, as a vice president and director, was "responsibly connected" with the company. "Responsibly connected" is defined as "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." 7 U.S.C. § 499a(b)(9). Bama contends that Mims should not be barred from its employment because he was not "responsibly connected" with Mims Produce. In support of this conclusion, Bama points to case law from the District of Columbia Circuit which holds that a director's status as "responsibly connected" can be rebutted if he shows that he had only a nominal role in the operations of the business.¹² See, e.g., *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983). The circuits have split, however, on whether the statutory definition of "responsibly connected," as it existed prior to the 1996 amendment, was a per se rule or a rebuttable presumption. Compare, e.g., *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (allowing a person to prove that he was not at fault or in control of those at fault to avoid the employment bar provision) with *Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985) (holding that the statutory definition of "responsibly connected" provided a per se rule). We need not reach the issue here, however, because neither Mims nor Mims Produce previously challenged the Secretary's conclusion that Mims was "responsibly connected," despite the notification sent by the USDA to Mims which indicated that he could raise such a challenge. Mims, therefore, waived his right to contest the issue of whether he was responsibly connected to Mims Produce by failing to challenge directly the determination. See *Farley and Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 969 (9th Cir. 1991) (holding that failure to respond to notices from the USDA constitutes a waiver of the right to a hearing to contest the issue of whether a person is responsibly connected with a PACA violator). Thus, Bama cannot step into Mims' shoes and challenge the final determination that Mims is subject to the employment bar provisions of the PACA.

C. Challenge of the Imposed Sanctions

Bama also argues that the Secretary erred in increasing the period of suspension from fourteen days to thirty days. "[W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy," however, our review is limited. *Butz v. Glover Livestock*

¹²Bama also points to section 499a(b)(9), as amended in 1996, in support of the argument that status as an officer or director does not render an individual per se "responsibly connected." 7 U.S.C.A. § 499a(b)(9) (Supp. 1997) (requiring that a "responsibly connected" person have active involvement in the PACA violations and status as more than a nominal officer, director, or shareholder). The definition of "responsibly connected" was amended after the violations of both Mims Produce and Bama and is not controlling in this case.

Comm'n Co., 411 U.S. 182, 185, 93 S. Ct. 1455, 1458, 36 L.Ed.2d 142 (1973) (internal quotation marks omitted). "We cannot disturb the action of the Secretary, as accomplished through the judicial officer, so long as the proceedings were properly conducted in accordance with constitutional and statutory standards, unless the judgment is 'unwarranted in law or . . . without justification in fact.'"¹³ *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (quoting *Glover Livestock*, 411 U.S. at 185-86, 93 S. Ct. at 1458).

A thirty-day suspension for violation of the employment bar provision is warranted under section 499h(b) of the PACA.¹⁴ In fact, even revocation of Bama's license would have been warranted in law. See 7 U.S.C. § 499h(b) ("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."). Because we find that the suspension imposed by the Secretary was warranted in law, we turn to whether the facts of this case justified a thirty-day suspension.

The ALJ took into account several mitigating factors when he imposed a reduced suspension of fourteen days. Specifically, the ALJ considered Bama's record as a financially responsible company and the effect of a suspension on Bama's employees. The judicial officer considered the same factors and explicitly rejected them. Instead, the judicial officer considered the duration of the violation,¹⁵ the numerous warnings that Bama received, and the fact that Mims worked for Bama during the period of time when he was ineligible to work, even with approval and a bond. The judicial officer also rejected explicitly Bama's contention that it had made numerous efforts to prevent Mims from continuing to work during the period of violation.

Bama contends that the judicial officer erred in failing to give weight to the mitigating factors considered by the ALJ and in failing to consider other factors, including Bama's efforts to prevent Mims' employment and the sporadic nature of

¹³Since Bama does not challenge the nature of the proceedings, we examine only whether the sanctions were warranted in law or justified in fact.

¹⁴We dismiss without discussion Bama's contention that the judicial officer erroneously imposed the "strict sanction" policy which had been rejected previously by the agency. The judicial officer sufficiently addressed the sanction policy in his opinion and we defer to his interpretation of agency policy.

¹⁵The judicial officer determined that the period of violation was four months longer than the ALJ had originally determined it to be.

Mims' presence at Bama during the period of alleged violation.¹⁶ We disagree. "Although the Secretary could permissibly have given weight to these factors, we think it clear that their presence cannot preclude a [thirty-] day suspension." *Maine Potato Growers, Inc. v. Butz*, 540 F.2d 518, 524 (1st Cir. 1976). Thus, we find that the thirty-day suspension is warranted in law and justified by the facts of the case.

III. CONCLUSION

In this appeal from a decision and order of the Secretary of Agriculture, Bama challenges the constitutionality of the employment bar provision of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499h(b), and further contends that the Secretary erred in applying the provision to Bama and in suspending Bama for thirty days. We determine that the statutory definition of "employment" does not implicate substantial constitutional rights and is neither vague nor overbroad. We also decide that Bama is barred from challenging the previous determination that Mims was "responsibly connected" with Mims Produce, and, therefore, the Secretary properly applied the employment bar provision to Bama. Furthermore, we find that the thirty-day suspension was warranted in law and justified by the facts of the case. We AFFIRM.

¹⁶Bama also argues that the judicial officer should have taken into consideration that Mims was not "responsibly connected" with Mims Produce. As discussed previously in this opinion, we find that Bama cannot challenge Mims status as "responsibly connected." Thus, we need not address this argument in the context of the appropriateness of the sanction. In addition, Bama argues that a suspension of Bama is inconsistent with PACA's goal of promoting financial responsibility because the suspension will harm an otherwise financially responsible, company. We reject this argument in view of policy concerns that financially responsible companies would be encouraged to ignore the strict employment bar provision of the PACA if they were exempt from suspension.

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEPARTMENTAL DECISIONS****In re: FIVE STAR FOOD DISTRIBUTORS, INC.****PACA Docket No. D-96-0521.****Decision and Order filed January 23, 1997.****Default — Admissions — Official notice of bankruptcy petition - Willful, flagrant, and repeated violations — Publication of facts and circumstances.**

The Judicial Officer affirmed Judge Baker's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. The ALJ's taking of official notice of documents Respondent filed in a bankruptcy proceeding is in accord with the Administrative Procedure Act, (5 U.S.C. § 556(e)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(6)); the Rules of Practice, (7 C.F.R. § 1.145(i)), require the Judicial Officer to rule on appeals, upon the basis of and after due consideration of the record and any matter of which official notice is taken; and documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings. Respondent has had ample time to obtain documents for its defense and the recent illness of one of Respondent's employees, who is knowledgeable of the documents, is not a basis for setting aside the ALJ's decision and remanding the matter to the ALJ for further proceedings. Publication of the facts and circumstances of a violation of 7 U.S.C. § 499b is not dependent on finding that the violation was willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over 11 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

Jane McCavitt, for Complainant.

Constantine N. Kangles, Chicago, IL, for Respondent.

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

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

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service (hereinafter Complainant), instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48); 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 Complaint on March 21, 1996.

The Complaint alleges, *inter alia*, that: (1) on May 26, 1995, Five Star Food Distributors, Inc. (hereinafter Respondent), filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code, (11 U.S.C. §§ 1100-1174), in the United States Bankruptcy Court for the Northern District of Illinois, which case was

converted to a proceeding under Chapter 7 of the Bankruptcy Code on June 21, 1995, (Complaint at 2, ¶ III); and (2) during the period May 1994 through March 1995, Respondent failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of \$238,374.08, which Respondent purchased, received, and accepted in interstate commerce, (Complaint at 3-9, ¶¶ IV, V).

Respondent filed an Answer on July 5, 1996: (1) admitting that it filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code and converted the voluntary petition to a proceeding under Chapter 7 of the Bankruptcy Code, (Answer ¶ III); and (2) denying that it failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of \$238,374.08, which Respondent purchased, received, and accepted in interstate commerce, (Answer ¶¶ I, IV, V).

On October 1, 1996, Complainant filed a Request for Official Notice to be taken of the pleadings filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); a Motion for a Decision Based Upon Admissions; a Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision; and a Proposed Decision Without Hearing by Reason of Admissions. Respondent did not file any response to Complainant's October 1, 1996, filings. On November 7, 1996, Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision Without Hearing by Reason of Admissions in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), in which the ALJ: took official notice of documents filed by Respondent in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); found that Respondent admitted in the documents it filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995) that Respondent owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full; found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)); and ordered the publication of the facts and circumstances of the violation. (Decision Without Hearing by Reason of Admissions at 1-3.)

On December 6, 1996, 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.)^{*} On December 26, 1996, Complainant filed Complainant's Objection to Respondent's Plea to Reopen, Continue for 35 Days, or Stand as Respondent's Appeal (hereinafter Complainant's Response). On December 26, 1996, 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 ALJ's Decision Without Hearing by Reason of Admissions as the final Decision and Order. Additions or changes to the Decision Without Hearing by Reason of Admissions 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.

Applicable 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

^{*}The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

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[.] . . .

7 U.S.C. § 499b(4).

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. § 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 [PACA] shall have the same meaning as stated therein. Unless otherwise defined, the following terms

whether used in the regulations, in the [PACA], or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for purpose of determining violations of the [PACA], means:

....

(5) 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).

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

... [T]he Complaint [alleges] that during the period of May 1994 through March 1995, Respondent purchased, received, and accepted, in interstate commerce from 14 sellers, 174 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$238,374.08. The Complaint also [alleges] that on May 26, 1995, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Northern District of Illinois pursuant to Chapter 11 of the Bankruptcy Code, (11 U.S.C. §[§] 1100[-1174]).

A copy of the Complaint was served upon Respondent, which filed an Answer in which [Respondent] admit[s] filing for bankruptcy but denie[s] that it had failed to make full payment promptly as alleged in the Complaint. Complainant . . . has filed a motion for a decision based upon Respondent's admission in its bankruptcy pleadings¹. Respondent has admitted in documents filed in connection with its Chapter 11 Bankruptcy proceeding entitled *Schedule D - Creditors Holding Secured Claims, Schedule F - Creditors Holding Unsecured*

¹Official notice is taken of the pleadings filed by Respondent in . . . [*In re Five Star Food Distributors, Inc.*,] No. 95-10746 [(Bankr. N.D. Ill. filed May 26, 1995)].

Nonpriority Claims and List of Creditors Holding 20 Largest Unsecured Claims that it owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full. . . . Therefore, upon the motion of the Complainant for the issuance of an order based upon admissions, [this] 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, Five Star Food Distributors, Inc., is a corporation organized and existing under the laws of the State of Illinois. Its business mailing address is [REDACTED], Illinois [REDACTED].

2. Pursuant to the licensing provisions of the PACA, license number [REDACTED] was issued to Respondent on August 7, 1985. This license was suspended May 3, 1995, . . . and was terminated on August 7, 1995, 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 May 26, 1995, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code, (11 U.S.C. §§ 1100[-1174]), in the United States Bankruptcy Court for the Northern District of Illinois. The case was converted to a [proceeding under] Chapter 7 [of the Bankruptcy Code] on June 21, 1995.

4. As more fully set forth in paragraph IV of the Complaint, Respondent, during the period May 1994 through March 1995, failed to make full payment promptly to 14 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$238,374.08 for 174 lots of perishable agricultural commodities, which [Respondent] purchased, received, and accepted in interstate commerce.

Conclusions [of Law]

Respondent's failure to make full payment promptly with respect to the transactions [referenced] in Finding of Fact No. 4, [supra], constitutes willful, repeated, and flagrant violations of section 2[(4)] of the [PACA], (7 U.S.C. § 499b[(4)]), for which the Order [in this Decision and Order] is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent asserts in Respondent's Plea to Reopen, Continue for 35 Days, or Stand as Respondent's Appeal (hereinafter Respondent's Appeal Petition) that:

1. The allegations are that through a period of May, 1994 through to March, 1995, [R]espondent purchased from the sellers perishable agricultural commodities and failed to make payment therefor. These allegations are not true, inasmuch as [R]espondent, during the period of May, 1994 and prior thereto and through to March, 1995, the period alleged, purchased items on suppliers' terms and paid for them. The agreement between [R]espondent and the suppliers was that purchases by [R]espondent were to be made on a COD basis or payment on delivery. The payments were made by check, except when credit was extended, and by reason of the bankruptcy, the records of the [R]espondent were placed with the Trustee Bankruptcy Court and on various occasions produced and left with various Courts on subpoenas.

To make matters more difficult John Zois, who is knowledgeable as to these transactions, has been seriously ill and even just recently has in October, November and on December 4, 1996 been hospitalized or admitted to emergency treatment by at least the Christ Hospital and Silver Cross Hospital and Silver Cross Emergency Room. On December 3, 1996 we learned through an aid of the Bankruptcy Court Trustee that the checks and documents we had been looking for covering this period were in the hands of an auditing branch in a] near suburb and would be made available to us. Unfortunately, however, John Zois has been unavailable for the examination and duplication of these records.

Respondent's Appeal Petition ¶ 1.

Respondent requests that:

[T]he [Decision Without Hearing by Reason of Admissions] entered herein not become final, that it be withdrawn, and that this [R]espondent be granted a period of 35 days to enable John Zois or some substitute party to examine these newly discovered records and to file documents and affidavits in support of [R]espondent's position. Respondent further requests and in the event that [R]espondent's request is denied, that [R]espondent be granted a period of 35 days to file pleadings supported by affidavit to reopen these proceedings. In the event all requests of [R]espondent are denied, then [R]espondent asks that these allegations be construed and held to be [R]espondent's appeal.

Respondent's Appeal Petition at unnumbered last page.

While I sympathize with Mr. Zois, the difficulty his illness has recently caused Respondent with respect to its quest to obtain documents related to this case is not a sufficient basis for setting aside the ALJ's Decision Without Hearing by Reason of Admissions and remanding the case to the ALJ for further proceedings, or in any way delaying this proceeding. The record reveals that, since April 1996, Respondent has perceived a need for and has known of the approximate location of the checks and documents which Respondent asserts could now be examined and duplicated but for Mr. Zois' unavailability due to his illness. (Respondent's Appeal Petition ¶ 1.)

Respondent was served with the Complaint in this proceeding on April 4, 1996. (April 4, 1996, Memorandum to File from Joyce A. Dawson.) On April 22, 1996, Respondent requested a 45-day extension of time within which to file its Answer, based on Respondent's need "to obtain information from the Bankruptcy Trustee and from the former accountant of Five Star Food Distributors Inc." (April 22, 1996, filings by John Zois, George Zois, and Perry Zois.) Chief Administrative Law Judge Victor W. Palmer granted Respondent an extension to June 7, 1996, to file its Answer, a 44-day extension of time. (Extension of Time filed April 24, 1996.)

On June 7, 1996, Constantine N. Kangles of the Law Offices of Constantine N. Kangles, Ltd., filed a request for an additional 60 days in which to file an Answer on behalf of Respondent. (June 7, 1996, filing by Constantine N. Kangles.) Constantine Kangles explained the basis for this second request for an extension of time to file an Answer on behalf of Respondent, as follows:

... [W]e ... have commenced a review of such documents as are presently available. We have similarly contacted Trustee Newman of the United States Bankruptcy Court concerning documents in his possession that are of evidentiary importance. The Trustee has indicated that it would be difficult to prepare copies of these documents but might allow one of our attorneys the opportunity to review these documents and to make copies of relevant documentation. We have been further advised a prior extension had been requested by the individual parties, and we hasten to advise the Department of our position and of our request for a period of time to review some 10 years of records, encompassing the dealings of these various parties, as well as the factual position of each of these parties and their acts or actions with regard to the matters in question.

Accordingly, we most respectfully request we be granted a period of 60 days in which to assemble our documentation and prepare a formal response to the Department's allegations

Respondent's June 7, 1996, filing at 1.

The ALJ granted Respondent an extension to July 5, 1996, to file its Answer, a 28-day extension of time. (Time Extended to Answer filed June 14, 1996.) On July 5, 1996, Respondent filed an Answer attached to which is a letter from Respondent's counsel which states:

July 2, 1996

United States Department of Agriculture
Office of the Hearing Clerk
Room 1081, South Building
Washington, D.C. 20250-9200

RE: FIVE STAR FOOD DISTRIBUTORS, INC.,
Respondent
PACA Docket No. D-96-521

Attn: Dorothea A. Baker
Administrative Law Judge

Dear Ms. Baker:

We are enclosing herewith the reply of [R]espondent.

....

We also request all hearings hereon be held in your Chicago office, which is the location of the sellers, the [R]espondent, the Bankruptcy Trustee, his store of [R]espondent's company records and all interested parties.

July 2, 1996, letter from Constantine N. Kangles to Office of the Hearing Clerk.

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 adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . .

7 C.F.R. § 1.139.

On October 1, 1996, Complainant filed a Motion for a Decision Based Upon Admissions, a Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision, a Proposed Decision Without Hearing by Reason of Admissions, and a Request for Official Notice. Complainant requested that the ALJ take official notice of the pleadings² filed in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), and asserted that Respondent admits in documents, which it filed in the bankruptcy proceeding, that it owes more than the \$238,374.08 alleged in the Complaint as being past due and unpaid to 14 sellers from whom Respondent purchased but failed to pay for produce during the period May 1994 through March 1995. (Request for Official Notice at 1; Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision at 2-3.) Complainant compared the amounts alleged to be owed to 14 sellers of perishable agricultural commodities in paragraph IV of the Complaint to amounts Respondent admits to owing these same 14 sellers in documents Respondent filed in *In re Five Star*

²While Complainant requested that the ALJ take official notice of "the pleadings" in *In re Five Star Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995), Complainant requested in particular that the ALJ take official notice of the following documents, copies of which Complainant attached to Complainant's Request for Official Notice: (1) Voluntary Petition Under Chapter 11; (2) Summary of Schedules; (3) List of Creditors Holding 20 Largest Unsecured Claims; (4) Schedule B, Personal Property; (5) Schedule D, Creditors Holding Secured Claims; (6) Schedule E, Creditors Holding Unsecured Priority Claims; and (7) Schedule F, Creditors Holding Unsecured Nonpriority Claims. (Complainant's Request for Official Notice at 1, and attachments.)

Distributors, Inc., No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), as follows:

Seller	Complaint	Bankruptcy
Garnand Mktg, Inc.	\$ 27,727.60	\$ 27,727.60
Miles Produce, Inc.	6,010.00	6,010.00
Mandolini Co	11,185.00	11,105.50
Anthony Marano Co.	27,477.55	28,191.55
Vitro & Pecararo Co., Inc.	16,688.75	18,893.70
Art Kramer's Produce	28,459.00	28,459.35
Ucon Produce	15,736.25	15,736.25
Michael J. Navilio, Inc.	7,265.12	7,265.12
Rancho Del Sol	6,456.20	6,618.20
Chapman Fruit Co., Inc.	6,004.75	6,004.75
Victory Spud Service, Inc.	13,038.40	35,305.90
Andershock's Fruitland, Inc	4,887.00	4,887.00
Strube Celery & Vegetable Co.	40,398.16	40,398.16
C.H. Robinson Co.	<u>27,049.30</u>	<u>27,526.05</u>
	\$238,374.08	\$264,129.13

Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision at 3.

A copy of Complainant's Motion for Decision Based Upon Admissions, a copy of Complainant's Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision, a copy of Complainant's Proposed Decision Without Hearing by Reason of Admissions, and a letter dated October 2, 1996, from the Office of the Hearing Clerk, were served on Respondent by certified mail on October 11, 1996. The October 2, 1996, letter from the Office of the Hearing Clerk states, as follows:

October 2, 1996

Ms. Constantine N. Kangles
Attorney at Law

████████████████████
████████████████████
████████████████████, Illinois ██████████

Dear Ms. Kangles:

**Subject: In re: Five Star Distributors, Inc., Respondent -
PACA Docket No. D-96-0521**

Enclosed is a copy of Complainant's Motion for a Decision Based Upon Admissions, together with a copy of the Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision and the Proposed Decision, 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.

October 2, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Constantine N. Kangles.

Respondent failed to file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions within 20 days, as provided in 7 C.F.R. § 1.139.

On November 7, 1996, the ALJ filed a Decision Without Hearing by Reason of Admissions in which the ALJ took official notice of documents filed by Respondent in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995). (Decision Without Hearing by Reason of Admissions at 2 n.1). The ALJ found that Respondent admits, in the documents which it filed in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full.

Official notice is authorized by the Administrative Procedure Act and the Rules of Practice. The Administrative Procedure Act provides, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(e) . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show to the contrary.

5 U.S.C. § 556(e)

Sections 1.141(h)(6) and 1.145(i) of the Rules of Practice provide:

§ 1.141 Procedure for hearing.

....

(h) *Evidence.*

....

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

....

§ 1.145 Appeal to Judicial Officer.

....

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. . . .

7 C.F.R. § § 1.141(h)(6), .145(i).

Federal courts may take judicial notice of proceedings in other courts if those

proceedings have a direct relation to matters at issue.³ Therefore, under section 1.141(h)(6) of the Rules of Practice, (7 C.F.R. § 1.141(h)(6)), an ALJ presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Moreover, under section 1.145(i) of the Rules of Practice, (7 C.F.R. § 1.145(i)), the Judicial Officer shall rule on any appeal on the basis of and after due consideration of any matter of which official notice is taken, as well as the record of the proceeding. Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.⁴

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,⁵ Respondent has shown no

³ *Conforti v. United States*, 74 F.3d 838, 840 (8th Cir.), cert. denied, 117 S.Ct. 49 (1996); *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), cert. denied, 116 S.Ct. 1549 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *United States v. Hope*, 906 F.2d 254, 260-61 n.1 (7th Cir. 1990), cert. denied, 499 U.S. 983 (1991); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *E.I. Du Pont De Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984) (per curiam); *Hart v. Commissioner*, 730 F.2d 1206, 1207-08 n.4 (8th Cir. 1984) (per curiam); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), cert. denied, 461 U.S. 960 (1983); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), cert. denied, 449 U.S. 996 (1980); *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969), cert. denied, 397 U.S. 1065 (1970); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947).

⁴ *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), printed in 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), appeal dismissed, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd* and remanded, 832 F.2d 601 (D.C. Cir. 1987), remanded, 47 Agric. Dec. 1486 (1988), final decision, 48 Agric. Dec. 595 (1989).

⁵ *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. ____ (Nov. 21, 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

basis for setting aside the Decision Without Hearing by Reason of Admissions here. The record clearly establishes that the documents filed by Respondent in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995) were properly noticed by the ALJ and that Respondent admits in those documents that it owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full.

The Rules of Practice, a copy of which was served on Respondent on April 4, 1996, and the Office of the Hearing Clerk's October 2, 1996, letter clearly provide that Respondent must file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions within 20 days. (7 C.F.R. § 1.139.) Respondent had ample opportunity during this 20-day period to file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions and to show that the facts to be noticed are erroneous. Moreover, Respondent has had ample opportunity to obtain the documents that Respondent has asserted since its first filing in this proceeding, April 22, 1996, would show that the allegations in paragraph IV of the Complaint are not true. In view of Respondent's admissions in the documents which it filed in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), there is no material issue of fact that warrants holding a hearing. Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.⁶ The same order would be issued in this case

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. Dec. 1254 (1981).

⁶The Complaint alleges that Respondent failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of \$238,374.08, which Respondent purchased, received, and accepted in interstate commerce. (Complaint ¶ IV.) Respondent admits in its bankruptcy filings that it owes these same 14 sellers \$264,129.13. Respondent admits in its bankruptcy filings that it owes the same amount as alleged in paragraph IV of the Complaint to seven of these sellers: Garnand Marketing, Inc.; Miles Produce, Inc.; Ucon Produce; Michael J. Navilio, Inc.; Chapman Fruit Co., Inc.; Andershock's Fruitland, Inc.; and Strube Celery & Vegetable Co. Respondent asserts in its bankruptcy filings that it owes more than the amount alleged in paragraph IV of the Complaint to six of these sellers: Anthony Marano Co.; Vitro & Pecararo Co., Inc.; Art Kramer's Produce; Rancho Del Sol; Victory Spud Service, Inc.; and C.H. Robinson Co. Respondent asserts in its bankruptcy filings that it owes \$79.50 less than the amount alleged in paragraph IV of the Complaint

unless the proven violations are *de minimis*.⁷

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. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.⁸

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 Respondent's violations of 7 U.S.C. § 499b(4) were willful.

Since Respondent violated express requirements of the PACA, (7 U.S.C. § 499b), by failing to make full payment for perishable agricultural commodities promptly, the ALJ's finding of willfulness is correct. See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *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.*, *supra*, 52 Agric. Dec. at 1612; *In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 643-53.

(\$11,185) to Mandolini Co. (Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision at 3.)

⁷ *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).

⁸ See, e.g., *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); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967) (concluding that because the 295 violations 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 over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ____ (Nov. 15, 1996) (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)); 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)); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ____ (Sept. 12, 1996) (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)).

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. *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), reprinted in 50 Agric. Dec. 14 (1991), cert. denied, 502 U.S. 560 (1991); *Finer Foods Sales Co. v. Block*, supra, 708 F.2d at 777-78; *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 Havana Potatoes of New York Corp.*, supra, slip op. at 16; *In re Andershock Fruitland, Inc.*, supra, slip op at 36; *In re Hogan Distrib., Inc.*, supra, 55 Agric. Dec. at 626; *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, supra, 54 Agric. Dec. at 1378; *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), aff'd, No. 95-3552 (8th Cir. Jan. 7, 1997); *In re National Produce Co.*, supra, 53 Agric. Dec. at 1625; *In re Samuel S. Napolitano Produce, Inc.*, supra, 52 Agric. Dec. at 1612.⁹ 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 '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.'").

Respondent failed to make full payment of the agreed purchase prices promptly to 14 sellers for 174 lots of perishable agricultural commodities in the total amount of \$238,374.08, which Respondent had purchased, received, and

⁹The 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. *Capitol 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 would still be willful in view of Respondent's gross neglect of the express provisions of the PACA known by Respondent to require prompt payment.

accepted in interstate commerce. These failures to pay took place over the period May 1994 through March 1995, a period of 11 months.

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions 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 an 11-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. It 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. *In re Hogan Distrib., Inc., supra*, 55 Agric. Dec. at 630; *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).

Accordingly, the Decision Without Hearing by Reason of Admissions was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its 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 Respondent to present matters by way of defense at this time.

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

Order

Respondent has 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.

In re: FIVE STAR FOOD DISTRIBUTORS, INC.**PACA Docket No. D-96-0521.****Order Denying Petition for Reconsideration filed March 19, 1997.****Admissions — Official notice of bankruptcy petition — Publication of facts and circumstances.**

The Judicial Officer denied Respondent's Petition for Reconsideration. Respondent has had approximately 11 months to obtain documents for its defense and there is no basis for providing Respondent with an additional 20 days within which to submit records which Respondent believes will show that Respondent did not violate the PACA. Respondent admits in documents that it filed in a bankruptcy proceeding, *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least \$238,374.08 to the 14 produce sellers which Complainant alleges Respondent has failed to pay promptly and in full, in accordance with the PACA. Respondent has provided no basis for its contention, which it makes for the first time in its Petition for Reconsideration, that its bankruptcy filings are false.

Jane McCavitt, for Complainant.

Constantine N. Kangles, Chicago, IL, for Respondent.

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

Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service (hereinafter Complainant), instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48); 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 Complaint on March 21, 1996.

The Complaint alleges, *inter alia*, that: (1) on May 26, 1995, Five Star Food Distributors, Inc. (hereinafter Respondent), filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100-1174) in the United States Bankruptcy Court for the Northern District of Illinois, which case was converted to a proceeding under Chapter 7 of the Bankruptcy Code on June 21, 1995 (Complaint ¶ III); and (2) during the period May 1994 through March 1995, Respondent failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of \$238,374.08, which Respondent purchased, received, and accepted in interstate commerce (Complaint ¶¶ IV, V).

Respondent filed an Answer on July 5, 1996: (1) admitting that it filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code and converted the voluntary petition to a proceeding under Chapter 7 of the Bankruptcy Code (Answer ¶ III); and (2) denying that it failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of \$238,374.08, which Respondent purchased,

received, and accepted in interstate commerce (Answer ¶¶ I, IV, V).

On October 1, 1996, Complainant filed a Request for Official Notice to be taken of the pleadings filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); a Motion for a Decision Based Upon Admissions; a Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision; and a Proposed Decision Without Hearing by Reason of Admissions. Respondent did not file any response to Complainant's October 1, 1996, filings. On November 7, 1996, Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision Without Hearing by Reason of Admissions in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in which the ALJ: took official notice of documents filed by Respondent in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); found that Respondent admitted in the documents it filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995) that Respondent owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full; found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and ordered the publication of the facts and circumstances of the violation (Decision Without Hearing by Reason of Admissions at 1-3).

On December 6, 1996, 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 December 26, 1996, Complainant filed Complainant's Objection to Respondent's Plea to Reopen, Continue for 35 Days, or Stand as Respondent's Appeal (hereinafter Complainant's Response). On December 26, 1996, the case was referred to the Judicial Officer for decision. On January 23, 1997, I issued a Decision and Order adopting the ALJ's Decision Without Hearing by Reason of Admissions. *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___ (Jan. 23, 1997). On February 12, 1997, Respondent filed a Petition for Reconsideration, and on March 7, 1997, Complainant filed Objection to Respondent's Petition for Reconsideration. On March 10, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent raises two issues in its Petition for Reconsideration. First,

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Respondent asserts that it has located "a good portion of all of the raw records substantiating [Respondent's] position" that Respondent did not violate the PACA as alleged in the Complaint, and Respondent requests 20 days to document fully that Respondent did not violate the PACA (Respondent's Petition for Reconsideration ¶¶ 1-3, 5).

As fully discussed in the Decision and Order, since April 1996, Respondent has perceived a need for, and has known of, the approximate location of the records which Respondent contends will show that it did not violate the PACA. *In re Five Star Distributors, Inc.*, *supra*, slip op. at 7-10. Respondent has had approximately 11 months in which to locate and submit the records which Respondent believes will show that it did not violate the PACA. I find no basis in Respondent's Petition for Reconsideration for providing Respondent with an additional 20 days within which to submit records which Respondent believes will show that it did not violate the PACA.

Second, Respondent contends that its admissions in documents which Respondent filed in *In re Five Star Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995) are "in fact false" (Respondent's Petition for Reconsideration ¶ 4).

Respondent admitted in its Answer that it filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100-1174) and converted the voluntary petition to a proceeding under Chapter 7 of the Bankruptcy Code (Answer ¶ III). Respondent admits in documents filed in connection with Respondent's Chapter 11 Bankruptcy proceeding entitled *Schedule D - Creditors Holding Secured Claims, Schedule F - Creditors Holding Unsecured Nonpriority Claims and List of Creditors Holding 20 Largest Unsecured Claims* that it owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full, in violation of the PACA.

On October 1, 1996, Complainant filed a request that the ALJ take official notice of the pleadings filed in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995) (Request for Official Notice at 1). A copy of Complainant's Motion for Decision Based Upon Admissions, a copy of Complainant's Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision, and a copy of Complainant's Proposed Decision Without Hearing by Reason of Admissions were served on Respondent by certified mail on October 11, 1996. In accordance with the Rules of Practice (7 C.F.R. §1.139), Respondent was given 20 days within which to file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions. Respondent did not file any objection, and on November 7, 1996, the ALJ filed a

Decision Without Hearing by Reason of Admissions in which the ALJ took official notice of documents filed by Respondent in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995) (Decision Without Hearing by Reason of Admissions at 2 n.1). The ALJ found that Respondent admits, in the documents which it filed in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least \$238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full.

Respondent appealed the ALJ's Decision Without Hearing By Reason of Admissions, but did not indicate in its appeal that the documents that it filed in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995) are false. Further, Respondent's president, John Zois, signed many of the documents filed in the bankruptcy petition under penalty of perjury, including a declaration, under penalty of perjury, that he had read the Summary and Schedules filed in the bankruptcy proceeding and that they are correct to the best of his information and belief (Complainant's Objection to Respondent's Petition for Reconsideration, attachments). Moreover, Respondent has offered nothing in its Petition for Reconsideration to support its assertion that its bankruptcy filings are false. Under these circumstances, I find no basis for finding that Respondent's admissions in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), are false.

For the foregoing reasons and the reasons set forth in the Decision and Order filed January 23, 1997, *In re Five Star Distributors, Inc.*, *supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.² Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on January 23, 1997. Therefore, since Respondent's Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Order in the Decision and Order filed January 23, 1997, is reinstated, with allowance for time passed, as follows:

²*In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ____, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. ____, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ____, slip op. at 1 (Oct. 29, 1996) (Order Denying Petition for Reconsideration).

Order

Respondent has 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.

This Order shall take effect 30 days after service of this Order Denying Petition for Reconsideration on Respondent.

In re: RUMA FRUIT AND PRODUCE CO., INC.

PACA Docket No. D-94-0565.

Decision and Order on Remand filed February 6, 1997.

Suspension of license — Civil penalties.

The Judicial Officer affirmed Judge Baker's (ALJ) decision assessing Respondent a civil penalty of \$12,400 or in lieu thereof imposing a 45-day suspension of Respondent's PACA license. For the reasons set forth in *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 642 (1996), the record supports the conclusion that Respondent willfully violated 7 U.S.C. § 499h(b) and the suspension of Respondent's PACA license for 45 days. Section 8(e) of the PACA (7 U.S.C. § 499h(e)) authorizes the assessment of a civil penalty in lieu of a license suspension or license revocation. When determining the amount of the civil penalty, the size of the business, the number of employees, and the seriousness, nature, and amount of the violation must be given due consideration. The violator's net profits, ability of the violator to pay the civil penalty, and ability of the violator to continue to conduct business after the civil penalty is assessed are not required to be considered when determining the amount of the civil penalty. Respondent's request that the parties be required to mediate an agreement to a payment plan is denied.

Andrew Y. Stanton, for Complainant.

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

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

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

The Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this disciplinary 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); 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 Complaint on August 25, 1994.

The Complaint alleges that Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), by employing Mr. Dean W. Hopkins from November 23, 1993, through March 7,

1994, without posting a surety bond meeting the approval of the Secretary, and requests the suspension of Respondent's PACA license for 45 days as a result of Respondent's willful violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)). (Complaint at 3-4.)

On September 16, 1994, Respondent filed an Answer in which it denied violating section 8(b) of the PACA and asserted several affirmative defenses. On February 28, 1995, Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) presided over a hearing in Boston, Massachusetts, during which Complainant was represented by Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., and Respondent was represented by Stephen P. McCarron, McCarron & Associates, Washington, D.C.

The ALJ filed an Initial Decision and Order on August 3, 1995, in which the ALJ found that Respondent willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), and suspended Respondent's PACA license for 45 days.

On October 4, 1995, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557, (7 C.F.R. § 2.35).¹ On October 24, 1995, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on October 26, 1995, the case was referred to the Judicial Officer for decision.

On April 1, 1996, Respondent filed Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer, in which Respondent requested the opportunity to demonstrate the applicability of section 11 of the Perishable Agricultural Commodities Act Amendments of 1995, (7 U.S.C. § 499h(e)),² to this proceeding. On April 18, 1996, Complainant filed

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

²Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

(e) Alternative Civil Penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty

Complainant's Response to Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer in which Complainant agreed with Respondent that the Judicial Officer has authority to impose a civil penalty in accordance with 7 U.S.C. § 499h(e), but opposed the imposition of a civil penalty in the instant proceeding because a 45-day suspension of Respondent's license is appropriate, and Complainant had reason to believe that Respondent's financial condition was insecure and the imposition of any civil penalty would threaten Respondent's payment of its current produce obligations. On April 22, 1996, Respondent filed Respondent's Reply Regarding Further Briefing/Argument requesting a further evidentiary hearing either before the ALJ or the Judicial Officer regarding the sanction to be imposed should Respondent be found to have violated 7 U.S.C. § 499h(b).

On April 24, 1996, the Judicial Officer issued an Order to Show Cause denying Respondent's April 1, 1996, motion for oral argument and Respondent's April 22, 1996, motion for a further evidentiary hearing, and requiring Respondent and Complainant to show cause why a sanction which gives Respondent an option of a suspension of its PACA license or the payment of a civil penalty should not be considered. *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 640 (1996) (Order to Show Cause).

Complainant filed Complainant's Response to Order to Show Cause on May 2, 1996, opposing the imposition of a civil penalty based upon Complainant's belief that the only appropriate sanction in this case is a 45-day suspension of Respondent's PACA license, and Complainant's reason to believe that Respondent's financial condition is very insecure and that imposition of any civil penalty would threaten Respondent's payment of its current produce obligations. On May 7, 1996, Respondent filed Respondent's Reply to Show Cause Order, opposing the imposition of any sanction, but stating that, if any sanction is imposed, it should be a civil monetary penalty.

On May 16, 1996, the Judicial Officer issued a Decision and Order and Remand Order which adopted the ALJ's Initial Decision and Order as the final Decision and Order, except that the case was remanded for consideration of a civil penalty in lieu of a 45-day suspension of Respondent's PACA license; and if a civil

not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

penalty is appropriate, what amount should be assessed. *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 642 (1996). The Decision and Order and Remand Order filed May 16, 1996, describes the limited purpose of the remand, as follows:

I find that the record in this case is not sufficient to determine whether the assessment of a civil penalty in lieu of the 45-day suspension of Respondent's license would be appropriate, and, if assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed.

Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), provides that, before a civil penalty may be assessed, due consideration must be given to the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of the violation. I find that the record is sufficient with respect to the seriousness, nature, and amount of Respondent's violation, but that it is not sufficient with respect to the size of Respondent's business and the number of Respondent's employees.

Therefore, this case is remanded to the ALJ for the limited purpose of determining the appropriateness of the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and, if the ALJ finds that assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed. The ALJ shall take evidence regarding the size of Respondent's business, the number of Respondent's employees, the sanction recommendations of at least one administrative official charged with the responsibility for achieving the congressional purpose of the PACA, and any other evidence the ALJ believes necessary to assist her determination regarding the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and issue an Order in accordance with her findings.

In re Ruma Fruit and Produce Co., *supra*, 55 Agric. Dec. at 672-73.

On July 25, 1996, the ALJ presided over a remand hearing concerning the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's PACA license. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., represented Respondent.

The ALJ filed an Initial Decision and Order Pursuant to Remand on November 19, 1996, in which the ALJ ordered, as follows:

Order

A civil penalty of \$12,400.00 is assessed against Respondent Ruma Fruit and Produce Co., Inc. and shall be payable within thirty-five (35) days after this Decision has been served upon Respondent unless a monthly payment plan is agreed upon with Complainant. Otherwise a forty-five day suspension is imposed.

Initial Decision and Order Pursuant to Remand at 9.

On December 23, 1996, Respondent appealed the Initial Decision and Order Pursuant to Remand to the Judicial Officer, requested oral argument before the Judicial Officer, and filed a Request for Mediation. On January 16, 1997, Complainant filed Complainant's Response to Respondent's Appeal Petition Regarding Hearing on Remand, and on January 17, 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. Oral argument would appear to serve no useful purpose because the issues concerning assessment of a civil penalty have been fully addressed in the remand hearing, in thorough briefs filed by the parties, and in the Initial Decision and Order Pursuant to Remand.

Based upon a careful consideration of the record, the Initial Decision and Order Pursuant to Remand is adopted as the final Decision and Order on Remand. Changes in the ALJ's Initial Decision and Order Pursuant to Remand are shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the conclusions of the ALJ.

ALJ'S INITIAL DECISION PURSUANT TO REMAND (AS MODIFIED)

On May 16, 1996, the Judicial Officer filed a Decision and Order and Remand Order wherein the Judicial Officer remanded the case to the ALJ to consider whether the imposition of a civil penalty in lieu of a 45-day suspension of Respondent's [PACA] license is appropriate, and if a civil penalty is appropriate, the amount of the civil penalty to be assessed.

Until [November 15, 1995,] the available sanctions, in a case of this nature, were limited to publication of the facts and circumstances of the violation, suspension of an offender's [PACA] license or revocation of [an offender's PACA license]. (7 U.S.C. § 499h(a)).

On November 15, 1995, the PACA was amended to add a new subsection (e) to 7 U.S.C. § 499h, as follows:

(e) Alternative Civil Penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment the Secretary may now assess civil penalties in lieu of suspending or revoking a license. . . . The Initial Decision [and Order filed August 3, 1995, imposed] a 45-day suspension [of Respondent's PACA license].

. . . .
. . . [T]he amendment to the PACA was approved after Respondent's violation of 7 U.S.C. § 499h(b) had been established and after the ALJ had issued the Initial Decision and Order. However, both Complainant and Respondent agreed that the Judicial Officer has authority . . . to impose a civil penalty [against Respondent in this proceeding]. Complainant was cognizant of the Secretary's greater flexibility in imposing sanctions while the case was on appeal to the Judicial Officer. However, Complainant opposed the imposition of a civil penalty in the instant case on the grounds that a 45-day suspension of Respondent's license was appropriate as a result of Respondent's willful violation of section 8(b) of the PACA and because the Complainant had reason to believe that Respondent's financial condition was very insecure and that the imposition of any civil penalty would threaten Respondent's payment of its current produce obligations.

. . . .
On May 21, 1996, a prehearing conference call ensued at which time it was agreed that the [remand] hearing would be held on July 25, 1996, at the Department of Agriculture, Washington, D.C. . . . At the [remand] hearing, the

parties presented the testimony of two witnesses and documentary evidence was admitted with respect to the issues which were the subject of the Remand Order.

At the commencement of the [remand] hearing, Complainant changed from its previous position and [stated] that it then believed that a civil penalty was appropriate. (Tr. 19). Complainant [stated] that it has "no reason to believe at this point that respondent is failing to make full payment promptly, that any penalty would take away from the produce industry." (Tr. 107.)

. . . Complainant's witness, Jane E. Servais, Head of the Trade Practice Section, PACA Branch, . . . [testified] that Complainant had changed its position regarding whether a civil penalty should be issued in this case in lieu of the 45-day license suspension ordered by [the ALJ] and affirmed by the Judicial Officer. [(Tr. 23-25.)] Ms. Servais testified as an administrative official with responsibility for achieving the congressional purpose of the PACA with regard to a civil penalty. (Tr. 22). She testified that, based on the financial data provided by Respondent, Complainant had concluded that, while Respondent's financial circumstances remained precarious, Respondent was a financially viable company. (Tr. 23-25.) Therefore, Complainant concluded that an appropriate civil penalty could be issued in this case. Complainant now recommends a civil penalty of \$12,400. This [civil penalty] is much less than the maximum possible civil penalty for Respondent's violation, as authorized by section 8(e) of the PACA, of \$210,000, or \$2,000 per day for the 105 days during which Respondent was found to have unlawfully employed a person under employment restriction in violation of the PACA.

Complainant's witness at the July 25, 1996, hearing, Ms. Servais, initially testified that Complainant's civil penalty recommendation was \$15,400. (Tr. 22.) However, after reviewing new evidence provided to Complainant the day of the hearing, Ms. Servais testified that Complainant had reduced its recommended civil penalty to \$12,400. (Tr. 101.) Ms. Servais further testified that, after considering the factors set forth in section 8(e) of the PACA, (7 U.S.C. § 499h(e)), and reviewing Respondent's financial records, including the most recent information provided by Respondent the same day as the hearing, Complainant would recommend a civil penalty, in lieu of a 45-day license suspension, in the amount of \$12,400. (Tr. 30-37, 100-01.) In arriving at this determination, Ms. Servais considered Respondent's business to be small to medium small and that Respondent employed from six full-time employees and two part-time employees to 15 employees. (Tr. 37[-39, 52-]53, . . . [105-06]).

Respondent protested that a \$12,400 penalty was too much and urged that a \$5,000 civil penalty be considered adequate. [(Tr. 77-78, 123-24.)]

. . . .

Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), provides that, [in assessing the amount of] a civil penalty . . . , due consideration must be given to the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of the violation. The Judicial Officer found that the record was sufficient with respect to the seriousness, nature, and amount of Respondent's violation, but that the record was not sufficient with respect to the size of Respondent's business and the number of Respondent's employees. The Judicial Officer directed that the ALJ should take evidence regarding these factors, as well as the sanction recommendations of at least one administrative official charged with the responsibility for achieving the congressional purpose of the PACA and any other evidence that the ALJ believed necessary to assist in the determination of whether or not the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license would be appropriate, and, if so, the amount of the civil penalty to be assessed. [*In re Ruma Fruit and Produce Co.*, *supra*, 55 Agric. Dec. at 672-73.]

Complainant's evidence indicates that it duly considered the factors set forth in section 8(e) of the PACA.

The testimony and evidence at the hearing, as well as Complainant's brief, indicates the methodology and means whereby the requested sanction of \$12,400 was arrived at, premised upon the most current financial data which was made available the day of the hearing. (Tr. 101.)

Mr. James Ruma testified as to the current financial status of Respondent. He indicated that a penalty in excess of \$5,000 would take money away from creditors and would preclude timely payment of [Respondent's] current accounts. Other than his testimony, there is no persuasive evidence, even in the financial statements adduced by Respondent, to sustain this contention of Respondent and such assertion is not regarded as credible. The PACA requires that only responsible persons be associated with the industry and it is incumbent upon Respondent to act as such and to be in compliance with the PACA at all times. . . .

At the present time, the record as a whole justifies the imposition of a \$12,400 civil penalty [as an alternative to] a 45-day suspension.

Premised upon the record herein, the following findings of fact are made.

Findings of Fact

1. Respondent's business may be described as "very small," (Tr. 56), "small" to "medium small," (Tr. 38, 59; CX 2).
2. The number of employees currently employed by Respondent is six full-

time employees and two part-time employees, (Tr. 67), which includes Mr. Ruma and members of his family. At one time Respondent employed 15 persons. In computing the amount of the civil penalty, the difference between 6 and 15 employees is immaterial.

3. Ms. Jane Servais, Head of the Trade Practice Section, Fruit and Vegetable Division, Agricultural Marketing Service, testified that the imposition of a civil penalty would achieve the purposes of the PACA and recommended a civil penalty of \$12,400, arrived at by a methodology, computation, and formula which she described.

Conclusions

Taking into consideration the record herein and the testimony and documentary evidence adduced at the remand hearing, . . . a civil penalty should be imposed as an alternative to the 45-day suspension already issued. The recommendation of the agency officials charged with administering the PACA is adopted herein.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues on appeal.

First, Respondent contends that the amount of any civil penalty assessed should be based upon the net profit Respondent would lose if Respondent's PACA license were suspended for 45 days, Respondent's ability to pay the civil penalty, and Respondent's ability to continue to conduct business. (Respondent's Appeal Petition at 1-4.)

I disagree with Respondent. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995, (7 U.S.C. § 499h(e)), does not require the Secretary to consider the net profit Respondent would lose if Respondent's PACA license were suspended, Respondent's ability to pay the civil penalty, or Respondent's ability to continue to conduct business, when determining the amount of the civil penalty, as Respondent asserts.

Respondent bases its contention, that Respondent's ability to pay the civil penalty and ability to continue to conduct business must be taken into account, on legislative history applicable to the Perishable Agricultural Commodities Act Amendments of 1995 and on statements made during a hearing on the PACA held on March 16, 1995, by the Subcommittee on Risk Management and Specialty Crops of the Committee on Agriculture, House of Representatives, as follows:

The second problem with this formula is that it fails to implement

the intent of Congress and the administration regarding the assessment of fines because it has no relationship to whether Ruma can actually pay such a fine.

As explained in the Judicial Officer's remand order at pages 38 through 40, the administration made it clear during the hearings on Section 11 of the Perishable Agricultural Commodities Act amendments of 1995 (PACAA-1995), that the authority to assess civil penalties was for the purpose of allowing a business to continue, rather than putting it out of business through a suspension. In the remand order, the Judicial Officer quoted each of the relevant passages from the legislative history, which included the House Report and the testimony of the administrator of the Agricultural Marketing Service. Each of those excerpts indicate that the purpose of the monetary penalty is to avoid forcing the violator out of business. It was not intended by Congress or the administration to assess a fine that a business cannot pay because such a fine results in the termination of the business. Yet, the agency official at the [remand] hearing said that the issue of whether a violator could afford to pay a fine amount was not a consideration in recommending the fine amount, and that the fine was supposed to be equivalent to a 45 day suspension (Tr. 119 - 120, 124 - 127). This methodology for assessing a fine has no basis in the statute or in reality. There must be some consideration given to whether a company can pay the amount of the fine that is assessed. Otherwise, the fine is nothing more than a disguised suspension which forces a business termination.

Respondent's Appeal Petition at 3.

I disagree with Respondent's analysis. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is

to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Neither House of Representatives Report No. 207, 104th Cong., 1st Sess. (1995), *supra*, p. 14, nor Mr. Hatamiya's statements, which are part of the record of the March 16, 1995, hearing, *supra*, pp. 14-15, indicate that the amount of a civil penalty assessed under 7 U.S.C. § 499h(e) must be related to a violator's net profit, a violator's ability to pay the civil penalty, or a violator's ability to stay in business.

House of Representatives Report No. 207, 104th Cong., 1st Sess. (1995), specifically states that the factors that the Secretary must consider when determining the amount of a civil penalty to be assessed under 7 U.S.C. § 499h(e) are "the business size, number of employees, [and the] seriousness, nature and amount of the violation." The House Report does not indicate, as Respondent asserts, that the Secretary must, or even should, consider a violator's ability to pay a civil penalty, ability to stay in business after the assessment of a civil penalty, or the net profit a violator would lose if the violator's PACA license were suspended or revoked.

Mr. Hatamiya's statements, which are part of the record of the March 16,

1995, hearing on PACA, merely reflect the fact that, prior to the enactment of the Perishable Agricultural Commodities Act Amendments of 1995, the only sanctions that could have been imposed against a PACA licensee found to have violated section 8(b) of the PACA were license revocation or license suspension; *viz.*, sanctions that would of necessity result in the inability of the PACA licensee to continue in business. The assessment of a civil penalty against a PACA licensee for a violation of section 8(b) of the PACA does not guarantee that a PACA licensee will be able to stay in business after being assessed a civil penalty, but, unlike license revocation or license suspension, the assessment of a civil penalty does not guarantee that the PACA licensee will be forced out of business.

Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995, (7 U.S.C. § 499h(e)), which authorizes the Secretary to assess a civil penalty in cases of this nature, requires the Secretary to give due consideration to three factors when determining the amount of a civil penalty. These factors are: (1) the size of the business; (2) the number of employees; and (3) the seriousness, nature, and amount of the violation. The record establishes that agency officials charged with the responsibility for achieving the congressional purpose of the PACA considered each of these factors and based their recommendation that Respondent be assessed a civil penalty of \$12,400 for its violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)), on these factors.

Ms. Jane E. Servais, the agency official charged with responsibility for achieving the congressional purpose of the PACA who testified at the remand hearing, stated that she found Respondent to be a small to medium small business and that Respondent employed from six full-time employees and two part-time employees to 15 employees. (Tr. 37-39, 52-53, 105-06.) The seriousness, nature, and amount of Respondent's violation of section 8(b) of the PACA are reflected by the 45-day suspension of Respondent's PACA license that I imposed in *In re Ruma Fruit and Produce Co.*, *supra*. I find that Complainant's calculation of and use of Respondent's average daily gross profit to arrive at the approximate amount Respondent would lose if its PACA license were suspended for 45 days, as described in the record, (Tr. 30-37), is reasonable and that this amount reflects the seriousness, nature, and amount of Respondent's violation.

The Department's sanction policy is set forth 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 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

[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.

The Initial Decision and Order Pursuant to Remand reveals that the ALJ gave appropriate weight to the recommendation of the administrative official charged with the responsibility for achieving the congressional purpose of the PACA and considered the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, as required by 7 U.S.C. § 499h(e), when she assessed Respondent a civil penalty of \$12,400.

Second, Respondent contends that:

The ALJ seemed to recognize that there might be a problem with the payment of the \$12,400.00 in a lump sum because she left open the possibility of an agreement for a monthly payment plan with the agency's consent. However, the agency refuses to consent to any payment plan.*

*Filed herewith is a Request for Mediation which respondent suggests may be an appropriate method of attempting to resolve this matter.

Respondent's Appeal Petition at 4.

Further, Respondent filed a request for mediation, which states that:

Respondent requests that the case be referred to the Alternative Dispute Resolution unit in the Department to attempt to reach a resolution of the matter through mediation.

Request for Mediation filed December 23, 1996.

While the Department does have a Dispute Resolution Specialist designated pursuant to the Administrative Dispute Resolution Act, as amended, (5 U.S.C. §§ 571-584), the Department does not have an "Alternative Dispute Resolution unit." The ALJ's Initial Decision and Order Pursuant to Remand assessing a \$12,400 civil penalty against Respondent as an alternative to a 45-day suspension of Respondent's PACA license was served on Complainant on November 20, 1996, and served on Respondent on November 21, 1996. Complainant and Respondent have had ample time to agree upon a payment plan. Further, based on Respondent's Appeal Petition in which Respondent asserts that "the agency refuses

to consent to any payment plan," it appears that Respondent and Complainant have discussed a payment plan and that Complainant has rejected a payment plan as a basis for settlement of this proceeding. Moreover, nothing in this Decision and Order precludes Respondent and Complainant from engaging in dispute resolution and filing a joint motion to modify the Order issued in this Decision and Order.³ Therefore, Respondent's request that I order the parties to mediate an agreement to a payment plan is denied.

For the foregoing reasons and the reasons in *In re Ruma Fruit and Produce Co.*, *supra*, the following Order should be issued.

Order

Respondent is assessed a civil penalty of \$12,400 which shall be paid by a certified check or money order made payable to the Treasurer of the United States, and forwarded to: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095-South Building, 1400 Independence Avenue, SW., Washington, DC 20250, within 60 days after the date of service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-94-565. In the event that the PACA Branch does not receive a certified check or money order in accordance with this order, a 45-day suspension of Respondent's PACA license shall take effect beginning 61 days after the date of service of this Order on Respondent.

In re: RUMA FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-94-0565.
Stay Order filed May 6, 1997.

Andrew Y. Stanton, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
Order issued by William G. Jenson, Judicial Officer.

³ *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (the Judicial Officer modified an order issued April 22, 1994, in accordance with a Joint Motion to Modify Order filed by the parties on April 12, 1996); *In re Leonard McDaniel*, 46 Agric. Dec. 125 (1987) (on February 25, 1987, the Judicial Officer modified an order issued December 8, 1986, in accordance with the agreement of the parties).

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 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. *In re Ruma Fruit and Produce Co.*, 56 Agric. Dec. ___ slip op. at 19-20 (Feb. 6, 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 for a ruling on Respondent's Request for Stay.

Respondent's Request for Stay is granted.

The Order issued in this proceeding on February 6, 1997, which would have required Respondent to pay a civil penalty of \$12,400 or incur a 45-day suspension of Respondent's PACA license, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: KANOWITZ FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-95-0504.
Decision and Order filed March 21, 1997.

License revocation — Willful, flagrant, and repeated violations — Failure to make full payment promptly — Collateral effects of revocation — Roll over debt.

The Judicial Officer affirmed Judge Bernstein's (ALJ) Decision and Order revoking Respondent Kanowitz's license because Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA

(7 U.S.C. § 499b(4)) by failing to make prompt payment for produce. Complainant proved Respondent's violations of the PACA and past-due debt by a preponderance of the evidence. Respondents may not convert a "no pay" case into a "slow pay" case by paying all outstanding debts alleged in the Amended Complaint, if Respondent is not in full compliance with the PACA payment provisions at the time of the hearing. Partial payment of outstanding debt does not satisfy full payment requirement, even if creditor agrees to discharge debt. Only 100% compliance at time of hearing triggers lowered sanction. Evidence of Respondent's outstanding debts is routinely admitted at time of failure-to-pay-promptly hearing to determine current compliance; but sanction is for the violations alleged in the Complaint and not for the roll over debt. Paying creditors named in the Complaint, while not paying other creditors within statutory requirements, is called "robbing Peter to pay Paul," and does not support a lowered sanction. PACA has no requirement that there be uniform sanctions among violators. ALJ's revocation sanction based upon this record was not arbitrary and capricious (5 U.S.C. § 706(A)(2)). The sanction policy set forth in *In re S.S. Linn County, Inc.*, does not change the policy set forth in *In re The Caito Produce Co.* Excuses for failure to pay and collateral effects of revocation are not relevant circumstances under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.

Jane McCavitt, for Complainant.

Sherylee F. Bauer, New York, NY, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

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

The 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 PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) (hereinafter Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7C.F.R. §§ 1.130- 151) (hereinafter Rules of Practice), by filing a Complaint on November 8, 1994.

On March 1, 1996, Complainant filed an Amended Complaint which alleges that, during the period March 1993 through December 1993, Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 18 sellers of the agreed purchase prices for 62 lots of perishable agricultural commodities in the total amount of \$206,850.69, which Respondent purchased, received, and accepted in interstate or foreign commerce and that, during the period January 1994 through January 1996, Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 30 sellers of the agreed purchase prices for 108 lots of perishable agricultural commodities in the total amount of \$195,495.10, which Respondent purchased, received, and accepted in interstate or foreign commerce (Amended Complaint ¶¶ III, IV). Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which Respondent denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 7, 1996, in New York, New York. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Sherylee F. Bauer, Esq. of New York, New York, represented Respondent. The ALJ issued a bench decision on May 27, 1996, in which he concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 201) and revoked Respondent's PACA license (Tr. 208). On May 29, 1996, 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 spelling, punctuation, and transcription errors (hereinafter Initial Decision and Order).

On June 24, 1996, 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).

¹On July 17, 1996, Complainant responded to Respondent's appeal, and on July 18, 1996, 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 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 case, 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.

PERTINENT STATUTORY PROVISION AND REGULATION

Section 2(4) of the PACA provides:

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

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[.]

7 U.S.C. § 499b(4).

Section 8(a) of the PACA provides:

§ 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. § 499h(a).

Section 46.2(aa)(5), (11) of the Regulations provides:

(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) (1993).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Findings of Fact

1. Respondent, Kanowitz Fruit and Produce Co., Inc., is a corporation organized and existing under the laws of the State of New York. Its business mailing address is [REDACTED] New York [REDACTED].

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License Number [REDACTED] was issued to Respondent on September 8, 1975. This license has been renewed annually. . . .

3. Before 1993, Respondent was in good financial condition and appeared to have paid its creditors on a timely basis. . . .

4. In 1993, Respondent discovered that employees had stolen inventory from Respondent. The amount stolen has been estimated by Respondent as being between \$300,000 and \$400,000. The police were notified, but informed Respondent that there was insufficient evidence to enable them to prosecute the alleged perpetrators.

5. During the period . . . March 1993 [through] December 1993, Respondent failed to make full payment promptly to 18 sellers [of] the agreed purchase prices of 62 lots of perishable agricultural commodities, in the total amount of \$206,850.69, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. Payments for these transactions were [made] from 2 weeks to 117 weeks late[, and not all sellers received the full amount originally owed to them.]

6. In an effort to correct its financial problems, Respondent undertook a number of steps. It borrowed approximately \$50,000 from its bookkeeper and office manager, Frances Falcone; it sold a warehouse; it sold one of three units in the Brooklyn Terminal Market; it opened its business 7 days a week; and . . . Mr. Steven Kanowitz, [Respondent's president], obtained a small business loan using his home and a life insurance policy as collateral. Mr. Steven Kanowitz has made a bona fide commitment to turning the business around.

7. Nevertheless, during January 1996, [a United States Department of Agriculture (hereinafter USDA)] investigator visited Respondent's business establishment and inspected Respondent's books and records, and this investigation revealed that during the period . . . January 1994 through January 1996, Respondent failed to make full payment promptly to 30 sellers [of] the agreed purchase prices of 108 lots of perishable agricultural commodities in the total amount of \$195,495.10, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. . . . [Respondents made payments for these transactions as of the time of the hearing. However, one produce seller, Finest Fruits, Inc., received less than full payment].

8. During the period April 15 through 19, 1996, [USDA's] investigator again visited Respondent's place of business and again inspected Respondent's books and records. This compliance review revealed that during the period . . . February 1996 [through] April 1996, Respondent failed to make full payment promptly to sellers [of] the agreed purchase prices of 100 lots of perishable agricultural commodities in the total amount of \$277,437.87, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. Respondent has paid a large amount of this debt, but nevertheless, approximately \$125,000 of this debt still remains unpaid.

9. Respondent has frequently issued checks to its sellers in interstate commerce which have been returned by its bank because Respondent had insufficient funds on deposit to cover these checks. Respondent's office manager, Ms. Falcone, estimated that these insufficient fund[s] checks averaged about six to seven each month.

10. In addition to the sums still owed [for produce purchased in interstate or

foreign commerce], . . . which are in the amount . . . of [approximately] \$125,000, Respondent also owes money to sellers in intrastate commerce and to the Internal Revenue Service.

11. With respect to all amounts alleged to have been unpaid to sellers in interstate [or foreign] commerce in the Complaint and Amended Complaint, . . . Respondent failed to make [full] payment promptly as that term is defined in section 46.2(aa) of the Regulations [(7 C.F.R. § 46.2(aa) (1993))].

12. There were no written agreements by Respondent with any of the sellers [identified in the Complaint and the Amended Complaint] to provide for different terms of payment in accordance with the requirement in section 46.2(aa)(11) of the Regulations [(7 C.F.R. § 46.2(aa)(11) (1993))]. In fact, Respondent has never entered into any such agreement to extend payment terms.

Conclusion of Law

In failing to make [full] payment promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received, and accepted [in interstate or foreign commerce during the period March] 1993 [through] April 1996, Respondent has committed willful, flagrant, and repeated violations of section 2[(4)] of the PACA (7 U.S.C. § 499b(4)).

Discussion

This is a disciplinary proceeding pursuant to section 8 of the PACA (7 U.S.C. § 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (1929). Its passage was occasioned by 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. No. 1041, 71st Cong., 2d Sess. [1] (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were 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[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971). Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. No. 1041, 71st Cong., 2d Sess. [3] (1930). See also [*George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988[, 990] (2d Cir.), cert. denied, 419 U.S. 830 (1974)].

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 [or foreign] commerce. Full payment promptly is defined by the Department in 7 C.F.R. § 46.2(aa)(5) [(1993)] as requiring payment of the agreed purchase prices for produce within 10 days after the day on which produce is accepted.

Complainant 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 transactions alleged in the Amended Complaint.

Respondent denie[s] violating the PACA. The \$206,850.69 indebtedness of Respondent, which [is] the subject of [paragraph III of the Amended] Complaint, was finally paid . . . by November 20, 1995[, but not all sellers received the full amount originally owed to them]. Payments were made from 2 weeks to 117 weeks late.

[T]he \$195,495.10 indebtedness of Respondent, which is the subject of [paragraph IV] of the Amended Complaint, was finally paid by May 7, 1996[, except that one produce seller received less than the original amount owed]. However, Respondent currently has outstanding and past-due indebtedness of approximately \$125,000 for perishable agricultural commodities that it purchased in interstate [or foreign] commerce.

Respondent's failure to make timely payment, as alleged in the Complaint and Amended Complaint, violates the prohibitions of section 2 of the PACA (7 U.S.C. § 499b). *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd [per curiam]*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Moreover, Respondent's failure to pay promptly . . . and in full for a total of 170 transactions occurring over a period of 34 months and totalling over \$400,000 constitutes repeated and flagrant violations of section 2 of the PACA. . . . The 170 violations are repeated because repeated means more than one and 170 [violations are] certainly more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred. . . .^[2]

[²See *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *United Fruit & Vegetable Co. v. Director of the Fruit and Vegetable Div.*, 668 F.2d 983 (8th Cir.) (holding 127 violations involving over \$750,000 over 11 months constitute repeated and flagrant violations of the PACA), *cert. denied*, 456 U.S. 1007 (1982); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations 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 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 over several months and

Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards [statutory requirements]. *Cox v. United States Dep't of Agric.*, [925 F.2d 1102 (8th Cir.), reprinted in 50 Agric. Dec. 14 (1991), cert. denied, 502 U.S. 860 (1991)]; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296[, 297-98] (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-69 [(1973), aff'd, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974)].

Respondent knew, or should have know[n], that it could not have made prompt payments for the large amount of perishable [agricultural commodities] it ordered, yet Respondent continued to make purchases. Respondent was aware of the [PACA's] requirement[s], yet continued to buy knowing that each purchase would result in another violation.

Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not, pay suppliers. It deliberately shifted the risk of nonpayment to its suppliers. The suppliers were required to involuntarily, in some cases unknowingly, extend credit to Respondent.

Thus, in this case in which two [USDA] compliance investigations indicated that Respondent had incurred additional "roll over" debt in order to meet its obligations on the transactions that were the subject of the original [Complaint] and of the Amended Complaint, . . . Respondent has intentionally violated the [PACA] and operated in careless disregard of the payment requirements of the PACA, and Respondent's violations were therefore willful. *In re Atlantic Produce Co.*, supra, 35 Agric. Dec. [at 1641-42]; . . . *In re Hogan Distributing, Inc.*, 55 Agric. Dec. [622, 628-30 (1996)].

The appropriate sanction for Respondent's violations is revocation of Respondent's PACA license. Even though Respondent has attempted to correct its financial problems, these problems have continued since 1993. As indicated, a large brunt of Respondent's problems has been passed on to its [produce] suppliers. This [practice of shifting risk of nonpayment to produce suppliers] is exactly the type of practice that the [PACA] is designed to prevent and correct.

Where a Respondent is not in compliance at the time of a hearing, the appropriate sanction is revocation of Respondent's [PACA] license. [*In re The Caito Produce Co.*, 48 Agric. Dec. 602, 633-36 (1989);] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118[, 149-50] (1984). . . .

In this case, Respondent failed to make full payment promptly for [170] lots of perishable agricultural commodities over a period of many years for a total of approximately \$400,000. Furthermore, since the filing of the Amended Complaint, Respondent has incurred new indebtedness and currently owes approximately \$125,000 on the new debt.

Where a respondent is not currently in compliance, but has in fact "rolled over" its debts, revocation is the appropriate sanction. *In re S W F Produce, Co.*, 54 Agric. Dec. [693, 700] (1995); *In re The Caito Produce Co.*, [supra], 48 Agric. Dec. [at 633]; *In re Gilardi Truck & Transp., Inc.*, supra, 43 Agric. Dec. at 149-50.

The Judicial Officer has recently stated that there is no basis for considering facts in mitigation of the sanction where a respondent has failed to pay for produce. *See In re Atlantic Produce Co.*, 54 Agric. Dec. [701, 712-15³] (1995).

Taking all these factors into consideration, the sanction sought by Complainant, which is revocation of Respondent's [PACA] license, [is appropriate]. *In re J.H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705 (1978); *In re George Steinberg & Son, Inc.*, supra.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a *prima facie* case.⁴ The burden of proof does not, however, require Complainant to disprove each of Respondent's assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the

³See *Erratum*, inside front cover of Part Three (PACA), 55 Agric. Dec. January-June (1996).

⁴*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), cert. denied sub nom. *American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), cert. denied sub nom. *Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); 3 *Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

Administrative Procedure Act is the preponderance of the evidence standard,⁵ and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.⁶ Complainant has proved its case by much more than a preponderance of the evidence, which is all that is required.

I completely agree with the ALJ's Initial Decision and Order, except to the extent that the ALJ apparently agrees with Respondent that Respondent has made full payment of the amounts alleged to be due in the Complaint and the Amended Complaint, prior to the commencement of the May 7, 1996, hearing.

To the contrary, Respondent attached documents to its Answer which establish that Respondent settled with produce sellers for less than the total amounts due. For example, Respondent paid \$5,849.75 to Godwin Produce Co. to settle a debt of \$16,173.10; \$35,648.05 to Michael Santelli & Sons, Inc., to discharge and extinguish a debt of \$50,514.45; and \$3,655 to Southern Produce Distributors, Inc., on a debt of \$6,676. Further, my examination of Respondent's payments to the produce sellers identified in paragraph IV of the Amended Complaint reveals that all were eventually paid in full, except for Finest Fruits, Inc., Transaction No. 74, which produce seller apparently received \$2,451 on a debt of \$3,284 (Amended Complaint ¶ IV; RX 39; Tr. 147-48). Nevertheless,

⁵ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

⁶ *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ___, slip op. at 6 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 20 n.2 (Nov. 15, 1996); *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 Brothers 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).

Respondent argues that such "full payment" entitles Respondent to a "slow pay" rather than a "no pay" sanction; to wit, a suspension of Respondent's PACA license in lieu of a revocation. However, the law and the Department's policy are clear that partial payments do not equal "full payment" in accordance with the PACA and do not negate a violation of the PACA.⁷

The record establishes that, at the start of the hearing, Respondent had not paid all its produce sellers in full; that the policy of converting "no pay" into "slow pay," therefore, is not available to Respondent on this record; and that revocation of Respondent's PACA license is appropriate under the circumstances in this case.

Respondent raises five issues in Respondent's Appeal Petition (hereinafter RAP). First, Respondent argues that the ALJ erred by allowing introduction at the hearing of evidence of Respondent's outstanding indebtedness. Respondent asserts that it is denied due process when such "new claims" are the basis for the ALJ's

⁷*In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 625-28 (where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the PACA); *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989) (Respondent contends that it no longer owes any money to the 22 produce sellers who agreed to take 60 cents on the dollar as a result of Respondent's bankruptcy; it has been repeatedly held that when a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment and does not negate a violation of the PACA), *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 Magic City Produce Co.*, 44 Agric. Dec. 1241, 1249 (1985) (although there may have been an occasional dispute as to the quality of produce, so that acceptance of partial payment in full satisfaction would be regarded as an accord and satisfaction, constituting full payment, there is no evidence in that respect with respect to most of the produce sellers; where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment and does not negate a violation of the PACA), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685 (1980) (even where a produce seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute "full payment" and does not negate a violation of the PACA), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414 (1980) (Respondent has failed to make full payments of the agreed purchase prices for produce it accepted and received; the debts were fully discharged under subsequent agreements between Respondent and the produce sellers providing for partial payments; it has been held that although acceptance of a partial payment of the purchase price by a seller under such an agreement fully satisfies and extinguishes the debt, it does not constitute full payment under the PACA); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1633 (a plan of arrangement under which creditors accept less than "full payment" in full satisfaction of their claims does not negate a violation of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884 (1975) (even though 35 of 49 produce sellers listed in the Complaint voluntarily released their claims in consideration of a settlement agreement of 30 cents on the dollar, such voluntary agreement does not constitute full payment promptly under the payment provision of the PACA); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975) (although partial payment may fully satisfy and extinguish the debt, it is, nonetheless, partial payment; partial payment is not full payment under the PACA).

draconian sanction of revocation; and that the ALJ should have required Complainant to amend the Complaint, thereby giving Respondent the required procedural due process.

This argument is rejected, because the ALJ properly allowed and considered outstanding indebtedness. 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 provisions, which call 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 provisions 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 recent case, an ALJ took the position advanced in this proceeding by Respondent, and 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 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., *supra*, 54 Agric. Dec. at 700.

At the hearing, Respondent's bookkeeper, Frances Falcone, testified that Respondent had outstanding current indebtedness of approximately \$125,000 (Tr. 160-61). This amount (within a few hundred dollars) is corroborated by the balances in the "Summary table of unpaid transactions" (CX 24A at 6; Tr. 194). If the produce sellers listed in CX 24A, who did not get paid in full, are designated "Peter," and the produce sellers who got paid are designated "Paul," then the conclusion is ineluctable that Respondent "robbed Peter to pay Paul."

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 paid some produce sellers, but not others.

Second, Respondent contends that the debt owing at the time of the hearing is "new claims" and not "roll over debt." I find that the outstanding indebtedness at the time of the hearing, whether it is called "new claims" or "roll over debt," means that Respondent is not in 100% compliance with the payment provisions of the PACA at the time of the hearing, and license revocation, rather than license suspension, is the appropriate sanction. Thus, the ALJ did not err in finding the outstanding indebtedness at the time of the hearing to be "roll over debt."

Respondent argues that an infusion of "new capital" from a company retrenchment, an unsecured \$50,000 loan, a secured small business loan, a factoring agreement, and a sale of assets means that produce sellers were paid with, I infer, money that would not normally have been available to pay produce sellers. Therefore, unlike Respondents in *Caito*, *Gilardi*, and *S W F*, Respondent urges that it did not "rob Peter to pay Paul." This argument is rejected, and I find Respondent did "rob Peter to pay Paul." It is not relevant where the money to pay the produce sellers originates. The only relevant factor is whether Respondent paid produce sellers in full by the date of the hearing. As it is, Respondent lacked the resources, from wherever derived, to pay all Respondent's produce sellers in full, which is the only relevant issue.

I agree with Complainant's description of the nature of Respondent's continuing roll over debt, as follows:

Respondent's debt was not paid at the time of the hearing. The debt from the complaint and the amended complaint, which was incurred during the period March 1993 through January 1996, had been, at least

in part, rolled over and continued from February 1996 until April 1996. Therefore, Kanowitz has had continuous rollover debt from the time listed in the original complaint, March 1993, until May 7, 1996, the date of the hearing. The Administrative Law Judge found that this continuous indebtedness constitutes rollover of the debt alleged in the complaint and the amended complaint. Therefore, there is a continuous failure to pay.

Complainant's Response to Respondent's Appeal at 9.

Respondent knew, or should have known, that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, but Respondent continued to operate. By continuing to operate without sufficient capitalization, Respondent deliberately shifted the risk of nonpayment to its produce suppliers, which is a willful violation of 7 U.S.C. § 499b(4).⁸

Third, Respondent, relying on *In re Atlantic Produce Co.*, 54 Agric. Dec. 701 (1995), contends that while mitigation may not be considered for determination of willfulness or flagrancy, the ALJ may consider mitigating circumstances when considering the sanction to be imposed (RAP at 8). Respondent's argument is completely without merit. *Atlantic Produce* makes clear that mitigating circumstances are not to be considered, either in determining willfulness or in determining sanctions, if Respondent has failed to pay promptly for produce, as follows:

Although *Caito* mentions briefly the Department's severe sanction policy, which has not been followed since *S.S. Farms Linn County*, *supra*, the overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, *excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time.* That doctrine is not altered by the new sanction policy set forth in

⁸ *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ____, slip op. at 21-22 (Jan. 23, 1997); *In re Hogan Distributing, Inc.*, *supra*, 55 Agric. Dec. at 630-31; *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.*, *supra*, 52 Agric. Dec. at 622; *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, *supra*, 54 Agric. Dec. at 1641.

S.S. Farms Linn County.⁹

In re Atlantic Produce Co., *supra*, 54 Agric. Dec. at 715 (emphasis added).

Fourth, Respondent argues that Complainant's recommendation of, and the ALJ's imposition of, the sanction of revocation, are arbitrary and capricious.

Respondent's underlying argument is that Complainant has arbitrarily and capriciously recommended revocation for Respondent, when there are many other PACA licensees who are not in compliance, and who are not receiving like sanctions. Respondent argues that Complainant's revocation sanction "bears no relationship to the purposes of the PACA (i.e., to ensure prompt payment of perishable vendors and reasonable regulation of dealers who attempt to comply with the Act)." (RAP at 10.)

This argument is rejected. The PACA has no requirement that there be uniformity in sanctions among violators. Moreover, Respondent gives no authority for the proposition that the revocation sanction herein is contrary to the purposes of the PACA.

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the statutes entrusted to the Secretary for enforcement, and there is no requirement for uniformity. In a failure-to-pay-promptly case instituted under a statute similar to the PACA, the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) (hereinafter Packers and Stockyards Act), it is explained that uniformity is not required:

Respondents argue that the suspension imposed by the ALJ is excessive and unwarranted . . . , because there is no "uniformity" in the sanction with other cases, which impose less severe sanctions, and thus the primary purpose--deterrence for respondents and others similarly situated--is not achieved. Respondents are incorrect.

There is no requirement that there be uniform sanctions in like cases.

In re Ozark County Cattle Co. (Decision and Order as to National Order Buying Company and Thomas D. Runyan), 49 Agric. Dec. 336, 371 (1990).

Almost the exact situation raised by Respondent in the proceeding, *sub judice*,

⁹The underlined portion of the quotation from *Atlantic Produce* was inadvertently omitted from Agriculture Decisions. See *Erratum*, inside front cover of Part Three (PACA), 55 Agric. Dec. January-June (1996).

was addressed in another decision under the Packers and Stockyards Act which specifically stated that Complainant is free to recommend and the ALJ is free to fashion the remedial sanction:

The cases cited by respondent for a reduction in the suspension period are not persuasive. Even if the facts were exactly the same, there is no requirement that there be uniform sanctions in like cases. The P&S [Packers and Stockyards Administration] and the ALJ are free to recommend and to fashion, respectively, the remedial sanction to fit the situation at hand, because "uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others." (Citation omitted.)

In re Floyd Stanley White, 47 Agric. Dec. 229, 309 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).¹⁰

Respondent also contends that the ALJ does not have sufficient record evidence of Respondent's wrongdoing to support revocation.

The ALJ's choice of revocation as the sanction can be found arbitrary and capricious, if the ALJ exhibited no rational basis for the treatment of the evidence, if the ALJ failed to consider the relevant factors, or if the ALJ demonstrated clear errors of judgment. The standard of review relevant to this inquiry is set forth in *Lansing Dairy* as follows:

The "narrow" scope of review under the arbitrary and capricious standard . . . (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), as follows:

Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)

¹⁰ See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, *supra*, 925 F.2d at 1107; *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. CFTC*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978 (per curiam)); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 18-20 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 112 (Jan. 13, 1997).

(1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

In re Lansing Dairy, Inc., 50 Agric. Dec. 1453, 1505-06 (1991), *rev'd sub nom. Farmers Union Milk Marketing Cooperative*, Nos. 1:89-CV-281, 5:91-CV-104, 1992 WL 71372 (W.D. Mich. Mar. 30, 1992), *reprinted in* 51 Agric. Dec. 24, 37 (1992), *rev'd*, 39 F.3d 1339 (6th Cir. 1994), *cert. denied*, 116 S.Ct. 50 (1995).

As discussed, *supra*, I have determined that the ALJ properly evaluated the evidence in a rational manner, made no clear errors in judgment, and considered all relevant factors. Respondent's argument that the ALJ's revocation sanction was arbitrary and capricious is rejected.

Fifth, Respondent contends that the sanction imposed on Respondent is unduly harsh, in light of mitigating circumstances and the fact that the USDA supported recent Congressional enactment of civil penalties in lieu of revocation or suspension. I disagree.

This case is governed by the sanction policy adopted by the Secretary 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 in pertinent part, 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.

However, the sanction policy in *In re S.S. Farms Linn County, Inc.*, *supra*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra*.¹¹ The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the 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 repeated failures to pay a substantial amount of money over an extended period of time. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) over a period from March 1993 to January 1996, by failing to make full payment to 48 sellers of the agreed purchase prices of 170 lots of perishable agricultural commodities in the total amount of \$402,345.79. Moreover, Respondent had approximately \$125,000 in outstanding indebtedness at the time of the May 7, 1996, hearing. Respondent's excuse for its failure to pay (embezzlement by two of Respondent's employees) is not sufficient to prevent the revocation of its license for violations of the PACA. Further, this sanction is in accord with the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA.

Mr. Bruce W. Summers, Senior Marketing Specialist, Trade Practices Section of the PACA Branch, a Division of the Agricultural Marketing Service, testified as to the appropriateness of the sanction as follows:

BY MS. McCAVITT:

Q. Mr. Summers, do you represent Complainant at this proceeding?

[BY MR. SUMMERS:]

A. Yes, I do.

Q. And, are you familiar with the type of violations alleged in the complaint and the amended complaint?

¹¹ *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 49 (Nov. 15, 1996); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 26 (Sept. 12, 1996); *In re Hogan Distributing, Inc.*, *supra*, 55 Agric. Dec. at 633; *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co.*, *supra*, 54 Agric. Dec. at 1329.

A. Yes, I am.

Q. Are you aware of whether Complainant has a recommendation it wishes to make to the Administrative Law Judge on the sanction he would issue if he finds that the Respondent violated the Act as alleged in the complaint and the amended complaint?

A. Yes.

Q. Would you tell Judge Bernstein what that recommendation is?

A. The Complainant would recommend that the Administrative Law Judge revoke the license of Kanowitz Fruit and Produce as a result of its violations of Section 2[(4)] of the PACA.

Q. And, can you tell Judge Bernstein what factors were considered by Complainant in making the recommendation?

A. Yes, there are several factors that we considered in making this recommendation. The numbers of violations, I believe that the documentation that has been introduced through Mr. Neilson as a result of his investigations shows that the Respondent has committed violations in well over 150 transactions, violations involving failure to make full payments promptly.

In addition, I believe the documentation shows that these transactions involved dollar amounts which you've seen \$300,000. We also considered as a aggravating factor, the number of non-sufficient fund[s] checks which have been issued by the Respondent which we believe have a very disruptive [e]ffect to the trade in trying to conduct their business.

Furthermore, a factor we considered is that they, as of yesterday at 5:00 when Mr. Neilson quit his phone calls, still had not brought their payment practices into compliance. At that time, I believe Mr. Neilson's phone calls showed that the firm still had past due and unpaid transactions exceeding \$50,000.

Finally, I would consider the serious effect that these types of violations, violations involving failure to make full payment properly on the produce industry.

Q. Why is the industry unique that this could be a serious offense?

A. Well, the produce industry is unique because of the produce itself. It's highly perishable, it has to move great distances in a short period of time before it starts to decay. If you wait too long, you can't sell it at all, so just by the very nature, that makes the industry unique.

Because of this characteristic, produce transactions occur generally over the phone between people which may or may not have ever met each other, produce is expensive, so the transactions involve very high dollar amounts and the -- in order to accomplish these transactions there had to be a great deal of trust between parties to ship this produce over great distance to people that you have never met; buyers trusting their shippers to ship the quality and quantity they need to meet their customers demands; conversely, suppliers are trusting that the receivers will accept it and pay for it in accordance with the contract terms that were discussed at the time of the negotiations.

So, this all works to make the produce industry unique. We believe it's the Secretary of Agriculture's role in this industry to insure that there's a level playing field for all members of the industry to conduct business on and we believe this is done through enforcement -- even-handed enforcement of the Perishable [Agricultural] Commodities Act.

Q. If Judge Bernstein takes the recommendation that you've suggested, do you think there would be any other [e]ffect on the industry?

A. Well, certainly if a revocation is issued by the Administrative Law Judge, the obvious [e]ffect is it puts Kanowitz Fruit and Produce Corporation out of the industry by revocation of their license, they'd no longer be legally allowed to operate, so that's one obvious [e]ffect of the revocation so there's a deterrent here, obviously to that corporation, but also there's a deterrent, we believe -- a message of

deterren[ce] in a sense to the produce industry as a whole that the Secretary of Agriculture considers these types of violations to be very serious and that they'll be prosecuted wherever and whenever they occur.

Tr. 100-03.

Respondent argues that USDA's support of the recent civil penalties legislation (section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995))), means that revocation in this case is inappropriate. I disagree. While USDA did support amendments to the PACA which allow the imposition of civil penalties, it did not support the elimination of the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

(e) Alternative Civil Penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment, the Secretary of Agriculture may now assess civil penalties in lieu of suspending or revoking a PACA license. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license suspension or

revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing

penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

These statements make clear that, although USDA supported the amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 1993 through January 1996, by failing to make full payment to 48 sellers of the agreed purchase prices for 170 lots of perishable agricultural commodities in the total amount of \$402,345.79.

The appropriate sanction for failure-to-pay cases, like this case, is license revocation. This admittedly harsh 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.¹² 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 had 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 produce sellers and would not serve as a sufficient deterrent to others.

Finally, Respondent argues that his 25 employees will suffer harm from any sanction other than a civil penalty. However, "this Department routinely denies requests for a lenient sanction based on the interests of [a] respondent's customers, community or employees." *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987). Collateral effects of a Respondent's PACA license revocation are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.¹³

¹²*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*, *supra*, 443 F.2d at 588-89; *Zwick v. Freeman*, *supra*, 373 F.2d at 117; *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 50-51 (Nov. 15, 1996); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 16-17 (Sept. 12, 1996); *In re Boss Fruit & Vegetable, Inc.*, *supra*, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc.*, *supra*, 52 Agric. Dec. at 621; *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re Connecticut Celery Co.*, *supra*, 40 Agric. Dec. at 1133; *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) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

¹³*In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 60-61 (Nov. 15, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 28-30 (Sept. 12, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co.*, *supra*, 55 Agric. Dec. at 639 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed willful, flagrant, and

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

Order

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent.

In re: KANOWITZ FRUIT AND PRODUCE CO., INC.

PACA Docket No. D-95-0504.

Order Denying Petition for Reconsideration filed June 5, 1997.

License revocation — Civil penalties — Willful, flagrant, and repeated violations — Failure to make full payment promptly — Collateral effects of revocation — Roll-over debt — Slow-pay — No-pay — Uniformity of sanction — Sanction evidence.

The Judicial Officer denied Respondent's Petition to Reconsider. Respondent may not convert a "no-pay" case into a "slow-pay" case by paying all outstanding debts alleged in the Complaint and Amended Complaint, if Respondent is not in full compliance with the PACA payment provisions at the time of the hearing. Evidence of the "commercial reasonableness" of agreements between Respondent and its produce creditors, Respondent's financing arrangements, and the payment practices of persons in the perishable

repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (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) (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (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) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (the fact that 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) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co.*, *supra*, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co.*, *supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

agricultural industry are not relevant to the existence of Respondent's roll-over debt. Respondent's good faith efforts to pay produce creditors and the collateral effects of license revocation are relevant neither to a determination whether Respondent violated the PACA nor to the sanction to be imposed for flagrantly or repeatedly violating the payment provisions of the PACA. The PACA has no requirement that there be uniform sanctions among violators. Sanction witness testimony is permitted. License revocation is an appropriate sanction under the circumstances. One of the purposes of revocation is to deter others in the perishable agricultural commodities industry from violating the PACA.

Jane McCavitt, for Complainant.

Sherylee F. Bauer, New York, NY, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The 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 PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) (hereinafter Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice) by filing a Complaint on November 8, 1994.

On March 1, 1996, Complainant filed an Amended Complaint which alleges that, during the period March 1993 through December 1993, Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 18 sellers of the agreed purchase prices for 62 lots of perishable agricultural commodities in the total amount of \$206,850.69, which Respondent purchased, received, and accepted in interstate or foreign commerce and that, during the period January 1994 through January 1996, Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 30 sellers of the agreed purchase prices for 108 lots of perishable agricultural commodities in the total amount of \$195,495.10, which Respondent purchased, received, and accepted in interstate or foreign commerce (Amended Complaint ¶¶ III, IV). Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which Respondent denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 7, 1996, in New York, New York. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Sherylee F. Bauer, Esq., of New York, New York, represented Respondent. The ALJ issued a bench decision on May 7, 1996, in which he concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 201) and revoked Respondent's

PACA license (Tr. 208). On May 29, 1996, 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 spelling, punctuation, and transcription errors (hereinafter Initial Decision and Order).

On June 24, 1996, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's (hereinafter USDA) adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).¹ On July 17, 1996, Complainant responded to Respondent's appeal, and on July 18, 1996, the case was referred to the Judicial Officer for decision.

On March 21, 1997, I issued a Decision and Order in which I found that Respondent had failed to make full payment promptly to 48 sellers of the agreed purchase prices, totalling \$402,345.79, for 170 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce during the period March 1993 through January 1996. I concluded that such failures to pay constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Kanowitz Fruit and Produce, Co., Inc.*, 56 Agric. Dec. ___, slip op. at 30 (Mar. 21, 1997). Based on this conclusion, I revoked Respondent's PACA license. *In re Kanowitz Fruit and Produce, Co., Inc.*, *supra*, slip op. at 33.

On May 7, 1997, Respondent filed a Petition for Reconsideration and Oral Argument (hereinafter Petition for Reconsideration), and on May 28, 1997, Complainant filed Complainant's Objection to Respondent's Petition for Reconsideration. On May 29, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent raises seven issues in its Petition for Reconsideration and requests the opportunity for oral argument. Respondent's request for oral argument is denied because the issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

First, Respondent asserts that all produce sellers that were listed in the Complaint and the Amended Complaint were paid at the time of the hearing. Respondent contends that, under these circumstances, "'slow pay' is the appropriate standard" (Petition for Reconsideration at 2).

Even if I were to find that Respondent had paid all the transactions alleged in

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

the Complaint and the Amended Complaint by the time of the hearing, that finding would not cause me to treat this case as a "slow-pay" rather than a "no-pay" case. The long-standing USDA policy has been that a case will be treated as a "slow-pay case" warranting license suspension, rather than a "no-pay" case warranting license revocation, only if the respondent has paid the amounts alleged to be due in a complaint by the opening of the hearing (or if no hearing is to be held, by the time the answer is due), the respondent is in compliance with the payment provisions of the PACA and the Regulations by the opening of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent has no agreement with produce creditors for payment to be made beyond 30 days after the day on which the produce is accepted.²

Thus, even if Respondent paid all of the amounts alleged to be due in the Complaint and the Amended Complaint by the date of the May 7, 1996, hearing, that payment alone would not convert this case from a "no-pay" to a "slow-pay" case because the record clearly establishes that Respondent had not paid all of its produce sellers at the time of the hearing. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment provisions 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.

At the hearing, Respondent's bookkeeper, Frances Falcone, testified that Respondent had outstanding current indebtedness of approximately \$125,000 (Tr. 160-61). This amount (within a few hundred dollars) is corroborated by the balances in the "Summary table of unpaid transactions" (CX 24A at 6; Tr. 194).

In order to convert this case from a "no-pay" to a "slow-pay" case and 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 paid some produce sellers, but not others.

Second, Respondent contends that its arrangements for financing, the reasonableness of the terms of its agreements with its produce creditors, and the payment practices of most persons in the perishable agricultural commodities industry are relevant to the existence of Respondent's roll-over debt, as follows:

²See, e.g., *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1268-72 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693, 700 (1995); *In re Lloyd Myers, Co.*, 51 Agric. Dec. 747, 763-65 (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, 634 (1989); *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 505-506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988).

Rollover debt was determined at the last moment by applying statutory prompt payment terms to [Respondent's] payables without regard to its actual, commercially reasonable, terms or the financing, actually arranged, to pay all suppliers without "borrowing from Peter to pay Paul." Two of the best known credit services for the industry are the Blue Book and the Red Book. A review of the ratings of the companies listed illustrate that most of the industry is NOT in compliance with prompt pay. (Transcript pp. 183 and 184). Therefore, the department did not present evidence that [Respondent] slowed its payments to these later suppliers in order to pay the suppliers covered by the initial and amended complaints.

Furthermore, [Respondent] had obtained an SBA commitment (see Exhibit "D") for a loan sufficient to pay all suppliers in full prior to the hearing. The loan was proceeding normally to a closing when [Respondent] was required by warranty provision to disclose this proceeding by the Department. The loan contained sufficient working capital to pay a reasonable fine, something the bank's counsel was prepared to entertain if this proceeding could be settled. By refusing to make a reasonable settlement of this matter after having been informed of the SBA commitment, the department caused the SBA to withdraw its commitment in the face of a threat by the Department to close down [Respondent]. (see Exhibit "E").

It is therefore, solely because of the Department's action that there was any unpaid suppliers at the time of the hearing. The Department should not be permitted just prior to the hearing to cite for the first time commercially reasonable debt to suppliers (upon information and belief, none of whom complained to the Department about non-payment) when the Department obstructed the payment of these suppliers.

Petition for Reconsideration at 2-3.

I disagree with Respondent's contention that Respondent's financing, the payment practices of persons in the perishable agricultural commodities industry, and the "commercial reasonableness" of the terms of Respondent's agreements to pay produce creditors are relevant to the issue of Respondent's roll-over debt. The only issues relevant to the existence of roll-over debt are whether Respondent paid

some or all of the amounts alleged to be due in the Complaint and the Amended Complaint by the beginning of the May 7, 1996, hearing, whether Respondent was in compliance with the payment provisions of the PACA and the Regulations by the beginning of the May 7, 1996, hearing, and whether any written agreement between Respondent and any of its produce creditors, executed in accordance with 7 C.F.R. § 46.2(aa)(11), provided that Respondent could pay for produce more than 30 days after the produce was accepted. *In re S W F Produce Co.*, *supra*, 54 Agric. Dec. at 700; *In re The Caito Produce, Co.*, *supra*, 48 Agric. Dec. at 634; *In re Carpenito Bros., Inc.*, *supra*, 46 Agric. Dec. at 505-506.

Section 46.2(aa)(5), (11) of the Regulations provides:

§ 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).

Respondent's alleged arrangements for financing, which would enable Respondent to pay produce creditors, is not payment in accordance with the PACA and is therefore not relevant to the issue of the existence of Respondent's roll-over debt. "Commercially reasonable" terms for the payment of produce creditors are not relevant to the existence of roll-over debt. Respondent has not proven or even alleged that, at the time of the hearing, these "commercially reasonable" agreements were reduced to a writing in accordance with 7 C.F.R. § 46.2(aa)(11) and provided that Respondent was to pay produce creditors within 30 days after the produce was accepted.

Moreover, the payment practices of others in the perishable agricultural commodities industry has no relevance to whether Respondent in this proceeding had roll-over debt at the time of the May 7, 1996, hearing.

Third, Respondent contends that several relevant factors, which were not considered, should have been considered in connection with the sanction to be imposed against Respondent (Petition for Reconsideration at 4).

Respondent contends that one factor that must be considered when imposing a sanction is whether Respondent's conduct threatens to undermine the PACA's purpose of licensing responsible persons, as follows:

The United States Department of Agriculture's (hereinafter "Department") stated policy is to only license responsible companies. What is more responsible than a company which lost \$400,000 to an embezzlement paying all its suppliers rather than walking away or declaring bankruptcy? It sold one of its units, it accepted a loan from an employee (without any date on which it has to be repaid), it gave up its warehouse, and it stayed open seven days a week. Its principal was willing to use his home and life insurance policies, as well as [Respondent's] units in the Brooklyn Terminal Market as collateral to obtain an SBA loan sufficient to pay all suppliers in full plus a fine to the Department. It was the Department that frustrated this loan by refusing to settle on a fine and threatening revocation, thereby making any loan impossible. [Respondent], a previously reputable licensee, suffered a loss through circumstances totally beyond its control and worked and struggled to ensure that everyone was paid in full and as quickly as possible. It is exactly this type of company that the Department should endeavor to preserve.

Petition for Reconsideration at 4-5.

The record establishes that Mr. Steven Kanowitz undertook a number of steps to correct Respondent's financial problems and demonstrated a *bona fide* commitment to turning the business around. *In re Kanowitz Fruit and Produce, Co., Inc., supra*, slip op. at 6. However, despite Respondent's commendable efforts to pay produce suppliers, the record establishes that Respondent failed to make full payment promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received, and accepted in interstate or foreign commerce and that such failures constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires payment—not good intentions to pay produce sellers or commendable efforts to pay produce sellers. 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 of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing. This policy is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.³ Respondent's failure to pay establishes that Respondent is not financially responsible.

³*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 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. 1967), cert. denied, 389 U.S. 835 (1967); *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, No. 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 The 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) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

In light of the record in this proceeding, which establishes Respondent's efforts to pay produce creditors and indicates that Respondent's inability to pay produce creditors began when some of Respondent's employees embezzled inventory valued between \$300,000 and \$400,000 from Respondent, it should be emphasized that the revocation order in this proceeding is not being issued for any punitive reasons. Respondent has done nothing worthy of punishment. Respondent has committed no action even remotely resembling a crime. The offenses here were *mala prohibita*, not *mala in se*. There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that paid produce sellers from 2 weeks to 117 weeks late in violation of the PACA.

Further, Respondent asserts that the cause of Respondent's violation (embezzlement) and the effect of the revocation of Respondent's PACA license on Respondent's business, Respondent's employees, the families of Respondent's employees, and the neighborhood in which Respondent's business is located should have been considered when determining the sanction to be imposed (Petition for Reconsideration at 5-6).

I disagree with Respondent. "[T]his Department routinely denies requests for a lenient sanction based on the interests of [a] respondent's customers, community or employees." *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987). 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 promptly.⁴

⁴*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) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225-28 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co.*, 55 Agric. Dec. 622, 639 (1996) (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) (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) (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (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) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (the fact that Respondent's

Fourth, Respondent contends that sanctions imposed against those who violate the PACA are not uniform and thus arbitrary and capricious (Petition for Reconsideration at 7-9).

I disagree with Respondent. The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 18-20 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 112 (Jan. 13, 1997). Moreover, the PACA has no requirement that there be uniformity in sanctions among violators.

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the statutes entrusted to the Secretary for enforcement, and there is no requirement for uniformity. In a failure-to-pay-promptly case instituted under a statute similar to the PACA, the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229), it is explained that uniformity is not required:

Respondents argue that the suspension imposed by the ALJ is excessive and unwarranted . . . , because there is no "uniformity" in the

creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1249 n.8 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1644 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978) (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1887 (1975) (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

sanction with other cases, which impose less severe sanctions, and thus the primary purpose--deterrence for respondents and others similarly situated--is not achieved. Respondents are incorrect.

There is no requirement that there be uniform sanctions in like cases.

In re Ozark County Cattle Co. (Decision and Order as to National Order Buying Company and Thomas D. Runyan), 49 Agric. Dec. 336, 371 (1990). See also *In re Floyd Stanley White*, 47 Agric. Dec. 229, 309 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).

Fifth, Respondent contends that it is improper for Complainant to have a "sanction witness" testify because the testimony is self-serving, taints the impartiality of the proceedings, is highly prejudicial, and tests the impartiality of the ALJ (Petition for Reconsideration at 9).

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.⁵

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.⁶ Witnesses for parties in these proceedings frequently testify regarding the appropriate sanction to be imposed. I am not aware of any proceeding, including the instant proceeding, in which sanction testimony from witnesses called by either party affected the impartiality of an administrative law judge or the judicial officer or in any way prejudiced an administrative law judge or the judicial officer.

Sixth, Respondent contends that revocation of Respondent's PACA license would not deter other PACA licensees from violating 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 of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing.⁷ This sanction policy is harsh, but has consistently been upheld by the

⁵*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).

⁶*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).

⁷*See, e.g., 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 Brothers 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,

courts.⁸ There are many steps that can be taken to minimize the likelihood of payment violations, and therefore, severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry.

Seventh, Respondent contends that the imposition of a civil penalty, rather than revocation of Respondent's PACA license, would be in accord with Congressional intent, would deter violations of the PACA, and would serve as an example "of to what extent a 'responsible' company should go to ensure that their vendors are paid promptly" (Petition for Reconsideration at 11).

I disagree with Respondent. While the PACA was amended to allow the imposition of civil penalties (section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995)), the amendment does not eliminate the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

(e) Alternative Civil Penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and

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).

⁸*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).

amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment, the Secretary of Agriculture may now assess civil penalties in lieu of suspending or revoking a PACA license. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the

violator out of business, would often better serve the public interest.

....

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

....

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on

Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

These statements make clear that, although USDA supported the amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 1993 through January 1996, by failing to make full payment promptly to 48 sellers of the agreed purchase prices for 170 lots of perishable agricultural commodities in the total amount of \$402,345.79.

The appropriate sanction for failure-to-pay cases, like this case, is license revocation. 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 had 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 produce sellers and would not serve as a sufficient deterrent to others.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 21, 1997, *In re Kanowitz Fruit and Produce, Co., Inc.*, *supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.⁹ Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on March 21, 1997. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed March 21, 1997, is reinstated, with allowance for time passed.

⁹*In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 10 (Apr. 16, 1997) (Order Denying Petition for Reconsideration); *In re City of Orange*, 56 Agric. Dec. ___, slip op. at 3 (Mar. 25, 1997) (Order Granting Request to Withdraw Petition for Reconsideration); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___, slip op. at 6 (Mar. 19, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ___, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Petition for Reconsideration).

Order

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent

In re: KANOWITZ FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-95-0504.
Stay Order filed June 25, 1997.

Jane McCavitt, for Complainant.
Sherylee F. Bauer, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 21, 1997, the Judicial Officer issued a Decision and Order holding that Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), committed willful, flagrant, and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA), and revoking Respondent's PACA license. *In re Kanowitz Fruit and Produce Co., Inc.*, 56 Agric. Dec. ___, slip op. at 33 (Mar. 21, 1997). On May 7, 1997, Respondent filed a Petition for Reconsideration and Oral Argument, and on June 5, 1997, the Judicial Officer issued an Order Denying Petition for Reconsideration. *In re Kanowitz Fruit and Produce Co., Inc.*, 56 Agric. Dec. ___ (June 5, 1997) (Order Denying Petition for Reconsideration).

On June 25, 1997, Respondent filed a Motion to Stay Order pending completion of proceedings for judicial review, which Respondent intends to institute, and on June 25, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Motion to Stay Order. On June 25, 1997, Jane McCavitt, attorney for Complainant in this proceeding, informed the Office of the Judicial Officer by telephone that Complainant does not oppose Respondent's Motion to Stay Order.

Respondent's Motion to Stay Order is granted. The Order issued in this proceeding on March 21, 1997, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

**MOUNTAIN RIVER PRODUCE, INC. v. POTATO SPECIALTIES, INC.
and/or GEM STATE PRODUCE SUPPLY, INC.**

PACA Docket No. R-95-0233.

Decision and Order filed January 23, 1997.

Agency; Principal - Undisclosed; Liability - Broker.

Where co-respondent broker, acting on behalf of shipper, failed to perform duties by failing to issue confirmation, and co-respondent receiver denied knowledge of identity of complainant shipper, broker acted as agent for undisclosed principal, and by negotiating an "accord and satisfaction" check, bound its principal, relieving the receiver of further liability. Broker held liable for invoice amount less damages from breach of contract as a result of its breach of the fiduciary responsibilities to shipper.

Patrice Harps, Presiding Officer.

Complainant, Pro se.

Lawrence H. Meuers, Naples, FL, for Respondent Potato Specialties, Inc.

Jeffrey M. Chebot, Philadelphia, PA, for Respondent Gem State Produce Supply, Inc.

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

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 formal complaint was filed with the Department against co-respondent Potato Specialties, Inc. on August 29, 1994 and a timely formal complaint was filed against co-respondent on February 24, 1995, in which complainant seeks a reparation award against the respondents in the amount of \$6,175.00 in connection with a railcar load of potatoes shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondents, which filed answers thereto, denying liability.

Since the amount claimed in the formal complaint does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of 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 part of the evidence of the case, as

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).

is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Respondent Potato Specialties, Inc. filed an answering statement and a brief. Respondent Gem State Sales also filed an answering statement and a brief.

Findings of Fact

1. Complainant, Mountain River Produce, Inc., hereinafter referred to as Mountain River, is a corporation whose post office address is [REDACTED], [REDACTED] Idaho [REDACTED]. At the time of the transaction involved herein, Mountain River was licensed under the Act.

2. Respondent Potato Specialties, Inc., hereinafter referred to as Potato Specialties, is a corporation whose post office address is P.O. Box 144, Elmhurst, Illinois [REDACTED]. At the time of the transaction involved in this proceeding, Potato Specialties was licensed under the Act.

3. Respondent Gem State Produce Supply, Inc., hereinafter referred to as Gem State, is a corporation whose post office address is [REDACTED] Idaho [REDACTED]. At the time of the transaction involved in this proceeding, Gem State was licensed under the Act.

4. On or about May 24, 1994, complainant arranged with co-respondent Gem State, acting as collect-and-remit broker, to ship one railcar load of potatoes to co-respondent Potato Specialties, comprised of 1,300 100-pound bags of U.S. No. 1 potatoes, FOB as to price, with grade and condition guaranteed to destination.

5. Complainant invoiced co-respondent Gem State \$4.75 per bag, for an invoice total of \$6,175.00. Co-respondent Gem State invoiced Potato Specialties \$5.00 per bag, for an invoice total of \$6,500.00.

6. The potatoes arrived at destination at Potato Specialties' place of business on June 8, 1994, and were made the subject of a federal inspection on June 10, 1994. The inspection revealed 8% internal black spot, 3% net necrosis, 5% silver scurf, 3% sunken discolored areas, and 1% soft rot, for a total of 20% defects.

7. Co-respondent Potato Specialties has paid co-respondent Gem State \$1,221.20, who in turn issued a check to complainant Mountain River for \$896.20. Complainant has not cashed that check.

Discussion

Complainant alleges that it shipped a railcar load of potatoes to Potato Specialties in accordance with contract terms negotiated through Gem State, who

acted as broker. Complainant further alleges that it has not received payment for the potatoes, and seeks payment of \$6,175.00 from Potato Specialties. In the event that Potato Specialties is not found liable for the amount claimed, Mountain River seeks a finding that Gem State is liable for its failure to perform the duties of a broker. As the proponent of this claim, complainant has the burden of proving its allegations. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

Since complainant's claim is made in the alternative, we must first explore the question of co-respondent Potato Sales' liability. Potato Sales makes several allegations in defense of its position. It first alleges that it contracted to purchase potatoes from Gem State rather than from Mountain River. Second, it alleges that the potatoes were purchased as U.S. No. 1 FOB, with grade guaranteed to destination. Third, it alleges that the destination inspection establishes a breach of contract from which it is entitled to recover damages. Fourth, it alleges that it made payment of the invoice received from Gem State with a check marked, "Paid In Full", which Gem State cashed, effecting an accord and satisfaction.

It is not necessary to determine whether or not the contract called for the grade to be U.S. No. 1 at destination, since the inspection made upon arrival establishes a breach of contract in either case, from which Potato Specialties would be entitled to recover damages. This leaves for consideration the defenses of (1) privity of contract between Mountain River and Potato Specialties, and (2) accord and satisfaction.

The most important matter to be decided is whether complainant has established by a preponderance of evidence that it entered into a contract with Potato Specialties. Complainant alleges that Gem State's Glenn Van Der Giessen negotiated this transaction, as a collect-and-remit broker. Although Mountain River initially claimed that Gem State acted on behalf of both parties, it is apparent that it acted solely as agent for Mountain River. This finding is supported by Gem State's answer to the formal complaint, signed by Mr. Van Der Giessen. In this document, Mr. Van Der Giessen declares that he acted as agent for Mountain River, and further admits that he did not send a copy of the confirmation of sale to Potato Specialties, and further admits a long-standing practice by which his firm failed to send copies of confirmations of sale to Potato Specialties.

Potato Specialties' Ted Katz, states in his sworn answering statement, that Gem State acted,

"as a seller or broker of potatoes to Potato Specialties. Gem State sold this load to Potato Specialties and did not issue Potato Specialties a broker's memorandum of sale indicating it acted as a broker".

In Gem State's answering statement, it again insists that Potato Specialties knew that it (Gem State) was acting as the seller's broker, alleging a course of dealings, and alleging that Potato Specialties acknowledged this course of dealing in its Answer and Counterclaim in the formal proceeding, *Winnemucca Farms, Inc. d/b/a Krakaw Produce Co. v. Potato Specialties, Inc. and Gem State Produce Supply, Inc.*, PACA Docket No. R-95-147. In fact, in paragraph 6 of that document, Potato Specialties states, "Potato Specialties provided Krakaw with a copy of the confirmation of sale which set out the specific contract terms". From this document provided by Gem State, we are led to the conclusion that Potato Specialties had received a memorandum of sale from Gem State in that instance. Rather than fortifying Gem State's position, this document actually works in favor of Potato Specialties' contention that it understood Gem State to be the seller in the present instance.

Gem State contends that in 98 out of 100 previous transactions, it had acted as a broker when dealing with Potato Specialties without, presumably, issuing memoranda of sale to that firm. We find this a most remarkable admission. However, allegations about a course of dealings must be proved by numerous instances of actual practice. *California Fruit Exchange v. Spracale Fruit Co.*, 89 F. Supp. 580 (W.D. PA. 1950); *Coast Marketing Co. v. World Wide Marketing Co., Inc.*, 30 Agric. Dec. 1742 (1971); *Michael Santelli & Sons, Inc. v. Samuel H. Rubenstein*, 21 Agric. Dec. 1053 (1962); *M.R. Davis & Bros. v. William J. Flynn*, 20 Agric. Dec. 1069 (1961). Since Gem State has provided no evidence to support its claim, we find that this argument must fail.

The file does not contain any other convincing evidence that Potato Specialties knew or had reason to believe that it was purchasing the potatoes from Mountain River, and we have rejected Gem State's claim that Potato Specialties knew that Gem State was operating as a collect-and remit broker in this transaction. We find that Potato Specialties had no reason to know that it was dealing with anyone other than Gem State, having conducted all negotiations with, and having received its only invoice from Gem State.

We find that respondent Gem State essentially acted as agent for an undisclosed principal, Mountain River, and therefore bound itself as if it were the principal. See *Ucon Produce v. Jimmy Shmon Produce Broker*, 37 Agric. Dec. 1747 (1978) where we quoted *Mawer-Gulden-Annis, Inc. v. Brazilian & Colombian Coffee Company*, 49 Ill. App. 2d 400, 199 N.E.2d 222 (1964):

It is a settled rule in verbal contracts, if the agent does not disclose his agency and name his principal, he binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in the same manner as if he were the principal in interest....And the fact that the agent is known to be a commission merchant, auctioneer, or other professional agent, makes no difference....The duty is upon the agent, who wishes to avoid liability, to disclose the name or identity of his principal clearly and in such a manner as to bring such adequately to the actual notice of the other party, and it is not sufficient that the third person has knowledge of the facts and circumstances which would, if reasonably followed by inquiry, disclose the identity of the principal.

Since respondent Gem State failed to disclose the identity of its principal, we find that it relieved Potato Specialties from liability by accepting and depositing a check from that firm offered in accord and satisfaction of the claim. When a shipper allows the broker to collect on its behalf, it invests that broker with the apparent authority to accept and process payments on its behalf. Along with this authority, the broker assumes the fiduciary responsibility to protect the shipper's interests, and the shipper is bound by its agent's actions. *Gulf-Western Food Products Company v. Prevor-Mayrsohn International, Inc.*, 34 Agric. Dec. 1911 (1975).

There remains for consideration the question of whether Gem State is liable to Mountain River, and if so, for how much. It is at this point that we will return to a discussion of Gem State's remarkable admission that it repeatedly violated the Act by failing to perform the duties of a broker.

The PACA (7 U.S.C. 499b) declares it unlawful for a 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 undertaking". The regulations under the Act establish the express duties of brokers in 7 C.F.R. § 46.28(a), which read, in part,

After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement The broker who does not deliver copies of these documents to all parties involved in the transaction is

failing to perform his duties as a broker If the broker's records do not support his contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence. . .

Respondent Gem State has readily admitted its failure to meet its responsibility to provide a copy of its confirmation to Potato Specialties, and actually relies on its repeated violations of the Act to support its contention that Potato Specialties was aware of a contract with Mountain River. At this juncture, we must decide whether Gem State's failure to perform its express duties as a broker was merely a technical violation in this instance, or whether its actions, or lack thereof, make it liable to Mountain River for damages.

The lack of a confirmation of sale issued to Potato Specialties is fatal to Mountain River's claim against that firm, since Gem State acted in its stead when it received and negotiated a check in accord and satisfaction from Potato Specialties. This is more than a technical violation, and is the proximate cause of Mountain River's inability to hold Potato Specialties liable for the value of the potatoes.

We cannot, however, find that Gem State owes the full invoice amount of \$6,175.00. The inspection at destination establishes that Mountain River breached the contract, which called for the potatoes to grade U.S. No. 1 at destination.

Even though complainant requested an audit of Potato Specialties' records, there is insufficient evidence in the file for us to find that complainant authorized Potato Specialties to handle the potatoes for its account. Gem State, therefore, owes Mountain River the original invoice amount less damages resulting from the breach of contract. The usual measure of damages is set forth in UCC § 2-714(2):

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The value the goods should have had can be established by taking note of the appropriate USDA Market News Report. The quotes for 100-pound bags of U.S. No. 1 Idaho Russet potatoes on June 8, 1994, on the Chicago, Illinois market were \$13.00 to \$14.00, mostly \$13.50 to \$14.00. Accepting the average of the "mostly" quote, \$13.75 per bag, as the fair market value of conforming goods yields a total

of \$17,875.00 (1,300 X \$13.75). An audit of Potato Specialties' records by personnel of the PACA Branch revealed that its sales records did not support the accounting it issued to Gem State on these potatoes. Absent an acceptable accounting, the value of the goods accepted may be shown by use of the percentage of defects disclosed by a prompt inspection. *South Florida Growers Association, Inc. v. Country Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *v. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

The inspection in this instance revealed 20 percent defects against the contract. The value of the product received is therefore calculated as \$17,875.00 less 20%. This figure, \$3,575.00, when subtracted from the initial value of \$17,875.00, yields the value of the non-conforming goods as \$14,300.00. Subtracting the value of the non-conforming goods (\$14,300.00) from the value of conforming goods (\$17,875.00) establishes basic damages of \$3,575.00, to which Potato Specialties would have been entitled, had complainant been able to prove a contract with that firm.

Respondent Potato Specialties would also have been entitled to recover the \$65.40 cost of inspection as an expense incidental to the breach of contract. Complainant's invoice to Gem State is for \$6,175.00. Subtracting total damages of \$3,640.40, leaves a balance still due of \$2,534.60. We find that respondent Gem State's failure to perform its duties as a broker caused complainant Mountain River to suffer damages in this amount.

Respondent Gem State's failure to pay complainant \$2,534.60 is a violation of section 2 of the Act for which reparation should be awarded to complainant. 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. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., 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).

Order

Within 30 days from the date of this order respondent Gem State shall pay complainant as reparation \$2,534.60 with interest thereon at the rate of 10% per annum from July 1, 1994 until paid. The complaint against Potato Specialties is dismissed.

Copies of this order shall be served on the parties.

PISMO-OCEANO VEGETABLE EXCHANGE v. A & S PRODUCE, INC.
PACA Docket No. R-95-0126.
Decision and Order filed February 3, 1997.

Evidence - Proof of mailing.

Where there was no evidence tending to confirm that invoices were received, and opposing party positively swore that invoices were not received, strict proof of the mailing of the invoices was required. Such evidence would consist of a declaration by the person responsible for the mailing, that the invoices were in fact properly addressed and placed in the mail.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Baret C. Fink, Los Angeles, CA, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

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 \$6,172.80 in connection with transactions in interstate commerce involving mixed vegetables.

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 failed to file a timely answer, and was held in default. Respondent then filed a timely petition to reopen the proceeding, and on December 7, 1994, respondent's petition was granted, and respondent's previously submitted proposed answer was received in evidence and served on complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, 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 filed a brief.

Findings of Fact

1. Complainant, Prismo-Oceano Vegetable Exchange, is a corporation whose address is [REDACTED] California.

2. Respondent, A & S Produce, Inc., is a corporation whose address is [REDACTED] California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about the following dates complainant shipped to respondent produce as follows:

<u>Date</u>	<u>Description</u>	<u>Quantity</u>
June 24, 1993	Nappa	100
June 25, 1993	Nappa	80
June 26, 1993	Nappa	100
July 15, 1993	Spinach	42
July 16, 1993	Red Leaf	63
July 17, 1993	Red Leaf	42
	Spinach	42
	Nappa	160
July 19, 1993	Red Leaf	42
	Spinach	42

4. An informal complaint was filed on January 6, 1994, which was within nine months after the causes of action alleged herein accrued.

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).

Conclusions

Complainant claims that the produce listed in finding 3 was sold to respondent on an f.o.b. basis prior to shipment. Dennis Donovan, complainant's sales manager, submitted an affidavit in which he stated that he was the person responsible for the sale of the produce on behalf of complainant, and that he was initially contacted by Casey O'Connor of California Fresh Marketing (hereafter CFM) of Arroyo Grande, California, who was seeking to purchase mixed vegetables for sale to respondent. Mr. Donovan states that he informed O'Connor that he would not let CFM take title to the produce, but would allow CFM to be broker on a sale of the produce to respondent. Donovan also alleges that the produce was subsequently sold to respondent, and that invoices were sent to respondent for each lot of produce. Complainant attached copies of invoices covering each lot to its complaint, and to other submissions herein.

Respondent denied purchasing the produce from complainant, but admitted receiving the produce. Respondent alleged that the produce was purchased from CFM, and submitted evidence that CFM had billed respondent for the produce, and had been paid for the produce. Respondent also submitted the affidavit of its president Mihee Jang stating that none of the invoices submitted by complainant were ever received by respondent.

Complainant submitted the affidavit of Donovan stating that he was personally aware of the fact that complainant had promptly invoiced respondent for each of the lots of produce. Mr. Donovan further stated that he "personally oversaw the invoices which were sent and mailed to respondent . . ." This statement falls short of a declaration by the person responsible for the mailing, that the invoices were in fact properly addressed to respondent, and placed in the mail.² If there were some evidence tending to confirm that the invoices were received by respondent, or if respondent had not positively sworn that the invoices were not received, we might be less stringent in our requirement of strict proof of mailing. However, in this case there is an important additional factor which leads us to question the mailing of the invoices. As respondent's counsel points out, complainant contends that respondent has not paid for any of the lots of produce. Why then would complainant continue to make shipments to respondent in July, when the original June shipments had not been paid? The original invoice, which

²See *Maine Potato Growers v. Orrell Produce Company*, 14 Agric. Dec. 399 (1955); *H. W. Butler & Brother v. S. D. Monash Produce Company*, 11 Agric. Dec. 472 (1952); *John H. Postel v. Phil Peck Company, Inc.*, 10 Agric. Dec. 82 (1951); and *Goldsby-Evans Produce Company v. Ernest E. Fadler Company*, 9 Agric. Dec. 228 (1950).

complainant claims to have sent on June 28, 1993, states (as do all the other invoices) that the terms are: "CASH F.O.B. NET 10 DAYS." This invoice would have been received by respondent no later than approximately July 1, 1993, and should have been paid no later than ten days from the date of receipt of the produce. The produce would have been received no later than the day following shipment, or June 26, 1993, and payment should have been made by July 6, 1993. One week after payment was due on this transaction complainant began, and then continued, the July shipments to respondent. We conclude that complainant has failed to meet its burden of proving by a preponderance of the evidence that the produce which is the subject of the complaint was sold to respondent. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

PRIMARY EXPORT INTERNATIONAL v. BLUE ANCHOR, INC.
PACA Docket No. R-95-0037.
Decision and Order filed February 11, 1997.

Purchase After Inspection — Failure to use term in contract negotiations
Transportation — Normality
Good Delivery — Averaging lots to determine

"Purchase after inspection" is a trade term defined in the Regulations, and must be employed by the parties to be applicable. Under the UCC an actual inspection of the very goods shipped, or a sample thereof, voids implied warranties, but the suitable shipping condition warranty, made applicable by use of f.o.b. terms, is an express warranty, and inspection of the goods shipped will not void such warranty in the absence of proof that it was the intent of the parties to do so.

A foreign survey that lumped together apples from three sea-land containers was utilized to determine whether apples arrived with abnormal deterioration, even though this method of survey made it impossible to associate the apples surveyed with the transit conditions applicable to each container. This was permitted because the temperature history for the three containers was sufficiently similar, and sufficiently within normal parameters, that transit conditions could safely be said not to void the suitable shipping condition warranty as to any of the containers.

After analysis of the definition of "commercial unit" in the Regulations, and of prior cases holding that lots of similar produce on a load should be averaged to determine if the load as a whole made good delivery, it was held that there is no reasonable basis for continuing to require that a breach pertain to a load as a whole. It was stated that "[t]here is nothing to prohibit rejection of a shipment when the breach exists only as to a portion of the load, and there is no prohibition of finding a breach and damages as to only a portion of a load when the whole load is accepted." The portions of a load which will be considered as subject to a finding

of a breach of contract were stated to be those which are distinguished in federal inspections.

George S. Whitten, Presiding Officer.

R. Jason Read, Newport Beach, CA, for Complainant.

Thomas R. Oliveri, Newport Beach, CA, for Respondent.

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

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 \$56,708.09 in connection with transactions in foreign commerce involving three loads of apples.

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.

The amount claimed in the formal complaint exceeds \$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. Complainant also filed a brief.

Findings of Fact

1. Complainant, Primary Export International, Inc., is a corporation whose address is [REDACTED] California.

2. Respondent, Blue Anchor, Inc., is a corporation whose address is [REDACTED]. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 1, 1994, respondent sold, on an f.o.b. basis, to complainant, and complainant sold (through CDS Distributing, Inc., of San Francisco, California, acting as broker) to EOS Trading Co., of Foster City, California, who, in turn, sold to Universal Fruit, Inc., of Taipei, Taiwan, three

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).

ocean container loads of California Fuji apples as follows:

Container No. EISU 5616215:

No. Ctns.	Size	Grade	F.o.b. Price to Complaint	Delivered Harbor Price to Universal
3	72	XFCY	\$48.00	\$55.95
16	80	"	39.00	45.95
4	88	"	33.00	39.95
14	100	"	26.00	32.95
16	113	"	24.00	30.95
11	125	"	23.00	29.95
8	138	"	22.00	28.95
49	150	"	20.00	26.95
18	163	"	18.00	24.95
25	72	FCY	35.00	41.95
42	80	"	33.00	39.95
42	88	"	27.00	33.95
84	100	"	23.00	29.95
42	113	"	22.00	28.95
42	125	"	22.00	28.95
46	138	"	20.00	26.95
42	150	"	18.00	24.95
42	163	"	17.00	23.95
42	80	No. 1	25.00	31.95
42	88	"	23.00	29.95
42	100	"	18.00	24.95
42	125	"	17.00	23.95
42	138	"	16.00	22.95
42	150	"	15.00	21.95
<u>42</u>	163	"	14.00	20.95
840				

Container No. EMCU 5103288:

No. Ctns.	Size	Grade	F.o.b. Price to Complaint	Delivered Harbor Price to Universal
5	64	No. 1	\$27.00	\$33.95

36	72	"	27.00	33.95
36	80	"	25.00	31.95
126	100	"	18.00	24.95
294	113	"	17.00	23.95
126	125	"	17.00	23.95
84	138	"	16.00	22.95
84	150	"	15.00	21.95
<u>49</u>	163	"	14.00	20.95
840				

Container No. ELSU 5605709:

No.	Ctns.	Size	Grade	F.o.b. Price to Complaint	Delivered Harbor Price to Universal
42		88	FCY	\$27.00	\$33.95
210		100	"	23.00	29.95
210		113	"	22.00	28.95
84		150	"	18.00	24.95
42		80	No. 1	25.00	31.95
84		88	"	23.00	29.95
<u>168</u>		100	"	18.00	24.95
840					

4. The three containers of apples were federally inspected at shipping point, between March 1 and 3, 1994, and found to grade as stated above. The apples were loaded on to the three containers, as stated above, on March 3, 1994, and shipped from loading point in Digiorgio, California to Universal Fruit, Inc. in Taipei, Taiwan. The containers were loaded on the vessel Ever Goods at the port of Los Angeles, California on March 4, 1994. The vessel Ever Goods arrived at port of discharge, Keelung, Taiwan, on March 27, 1994, and the containers were landed on March 28, 1994. The containers were delivered to the receiver on March 30, 1994.

5. On March 31, April 1, and 2, 1994, the apples from the three containers were subjected to a survey by Standard Marine Surveyors & Adjusters LTD. The survey covered the apples from all three containers, and grouped the apples by grade, and within grade categories by size, giving the percentage of damaged fruit for each size and grade of apples. The total sample used was stated to be 119 cartons taken at random from various locations in the refrigerated chambers in which the apples were stored. This is a more than adequate sampling. The

breakdown gave the percentage of apples "partly rottened," and the percentage having "several brown spots on the skin." The survey also stated a percentage of apples that were "yellowish," and a hardness range for each category. A summary of the percentages of rot and brown spots is given below:

U.S. No. 1:

<u>Size</u>	<u>Percentage of Rot</u>	<u>Percentage of Brown Spots</u>
64	10.94	48.44
72	9.72	18.06
80	8.54	14.17
88	9.09	22.16
100	8.38	24.19
113	3.13	25.55
125	3.20	9.60
138	3.14	12.68
150	5.67	8.67
163	0.	0.

For the U.S. No. 1 category the average rot was 5.57%, and the average brown spots was 17.66%.²

U.S. Fancy:

<u>Size</u>	<u>Percentage of Rot</u>	<u>Percentage of Brown Spots</u>
72	—	—
80	—	—
88	12.50	6.53
100	2.79	3.79
113	5.31	9.14
125	1.60	6.80

²These averages were derived by calculating the number of boxes in each size category from the percentages of rot and brown spots, and then calculating the average percentages from the relation of the total of such boxes to the total boxes in the grade category.

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138	0.	6.52
150	1.22	5.44
163	0	8.28

For the U.S. Fancy category the average rot was 3.60%, and the average brown spots was 5.86%.³

U.S. Extra Fancy:

<u>Size</u>	<u>Percentage of Rot</u>	<u>Percentage of Brown Spots</u>
72	6.94	0.
80	5.00	0.
88	6.82	0.
100	8.00	0.
113	6.20	0.
125	4.00	0.
138	7.97	0.
150	4.00	—
163	3.07	—

For the U.S. Extra Fancy category the average rot was 5.02%.⁴

6. Temperature recorders were placed in each of the containers at shipping point, and were set to run for 32 days. Chart number 301414 was extracted from the instrument from container No. EISU 5616215 at destination, and showed as follows: The trace begins on the first day at approximately 38°, rises to 40° at about the eighth hour, and varies between 39° and 41° through the eighth day. From the middle of the eighth day until the middle of the fifteenth day the trace makes a gradual descent from 40° to about 34°, and remains at about 34° until the twenty-fifth day. There is a gradual rise to about 35° at the twenty-sixth day, and the tape varies between 35° and 36° for the remainder of the tape. Chart number 301413 was extracted from the instrument from container No. EISU 5103288 at destination, and showed as follows: The trace begins on the first day at

³See note 2. The dashes indicate that the surveyor was unable to find any size 72 and 80 apples. Nevertheless, the number of boxes of these sizes shipped were included in the averages for the U.S. Fancy category.

⁴See note 2.

approximately 39°, falls to about 37° at the eighth hour, rises to about 42° at the twelfth hour, and then falls to about 38° at about the thirtieth hour where it remains until the beginning of the third day. From the third day to the fifth day the trace varies between 37° and 40°. From the fifth day to the eleventh day the trace gradually falls from about 37° to about 34°, and remains at approximately 34° through the remainder of the tape. Chart number 301412 was extracted from the instrument from container No. EISU 5605709 at destination, and showed as follows: The trace begins at about the fourth hour on the first day at approximately 42°, rises to about 45° at about the tenth hour, falls to about 41° at the twelfth hour where it remains for the remainder of the first day. At about the beginning of the second day the trace falls to about 40° where it remains through the middle of the second day. From the middle of the second day until the beginning of the fifth day the trace varies between 39° and 41°. From the beginning of the fifth day until the beginning of the fourteenth day the trace falls gradually from 39° to 34° where it remains until the middle of the twentieth day. From the middle of the twentieth day to the beginning of the twenty-fourth day the trace rises from 34° to about 36°, and varies between 36° and 37° for the remainder of the tape.

7. The receiver in Taiwan incurred the following expenses in connection with the apples:

Import duty	\$26,228.74
Labor fees (into and out of cold room)	761.88
Coldroom charge	1,142.81
Drayage	845.88
Handling charge	476.55
Customs broker charge and customs inspection charge	389.30
Terminal receiving charge	429.92
Survey charge	605.00

8. The formal complaint was filed on September 15, 1994, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant purchased the three containers of apples from respondent on an f.o.b. basis, admits acceptance at destination, and has paid respondent the full purchase price. Complainant alleges that respondent breached the contract of sale by shipping apples that were not in suitable shipping condition, and seeks to

recover the damages resulting from that breach.

The Regulations,⁵ in relevant part, define 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 the through land 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." Suitable shipping condition is defined,⁶ in relevant part, as meaning, "that the commodity, at 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."

The suitable shipping condition provisions of the Regulations,⁷ which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery,"⁸ are based upon case law predating the adoption of the Regulations.⁹ 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 the 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. 1 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

⁵7 C.F.R. § 46.43(i).

⁶7 C.F.R. § 46.43(j).

⁷7 C.F.R. § 46.43(j).

⁸7 C.F.R. § 46.44.

⁹See *Williston, Sales* § 245 (rev. ed. 1948).

make good delivery.¹⁰ This is true because under the f.o.b. terms the grade 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. 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.¹¹

Respondent alleges that the suitable shipping condition warranty is inapplicable to the shipment of apples because the apples were purchased after inspection. Respondent asserts, and submits testimony to prove, that complainant's representative inspected the very apples shipped, and complainant asserts, and submits testimony to prove, that the representative only looked at the general run of apples being shipped. Respondent cites section 46.43(ff) of the Regulations for the proposition that complainant waived all warranties as to quality and condition relative to the apples. The cited section provides:

"Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition, except warranties expressly made by the seller.¹²

However, the first sentence of section 46.43 of the Regulations states:

The following terms and definitions, when used in any contract or communication involving any transaction coming within the scope of the Act, shall be construed as follows:

It should be obvious that the intent of the Regulations is that the waiver of warranty applies when the parties actually use the trade term "purchase after

¹⁰See *Pinnacle Produce, Ltd. v. Produce Products, 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).

¹¹See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

¹²7 C.F.R. § 46.43(ff).

inspection." This term was not used by the parties to the contract here.¹³ Moreover, the contract documents, such as the invoices issued by respondent to complainant, not only omit all reference to the "purchase after inspection" trade term, they explicitly include the trade term "f.o.b." (which, under the Regulations, expressly entails the suitable shipping condition warranty), and refer to the apples by the U.S. grades Extra Fancy, Fancy, and No. 1.

Although the "purchase after inspection" trade term was not used, and is therefore not applicable, the Uniform Commercial Code contains a section with similar import whose applicability does not depend upon its express use as a trade term. The Uniform Commercial Code, section 2 - 316, provides as follows:

§ 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty or merchantability or any part of it the language must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

¹³See *Viva Tiger, Inc. v. Cornucopia Trading Co., Inc.*, 53 Agric. Dec. 817 (1994); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Jim Hronis & Sons v. Luna Co., Inc.*, 47 Agric. Dec. 1497 (1988).

- (b) **when the buyer before entering the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and**
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
- (4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and in contractual modification of remedy (Sections 2-718 and 2-719).

In analyzing the applicability of the above quoted section of the UCC to the usual produce transaction it is first necessary to establish the significance of the parties' use of "f.o.b." as a trade term. In this connection it is inescapable that the use of the contract term f.o.b. entails the applicability of the warranty of suitable shipping condition.¹⁴ Thus, what originated as an extension of the implied warranty of merchantability,¹⁵ seems to become an express warranty by use of the term f.o.b. This regulatory definition of the term entails some interpretative difficulty when we confront the above quoted provisions of the UCC. Is the suitable shipping condition warranty to be treated as an express warranty under 2 - 316(1), or does it partake of the nature of an implied warranty, and fall under 2 - 316(2), due to its historical derivation from the warranty of merchantability?

In *L. E. Jensen & Sons, Inc. v. Huston Produce, Inc.*,¹⁶ the parties used "f.o.b." as an express term of the contract, but also, in the same document, used exculpatory language negating implied warranties. We stated that there was no

¹⁴Section 46.43(i) of the Regulations (7 C.F.R. § 46.43(i)) states:

"F.O.B." (for example, "f.o.b. Laredo, Tex.," or "f.o.b. California") means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in "suitable shipping condition (see definitions of "suitable shipping condition," paragraphs (j) and (k) of this section), 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. . . .

¹⁵*Lookout Mountain, et al. v. Consumer Produce Co., et al.*, 50 Agric. Dec. 960 (1991).

¹⁶*L. E. Jensen & Sons, Inc. v. Huston Produce, Inc.*, 51 Agric. Dec. 814 (1992).

mention in the contract of merchantability as required by 2 - 316(2), and concluded that:

since the warranty of suitable shipping condition, made applicable by the Department's regulations in f.o.b. sales, is an extension of the warranty of merchantability, the suitable shipping condition warranty is also not excluded by the exculpatory language of the contract.

The thrust of the decision seems to be that, due to its historical derivation from the warranty of merchantability, the suitable shipping condition warranty should be taken as an implicit part of the warranty of merchantability when f.o.b. terms are used in connection with the sale of perishables. The decision might equally have been based on 2 - 316(1). The use of "f.o.b." in a produce contract can be said to *express* the suitable shipping condition warranty.¹⁷ The negation of the warranty could not reasonably be construed as consistent with the expression of the warranty, and therefore its negation must be deemed inoperative.¹⁸ Following this

¹⁷Due to its historic connection with the warranty of merchantability we have sometimes referred to the suitable shipping condition warranty as an implied warranty. See *Rancho Dos Palmas, Inc. v. Desert Melon Distributors, Inc.*, 54 Agric. Dec. 727 (1995). Though in one sense of the word "implied," the warranty might be thought to be implied in the term f.o.b. by reason of the provision of the Regulations, this is not what is normally meant by the term "implied warranty." Because of the regulatory definition the warranty is better thought of as an express warranty whose applicability is signaled by the use of the term "f.o.b."

¹⁸In *Jensen* the f.o.b. terms were inserted, whereas the negation of the warranty was apparently contained in a pre-printed part of the contract. One can imagine circumstances which would require a different interpretation of what the parties meant by "f.o.b.," notwithstanding the definition in the Regulations. For instance, if the inserted terms were "f.o.b. — as is," then the most reasonable interpretation of the intent of the parties would likely be that the "f.o.b." portion of the terms was intended only as an indication of pricing, i.e., that the quoted price did not include freight. This is true because the close juxtaposition of "f.o.b." and "as is" would strongly indicate that the parties knowingly wished to give effect to both, and such an interpretation would be the most likely meaning of the parties in such an event. In all contract interpretation the intent of the parties, where it can reasonably be discerned, should be paramount, except in those rare instances where public policy is thereby contravened. That such intent controls the meaning of the trade terms defined in the Regulations, and not vice versa, cannot be doubted. See *L. T. Malone Company v. Al Kaiser & Bros.*, 19 Agric. Dec. 84 (1960), and *L. T. Malone Company v. Jebbia-Metz Co.*, 18 Agric. Dec. 1287 (1959) where we stated:

... the terms "f.o.b." and "delivered," as they pertain to sales, are defined in the regulations under the act and therefore have a well-established meaning in the trade. If [a party] chooses to use the terms in a different sense from that generally understood in the trade, then the burden rests upon him to show the peculiar meaning he attached to the term in the course of [the] transaction, and further to show that the party with whom he was dealing . . . understood such usage of the term

same reasoning, the provisions of 2 - 316(3)(b) apply only to implied warranties, and not to the express warranty of suitable shipping condition, applicable in this case by reason of the use by the parties of f.o.b. terms. Of course, similar conclusions are even more clearly applicable to the definition of "purchase after inspection" given in the Regulations, for in such definition warranties expressly made by the seller are specifically excepted from the effects of the term when it is used. As emphasized earlier, the term was not used in this case. There is no occasion here for concluding that the inspection of the apples performed by complainant's agent, even if admitted to have been an inspection of the same apples shipped, had any affect on the contract between the parties.

We turn now to a consideration of whether the apples made good delivery on arrival in Taiwan. In this connection we must consider the way in which the fruit was surveyed in Taiwan. The survey was performed prior to the unloading of the containers, and was done on March 31, April 1, and April 2, following the landing of the containers on March 28, and delivery to the receivers on March 30. We find this to be prompt for an international shipment.

The containers were placed in different locations, and instead of giving the results for each container, the survey lumps together the results for all containers, but gives a breakdown as to each size grouping for each grade of apples shipped. Since grades were mixed in the containers it is not possible to allocate the results by container. Respondent objects to the survey on this basis, asserting that it is impossible to know what affect transit conditions had on the damage revealed in the survey. Respondent's objection would be well taken were it not for the fact that the temperature history for the three containers is sufficiently similar, and sufficiently within normal parameters, that transit conditions may safely be said not to void the suitable shipping condition warranty as to any of the containers.

There remains the question whether, in determining the issue of breach, we should consider each container as a whole, consider the three containers as a whole shipment, consider each grade category as a separate whole, or consider each size within each grade. If we are required to consider each container as a whole then we have insufficient data to determine whether there was a breach. There is little basis for considering the three containers as one shipment, since separate contract documents were issued as to each container. The question whether we should consider each grade, or each size within each grade, leads us into confrontation with a number of cases which have determined that loads of produce must be considered as a whole for purposes of determining whether there

is a breach of contract. However, an examination of the way this subject has been treated over the years discloses inconsistencies that raise the question whether we should continue to follow these precedents. The earliest case we have discovered which treated a load as a whole for purposes of determining whether there was a breach was *Idaho Fruit Sales, Inc. v. Milwaukee Produce Distributing Co., Inc.*¹⁹ where complainant sold respondent a truckload of U.S. No. 1 cherries, with the two halves of the load having been loaded at different orchards, and where each half bore a different label which reflected the orchard of its origin. A federal inspection at destination showed that the half of the load from one orchard contained considerable damage, enough to show a breach of contract as to that half, but the other half had very little damage. The decision stated that "since this was one load of cherries," it was necessary to consider the load as a whole, and as a whole the load made good delivery. In *Sin-Son Produce Co., Inc. v. Tom Lange Company, Inc.*²⁰ we found that a truckload containing three sizes of tomatoes shipped under one contract was a "commercial unit," and the whole load was deemed accepted when the tomatoes were unloaded "because a receiver cannot accept a part of a truckload of perishable agricultural commodities while rejecting the rest." We found that the inspection results as to each size should be averaged together to arrive at a damage percentage for the whole load in order to determine whether the load as a whole made good delivery.²¹ These decisions seem to be influenced by a consideration of the "commercial unit" definition adopted by the Regulations which states:

"Commercial Unit" means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract. Such commercial unit must be accepted or rejected in its entirety. Acceptance of a commercial unit does not modify the parties' existing contractual rights and responsibilities.²²

¹⁹*Idaho Fruit Sales, Inc. v. Milwaukee Produce Distributing Co., Inc.*, 37 Agric. Dec. 737 (1978).

²⁰*Sin-Son Produce Co., Inc. v. Tom Lange Company, Inc.*, 44 Agric. Dec. 409 (1985).

²¹See also *Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810 (1994).

²²7 C.F.R. § 46.43(ii).

However, in the same year in which *Sin-Son* was decided another decision cast doubt on its result. In *DMB Packing Corp. v. Garden Products, Inc.*,²³ respondent had accepted a load, consisting of three sizes, of tomatoes. The extra large size tomatoes were shown by the arrival inspection to be the most severely damaged. We stated:

This lot was of course, the smallest, amounting to only 72 cases. Considering the lot shipment as a whole, the inspection does not show that the load failed to make good delivery. However, this does not mean that we would be precluded from awarding damages relative to the extra large size tomatoes, assuming that such damages had been proven.

In addition, where a mixed load is involved, we have not followed the precedents cited earlier. Where such goods are accepted a buyer can prove a breach, and collect damages, as to less than a commercial unit. In *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*,²⁴ asparagus were a small part of a load of mixed produce, and we found a breach as to the asparagus and awarded damages. In *The Garin Company v. Ed Given, Inc.*²⁵ we awarded damages for cauliflower which did not make good delivery on arrival, and was a part of a mixed load containing other produce which did make good delivery. A breach was found as to cantaloupes that were a part of a larger mixed load of produce, and damages were awarded, in *Sharyland Corp. v. Milrose Food Brokers of NJ, Inc.*,²⁶ and in *Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*²⁷ a breach was found as to cauliflower which was accepted as a part of a larger mixed load of produce, and damages were awarded. In *Everkrisp Vegetables, Inc. v. J.*

²³*DMB Packing Corp. v. Garden Products, Inc.*, 44 Agric. Dec. 1304 (1985).

²⁴*Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991).

²⁵*The Garin Company v. Ed Given, Inc.*, 44 Agric. Dec. 1359 (1985).

²⁶*Sharyland Corp. v. Milrose Food Brokers of NJ, Inc.*, 50 Agric. Dec. 994 (1991).

²⁷*Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1209 (1982)

*Randazzo & Sons, Inc.*²⁸ the whole load consisted of grapes, but in two varieties. Complainant sold to respondent 882 cartons of Perlett grapes, and 318 cartons of Flame grapes. An inspection on arrival showed different percentages of damage for each lot, and a breach was found, and damages awarded, for the Perlett grapes, but no breach was found for the Flame grapes. More significantly, these exceptions to the precedent requiring that we treat a load as a whole load for determining whether there is a breach, have been logically extended to allow rejection where a breach has been found as to only some of the commodities in a mixed load.²⁹

If, as *Sin-Son* would seem to indicate, the "commercial unit" definition is the basis for focusing on the whole load to determine whether there is a breach of contract, it is apparent that there is no basis in the definition for treating mixed loads any different than loads containing a single commodity. The regulation speaks of "one or more perishable agricultural commodities."

In the only case found from the era long prior to the issuance of the "commercial unit" definition, we find a very different attitude toward breach when only a portion of a load was in question. There, a load containing 1,470 boxes of peaches, sold as U. S. Extra No. 1, was shipped, and the buyer accepted the load on arrival. A federal inspection indicated that only 142 boxes, consisting of the size 65s and 70s, failed to make grade. Nevertheless, a breach was found as to only the 142 boxes.³⁰

When we give close consideration to the "commercial unit" regulation we find that there is no requirement that damaged portions of a load be lumped with the portions of the load that have no, or less, damage. The definition only requires acceptance or rejection of the whole shipment. There is nothing to prohibit rejection of a shipment when the breach exists only as to a portion of the load, and there is no prohibition of finding a breach and damages as to only a portion of a load when the whole load is accepted. We can find no reasonable basis for continuing to require that a breach pertain to a load as a whole, and the cases that

²⁸*Everkrisp Vegetables, Inc. v. J. Randazzo & Sons, Inc.*, 46 Agric. Dec. 1536 (1987).

²⁹*Van Solkema Farms, Inc. v. Atlantic Produce*, 45 Agric. Dec. 1637 (1986).

³⁰*United Packing Co. v. Connecticut Celery Co.*, 16 Agric. Dec. 810 (1957).

hold otherwise are overruled.³¹

The portions of a load which will be considered as subject to a finding of breach of contract will generally be those which are distinguished in federal inspections. The *General Market Inspection Instructions for Use of Fresh Fruit and Vegetable Inspectors*,³² provide, in part, that:

[471] [w]henever there is a marked difference found in quality, condition or size and such differences can be definitely associated with different types or sizes of packages or certain markings on the packings, then the certificate and notesheet must report such differences as separate lots. The package markings which must be separated when such differences exist include brands, size, grade, variety, and Positive Lot Identification marks. The notesheet must show next to each sample the particular markings so that such differences can be recognized during the process of inspection and for appeal purposes. It is not permissible to combine readily identifiable out-of-grade or properly sized lots with identifiable out-of-grade or off-size lots in order to cause the combined lot to either fail or pass, . . ."

[472] "No firm rule can be established on the amount of irregularity required before such lots must be reported separately. However, when some lots would fail to grade and others would pass, even on the basis of a condition only inspection, then those lots definitely must be reported separately. . . ."

In the present case, the categories used by the survey in Taiwan are

³¹This should not be viewed as having any affect upon the line of cases dealing with those situations where only a portion of a homogeneous load is inspected, and found to be in poor condition. Those cases are based upon the thoroughly reasonable fear that the portion not inspected may have been of better quality, and may have been selected out for that reason. If, however, the portion inspected is distinguishable as a lot from the remainder not inspected, even though the portion not inspected is assumed to have been free of significant defects, the rule enunciated today will apply, and a breach may be found as to the inspected portion. See *South Florida Growers Association, Inc. v. County Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *Salinas Lettuce farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991); and *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons, Co., and C. H. Robinson*, 49 Agric. Dec. 620 (1990).

³²*General Market Inspection Instructions for Use of Fresh Fruit and Vegetable Inspectors*, Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, paragraphs 471 and 472 (Jan., 1988, as revised May, 1992).

appropriate for us to use in making the determination as to whether a breach of contract is indicated as to each of such categories. After consideration of the terms of sale, and the expected length of the transit period, we have determined that any amount of rot or decay in excess of 5.5 percent will be considered abnormal, and any total of rot and brown spots in excess of 20 percent will be considered abnormal.³³ The application of these criteria to the survey results related in finding 5 should make clear those portions of the three containers which we deem to have arrived in breach of the warranty of suitable shipping condition. It only remains to attempt an assessment of damages as to each of those portions.

The measure of damages as to accepted goods is stated in UCC section 2-714(2) as follows:

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

As the value of the apples if they had been as warranted, in the absence of market prices in Taiwan, we may use the delivered cost of the apples. The value of the apples accepted may be shown by the gross proceeds of the resale of such apples in Taiwan. In addition, under UCC section 2-714(3) ". . . any incidental and consequential damages under section 2-715 may also be recovered."

Complainant's customer in Taiwan has supplied us with a detailed record of the expenses associated with the apples. Some of these expenses should be included as components of the delivered cost of the apples. The expenses are, unfortunately, stated as totals associated with the three shipments as a whole. However, such expenses can be broken out so as to allocate them to the lots which were surveyed. The major expense is the import duty on the three containers in the amount of \$26,228.74. Unfortunately complainant did not inform us whether this import duty was assessed on the basis of the invoice cost of the apples, or on the basis of the weight. Therefore, in order to use the duty as a part of the delivered cost as to the several lots of apples as to which we have found a breach we will have to compute the applicable amount on the basis of both weight and invoice

³³If we had used the grade designations as the basic categories for determination of whether there was a breach, we would have concluded that there was a breach as to the U.S. No. 1 cartons considered as a whole, and that there was no breach as to any of the Extra Fancy and Fancy apples. We did not use these categories because the surveyor broke the shipments into smaller categories, and subsequent sales were based on these smaller categories.

cost, and use the lesser of the two amounts.³⁴ The labor fees, coldroom charge, and handling charge should not be used as a component of the delivered cost since these are expenses associated with the normal handling and distribution of the produce. Complainant also listed as an expense "tax" in the amount of \$5,935.26. In the affidavit of Betty Sung, submitted as a part of complainant's statement in reply, the expenses are set forth with an explanation for each item, and documentation for each item is attached. However, the "tax" is not listed as an expense in this affidavit, and no explanation for the tax is contained in the affidavit. Nevertheless, exhibit 6, a letter from the Taiwanese buyer, which is attached as evidence for the handling fee, contains a statement as to the "tax." This statement indicates that the listed amount is an "estimated" "value added tax," and that it is computed on the "landed cost." We are unable to ascertain from the evidence submitted whether the tax has been paid, or whether the amount claimed is the correct amount. Nor is it certain that, if such information were available, the tax would be a proper expense for inclusion in complainant's damages. The "tax" is disallowed. The drayage will be allowed as a component of the delivered cost, and allocated, on the basis of weight, to the items as to which we have found a breach. The Customs charges and terminal receiving charge will also be allowed as a part of the delivered cost. Since we were not informed as to whether these were assessed on the basis of weight or invoice cost, we will add these to the import duty so as to utilize the lesser of the amounts calculated on both bases. The survey charge will be allowed in its entirety as an incidental expense attributable to the breach.

The 5 cartons of size 64 U.S. No. 1 apples were sold at a delivered to harbor price of \$33.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges, allocated on the basis of the \$33.95 price, amount to \$13.38 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges of \$.3357 per carton, to the delivered harbor price results in a per carton delivered cost of \$45.0157, or a delivered cost for the 5 cartons of \$225.08. The accounting shows

³⁴By using this method of computation we do not allow complainant the full amount of the duty charge allocable to the lots as to which we have found a breach. However, complainant's failure to supply us with the necessary information to compute complainant's damages must not be allowed to harm respondent. *Cf. Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981).

that these apples sold for NT\$ 750,³⁵ or US \$28.3661,³⁶ or \$141.83. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$83.25.

The 36 cartons of size 72 U.S. No. 1 apples were sold at a delivered to harbor price of \$33.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$33.95 price amount to \$13.38 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$45.0157, or a delivered cost for the 36 cartons of \$1,620.57. The accounting shows that these apples sold for NT\$ 750, or US \$28.3661, or \$1,021.18. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$599.39.

The 120 cartons of size 80 U.S. No. 1 apples were sold at a delivered to harbor price of \$31.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$31.95 price amount to \$12.59 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$43.0157, or a delivered cost for the 120 cartons of \$5,161.88. The accounting shows that 119 cartons of these apples sold for an average price of NT\$ 716.13, or US \$27.0851, or \$3,223.13.³⁷ Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$1,938.75.

The 126 cartons of size 88 U.S. No. 1 apples were sold at a delivered to harbor price of \$29.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$29.95 price

³⁵An examination of the accounting shows that these 5 cartons were sold under the U.S. No. 1, size 72 category, and that the 36 cartons of U.S. No. 1, size 72 apples were sold under the U.S. No. 1, size 88 category. This is evident from the fact that reported sales for each category, exclusive of these two, balance with the amounts reported shipped, with minor exceptions attributable for the most part to the four cartons lost due to the survey.

³⁶The exchange rate of 26.44 Taiwan dollars to 1 U.S. dollar was supplied by complainant. Respondent did not object to this exchange rate.

³⁷The missing carton was apparently lost as a result of the survey, and therefore we have, by using the figure of 119 in computing the actual value of the apples, allowed the loss of this carton as a part of complainant's damages.

amount to \$11.80 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$41.0157, or a delivered cost for the 126 cartons of \$5,167.98. The accounting shows that 126 cartons of these apples sold for an average price of NT\$ 686.90, or US \$25.9796, or \$3,273.43. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$1,894.55.

The 336 cartons of size 100 U.S. No. 1 apples were sold at a delivered to harbor price of \$24.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$24.95 price amount to \$9.83 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$35.1157, or a delivered cost for the 336 cartons of \$11,798.88. The accounting shows that 336 cartons of these apples sold for an average price of NT\$ 730.57, or US \$27.6312, or \$9,284.08. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$2,514.80.

The 294 cartons of size 113 U.S. No. 1 apples were sold at a delivered to harbor price of \$23.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$23.95 price amount to \$9.44 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$33.7257, or a delivered cost for the 294 cartons of \$9,915.36. The accounting shows that 294 cartons of these apples sold for a per carton price of NT\$ 650, or US \$24.5840, or \$7,227.70. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$2,687.66.

The 126 cartons of size 150 U.S. No. 1 apples were sold at a delivered to harbor price of \$21.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$21.95 price amount to \$8.65 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$30.9357, or a delivered cost for the 126 cartons of \$3,897.90. The accounting shows that 126 cartons of these apples sold for a per carton price of NT\$ 733.33, or US \$27.74, or \$3,495.24. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$402.66.

The 84 cartons of size 88 U.S. Fancy apples were sold at a delivered to harbor price of \$33.95 per carton. Per carton drayage charges are \$.3357. The duty,

customs, and terminal receiving charges allocated on the basis of the \$33.95 price amount to \$13.38 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$45.0157, or a delivered cost for the 84 cartons of \$3,781.32. The accounting shows that 84 cartons of these apples sold for an average per carton price of NT\$ 788.45, or US \$29.8203, or \$2,504.91. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$1,276.41.

The 3 cartons of size 72 U.S. Extra Fancy apples were sold at a delivered to harbor price of \$55.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$55.95 price amount to \$22.06 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$67.0157, or a delivered cost for the 3 cartons of \$201.05. The accounting shows that 3 cartons of these apples sold for a per carton price of NT\$ 800, or US \$30.2572, or \$90.77. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$110.28.

The 4 cartons of size 88 U.S. Extra Fancy apples were sold at a delivered to harbor price of \$39.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$39.95 price amount to \$15.74 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$51.0157, or a delivered cost for the 4 cartons of \$204.06. The accounting shows that 4 cartons of these apples sold for a per carton price of NT\$ 800, or US \$30.2572, or \$121.03. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$83.03.

The 14 cartons of size 100 U.S. Extra Fancy apples were sold at a delivered to harbor price of \$32.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$32.95 price amount to \$12.98 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$44.0157, or a delivered cost for the 14 cartons of \$616.22. The accounting shows that 14 cartons of these apples sold for a per carton price of NT\$ 800, or US \$30.2572, or \$423.60. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$192.62.

The 16 cartons of size 113 U.S. Extra Fancy apples were sold at a delivered

to harbor price of \$30.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$30.95 price amount to \$12.19 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$42.0157, or a delivered cost for the 16 cartons of \$672.25. The accounting shows that 16 cartons of these apples sold for a per carton price of NT\$ 800, or US \$30.2572, or \$484.12. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$188.13.

The 8 cartons of size 138 U.S. Extra Fancy apples were sold at a delivered to harbor price of \$28.95 per carton. Per carton drayage charges are \$.3357. The duty, customs, and terminal receiving charges allocated on the basis of the \$28.95 price amount to \$11.41 per carton. Allocated on a weight basis these charges are \$10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of \$40.0157, or a delivered cost for the 8 cartons of \$320.13. The accounting shows that 8 cartons of these apples sold for a per carton price of NT\$ 800, or US \$30.2572, or \$242.06. Complainant's damages for this lot is the difference between this amount and the delivered cost, or \$78.07.

The total of the damages resulting from respondent's breaches of contract is \$12,049.60. In addition complainant is entitled to the \$605.00 survey fee as an incidental expense resulting from the breach. The value of the four cartons of apples lost as a result of the survey should also be allowed. One of these was allowed in the computation of damages as to the U.S. No. 1, size 80 apples. Two of the cartons came from the U.S. No. 1, size 163, which had a per carton delivered value which totaled \$29.5357, or \$59.07 for the two containers. The remaining container came from the U.S. Fancy, size 72, which had a delivered value which totaled \$53.02. Since complainant accepted the apples it became liable to respondent for their full contract price. Since such price has been paid in full, complainant is entitled to reparation for the full amount of its damages. Respondent's failure to pay complainant \$12,766.69 is a violation of section 2 of the Act.

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.³⁸ Since the

³⁸*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).

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.³⁹ We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$12,766.69, with interest thereon at the rate of 10% per annum from May 1, 1994, until paid.

Copies of this order shall be served upon the parties.

DeBRUYN PRODUCE CO. v. RUBEN E. LOPEZ d/b/a R L DISTRIBUTORS.

PACA Docket No. R-96-0008.

Decision and Order filed March 17, 1997.

Consignments — adequacy of accounting

Onions arrived showing breach of delivered sale contract, but were in good enough condition that they would have made good delivery if sale had been f.o.b. As a result of the breach the parties agreed to the receiver handling the onions on a consignment basis. The accounting disclosed that the onions were sorted, and then sold in one lot which contained the same number of sacks as were shipped. Gross proceeds of the resale were less than half of the current market price, but this was stated to not be sufficient cause, in and of itself, to find the accounting improper. The accounting also lumped together as one charge the cost of storage, sorting, and commission. It was stated that the sale of the onions in one lot, though not fatal to the accounting, was unusual, and was more questionable when the price appears markedly low relative to market price. The accounting was found to be improper in that it showed no wastage resulting from the sorting, and in that it failed to break out the charges for commission, sorting, and storage. The charge for storage was also stated to be improper. The shipper was awarded reasonable value based on the low price shown by market reports, less the percentage of condition defects shown by the arrival inspection.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

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

³⁹See *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).

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 \$4,587.43 in connection with a transaction in interstate commerce involving onions.

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.

The amount claimed in the formal complaint does not exceed \$15,000.00, 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. Both parties filed briefs.

Findings of Fact

1. Complainant, DeBruyn Produce Co., is a corporation whose address is [REDACTED] Michigan.
2. Respondent, Ruben E. Lopez, is an individual doing business as R L Distributors, whose address is [REDACTED] (b) (6). At the time of the transaction involved herein respondent was licensed under the Act.
3. On or about March 10, 1995, complainant sold to respondent 870 50 lb. sacks of medium yellow onions, U. S. No. 1, for \$9.00 per sack, or a total of \$7,830.00, delivered to respondent at Cypress, California.
4. On March 13, 1995, at 3:20 p.m., the onions were federally inspected at shipping point in Ontario, Oregon, and graded U. S. No. 1, 2 inch minimum, with no defects noted. On the same date the onions were shipped to respondent by truck.
5. The onions arrived at respondent's place of business near Los Angeles on March 15, 1995, and were federally inspected at 9:00 a.m. of that day while still loaded on the truck. The certificate of inspection stated in relevant part as follows:

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).

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF	INSP.
A	50 to 56 °F	Northern Onions	"CITATION"	ID	yellow	870 Sacks	N
LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER		
00	% 00	%	% Quality		Gen firm & Dry		
07	% 07	%	% Watery Scales (1 to 15%)				
01	% 00	%	% Sprouts				
½	% ½	%	% Decay				
08	% 07	%	% Checksum				
GRADE: fails to grade U.S. No. 1,2* minimum DIA only account condition.							Size: 2 1/8 to 3 1/4* DIA. no off size.

6. Respondent promptly rejected the onions to complainant, and complainant requested that respondent handle the onions on a consignment basis. Respondent agreed to complainant's request.

7. On March 17, 1995, respondent rendered an accounting to complainant showing that 870 sacks of medium yellow onions had been sold in one lot for \$4.65 per sack, or \$4,045.50. Respondent deducted \$687.73 for "STORAGE SORTING & COMMISSION," \$40.00 for "UNLOADING," and \$75.20 for the inspection, leaving net proceeds of \$3,242.57, which were remitted to complainant.

8. Market reports² show that fair average quality medium yellow onions in 50 lb. sacks from Idaho-Oregon were selling on the Los Angeles terminal market at the following prices, on the following dates:

March 15, 1995	\$12.00 - 14.00
March 16, 1995	\$11.00 - 13.00
March 17, 1995	\$11.00 - 13.00

9. The formal complaint was filed on July 27, 1995, which was within nine months after the cause of action therein accrued.

Conclusions

Complainant asserts that the accounting furnished by respondent is flawed, and complains that the price reported in such accounting is too low in comparison to the prices shown by contemporary market reports. We have stated:

²Published by the Market News Branch of the Fruit & Vegetable Division of the Agricultural Marketing Service of this Department.

Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.³

The prices realized in this case are low relative to market price. The fact of complainant's obvious breach of the original sale contract does not alter this conclusion. As complainant points out, the federal inspection at destination shows that the onions failed to make the required grade by only 3 percentage points. Moreover, if the contract had been f.o.b. instead of delivered, the onions would have made good delivery, and there would have been no breach. It is, nevertheless, questionable whether we would find a breach by respondent of his agency duties under the consignment contract based on the price differential alone. However, in this case complainant has called into question more than the price differential between market price and the price realized by its agent. Complainant also points out that the accounting claims that the onions were sorted, but also shows that all 870 sacks were sold. Respondent's reply was to imply that the sacks in which it sold the onions contained less than 50 pounds, and to assert that this was not a violation of the false branding requirements of the Act⁴ because the party to whom the onions were sold knew that the weight label was false. Respondent's idea that a verbal disclosure to a purchaser that produce weighs less than the weight stated on the label obviates the false branding requirements of the Act is patently incorrect. But more importantly for our purposes here, this assertion by respondent does not cure the flaw in the accounting. The proper sorting of produce with defects totaling 8 percent on a federal inspection will result in at least 8 percent (and likely more) wastage. An accounting that, on its face, shows no wastage, and yet claims expenses for sorting, is flawed, even if the consignee attempts to explain away the apparent discrepancy by admitting to illegal acts. The

³*Lavern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc.*, 46 Agric. Dec. 1673 (1987). See also *Southampton Prod. Dist'rs v. D.C. Flores & Co.*, 19 Agric. Dec. 893 (1960); *Monarch Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956); PACA Docket 5512, 11 Agric. Dec. 388 (1952).

⁴7 U.S.C. § 499b(5).

accounting is further flawed by failing to break out the costs relating to storage⁵, sorting, and commission. The sale of the onions in one lot to one customer is unusual, but not necessarily fatal. Such practice becomes more questionable when the price appears to be markedly low. We find on the basis of all the evidence of record that respondent failed to issue a proper accounting, and thus failed to perform its fiduciary duty under the consignment agreement.

Respondent is liable to complainant for the reasonable value of the onions. We will use the low price shown by the market report for March 15, or \$12.00, and reduce such value by the 8 percent defects shown by the federal inspection, to arrive at a figure of \$11.04 as the value of the onions. In addition respondent should be allowed a commission of 20 percent, or \$2.21 per sack, and the inspection fee of \$75.20. The total reasonable value of the shipment was \$7,606.90. Respondent has already paid complainant \$3,242.57. The total amount remaining due from respondent to complainant is \$4,364.33. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act. In addition, respondent is liable to complainant for the \$300.00 handling fee as prescribed by section 5(a) of the Act.⁶

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.⁷ 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.⁸ We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$4,364.33, with interest thereon at the rate of 10% per

⁵Storage would not be allowable as an expense in any event.

⁶7 U.S.C. § 499e(a).

⁷*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).

⁸See *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).

annum from April 1, 1995, until paid. Within 30 days from the date of this order respondent shall pay to complainant the additional sum of \$300.

Copies of this order shall be served upon the parties.

R & R PRODUCE, INC., v. FRESH UNLIMITED, INC., d/b/a FRESHWAY FOODS.

PACA Docket No. R-95-0212.

Decision and Order filed April 30, 1997.

Contracts — Impossibility Of Performance

Contracts — Right To Adequate Assurance Of Performance

Cover — May Be Accomplished By Contract To Purchase In Future

Cover — Right To Cover Does Not Survive Justified Demand For Assurance

Where complainant was obligated under a requirements contract to ship 5 loads of bin lettuce per week to respondent for the period of one year, a claim that no supplies were available was insufficient to furnish an excuse not to ship under UCC section 2-615. Respondent's late payments also did not furnish an excuse not to ship under the contract, but were grounds for insecurity and a demand for assurance of respondent's ability to perform under the contract. Furthermore, under UCC section 2-609(3), complainant's right to demand assurance was not prejudiced by its delay in making the demand, and complainant was justified in withholding performance under the supply contract while it awaited a response to its demand for assurance, and following respondent's failure to respond to its demand.

Respondent was found to be entitled to make purchases to cover complainant's failure to ship under the contract for the period prior to the demand for assurance, and was also entitled to credit for cover as to purchases made under a substitute supply contract insofar as that contract was concluded prior to the demand for assurance, but not as to purchases made under a modification of that contract made after the demand for assurance.

George S. Whitten, Presiding Officer.

Andrew M. Lauderdale, Watsonville, CA, for Complainant.

Joseph P. McCafferty, Cleveland, OH, for Respondent.

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

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 sought an award of reparation in the amount of \$66,432.20 in connection with sixteen transactions in interstate commerce involving mixed perishable produce, principally bin lettuce.

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. Complainant then filed an amended complaint in which it added one shipment of bin lettuce bringing the total amount of reparation sought to \$70,318.70. Respondent filed an answer to the amended complaint denying any liability thereunder. Respondent's amended answer included a counterclaim and set-off in the amount of \$368,789.82 arising out of the parties' contract for the supply of bin lettuce.

The amounts claimed in both 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. Both parties filed a brief.

Findings of Fact

1. Complainant, R & R Produce, Inc., is a corporation whose address is [REDACTED] California. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Fresh Unlimited, Inc., is a corporation doing business as Freshway Foods, whose address is [REDACTED] Ohio. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 6, 1994, complaint and respondent entered into a contract calling for complainant to supply respondent with bin lettuce. The contract was written under complainant's letterhead, and stated as follows:

ATTENTION: FRANK GILARDI
 FRESHWAY FOODS

R&R PRODUCE, INC. HAS SECURED FIVE LOADS OF BIN LETTUCE WEEKLY, STARTING JUNE 1st, 1994 THRU MAY 31st, 1995.

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).

Respondent gave complainant "until midnight Friday, December 23, 1994, to confirm shipment and dispatch of at least two full loads (41,000 plus pounds) of bin lettuce to our facility." Respondent stated that if this was not done respondent would buy against the contract. On or about December 23, 1994, Gilardi and Rossi talked by phone, and Rossi stated that complainant did not have any supply of bin lettuce to ship, but requested time to find a supply. Gilardi stated that respondent would not buy against the contract if complainant could confirm by December 27, 1994, that a load was on its way to respondent. No such confirmation was given.

7. On January 5, 1994, respondent sent (stated to have been sent via UPS next day air and faxed for receipt January 6, 1995) complainant a letter setting forth purchases against the contract, and attached a "DEBIT MEMO" which respondent said was being applied as a credit to their accounts payable. The debit memo stated in part as follows:

Because of your failure to supply our company with bulk bin lettuce as stated in our contract we were forced to purchase substitute goods in order to fulfill contracts with our customers. This debit memo represents the amount of product purchased against your contract.

A summary of the dates, quantities, and dollar amounts purchased follows:

<u>DATE</u>	<u>QTY</u>	<u>AMOUNT ACTUALLY PAID</u>	<u>AMOUNT CONTRACT PRICE</u>	<u>AMOUNT PAID OVER CONTRACT</u>
12-26-94	40,660#	\$16,670.60	\$4,066.00	\$12,604.60
12-28-94	10,100#	6,060.00	1,010.00	5,050.00
12-28-94	14,900#	7,599.00	1,490.00	6,109.00
12-29-94	7,500#	3,060.00	750.00	2,310.00
12-29-94	10,000#	5,800.00	1,000.00	4,800.00
12-29-94	12,000#	6,480.00	1,200.00	5,280.00
12-29-94	13,750#	7,012.50	1,375.00	5,637.50
12-31-94	30,991#	6,198.20	3,099.10	3,099.10
TOTAL	139,901#			\$44,890.20

8. On January 6, 1995, complainant wrote the informal complaint letter. This letter was received by the Department on January 10, 1995. A copy was sent by

complainant to respondent. This letter, like the formal complaint filed later, listed 16 loads as unpaid. Invoices were attached which showed, in part, as follows:

<u>DATE</u>	<u>INV. NO</u>	<u>QUANT.</u>	<u>DESCRIPTION</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
11-8-94	G-2096	96	BROCCOLI BITS	\$12.30	\$1,180.80
		40	LETTUCE BINS 37,180# RECORDER #701534	.10	3,718.00 23.50
					<u>\$4,922.30</u>
11-8-94	G-2112	42	LETTUCE BINS 34,460# RECORDER #162136	.10	\$3,446.00 23.50
					<u>\$3,469.50</u>
11-9-94	G-2137	42	LETTUCE BINS 34,460# RECORDER #622724	.10	\$3,446.00 23.50
					<u>\$3,469.50</u>
11-14-94	G-2161	46	LETTUCE BINS 36,700# RECORDER #162123	.10	\$3,670.00 23.50
					<u>\$3,693.50</u>
11-14-94	G-2172	48	CAULIFLOWER 9	11.75	\$ 564.00
		32	CELERY 30	10.25	328.00
		32	LETTUCE BINS 27,300# RECORDER #223227	.10	2,730.00 23.50
					<u>\$3,645.50</u>
11-15-94	G-2165	900	LETTUCE 24 "EARLY MONTEREY"	4.35	\$3,915.00 23.50
					<u>\$3,938.50</u>
11-17-94	G-2185	40	LETTUCE BINS 40,520# RECORDER #207322	.10	\$4,052.00 23.50
					<u>\$4,075.50</u>
11-17-94	G-2186	64	CELERY 30	9.75	\$ 624.00
		24	LETTUCE BINS 24,080#	.10	2,408.00
		16	LETTUCE BINS 13,220# RECORDER #223227	.10	1,322.00 23.50
					<u>\$4,377.50</u>
11-19-94	G-2194	48	LETTUCE BINS 42,220# RECORDER #391247	.10	\$4,222.00 23.50
					<u>\$4,245.50</u>
11-21-94	G-2200	64	CELERY 30	9.75	\$ 624.00
		42	LETTUCE BINS 36,920# RECORDER #216241	.10	3,692.00 23.50
					<u>\$4,339.50</u>
11-22-94	G-2204	46	LETTUCE BINS 39,040# RECORDER #216257	.10	\$3,904.00 23.50
					<u>\$3,927.50</u>
12-02-94	G-2260	46	LETTUCE BINS 40,050# RECORDER #2007736	.10	\$4,005.00 23.50
					<u>\$4,028.50</u>
12-05-94	G-2269	46	LETTUCE BINS 41,080# RECORDER #2007228	.10	\$4,108.00 23.50
					<u>\$4,131.50</u>
12-08-94	G-2295	43	LETTUCE BINS 41,350# RECORDER #581829	.14	\$5,789.00 23.50
					<u>\$5,812.50</u>

12-16-94	G-2317	38	LETTUCE BINS 34,160#	.14	\$5,812.50
			RECORDER #2012557		\$4,782.40
					23.50
					\$4,805.90
12-29-94	G-2375	44	LETTUCE BINS 35,260#	.10	\$3,526.00
			RECORDER #2004793		23.50
					\$3,549.50

Complainant later amended its complaint to include an additional load shipped January 4, 1995, with a total cost of \$3,886.50, but disclosed no particulars as to such load. Respondent, however, admitted receipt of the load, and that the total claimed for the load was correct.

9. When complainant sent a copy of the informal complaint letter to respondent on January 6, 1995, it included a letter to respondent which was not made a part of the record. On January 13, 1995, respondent sent a letter to complainant in which it responded to allegations made in complainant's January 6, letter. On January 23, 1995, respondent again wrote to complainant giving notice that three additional purchases had been made against the contract. These purchases were set forth as follows:

<u>DATE</u>	<u>QTY</u>	<u>AMOUNT ACTUALLY PAID</u>	<u>AMOUNT CONTRACT PRICE</u>	<u>AMOUNT PAID OVER CONTRACT</u>
1-10-95	41,574#	\$7,899.06	\$4,157.40	\$3,741.66
1-12-95	39,852#	4,383.72	3,985.20	398.52
1-12-95	42,312#	5,289.00	4,231.20	1,057.80

10. On February 3, 1995, Robert Rossi of complainant wrote the following letter to Frank Gilardi of respondent:

For reasons beyond the control of R&R PRODUCE, INC. we have been unable to supply FRESHWAY with five deliveries of lettuce per week. I explained these reasons to you in some detail in my letter of January 6, 1995.

R&R PRODUCE is ready and willing to perform under our May 6, 1994 contract to the maximum extent possible. We are ready to begin doing so as soon as we receive some reasonable assurance from you that R&R PRODUCE will be paid for any product delivered.

We deny that R&R is responsible for any of FRESHWAY's costs for open purchases but R&R will certainly not be responsible for FRESHWAY's

refusal to accept and pay for the lettuce we can deliver.

Please advise.

11. On February 9, 1995, complainant faxed a proposed modification of the May 6, 1994, contract to respondent. This proposed modification recited the dispute that had arisen over the May 6, 1994, contract, provided that rights and claims which arose prior to the modification would not be waived or released, called for the shipment of 1 load of bin lettuce per week until May 31, 1995, and a 30 day payment period, and included a force majeure clause. Respondent did not sign the proposed modification.

12. On January 18, 1995, respondent entered into a "Bin Lettuce Agreement" with Diamond Produce, of Salinas, California whereby that firm was required to supply respondent with 1 load of bin lettuce per week ("40 bins per load") through December 31, 1995, at \$0.105 per pound. The contract included a force majeure clause that provided as follows:

2. Shipper shall supply Buyer with:

a. A steady supply of lettuce as specified in Section 1 above regardless of the lettuce market. It is the responsibility of shipper to fulfill its obligations under Section 1 of this Agreement, with the exception of an industry-wide crop shortage due to acts of God (i.e. hurricane, tornado, or an industry-wide shortage of the lettuce crop due to adverse weather), labor strikes or other unforeseen events beyond the reasonable control of the shipper.

b. The exception described in the previous paragraph applies only if the entire produce industry within Shipper's District is affected. This exception does not allow for grower errors in estimating acreage for fulfilling commitment, poor growing practices or any conditions subject to or under human control.

On February 15, 1995, respondent and Diamond Produce entered into a second "Bin Lettuce Agreement" for the supply of bin lettuce with essentially the same provisions as the January 18, 1995, contract, except that 2 loads per week of bin lettuce were required to be shipped. This was interpreted by the parties as adding one load to the January 18, 1995, contract, so that Diamond Produce's total

obligation was to ship only 2 loads per week.

13. Under the above contracts Diamond Produce made the following lettuce shipments:

<u>DATE</u>	<u>QTY</u>	<u>AMOUNT ACTUALLY PAID</u>	<u>AMOUNT CONTRACT PRICE</u>	<u>AMOUNT PAID OVER CONTRACT</u>
1-26-95	41,378#	\$4,344.69	\$4,157.40	\$206.89
2-02-95	41,884#	4,397.82	4,188.40	209.42
2-10-95	36,016#	3,781.68	3,601.60	180.08
2-16-95	36,284#	3,809.82	3,628.40	181.42
2-22-95	41,640#	4,372.20	4,164.00	208.20
2-23-95	34,508#	3,623.34	3,450.80	172.54
2-27-95	41,484#	4,355.82	4,148.40	207.42
3-03-95	36,038#	3,783.99	3,603.80	180.19
3-06-95	40,324#	4,234.02	4,032.40	201.62
3-09-95	32,500#	3,412.50	3,250.00	162.50
3-14-95	40,616#	4,264.68	4,061.60	203.08
3-16-95	31,212#	3,277.26	3,121.20	156.06
3-20-95	40,172#	4,218.06	4,017.20	200.86

14. Respondent relieved Diamond Produce of its obligation under the "Bin Lettuce Agreement" "[d]ue to market shortages in late March 1995" From March 23, 1995, through May 23, 1995, Diamond Produce supplied respondent with 28 loads of bin lettuce. The difference between the price of such lettuce under the \$.10 per pound price of the original May 6, 1994, contract between complainant and respondent, and the market prices paid by respondent to Diamond Produce totaled \$312,931.36.

15. An informal complaint was filed on January 10, 1995, which was within nine months after the causes of action alleged therein accrued. The counterclaim was filed on July 12, 1995, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 16 loads of mixed perishable produce, the largest portion of which was bin lettuce sold to respondent under the contract set forth in finding of fact 3. Respondent admits the purchase, shipment, and acceptance of the produce, but claims that it was justified in setting off against the admitted purchase price of the 16 loads, the cost of cover purchases made against the contract as a consequence of complainant's failure to

ship the number of loads required by the contract. In addition respondent has counterclaimed for a substantial excess of the cost of cover above the purchase price of the 16 loads.

Since respondent's basic liability for the 16 loads is not in dispute, the focus of our inquiry is upon respondent's alleged right to cover, and the extent of that right. Complainant disputes respondent's alleged right to cover on several grounds.

First, complainant asserts supplies of bin lettuce became scarce in November, 1994, to January, 1995, and that supplies became non-existent. On this basis complainant claims that it was excused from shipping the required number of loads under the contract on the ground of impossibility. The Uniform Commercial Code, section 2-615, provides:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

However, complainant's reliance on this provision of the UCC is misplaced. The Official Comments state in part:

Increased cost alone does not excuse performance unless the rise in

cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.²

The comment goes on to say that a "local crop failure" will provide the type excuse contemplated by the section. Official Comment 9 describes what is meant by a local crop failure:

The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, where there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

In dealing with this section of the UCC we have often affirmed the requirement that a specific acreage be referenced in the contract as the source for produce in order for the section to have effect.³ Moreover, complainant has not shown that there was no supply to be had of bin lettuce at any price. Respondent managed to purchase bin lettuce.⁴ Carton lettuce could have been striped from the cartons and used to supply the bin lettuce commitment.⁵ As respondent does not tire of

²UCC § 2-615, Official Comment 4.

³See *G. & H. Sales Corp. v. C. J. Vitner Co., Inc.*, 50 Agric. Dec. 1892 (1991); *Al Campisano Fruit Co., Inc. v. Richard C. Shelton*, 50 Agric. Dec. 1875 (1991); *Bliss Produce Co. v. A. E. Albert & Sons*, 35 Agric. Dec. 742, 20 UCC Reporting Service 917 (1976); *Harrell v. Olin Price*, 31 A.D. 331 (1972), and *Holt v. Shipley*, 25 A.D. 436 (1966).

⁴Complainant asserts that because respondent's cover purchases on December 28, and 29, 1994, were of carton lettuce, the impossibility of purchasing bin lettuce is demonstrated. However, respondent explains that the cover purchases were delayed at complainant's request following complainant's undertaking to confirm a shipment of bin lettuce by December 27, 1994, and that when no such confirmation was received it was necessary to have lettuce immediately, and not wait for an f.o.b. shipment from the growing areas in the West.

⁵The availability of carton lettuce throughout the period of the contract shows that there was no general failure of the lettuce crop throughout all possible supply regions such as could be argued to have caused the agreed performance to have been made impracticable by the occurrence of a contingency the nonoccurrence

pointing out, the basic purpose of the contract, was to insure a supply of bin lettuce regardless of variation in market price. Respondent points to the fact that at the time it entered into the contract, agreeing to pay \$.10 per pound, the market price for bin lettuce was \$.08 per pound. Neither party knew what the price range of bin lettuce would be during the coming contract year. If the price fell far below production costs complainant was nevertheless assured of a good price for its lettuce, and if the price soared respondent was assured of lettuce at a reasonable cost. This is the nature of the type contract into which the parties entered, and it is far to late in the game for complainant to have second thoughts about the cost of meeting its obligations under the contract.

Complainant's second excuse for failure to ship the required lettuce centers on respondent's late payment for the lettuce that was shipped. That payment was late, and grossly so, is beyond dispute. Where the parties fail to provide any other payment period, the Regulations provide for payment to be accomplished within 10 days after the day on which produce is accepted.⁶ Moreover the Regulations also provide that:

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

There was no such written provision here, and therefore the 10 day payment period applies, even though complainant admits that it encouraged respondent, when the contract was entered, to keep within a 30 to 35 day payment schedule.

of which was a basic assumption on which the contract was made. The rationale of the requirement that the contract call for the crop to be grown on designated land in order for the impossibility excuse to be applicable, is that the absence of such a provision leaves the whole of the remaining world (excepting only reasonable transportation strictures) as a possible source of supply, and, that absent such a clause in the contract, it must be concluded that there were no contemplated restrictions on the seller accessing these other sources of supply.

⁶See 7 C.F.R. § 46.2(aa)(5).

⁷7 C.F.R. § 46.2(aa)(11).

But we must ask what relevance this has for the issues between the parties here. Clearly respondent violated the Act by not paying within 10 days. Clearly complainant could have at any time insisted on payment within 10 days. Clearly a disciplinary action could be brought on the basis of the late payments. But for complainant to suspend its performance under the contract on the basis of the late payments two contingencies must have occurred. First, complainant must have taken the late payments as grounds for insecurity, and second, a demand in writing must have been made by complainant for adequate assurance of due performance (payment) on the part of respondent. 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.

Complainant claims that the late payments did constitute grounds for insecurity. We note, however, that although complainant claims to have made verbal protests throughout the period in question concerning the lateness of the payments, it nevertheless continued to go along with the late payments for quite some time. Respondent asserts that the slowing of shipments coincided with the substantial rise in the market price for bin lettuce. It seems apparent that although 10 day payment was the *due* performance required by the contract, complainant entered the contract without any expectation of such due performance. But, under paragraph (3) of section 2-609, complainant's acceptance of respondent's improper payments did not prejudice complainant's right to demand adequate assurance of performance at a later time. Furthermore, Robert Rossi alleged, and the point was

not disputed by respondent, that in late November or early December of 1994, Rossi was informed by respondent's trucker, CTI, that respondent was in debt to CTI for over \$200,000.00.⁸ While complainant claims this, along with the late payments, as justification for its failure to ship the required number of loads beginning in November, complainant delayed in demanding assurance in writing of due performance. Complainant's demand for such assurance was not made until the February 3, 1995, letter from Robert Rossi to Frank Gilardi quoted in finding of fact 10. Consequently, qualifying cover purchases made before the February 3, 1995, demand for assurance should be allowed.

On January 18, 1995, respondent entered into the supply contract with Diamond Produce calling for the supply of one load of bin lettuce per week at \$0.105 per pound. This was a valid cover contract because at the time it was entered complainant was in breach of the May 6, 1994, supply contract with respondent, and had made no demand for the adequate assurance of respondent's performance to which it was entitled. Moreover, the right to claim cover under this contract continued until the termination of the contract, or the expiration of the May 6, 1994, contract on May 31, 1995, whichever occurred first.⁹ However, when the January 18, 1995, contract was amended on February 15, 1995, to call for an additional load per week, respondent was in receipt of an offer by complainant to ship under the May 6, 1994, contract if respondent furnished some reasonable assurance of payment. Respondent did not respond to that letter by offering such assurance, and consequently its cover purchases under the February 15, 1995, expansion of the January 18, 1995, contract should not be allowed.

Respondent released Diamond Produce from its obligation to supply lettuce under the January 18, 1995, contract following the March 20, 1995, shipment by Diamond recited in finding of fact 13. The release was stated by respondent to have been "[d]ue to market shortages in late March 1995" This is not an adequate reason for the release of Diamond Produce from the contract, either

⁸Such "rumors" have been held to be adequate justification for a demand for assurance. See Official Comments 3 and 4 to UCC § 2-609.

⁹UCC § 2-712 provides, in part, that:

(1) After a breach within section 2-711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. (underlining supplied)

Certainly, considering the period of inflated prices which had been recently experienced in the bin lettuce market, the January 18, 1995, contract to purchase lettuce for \$.105 per pound was reasonable.

under the force majeure clause of that contract, or under the Uniform Commercial Code.

Complainant was justified in withholding performance while it awaited a response to its February 3, 1995, demand for assurance, and following respondent's failure to provide that assurance within a reasonable time. However, the cover loads at the rate of one per week, under the contract (concluded prior to the February 3, 1995, demand) with Diamond Produce, should be allowed. Thus, for the period prior to excusing Diamond from the contract, nine loads can be used as valid cover purchases. We will use those loads that were closest to the required contract volume of approximately 41,000 pounds. The total cost of cover for these loads was \$1,799.10.

In addition to the cover loads purchased under contract from Diamond Produce, respondent purchased eleven other loads as set forth in findings of fact 7 and 9. Complainant asserts that many of these loads should not be allowed because the lettuce purchased was carton lettuce. However, these purchases appear to have all been on December 28, and 29, 1994, following the delay in making cover purchases requested by complainant, and respondent states that they were necessary in order to meet immediate needs for lettuce caused by that delay.¹⁰ Respondent explains that the purchase of head lettuce from nearby suppliers bypassed the delay that would have resulted if orders for bin lettuce were made from California. An examination of the invoices shows that the lettuce came from Ohio, Indiana, Kentucky, and Michigan. Considering all the circumstances we consider these cover purchases to have been commercially reasonable. The total cost of cover for purchases made prior to the February 3, 1995, demand for

¹⁰Respondent seeks cover for one load purchased on December 26, 1994, a day before the December 27, 1994, extension which respondent granted complainant to resume shipment. Respondent's explanation follows:

Because of the ongoing deficiencies of R & R Produce in meeting its obligation to Freshway, we were forced, in order to meet the demand of our customers, to purchase a load of lettuce on Monday, December 26, 1994. Pursuant to my word, this load would not have been credited against R & R's contractual agreement had R & R been able to confirm by Tuesday, December 27, 1994, that a truckload of lettuce was on its way to Freshway.

We do not view the application of this load to cover as inconsistent with respondent's undertaking to delay making cover purchases. Nor should the purchase of this load on December 26, 1994, be thought (on the basis of hindsight) to be inconsistent with respondent's need to purchase carton lettuce because of the delay incurred by waiting for complainant to ship by the 27th. Respondent purchased one load outside the contract at inflated prices on the 26th knowing that complainant might resume shipments under the contract. It was not necessary that it purchase several (thus precluding the necessity of later carton lettuce purchases) when there was the possibility that complainant would resume shipments under the contract.

assurance, and not purchased under the January 18, 1995, contract with Diamond Produce, was \$50,088.18. The cost of all respondent's allowable cover purchases was \$51,887.28. This amount should be set off against the \$70,318.70 owing from respondent to complainant. The net amount owing from respondent to complainant is \$18,431.42. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act. The counterclaim should be dismissed.

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.¹¹ 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.¹² We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$18,431.42, with interest thereon at the rate of 10% per annum from December 1, 1994, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SHARYLAND LP d/b/a PLANTATION PRODUCE v. CARIBE FOOD CORP.

PACA Docket No. R-95-0090.

Decision and Order filed May 5, 1997.

Breach of Contract - No-Grade Delivered Sale.

Shipper and buyer contracted for the delivery of onions on a no-grade delivered basis. Timely inspection upon arrival revealed condition defects in excess of those allowed under the U.S. Grade Standards for onions. Held that condition defects on a no-grade delivered sale may not exceed the tolerances established

¹¹*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).

¹²See *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).

under the U.S. Grade standards.

Patrice Harps, Presiding Officer.

Complainant, Pro se.

John D. Kallen, N. Miami Beach, FL, for Respondent.

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

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 informal complaint was filed with the Department on July 18, 1994, and a formal complaint was filed on the same date, in which complainant seeks a reparation award against the respondent in the amount of \$4,824.00 in connection with a trucklot of onions shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying liability and alleging a set-off. Complainant replied to the set-off, denying liability.

Since the amount claimed in the formal complaint does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of 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 part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Complainant filed an opening statement and a brief. Respondent filed an answering statement.

Findings of Fact

1. Complainant, Sharyland LP d/b/a Plantation Produce, hereinafter referred to as Plantation, is a limited partnership whose post office address is [REDACTED] Texas [REDACTED]. At the time of the transaction involved herein, Plantation was licensed under the Act.

2. Respondent, Caribe Produce Corp., hereinafter referred to as Caribe, is a corporation whose post office address is [REDACTED] Florida [REDACTED]. At the time of the transactions involved in this proceeding, Caribe was licensed under the Act.

3. On or about May 21, 1994, complainant sold and shipped to respondent

¹Effective November 15, 1995, the threshold for oral hearings was raised to \$30,000 by Public Law 104-48.

640 50-pound sacks of Large/Medium yellow onions at \$5.60 Delivered, 150 50-pound sacks of jumbo yellow onions at \$5.60 Delivered, and 96 25-pound sacks of jumbo red onions at \$7.05 Delivered.

4. Upon arrival at respondent's place of business in Miami, Florida, the onions were federally inspected on May 25, 1994, with the following results;

Yellow Jumbo - 4% Decay

Red Jumbo - 18% Decay

Yellow Large/Medium - 1% Black Mold, 4% Decay

5. Respondent has paid \$3,080.00 against this shipment.

Discussion

Complainant Plantation sold to respondent Caribe a trucklot of onions at delivered prices. In its formal complaint, complainant alleges that the red onions were sold "open", and its invoice shows the same terms. Respondent, however, correctly points out that complainant's invoice was not issued until the product arrived on May 25, 1994. In addition, the broker's confirmation of sale issued by CDC Sales (Department's Report of Investigation (ROI) Exhibit 4A), issued May 21, 1994, shows the red onions sold for \$7.05 delivered, and we so find.

Upon arrival at destination, the onions were federally inspected, with the results reported in Finding of Fact 4. It was apparently at this time that the parties entered into discussions concerning the disposition of the onions. They agree that some sort of alteration in the contract was discussed regarding the red onions, but differ on the nature of that alteration.

Respondent alleges that the terms of sale were changed through the broker to allow it to handle all the onions with "full protection" for the shipper's account. Complainant denies that the terms were changed with regard to the yellow onions, since they arrived within what it characterizes as "good delivery standards". Complainant's claim is supported by the sworn affidavit of its John R. Bearden, the salesman in this transaction (Complainant's Reply to Set-Off, Exhibit 10), and by a statement from the broker, Dean Bearden of CDC Sales dated August 4, 1994 (ROI Exhibit 5).

In his statement, Mr. Dean Bearden states,

I contacted John Bearden at Plantation on the same day (May 25, 1994), he said that he would not give them a open ticket but he would help when it was time to settle on 640 large mediums, 150 jbo yellow onions and full protection on the 100 1/2 sxs. jbo red onions. On June 27, 1994, John at Plantation offered Caribe \$1.00 \$1.00 per sx. on the L/Ms and Jbo

yellow onions and his settlement on the Jbo red onions, which was declined by Caribe.

This letter was accompanied by a copy of a "Trouble Report" issued by CDC on June 28, 1994 (ROI, Exhibit 5A), which refers to this load, and states, under "Disposition", "Shipper has offered a \$1.00 adjustment, which was declined by receiver, on the L/M yellow onions and the Jbo onions and the reds would be settled according to his accounting". Hand-written notations by Plantation's John Bearden state, "CDC Att. Dean/ Our offer was on the LM as Caribe did not need any help on the Jbo. If they do not accept this offer we withdraw and expect full payment - PPC/John".

For there to be a novation of a contract, it must be clear that it is the intent of both parties to substitute a new agreement for the old one. *Eastern Potato Dealers of Maine, Inc. v. Commodity Marketing Co.*, 36 Agric. Dec. 2017 (1977); *Morris Bros. Fruit Co. v. Elmer Stutzman, et al.*, 1 Agric. Dec. 98 (1942). Based on the preponderance of evidence, we find that the parties did not agree to amend the contract with regard to the yellow onions, and will base our decision on whether complainant breached the contract terms. Mr. John Bearden, in his sworn affidavit, admits that the red onions were to be handled for the account of Plantation.

Respondent claims that the contract called for U.S. #1 onions, an assertion which complainant stoutly denies. The evidence in the file supports complainant's position. Neither the invoice nor the broker's confirmation shows that Plantation agreed to ship U.S. #1 onions, nor is there any evidence that respondent objected to either of these documents. The confirmation is not the contract between the parties but merely evidence of the contract. *L. S. Taube & Co. v. Palmer*, 38 Agric. Dec. 731 (1979). It is true, however, that confirmations of sale and invoices are considered as evidencing the understanding between the parties when no prompt objection is made to their contents. *J. R. Simplot Co. v. Red L. Foods Corp.*, 17 Agric. Dec. 384, at 389 (1958).

We find, then, that the yellow onions were sold Delivered with no specified grade. "Good Delivery Standards" do not apply, as mistakenly asserted by complainant. This term applies to Iceberg lettuce only, and then under FOB terms. Under Delivered terms, when no grade is specified, the shipper's responsibility is still to deliver product with condition defects within the tolerances established in the U.S. Grade Standards. Where those standards provide destination tolerances for specific commodities, those tolerances apply. In this instance, the tolerances for decay in all grades is 2%, and there are no destination tolerances. We find that the yellow onions, which contained 4% decay, failed to meet this standard, and

that complainant breached the contract. We should note here that had the shipment been made under FOB terms, we would have held that the 4% decay would not have represented abnormal deterioration and would have held that the onions had been shipped in suitable shipping condition.²

Complainant has agreed that respondent's settlement on the red onions is acceptable, and we find respondent liable for the amount of \$576.00 for these 96 packages. With regard to the yellow onions, we will calculate the damages which Caribe may recover due to complainant's breach of contract. The basic measure of damages is set forth in UCC § 2-714(2):

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average prices shown by Market News Service Reports, or other industry market reports for the destination market on the first day on which resales could have been made following arrival.

The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale. *R. F. Taplett Fruit & Cold Storage Co. v. Chinook Marketing Co. et al.*, 39 Agric. Dec. 1537 (1980). Such results are evidenced by the submission into evidence of a proper accounting.

A proper accounting should show a breakdown of sales of individual lots of produce with the number of containers sold at each price and the date on which sales of each lot took place. An accounting that shows a breakdown of sales by individual lots, but that does not show the dates of the resale of each lot, may be utilized if there is no objection from the opposing party. The determinative factor is whether from all the evidence it is concluded that the resales were made promptly.

Complainant has objected to the returns realized by respondent through its resale of the onions. We find that although respondent's accounting does not show the dates of sale of each sale, the accountings for the onions were generated on June 7, 1994, less than two weeks after arrival, and are considered timely.

The U.S. Market News for Miami, Florida on May 26, 1994 shows medium

²⁷ C.F.R. § 46.43 (i).

yellow onions selling for \$6.00 - \$7.00. Utilizing the average of \$6.50, we find that the 640 sacks had a market value of \$4,160.00. Subtracting from this amount the respondent's gross proceeds of \$2,409.20, yields its damages of \$1,750.80.

The U.S. Market News on the same date shows jumbo yellow onions selling for \$6.50 - \$7.50. Utilizing the average of \$7.00, we find that the 150 sacks had a market value of \$1,050.00. Respondent realized gross proceeds of \$1,160.75, and therefore suffered no damages on these onions, and owes the original invoice price for them.

Respondent is also allowed to recover expenses incidental to the breach. Pro-rating the inspection fee of \$108.00 to cover the yellow onions, yields an additional amount of \$94.80.

To summarize, we have found that respondent owes complainant the agreed amount of \$576.00 for the red onions. It also owes complainant the full original invoice amount of \$840.00 for the jumbo yellow onions. For the Large/Medium onions, respondent is liable for the original invoice amount of \$3,584.00 less its damages of \$1,750.80, or \$1,833.20. The grand total due is, then \$3,249.20, from which we deduct the inspection fee of \$98.40, for a net due of \$3,150.80. Since respondent has already paid \$3,080.00, the amount for which it is liable to complainant is \$70.80.

Respondent's failure to pay complainant \$70.80 is a violation of section 2 of the Act for which reparation should be awarded to complainant. 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. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., 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).

Order

Within 30 days from the date of this order respondent shall pay complainant as reparation \$70.80 with interest thereon at the rate of 10% per annum from August 1, 1994 until paid.

Copies of this order shall be served on the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

**In re: HAVANA POTATOES OF NEW YORK CORP., and HAVPO, INC.
PACA Docket No. D-94-0560.**

Order Denying Petition for Reconsideration filed February 4, 1997.

**Burden of proof — Standard of proof — Preponderance of the evidence — Substantial evidence
— Consideration of the whole record — Hearsay documents prepared in anticipation of litigation.**

The Judicial Officer denied Respondents' Petition to Reconsider. Complainant, as proponent of an order, bears the burden of proof. Complainant not only met its burden of proof, but also met the burden of persuasion by a preponderance of the evidence. Complainant introduced substantial evidence of Respondents' willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). Hearsay documents prepared in anticipation of litigation are admissible, and under the circumstances, have probative value. Testimony regarding admissions of Respondents' president is entitled to considerable weight. The whole record was considered prior to the issuance of the Decision and Order and imposition of the sanctions.

Andrew Y. Stanton, for Complainant.

Tab K. Rosenfeld, New York, NY, for Respondents.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (hereinafter PACA), (7 U.S.C. §§ 499a-499s); the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.130-.151), by filing a Complaint on August 1, 1994.

The Complaint alleges that, during the period February 1993 through January 1994, Respondent Havana Potatoes of New York Corp. (hereinafter Havana) violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing 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, which Havana purchased, received, and accepted in interstate and foreign commerce and that, during the period August 1993 through December 1993, Respondent Havpo, Inc. (hereinafter Havpo), violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to six sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of

\$101,577.50, which Havpo purchased, received, and accepted in interstate commerce. Respondents filed Answers on August 17, 1994, in which they denied violating the PACA.

On May 2, 1995, and May 3, 1995, Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing. Julie Cook, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant, and Tab K. Rosenfeld, Esq., of New York, New York, represented Respondents. The ALJ issued an Initial Decision and Order on October 19, 1995, in which he found that Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and revoked Respondent Havana's PACA license and Respondent Havpo's PACA license. (Initial Decision and Order at 5, 17.)

On February 20, 1996, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557. (7 C.F.R. § 2.35.) On March 18, 1996, Complainant responded to Respondents' appeal, and on March 19, 1996, the case was referred to the Judicial Officer for decision.

On November 15, 1996, I issued a Decision and Order adopting the ALJ's Initial Decision and Order. On January 2, 1997, Respondents filed a Petition to Reconsider Decision of the Judicial Officer (hereinafter Respondents' Petition for Reconsideration), and on January 16, 1997, Complainant filed Complainant's Response to Respondents' Petition to Reconsider Decision of the Judicial Officer (hereinafter Complainant's Response). On January 17, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondents raise six issues in Respondents' Petition for Reconsideration. I do not find that Respondents have raised any issue in Respondents' Petition for Reconsideration that warrants my granting Respondents' Petition for Reconsideration or in any way modifying the Decision and Order filed November 15, 1996, *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___ (Nov. 15, 1996).

First, Respondents contend that:

2. . . . [C]omplainant failed to satisfy its burden of proving the elements of the alleged violations by substantial evidence.

Respondents' Petition for Reconsideration at 1-2.

I disagree with Respondents.

The Administrative Procedure Act provides, with respect to substantial

evidence, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*.

5 U.S.C. § 556(d). (Emphasis added.)

"Substantial evidence" denotes quantity,¹ and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² Complainant introduced a large number of sellers' invoices obtained from Respondents' accounts payable files and summaries of amounts unpaid and past-due and called three witnesses who gave extensive testimony regarding their review of Respondents' business records, discussions with Respondents' president and Respondent Havana's controllers regarding the Respondents' failures to pay produce sellers in accordance with the PACA, and conclusions drawn from the review of Respondents' business records and discussions with Respondents' president and Respondent Havana's controllers. As fully discussed in the Decision and Order filed November 15, 1996, I find the evidence introduced by Complainant substantial evidence of Respondents' violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and Respondents have not raised any issue in Respondents' Petition for Reconsideration that would cause me to reconsider my finding that Complainant introduced substantial evidence of Respondents' violations of the PACA.

¹*Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Wall Street West, Inc. v. SEC*, 718 F.2d 973, 974 (10th Cir. 1983); *Baumler v. State Farm Mutual Automobile Ins. Co.*, 493 F.2d 130, 134 n.8 (9th Cir. 1974).

²*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (*per curiam*); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994).

Second, Respondents contend that:

15. The JO further erred when he impermissibly shifted the burden of proof to Havana and Havpo, even though complainant utterly failed to prove its case. It was complainant's burden to prove the elements of the alleged violations; i.e., inter alia, agreed upon price, delivery to and acceptance by Havana, including date of acceptance, etc. Notwithstanding that the burden falls on complainant, the JO, nevertheless, asserted that "while it is possible that any given produce supplier invoice may be inaccurate, respondents have not introduced any evidence to show that any of respondents' produce supplier invoices in question are inaccurate." Decision at 32.

Respondents' Petition for Reconsideration at 10.

I agree with Respondents that Complainant has the burden of proof in this proceeding. However, I disagree with Respondents' contention that the sentence from *In re Havana Potatoes Corp. of New York, supra*, slip op. at 32, quoted in Respondents' Petition for Reconsideration at 10, "shifted the burden of proof to Havana and Havpo."

The Administrative Procedure Act provides, with respect to burden of proof, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof.*

5 U.S.C. § 556(d). (Emphasis added.)

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.³ The burden of proof does not, however,

³*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), cert. denied sub nom. *American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976),

require Complainant to disprove each of Respondents' assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,⁴ and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.⁵

As fully explained in the Decision and Order filed November 15, 1996, Complainant not only met its burden of proof by coming forward with a prima facie case, but also met the burden of persuasion, with respect to all allegations in the Complaint, by proving each allegation by a preponderance of the evidence.

The Decision and Order filed November 15, 1996, contains a discussion of Respondents' theory of the case and Respondents' failure to introduce evidence to support that theory, as follows:

cert. denied sub nom. Velsicol Chemical Corp. v. EPA, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). See also *Attorney General's Manual on the Administrative Procedure Act 75* (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); 3 *Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

⁴ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, *supra*, 450 U.S. at 92-104.

⁵ *In re Havana Potatoes of New York Corp.*, *supra*, slip op. at 20 n.2; *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, No. 95-3552 (8th Cir. Jan. 7, 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 Brothers 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).

Respondents contend that it is possible that the produce supplier invoices may not mean what they appear to mean, or may have no meaning at all. (Respondents' Appeal to the Judicial Officer at 5-12, 28-30.) Specifically, Respondents contend that produce supplier invoices kept by purchasers of perishable agricultural commodities can contain inaccuracies, can contain iterations and stamps whose meaning is not fathomable to any given reviewer, can be generated by persons other than those whose names appear on the invoices as produce suppliers, and can even refer to produce that has never been received. However, I find nothing in the record to indicate that the produce supplier invoices, which were located in Respondents' files, described by Respondents' president and Respondent Havana's controllers as the accounts payable files, are anything other than they appear to be; *viz.*, itemized statements of perishable agricultural commodities sold to Respondents by those identified on the invoices.

Not only is there no evidence that any of Respondents' litany of possibilities apply to Respondents' produce supplier invoices, but Respondents' own actions belie their contention that their produce supplier invoices are inaccurate or meaningless. Respondents' president confirmed to both Mr. Dutton and Mr. Koller that the produce supplier invoices represent amounts owed suppliers of perishable agricultural commodities, and that, generally, the amounts found by Mr. Dutton and Mr. Koller to be past-due are correct. (Tr. 46, 106-07.) Further, Mr. Perez discussed with Mr. Dutton the "steps that he[, Mr. Perez,] could take ... to resolve these problems he was having" and the steps he had taken to "return his business to a status of being able to pay on a timely basis." (Tr. 46-47.) Further still, Respondents stipulated that, by the time of the hearing, they had paid all of the amounts alleged in paragraph III of the Complaint to be past-due and identified in produce supplier invoices obtained from Respondents' files by Mr. Dutton, (Tr. 27; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5). I find it improbable that Respondent Havana would have paid \$1,960,958.74 and Respondent Havpo would have paid \$101,577.50 based on what Respondents contend are inaccurate, unintelligible produce supplier invoices, which invoices could have been sent to Respondents by persons that are not identified on the invoices, for perishable agricultural commodities that had never been delivered to Respondents. Moreover, Respondents' president, in response to Mr.

Dutton's findings, "agreed . . . that the total dollar amounts . . . seemed reasonable in terms of what the company's debt was," and, in response to Mr. Koller's finding new past-due debt, "acknowledged that the transactions were past-due and unpaid" and that none of the transactions were in dispute. (Tr. 46, 106-07.)

While it is possible that any given produce supplier invoice may be inaccurate, Respondents have not introduced any evidence to show that any of Respondents' produce supplier invoices in question are inaccurate. I find nothing in the record to indicate that the produce supplier invoices are anything other than they appear to be--reliable, probative, and substantial evidence of past-due debts for perishable agricultural commodities Respondents purchased, received, and accepted in interstate and foreign commerce.

In re Havana Potatoes of New York Corp., supra, slip op. at 31-32. This discussion of Respondents' theory of the case and Respondents' failure to introduce evidence to support that theory does not, as Respondents assert, shift the burden of proof to Respondents. Instead, it is a finding that Respondents failed to introduce reliable, probative, and substantial evidence to prove their theory of the case and thereby rebut Complainant's evidence.

Third, Respondents contend that:

3. . . . [T]he testimony of complainant's witnesses utterly failed to make out the elements of the charged PACA violations. The extent to which such testimony was thoroughly impeached, and the sheer unsubstantiated nature of this testimony, is set forth at length in pages 3 - 12 of Respondents' Appeal[.] . . . It is crucial to note, however, that complainant's witnesses largely based their testimony on hearsay documents created in anticipation of litigation; to wit, tables of past due amounts compiled by the witnesses themselves.

Respondents' Petition for Reconsideration at 2.

I disagree with Respondents' contention that Complainant's witnesses were impeached. I find nothing on this record which indicates that Complainant's witnesses are not credible.

Further, while some of Complainant's witnesses' testimony is based on hearsay documents prepared in anticipation of litigation, most of Complainant's witnesses' testimony is based on their review of Respondents' business records and

interviews, which two of Complainant's witnesses had with Respondents' president and Respondent Havana's controllers. Moreover, the hearsay documents prepared in anticipation of litigation, (CX 4, 5, 6, 7), are merely summaries of information obtained from Respondents' records. Copies of Respondents' records upon which these summaries are based were introduced into evidence, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and a comparison of the summaries to Respondents' records on which the summaries are based reveals that the summaries are accurate.

Fourth, Respondents contend that:

5. . . . [T]he Administrative Procedure Act requires . . . proof to amount to "substantial evidence". In this regard, it is settled that all factors in the record must be weighed and considered, including factors detracting from complainant's case. . . .

6. . . . [T]he JO failed to consider the plethora of evidence on the record seriously detracting from complainant's case.

Respondents' Petition for Reconsideration at 3-4.

The Administrative Procedure Act provides:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

I agree with Respondents that a sanction or order may not be issued unless the whole record or those parts of the record cited by a party and supported by and in accordance with reliable, probative, and substantial evidence, is first considered. Further, I find that Respondents clearly cited those parts of the record that Respondents believe detract from Complainant's case. However, I disagree with Respondents' assertion that I failed to consider the evidence that detracts from Complainants' case and I disagree with Respondents' description of the quantity of the evidence detracting from Complainant's case as a "plethora" of evidence.

The Decision and Order filed November 15, 1996, describes Respondents' evidence, as follows:

In the face of [Complainant's] evidence, Respondents have chosen to present no contradictory evidence. They have merely adopted an obstructionist stance, trying to pick holes in the evidence which Complainant obtained from Respondents' own files. If this evidence were not correct, Respondents could have introduced evidence to contradict it. Respondents' failure to contradict this evidence leads me to conclude that the evidence is sufficient to prove Complainant's allegations of sales, deliveries, and failure to pay in a timely fashion. I find that Complainant has met its burden of proof. The documentary evidence presented at the hearing was obtained directly from the books of Respondents. Respondents have failed to rebut this evidence. Therefore, I find the evidence proves the allegations in the Complaint.

Although Complainant submitted voluminous exhibits, Respondents submitted no exhibits. The only evidence presented at the hearing by Respondents was testimony of [Mr.] Hector Paredes, a controller of Havana Potatoes, and [Mr.] Robert Reich, an employee of one of Havana's [produce] suppliers.

Respondents' attorney argues . . . that Mr. Koller's testimony is devoid of credibility and no probative weight should be given to this testimony because "Complainant can not dispute Mr. Paredes' testimony that he does not speak English." [(Respondents' Reply Memorandum at 7.)] However, [the ALJ] found Mr. Koller to be a very credible witness, something [the ALJ did not find] with respect to Mr. Paredes. [(Initial Decision and Order at 10.)]

Mr. Paredes testified through an English-Spanish interpreter. He first stated that he does not speak English but knows words that he needs such as "accounts payable" and "accounts receivable." He has a degree in public accounting and a degree in business administration from Venezuelan universities. (Tr. 285, 287.) [Mr. Paredes] testified that, when Mr. Koller visited Respondents' office in April 1995, at Mr. Perez' request, Mr. Paredes directed Mr. Koller to Respondents' financial files, including [their] accounts payable records. (Tr. 290, 294.) When [the ALJ] questioned Mr. Paredes, he stated that he had been living in the

United States for 3 years and 2 months, (Tr. 296), and that he studied English for 3 years in secondary school, (Tr. 297-98). As a result of Mr. Paredes' study of English for 3 years in Venezuela, his residence in the U.S. for over 3 years, and his dealing on a daily basis with records that were in English, [the ALJ found] that [Mr. Paredes] understood more than enough English to direct Mr. Koller to the appropriate financial records. [(Initial Decision and Order at 11.)]

Respondents' only other witness was Robert Reich, sales manager for Red Hawk Farms, one of Havana's [produce suppliers]. Mr. Reich testified regarding his belief as to what payment practices in the produce industry as a whole are. (Tr. 442[-43.]) Mr. Reich also testified regarding ratings of produce firms in a private publication known as "The Blue Book." (Tr. 444-51.) This testimony is not relevant because the law regarding payment for perishable agricultural commodities is set out in the PACA and the regulations promulgated pursuant to the PACA. This matter is not bound by "The Blue Book," but by the law itself. The regulations promulgated pursuant to the PACA define prompt payment. See 7 C.F.R. § 46.2(aa). Under the [PACA] and regulations, payment for produce must be made within 10 days after the day on which the produce is accepted, unless there are written payment terms, entered into prior to the transaction, extending the time for payment.

Mr. Reich also testified that Havana had extended payment terms with his firm and that he was sure that Havana had paid Red Hawk Farms in a timely manner. However, Mr. Reich could not identify what the specific payment terms were or when his company was paid. (Tr. 463, 465-67.) Respondents have not submitted any written credit agreements with Red Hawk into evidence. Additionally, Mr. Reich was unable to explain why, if his firm was satisfied with Havana's payment practices, it had filed reparation complaints against Havana and notified USDA of the insufficient funds checks that it had received from Havana in purported payment for produce purchases. (Tr. 464.)

In re Havana Potatoes of New York Corp., *supra*, slip op. at 12-14.

Fifth, Respondents contend that the summaries of Respondents records prepared by two of Complainant's witnesses, Mr. Dutton and Ms. Jervis, (CX 4, 5, 6, 7), have almost no probative value, as follows:

7. . . . - - - documents specifically prepared in anticipation of litigation - - - are, as a matter of law, the type of hearsay which is entitled to almost no probative value.

Respondents' Petition for Reconsideration at 4.

The hearsay documents prepared by Mr. Dutton and Ms. Jervis in anticipation of litigation, (CX 4, 5, 6, 7), are merely summaries of information obtained from Respondents' records. Copies of Respondents' records upon which these summaries are based were introduced into evidence, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and a comparison of the summaries to Respondents' records on which the summaries are based reveals that the summaries are accurate. My views as to the admissibility of these summaries and the weight to be given these summaries are fully explained in the Decision and Order filed November 15, 1996, *In re Havana Potatoes of New York Corp.*, *supra*, slip op. at 33-40, and Respondents have not raised any issue in Respondents' Petition for Reconsideration that would cause me to change my view either as to the admissibility of the summaries or the weight to be given these summaries.

Even if I agreed with Respondents (which I do not), and found that the summaries are "entitled to almost no probative value," that finding would not constitute a basis for granting Respondents' Petition for Reconsideration or modifying the Decision and Order filed November 15, 1996, in light of the evidence of Respondents' violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), contained in the sellers' invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), which were obtained from Respondents' files and Mr. Dutton's and Mr. Koller's testimony regarding their conversations with Respondents' president and Respondent Havana's controllers.

Sixth, Respondents contend that the ALJ and the Judicial Officer give too much weight to statements made by Respondents' president to Mr. Dutton and Mr. Koller, as follows:

14. In addition, it is quite telling that, although both the ALJ and the JO make much of an exit interview between U.S.D.A. marketing specialist Donald Dutton ("Dutton") and Havana's president Pedro Perez ("Perez"), in which Perez allegedly agreed with Dutton's statement regarding the latter's findings in terms of total dollar amount past due (Tr. 46), the Decision completely ignores the evidence indicating the lack of significance of such "admission". Specifically, the JO ignored the clear fact, emphasized in Respondents' Appeal, that Dutton himself admitted never reviewing a single invoice with Perez, or even identifying

for Perez the invoices Dutton believed were unpaid. (Tr. 73, 85, 410, 414). Similarly, the Decision erroneously points to the testimony of John Koller, Assistant Regional Director for the Northeast Region ("Koller"), as proof that Perez acknowledged to Koller unpaid past due transactions. Here too, however, Koller failed to indicate what specific transactions, if any, he discussed with Perez, and made no attempt to recall the actual words used in their alleged conversation.

Respondents' Petition for Reconsideration at 9-10.

I disagree with Respondents' contention that the ALJ and the Judicial Officer give too much weight to testimony by Messrs. Dutton and Koller concerning their discussions with Respondents' president, Mr. Perez.

The record does not reveal that either Mr. Dutton or Mr. Koller reviewed with Mr. Perez each of Respondents' transactions which were unpaid and past-due. Nonetheless, the record establishes that, after their respective audits of Respondents' past-due accounts, Mr. Dutton and Mr. Koller each discussed, with Mr. Perez, their findings of Respondents' failures to pay produce sellers in accordance with the PACA. The record further reveals that Mr. Perez agreed with Mr. Dutton's and Mr. Koller's findings.

Mr. Dutton's and Mr. Koller's testimony regarding Mr. Perez's admissions is uncontroverted and I gave Mr. Dutton's and Mr. Koller's testimony regarding Mr. Perez's admissions considerable weight, *In re Havana Potatoes of New York, Corp., supra*, slip op. at 9-12, 22-31. I do not find Mr. Dutton's or Mr. Koller's failure to review each unpaid and past-due seller's invoice with Mr. Perez a basis for giving Mr. Dutton's or Mr. Koller's testimony regarding their conversations with Mr. Perez less weight than I gave to their testimony in the Decision and Order filed November 15, 1996.

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 15, 1996, *In re Havana Potatoes of New York Corp., supra*, Respondents' Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice, (7 C.F.R. § 1.146(b)), provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.⁶ Respondents' Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on November 15, 1996. Therefore, since

⁶ *In re Saulsbury Enterprises* (Order Denying Petition for Reconsideration), 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997); *In re Andershock Fruitland, Inc.* (Order Denying Petition for Reconsideration), 55 Agric. Dec. ___, slip op. at 1 (Oct. 29, 1996).

Respondents' Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Order in the Decision and Order filed November 15, 1996, is reinstated, with allowance for time passed, as follows:

Order

1. Respondent Havana Potatoes of New York Corp.'s PACA license is revoked, effective 11 days after service of this Order on Respondent Havana Potatoes of New York Corp.
2. Respondent Havpo, Inc.'s, PACA license is revoked, effective 11 days after service of this Order on Respondent Havpo, Inc.
3. The facts and circumstances set forth in this decision shall be published.

In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.
Stay Order filed February 20, 1997.

Andrew Y. Stanton, for Complainant.
Tab K. Rosenfeld, New York, NY, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

The Order previously issued in this case, which would have revoked Respondent Havana Potatoes of New York Corp.'s PACA license and Respondent Havpo, Inc.'s PACA license, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A.
ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Stay Order filed March 4, 1997.

Timothy A. Morris, for Complainant.
Mark A. Amendola, Cleveland, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On September 12, 1996, I issued a Decision and Order revoking Respondent Andershock Fruitland, Inc.'s license issued under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); denying Respondent AAA Recovery's application for a PACA license; and ordering the publication of the facts and circumstances of the decision. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 38 (Sept. 12, 1996). On September 26, 1996, Respondents filed a Petition for Reconsideration, and on October 29, 1996, I issued an Order Denying Petition for Reconsideration. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___ (Oct. 29, 1996). On December 30, 1996, Respondents filed a Petition for Review of the Order Denying Petition for Reconsideration with the United States Court of Appeals for the Seventh Circuit. On January 22, 1997, Respondents filed a Motion for Stay of the Judicial Officer's Order Denying Petition for Reconsideration, pending the disposition of Respondents' Petition for Review with the United States Court of Appeals for the Seventh Circuit.

Complainant did not respond to Respondents' Motion for Stay, and on March 4, 1997, the case was referred to the Judicial Officer for a ruling on Respondents' Motion for Stay.

Respondents' Motion for Stay is granted.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: THE PRODUCE PLACE.

PACA Docket No. D-93-0550.

Order Lifting Stay filed March 28, 1997.

Andrew Y. Stanton, for Complainant.

Stephen P. McCarron, Washington, DC, for Respondent.

William G. Jenson, Judicial Officer.

On December 14, 1994, the Judicial Officer issued a Decision and Order which suspends The Produce Place's (hereinafter Respondent) license under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499A-499s) (hereinafter PACA), for 90 days. *In re The Produce Place*, 53 Agric. Dec. 1715 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert denied*, 117 S.Ct. 959 (1997). Respondent filed a Request for Stay pending the outcome of proceedings for judicial review which the Judicial Officer granted on March 29, 1995. *In re The Produce Place*, 54 Agric. Dec. 738 (1995). On March 11, 1997, Complainant

filed a Motion to Lift Stay Order. On March 27, 1997, Respondent and Complainant filed a Joint Motion to Lift Stay Order in which Complainant and Respondent request that Respondent's 90-day license suspension take effect commencing April 1, 1997.

Complainant's Motion to Lift Stay Order filed March 11, 1997, is denied. Complainant's and Respondent's Joint Motion to Lift Stay Order filed March 27, 1997, is granted. The Stay Order issued March 29, 1995, *In re The Produce Place*, 54 Agric. Dec. 738 (1995), is lifted, and the Order issued in *In re The Produce Place*, 53 Agric. Dec. 1715 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 959 (1997) suspending Respondent's PACA license for 90 days is effective beginning April 1, 1997.

In re: COUNTY PRODUCE, INC.
PACA Docket No. D-94-548.
Order Lifting Stay filed May 16, 1997.

Andre Allen Vitale, for Complainant.
Harold James Pickerstein, Fairfield, Connecticut, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On January 22, 1996, the Acting Judicial Officer filed a Decision and Order which revokes County Produce, Inc.'s (hereinafter Respondent), license under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA). *In re County Produce, Inc.*, 55 Agric. Dec. 596 (1996), *aff'd*, 103 F.3d 263 (2d Cir. 1997). Respondent filed a Motion for Stay Pending Appellate Review which the Judicial Officer granted on March 5, 1996. *In re County Produce, Inc.*, 55 Agric. Dec. 617 (1996) (Stay Order). On April 29, 1997, Complainant filed a Motion to Lift Stay Order. On May 13, 1997, Respondent filed a Response to Motion to Lift Stay Order stating that Respondent has no objection to Complainant's Motion to Lift Stay Order.

Complainant's Motion to Lift Stay Order filed April 29, 1997, is granted. The Stay Order issued March 5, 1996, *In re County Produce, Inc.*, 55 Agric. Dec. 617 (1996), is lifted. The Order issued in *In re County Produce, Inc.*, 55 Agric. Dec. 596 (1996), *aff'd*, 103 F.3d 263 (2d Cir. 1997), revoking Respondent's PACA license and requiring the publication of the facts and circumstances set forth in the Decision and Order filed in this proceeding on January 22, 1996, is effective on the 30th day after service on Respondent of this Order Lifting Stay.

In re: PATRICIA LARSON.
PACA Docket No. APP 96-0005
Dismissal and Order Canceling Hearing filed March 10, 1997.

Jane McCavitt, for Complainant.

Stephen Thomas, Peoria, IL, for Respondent.

Dismissal issued by Edwin S. Bernstein, Administrative Law Judge.

In a Motion filed March 7, 1997, by Attorney for Complainant, the P.A.C.A. Branch Chief's responsibly connected determination against Patricia Larson, which is the subject matter of this appeal, has been deemed moot. As a result, the parties hereby request that the above-captioned matter be dismissed. Upon good cause shown, Complainant's motion to dismiss is granted and the hearing scheduled to commence on March 12, 1997, in Peoria, Illinois, is hereby canceled.

In re: STELLA AMERIAN and JOHN JANIGAN.
PACA Docket No. APP-96-0008.
Dismissal filed May 5, 1997.

Jane McCavitt, for Complainant.

Duane M. Geck and Gregory C. Nuti, San Francisco, CA, for Respondents.

Order issued by Victor W. Palmer Chief Administrative Law Judge.

On the basis of the Withdrawal of Petition, the petition is hereby dismissed.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

**In re: TOM'S QUALITY PRODUCE, INC.
PACA Docket No. D-96-0527.
Decision and Order filed December 11, 1996.**

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant and repeated violations - Settlement payments irrelevant to issue of whether there have been violations of section 2(4) of the PACA - Publication.

Andrew Stanton, for Complainant.

Justin Johl, Overland Park, KS, for Respondent.

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

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 April 24, 1996, by the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the complaint that respondent had committed wilful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly to 21 sellers for purchases of 448 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$880,654.06 during the period April 1995 through July 1995. Complainant requested that a finding be made that respondent had committed wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that respondent's license be revoked. Respondent's license has since terminated.

Respondent filed an answer, denying that it committed any of the violations alleged in the complaint and stating "that it has, since July 1995, ceased doing business altogether." Respondent also asserted all of the sellers referenced in the complaint had been paid, voluntarily settled all of their claims, waived their rights to pursue any further claims, or failed to file the required PACA trust notices in a timely manner and, as a result, are not entitled to protection under the PACA.

Respondent's affirmative defense is based on a March 29, 1996, settlement order in an action before the United States District Court for the Western District of Missouri, Case No. 95-0607-CV-W-3, brought pursuant to the trust provisions of the PACA (7 U.S.C. § 499e(c)) against respondent by numerous produce creditors, including many of the produce sellers set forth in paragraph III of the

complaint. The settlement order provides for payment of \$831,484.25 to 18 produce creditors.

However, settlement payments pursuant to the PACA trust provisions are irrelevant to the issue of whether there have been violations of section 2(4) of the PACA. Further, examination of the payments noted in the March 29, 1996, settlement order reveals that respondent paid \$708,745.59 to 16 of the 21 sellers set forth in paragraph III of the complaint, although such payment was made after it was due. A total of \$171,908.47 remains unpaid to 20 of the 21 sellers named in the complaint. As respondent admits in its answer that it is not currently engaged in business, it is highly unlikely that any of the \$171,908.47 will be paid by the date of the hearing.

Respondent's failure to make full payment promptly constitutes wilful, flagrant and repeated violations of section 2(4) of the PACA. *Caito Produce Co.*, 48 Agric. Dec. 602 (1989). When a respondent is found to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly, and fails to make such payments by the time of the hearing, the appropriate sanction is a license revocation or a finding of the commission of wilful, flagrant and repeated violations if the license has terminated. *Andershock Fruitland, Inc. and James A. Andershock d/b/a AAA Recovery*, 55 Agric. Dec. ___ (1996).

The granting of a Motion for Decision Without Hearing by Reason of Admissions should be granted prior to the hearing when respondent has admittedly made partial payment after such payment was due, and it is apparent that full payment will not be made by the date of the hearing. *Moreno Bros.*, 54 Agric. Dec. 1425, 1443 (1995); *Potato Sales Co., Inc.*, 54 Agric. Dec. 1409, 1424 (1995), appeal voluntarily dismissed, No. 95-70906 (9th Cir. 1996).

In its brief and "stipulation of facts" (containing twelve numbered paragraphs), respondent contends that because of mitigating circumstances -- its past history of compliance with the PACA and its effort, and that of its president, Thomas Sherrer, to voluntarily take prompt steps when it found itself unable to pay for all its produce purchases to lessen the loss to its creditors -- it should not be further sanctioned and its president, Thomas Sherrer, should not be barred from employment in the produce industry.

Complainant, agreeing with the "stipulation of facts," except for paragraphs 9 and 11, contends that, under the Department's longstanding policy, mitigating circumstances are considered "excuses" which are never accepted in non-payment PACA cases for purposes of reducing a sanction, citing *Havana Potatoes, et al.*, 55 Agric. Dec. ___ (Nov. 15, 1996).

As complainant argues, *Havana Potatoes* provides that even "good excuses" for non-payment "are never regarded as sufficiently mitigating to prevent a

respondent's failure to pay from being considered flagrant and wilful." Accordingly, I find that the circumstances in this case do not warrant a reduction in complainant's proposed sanction. However, no decision is made as to Mr. Sherrer's employment status.

Therefore, upon the motion of the 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. Tom's Quality Foodservice, Inc. (hereinafter, "respondent"), is a corporation organized and existing under the laws of the State of Missouri. Its business address is [REDACTED] Missouri [REDACTED] and its mailing address is [REDACTED] Missouri [REDACTED].

2. At all times material herein, respondent was licensed under the provisions of the PACA. License number [REDACTED] was issued to respondent on May 5, 1980. This license was renewed annually but terminated on May 5, 1996, when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, respondent, during the period April 1995 through July 1995, failed to make full payment promptly to 21 sellers for purchases of 448 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$880,654.06.

4. Respondent, on approximately March 29, 1996, paid \$708,745.59 to 16 of the 21 sellers set forth in paragraph III of the complaint, although such payment was made after it was due. A total of \$171,908.47 remains unpaid to 20 of the 21 sellers.

Conclusions

Respondent has failed to make full payment promptly for purchases of produce, as alleged in the complaint, and \$171,908.47 remains unpaid. Respondent's failures to make payment 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, Tom's Quality Foodservice, Inc., is hereby found to have committed wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and such finding is hereby ordered 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 PACA, 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).

[This Decision and Order became final January 21, 1997.-Editor]

In re: LOTTO INTERNATIONAL, INC.
PACA Docket No. D-96-0519.
Decision and Order filed March 19, 1997.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant, and repeated violations - License revocation.

Kimberly Hart, 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.*), (the "Act") instituted by a Complaint filed on March 8, 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 August 1994 through December 1994, Respondent, Lotto International, Inc., failed to make full payment promptly to six sellers of the agreed purchase prices in the total amount of \$252,252.64 for 22 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

In a timely Answer filed April 30, 1996, Respondent did not deny owing the sums alleged but stated that it had reduced the total debt by \$45,000. On December 18, 1996, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions. Respondent's Answer to the motion, filed January 21, 1997, reemphasized that it was attempting to repay its creditors.

In a telephone conference on January 29, 1997, Respondent stated that it still owed \$100,000. and requested more time to pay these debts. I encouraged the parties to enter into constructive discussions which would encompass Respondent paying the balance of these debts in the near future.

On February 27, 1997, Complainant filed a renewed Motion for Decision Without Hearing. The renewed motion stated that Respondent's PACA license has been suspended since June 22, 1995; since then four additional reparation awards have been issued against Respondent; three of these awards remain unpaid to date; and there are no assurances that Respondent will pay its debts within a specified time period.

Respondent's Answer to the renewed motion, filed March 14, 1997, did not deny that it has failed to pay moneys owed, as alleged, but instead requested sympathy for its financial plight which it stated was due in large part to the devaluation of the Mexican peso.

That Respondent admits to being substantially indebted to the sellers named in the Complaint as alleged in the Complaint is irrefutable. Since this indebtedness is not *de minimus*, Complainant is entitled to the issuance of an Order without further proceedings. *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question).

In re Atlantic Produce Co. and Joseph Pinto, 54 Agric. Dec. 701 (March 23, 1995) sets forth the policy that, where a respondent violates section 2(4) of the PACA by failing to make full payment promptly, the appropriate sanction is a license revocation with no excuses accepted in mitigation of such sanction where the respondent owes a substantial amount of money for produce purchases in numerous transactions over an extended period of time.

The numerous violations by Respondent over a lengthy period of time constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370 (5th Cir. 1980); *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom.*, *George Steinberg & Son, Inc. v. Butz*, *supra*, 491 F.2d 988 (2d Cir.); *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 125-127 (1984).

Respondent's violations are willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, Inc.*, *supra*, 32 Agric. Dec. 236, 263-269; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961). Respondent knew or should have known that it could not make prompt payment for the perishables it ordered, yet Respondent continued to make purchases knowing that each additional purchase would result in another violation.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)), and that its PACA license is revoked as a result of those violations.

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 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 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).

[This Decision and Order became final April 30, 1997 and effective May 11, 1997.-Editor]

In re: ANTHONY R. TRUJILLO, dba WEST TEXAS PRODUCE.
PACA Docket No. D-97-0003.
Decision and Order filed April 7, 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 Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA) initiated by a Complaint filed on October 15, 1996, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that Respondent, Anthony R. Trujillo, doing business as West Texas Produce (hereinafter "Respondent"), failed to make full payment promptly to 31 sellers of the agreed purchase prices in the total amount of \$446,802.48 for 166 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce during the period November 1994 through August 1995. Complainant requested that a finding be made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and that such

findings be ordered published.

A copy of the complaint was served on Respondent on October 25, 1996. An answer was not filed within the time prescribed by the Rules of Practice. The complainant moved for the issuance of a decision without hearing by reason default. As a result of the respondent's failure to file an answer within the time prescribed, the material facts alleged in the complaint are deemed admitted and are adopted as set forth below in the findings of fact.

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, Anthony R. Trujillo, is an individual doing business as West Texas Produce, with a business mailing address of [REDACTED] Texas [REDACTED]

2. Pursuant to the licensing provisions of the PACA, license number [REDACTED] was issued to Respondent on September 24, 1993. This license was renewed annually but terminated on September 24, 1995, 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 August 24, 1995, Respondent filed a Voluntary Petition for Bankruptcy in the U.S. Bankruptcy Court for the District of Texas pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*). The bankruptcy petition was designated case No. 95-31180 and on March 12, 1996 was converted to Chapter 7.

4. As set forth in paragraph III of the complaint, Respondent purchased, received and accepted 166 lots of perishable agricultural commodities in interstate and foreign commerce from 31 sellers from November 1994 to August 1995, and failed to make full payment promptly for the agreed purchase prices or balance thereof in the total amount of \$446,802.48.

Conclusion

Respondent's failures to make full payment promptly with respect to the transactions set forth above in Finding of Fact No. 4, constitute wilful, repeated and flagrant 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)).

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 days after such 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 May 20, 1997.-Editor]

In re: ADAN O. TINAJERA dba INTER-DISTRIBUTORS.
PACA Docket No. D-95-0505.
Decision and Order filed November 14, 1996.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. 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.*) hereinafter referred to as the "Act", instituted by a complaint filed on November 15, 1994, in which it was alleged that respondent had committed wilful, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to eight sellers for purchases of 69 lots of perishable commodities in the course of interstate or foreign commerce in the amount of \$173,418.30 during the period of April 1993 through September 1994. Complainant requested that a finding be made that respondent had committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that respondent's license be revoked. Respondent's license expired on October 6, 1996, and has not been renewed.

A copy of the complaint was served upon respondent and was answered on December 8, 1994. In the answer respondent admitted that it owed some sellers

for produce as alleged in the complaint, but stated that some of the sellers were paid and that it was making payments on account for other sellers. Specifically, respondent admitted that it is making payments to two sellers; is attempting to arrange monthly payments to four other sellers; and believes that two sellers have been paid. Respondent's answer thus constitutes an implicit admission that it had failed to make prompt payment to at least six sellers for some of the produce purchases alleged in the complaint. Its answer therefore constitutes an admission of material allegations of fact contained in the complaint within the meaning of Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Complainant has now moved for the issuance of a Decision Without Hearing by Reason of Admissions, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As respondent's admission that it had failed to pay at least six sellers for the purchase of produce constitutes an admission of material allegations of fact contained in the complaint, complainant's motion is granted. *Cf. Potato Sales Co., Inc.*, 54 Agric. Dec. 1409 (1995).

Findings of Fact

1. The mailing address of respondent, Adan O. Tinajera, d/b/a Inter-Distributors is [REDACTED] (b) (6)

2. Pursuant to the licensing provisions of the Act, license number [REDACTED] was issued to respondent on October 6, 1992. This license was renewed annually, but terminated on October 6, 1996, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee. This license was suspended on October 8, 1993, for failure to pay a reparation order pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g(d)).

3. As more fully set forth in paragraph III of the complaint, during the period April 1993 to September 1994 respondent purchased, received, and accepted in interstate and foreign commerce various lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices to at least six sellers.

Conclusion

Respondent's failure to make full payment promptly with respect to six sellers constitutes wilful, repeated, and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed wilful, flagrant, and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, 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).

[This Decision and Order became final June 19, 1997 and effective on June 30, 1997.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Reddish Enterprises, Inc. PACA Docket No. D-97-0011. 1/2/97.

M. Miqueli & Co., Inc. PACA Docket No. D-97-0012. 1/14/97.

Amerian Brother, Inc. PACA Docket No. D-96-0518. 5/5/97.