

AGRICULTURE DECISIONS

Volume 65

July - December 2006
Part Three (PACA)
Pages 1274 -1489



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

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (ALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are also available online at <http://www.usda.gov/da/oaljdecisions/>, along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned and will appear in pdf on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

A compilation of past volumes on Compact Disk (CD) and individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available for sale. Go to www.pay.gov and search for "AgricDec". Please complete the order form therein.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

This page intentionally left blank.

LIST OF DECISIONS REPORTED

JULY - DECEMBER 2006

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

JAMES E. THAMES, JR. v. USDA.
Case No. 06-11609. 1274

G & T TERMINAL PACKAGING CO., INC. v. USDA.
Case No. 05-5634-ag 1280

HUNTS POINT TOMATO CO., INC. v. USDA.
Case No. 06-1072-ag. 1297

DEPARTMENTAL DECISIONS

EDWARD S. MARTINDALE.
PACA-APP Docket No. 04-0010.
Decision and Order. 1301

RAY JUSTICE.
PACA-APP Docket No. 05-0004.
Decision and Order. 1325

WILLIAM DUBINSKY & SON, INC
PACA Docket No. D-02-0002.
Decision without Hearing 1337

DONALD R. BEUCKE.
PACA-APP Docket No. 04-0009.
Decision and Order 1341

JUDITH'S FINE FOODS INTERNATIONAL, INC.
PACA DOCKET NO. D-06-0012.
Decision and Order 1369

DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
&
KEITH K. KEYESKI.

PACA-APP Docket No. 04-0020.
Decision and Order. 1372

DENNIS E. HUTCHINS, d/b/a HUTCHINS DISTRIBUTING
COMPANY.
PACA Docket No. D-05-0014.
Decision Without Hearing by Reason of Admissions. 1409

LUSK ONION, INC.
PACA Docket No. D-06-0007.
Decision and Order Based upon Admissions. 1414

REPARATIONS

STEVE ALMQUIST d/b/a STEVE ALMQUIST SALES
& BROKERAGE v. MOUNTAIN HIGH POTATOES
& ONION, INC.
PACA -R-05-095.
Decision and Order. 1418

AMERIFRESH, INC., v. WILLIAMS AG
COMMODITIES BROKERAGE, INC.
PACA Docket No. R-05-076.
Decision and Order. 1426

VINCENT CHIODO, D/B/A CHIODO FARMS v.
FARMING TECHNOLOGY, INC.
PACA Docket No. R-05-132.
Decision and Order. 1432

FRU-VEG MARKETING, INC v. J. F. PALMER
& SONS PRODUCE, INC.
PACA Docket No. R-06-083.
Decision and Order. 1452

HARVEST LOGISTICS, INC. v. MOBILE PRODUCE, INC.
PACA Docket No. R-06-093.
Decision and Order. 1460

MISCELLANEOUS ORDERS

KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.

Order Denying Petition to Reconsider. 1470

DEFAULT DECISIONS

WR FOODS, INC., d/b/a WESTERN ROSE FOODS.
PACA Docket No. D-06-0005.
Decision Without Hearing by Reason of Default. 1480

ADAMS APPLE PRODUCE, INC.
PACA Docket No. D-05-0016.
Default Decision. 1483

JOE’S VEGETABLES, INC.
PACA Docket No. D-06-0008
Decision Without Hearing by Reason of Default. 1485

MCGEE PRODUCE, INC.
PACA Docket No. D-05-0012.
Default Decision. 1487

Consent Decision 1489

This page intentionally left blank.

PERISHABLE AGRICULTURAL COMMODITIES ACT
COURT DECISIONS

JAMES E. THAMES, JR. v. USDA.
Case No. 06-11609.
Filed August 15, 2006.

(Cite as:195 Fed. Appx. 850). *

PACA – Non-nominal board director – Responsibly connected-- Arbitrary and capricious, when not – Failure to exercise prudent Director duties.

PACA Licensee, a tomato repacking plant, failed to make full and prompt payment to its producers. Its license was revoked when it failed to pay a licensing fee to USDA. The petitioner was a vice president, a director, and a 16.2% shareholder of the company and could not overcome the presumption that he was more than a nominal director. Additionally, as an industry expert and a director, he could have but did not exert his authority to prevent the PACA violations and therefore was “responsibly connected” to the revoked license.

**United States Court of Appeals,
Eleventh Circuit.**

Petition for Review of a Decision of the Department of Agriculture.
Agency No. 04-0003-PACA-APP.

Before BIRCH, BLACK and BARKETT, Circuit Judges.
PER CURIAM:

James E. Thames, Jr., petitions for review of the final decision of the Secretary of Agriculture, acting through a Department of Agriculture Judicial Officer (“JO”), determining that Thames was “responsibly connected” with John Manning Company, Inc., (“John Manning”) at a time during which that company violated section 2(4) of the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. § 499b(4), thereby subjecting him to licensing and employment restrictions under the PACA. *See* 7 U.S.C. § 499h. Because we find that there is substantial evidence in the record to support the JO's determination, the petition is DENIED.

* Rehearing was denied on November 09, 2006 by Eleventh Circuit Appeals Court. - Editor.

I. BACKGROUND

Thames began working in the produce packing industry in 1963. He joined John Manning, a tomato re-packing plant, in 1991, at which point he, George Fuller, Jr., and Jon Fuller each owned 31 percent of the stock and George Fuller, Sr., one of the founders, owned 7 percent. ROA-Tab 11, ¶ 1. Thames and the Fullers also constituted the board of directors of John Manning at that time. Thames held the position of vice president, ran the tomato-repacking line, purchased produce, and was responsible for hiring and firing those working on the line.

In 1999, the board decided to bring Steve McCue into the company. George Fuller, Sr., sold his 7 percent to McCue, and Thames and the other Fullers sold enough of their stock to make McCue, Thames and the younger Fullers equal one-fourth owners. *Id.* Tab 11, ¶ 2. McCue was also made president of John Manning.

After a year, with the business going well, McCue told the other board members that he would stay with John Manning only if he were made a majority stockholder in the business. On 27 August 2001, Thames and the younger Fullers sold McCue sufficient stock, at one dollar per share, to make him an owner of 51 percent while they shared ownership of the remaining 49 percent. *Id.* Tab A at 17-18. Thames continued to serve as vice president and owned 16.2 percent of the corporate shares of John Manning. *Id.* Tab 7.

John Manning's by-laws provide that “[t]he holders of a majority of the stock issued and outstanding ... shall constitute a quorum at all meetings of the shareholders for the transaction of business” and that “the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders.” *Id.* Tab 4, § § 2.5, 2.7. The by-laws also provide that “the property and business of the corporation shall be managed by its Board of Directors,” which, as elected by the shareholders, is to “consist of not less than three nor more than five members.” *Id.* Tab 4, § § 3.1, 3.2; *see id.* Tab 4, § 2.2. Finally, “[a] majority of the members of the Board shall be necessary to constitute a quorum and a matter may be carried by a majority within the quorum. The act of a majority of the directors at any meeting at which there is a quorum shall be the act of the Board of Directors.” *Id.* Tab 4, § 4.5.

1276 PERISHABLE AGRICULTURAL COMMODITIES ACT

As for corporate officers, the by-laws provide that the president “shall have general and active management of the corporation, and shall see that all orders and resolutions of the Board are carried into effect.” *Id.* Tab 4, § 5.4(a). If the President fails to act in accordance with this duty, the Vice President “shall have all the powers of the President, and shall perform such duties as shall from time to time be imposed upon him by the Board of Directors.” *Id.* § 5.5. Finally, “[a]ll checks and drafts shall be signed in such a manner as the Board of Directors may from time to time determine.” *Id.* Tab 4, § 12.1.

Thames testified that, after McCue became majority shareholder, Thames continued to run the tomato processing line and to manage his employees, as he had previously done, but that he was no longer involved in purchasing produce. He explained that he was not included in any meetings with the accountant McCue hired nor did he have any check-signing authority. *Id.* Tab A at 20-22. Thames was paid \$1000 a week for his work. *Id.* Tab A at 27. He was also entitled to receive a portion of any retained earnings in proportion to the stock he held. Thames worked in this capacity until John Manning closed its doors. Throughout this period, he also continued to sit on the board of directors along with McCue and the younger Fullers. In that capacity, Thames signed two guarantees for loans on behalf of John Manning, one for \$100,000 in September 1999 and one for \$250,000 in December 2000. *Id.* Tab A at 59. He also signed a lease for new expanded headquarters. Throughout this period, Thames attended board meetings at which John Manning's financial concerns were discussed.

At the meeting on 24 April 2002, the board discussed the corporation's precarious financial situation, which had been made evident by its failure to pay monthly group health insurance premiums, the discontinuation of corporate cell phone service, its failure to pay the Blue Book bill, and trouble paying produce suppliers. At that meeting, McCue sought and was granted permission by the younger Fullers to ask their father for a loan to stave off the bankruptcy of John Manning.

At a follow-up meeting held five days later, the board discussed obtaining a loan for \$200,000 to be secured by a guarantee signed by the directors. *Id.* Tab 15, ¶ 6. The younger Fullers refused to sign the guarantee without first being provided certain financial information. On 3 May 2002, the board met for a third time and McCue distributed a 2001 year-end report showing a loss of \$140,805 for 2001 and a \$32,598 loss for the first quarter of 2002. *Id.* Tab 16, ¶ 3. The board

members refused to assist with an infusion of personal cash and John Manning closed its doors that August. Its PACA license was terminated on 5 June 2003, for failure to pay the annual renewal fee.

In November 2003, the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, determined that Thames was responsibly connected with John Manning at the time it violated the PACA by failing to make full and prompt payment for certain lots of perishable agricultural commodities. Thames filed a petition seeking reversal of this determination. In April 2004, an Administrative Law Judge (“ALJ”) consolidated his case with those of the two younger Fullers and conducted a hearing in Atlanta in March 2005. In October, the ALJ issued a decision and order finding that all three were responsibly connected to John Manning at the time of the violations. Thames then sought review of that decision. The JO, acting for the Secretary of Agriculture, adopted the ALJ’s conclusions and found that Thames had failed to prove by a preponderance of the evidence that he was only nominally an officer, director, or shareholder of John Manning. Thus, the final decision of the Secretary was that Thames was responsibly connected to John Manning for purposes of the PACA licensing and employment restrictions. Thames has filed a timely petition for our review, virtually repeating the arguments he made before the JO.

II. DISCUSSION

With an aim to prevent unfair business practices and promote financial responsibility in the interstate commerce of the shipping and handling of perishable agricultural commodities, the PACA requires that brokers and dealers be licensed by the Secretary of Agriculture and that licensees refrain from unfair business conduct. 7 U.S.C. § § 499b(4), 499c-499d; *see Bama Tomato Co. v. USDA*, 112 F.3d 1542, 1545 (11th Cir.1997). To promote compliance, the PACA authorizes the Secretary to revoke or suspend the license of a licensee who fails to “make full payment promptly” for perishable shipments and to restrict employment within the industry of “any person who is or has been responsibly connected with” such a violator. 7 U.S.C. § § 499b(4), 499h(b).

“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.” *Bama Tomato Co.*, 112 F.3d at 1546 (citing 5 U.S.C. § 706(2)). We review factual findings,

1278 PERISHABLE AGRICULTURAL COMMODITIES ACT

such as the determination that a person is “responsibly connected” with a violating licensee, under the substantial evidence test. *Id.* Under this test, an agency determination must be supported by the record in the form of “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). Under “this deferential standard of review[,] ... as long as the conclusion is reasonable, we defer to the agency’s findings of fact even if we could have justifiably found differently.” *Kelliher v. Veneman*, 313 F.3d 1270, 1277 (11th Cir.2002).

Under the PACA, a person is “responsibly connected” if he or she is “affiliated or connected with a commission merchant, dealer, or broker as ... [an] 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). The presumption that a person so situated is responsibly connected may be rebutted, however, if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] *and* that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. *Id.* (emphasis added).¹

With regard to the second part of this test, Thames argues that, because the by-laws of John Manning gave McCue, as president, director, and majority shareholder, the unqualified authority to elect and remove directors or corporate officers, he occupied his positions as vice-president and director only at McCue’s whim, and was thus only a nominal officer and director. Courts interpreting this statute, however, have held that to be considered a nominal officer or director, a person must show that he lacks any “actual, significant nexus with the violating company,” and “therefore, neither knew nor should have known of the company’s misdeeds.” *Hart v. Department of Agriculture*, 112 F.3d 1228, 1231 (D.C.Cir.1997) (quotations and punctuation omitted).

Here, in light of his lengthy experience working in the produce repacking industry in general, and his more than decade-long experience

¹In this case, because he owned 16.2 percent of the outstanding John Manning stock at the time of the violations, the latter option, regarding ownership of a violating licensee, is not available to Thames.

as an officer and director at John Manning, Thames had sufficient background to understand the import of the corporation's financial predicament. As a continuing director, under sections 3.1 and 4.5 of the by-laws, Thames had a vote equal to McCue's as to any matter involving the management of John Manning's property and business. Thames attended board meetings during the period of the violations at which he could have voted as part of a majority, along with the Fullers, to address John Manning's financial problems.

Although Thames asserts that courts have found that attendance at board meetings, the ability to vote at a meeting, and knowledge of the fact that producers were going unpaid do not necessarily preclude nominal director or officer status, each of the cases he cites is easily distinguishable from the facts of his case. First, in *Minotto*, the director at issue was a clerical employee, with no prior experience in the produce industry and no knowledge of the activities that led to the violating transactions, who had been put in the position to ensure a quorum at board meetings. *Minotto v. USDA*, 711 F.2d 406, 407-09 (D.C.Cir.1983). In *Bell*, the person in question was made president of the corporation to mediate disputes between the two owners, but “never participated in the formal decision making structures of the corporation.” *Bell v. Dep't of Agric.*, 39 F.3d 1199, 1204 (D.C.Cir.1994). Yet another corporation appointed a production line supervisor as vice-president to satisfy a statutory minimum number of officers, but gave him no decisionmaking authority in that role. *Quinn v. Butz*, 510 F.2d 743, 747 (D.C.Cir.1975). Finally, a further wholesale produce business made the manager of its vegetable department titular president, apparently without his understanding that it had done so, upon his investing \$40,000 in the company, but he never attended any corporate meetings. *Maldonado v. Dep't of Agric.*, 154 F.3d 1086, 1087 (9th Cir.1998).

Thames, on the other hand, had plenty of background in the produce industry and had long sat on the board of John Manning out of his own entrepreneurial interests rather than for the administrative convenience of the corporation. Further, in addition to attending board meetings, Thames continued to run the processing line, to be paid his salary of \$1000 per week, and to have the right to receive a portion of retained earnings. Finally, although McCue could have removed Thames from the board of directors, he never did so. Accordingly, we conclude that there is sufficient evidence in the record to support the conclusion of the JO, on behalf of the Secretary of Agriculture, that, at the time of the PACA violations, Thames “had an actual, significant nexus with” John

1280 PERISHABLE AGRICULTURAL COMMODITIES ACT

Manning and possessed oversight and governance powers that “he failed to use in an effort to prevent [John Manning's] violations of the prompt payment provision of the PACA,” and thereby failed to establish that he was only nominally an officer or director of John Manning for purposes of the PACA's licensing and employment restrictions.² Administrative Papers, Decision and Order of the Judicial Officer for the Secretary of Agriculture at 20-21, 26 (Jan. 24, 2006.).

III. CONCLUSION

Thames petitions for review of the final determination of the Secretary of Agriculture that he was responsibly connected with John Manning when it violated the PACA. We find that there is substantial evidence in the record to support the JO's determination that Thames failed to demonstrate he was only a nominal director and officer of John Manning at the time of the violations and was thus responsibly connected to the company for purposes of licensing and employment restrictions. Accordingly, the petition is **DENIED**.

G & T TERMINAL PACKAGING CO., INC. v. USDA.
Case No. 05-5634-ag.
Filed November 3, 2006.

(Cite as: 468 F. 3d 86).

PACA – Perishable agricultural commodities - Bribery - Extortion - Illegal payments - Credibility determinations - Acts of employees and agents - Willful, flagrant, and repeated violations - License revocation – Implied duty not to pay bribe.

Citing deference under *Chevron* (104 S.Ct. 2778), the court found that petitioners, PACA licensees, had willfully paid bribes to USDA inspectors to obtain inaccurate reports for years and violated licensee's implied duty to refrain from making illegal payments to inspectors. The Secretary's decisions were affirmed and the appeal petition was denied.

United States Court of Appeals,

²Because the record supports the conclusion that Thames was not a nominal officer or director, we do not reach the issue of whether he was “actively involved” in the activities resulting in violations of the PACA.

G & T TERMINAL PACKAGING CO., INC. v. USDA 1281
65 Agric. Dec. 1280

Second Circuit.

Before: MESKILL, SOTOMAYOR, and KATZMANN, Circuit Judges.

KATZMANN, Circuit Judge:

The matter at hand calls upon us to interpret the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. § 499b, *et seq.*, specifically, to determine whether a PACA licensee bears an implied duty to refrain from paying illegal gratuities to a United States Department of Agriculture (“USDA”) inspector, and the scope of the circumstances that constitute “reasonable cause” for the breach of such a duty.

This case arises out of the rampant corruption that existed for years, if not decades, in the Hunts Point Terminal Produce Market in the Bronx, NY. It is undisputed that many of the produce inspectors hired by the Department of Agriculture to provide impartial assessments of the condition of agricultural commodities arriving at Hunts Point for distribution throughout the metropolitan New York City area, far from acting as honest brokers, regularly accepted, and often demanded, cash payments from the merchants they were supposed to serve. When they did not receive payments from a merchant, the unscrupulous inspectors often would delay the performance of their duties or intentionally skew the results of their inspections in a manner calculated to harm the bottom line of the non-compliant merchant. In contrast, these inspectors gave preferential treatment to the merchants who crossed their palms with silver, quickly responding to their requests for inspections and, at least in some cases, shading the outcomes of their inspections in favor of merchants who agreed to pay. This situation left merchants operating in the Hunts Point Market to decide whether to acquiesce in the corruption and pay the illicit gratuities, knowing that if they did not, they risked operating at a competitive disadvantage *vis-à-vis* the complicit merchants. Petitioners G & T Terminal Packaging Co, Inc. and Tray-Wrap, Inc., by their agent, Anthony Spinale, chose to pay. The question now before us is whether we may affirm the Secretary of Agriculture's conclusions (1) that the petitioners breached a duty impliedly imposed by the Perishable Agricultural Commodities Act in making these illegal payments, and (2) that the situational coercion created by the inspectors' corruption did not constitute “reasonable cause” for this breach. We grant *Chevron* deference to the Secretary's

1282 PERISHABLE AGRICULTURAL COMMODITIES ACT

construction of the scope of the implied duties created by the PACA and affirm that construction as reasonable. We do not decide whether the Secretary's unelaborated determination that the "extortion evidenced in this proceeding is not a 'reasonable cause' " for Spinale's payments" is similarly entitled to deference under *Chevron* because we would reach the same conclusion upon a *de novo* review. We therefore deny the petition for review and affirm the Secretary's decision.

I.

A.

The Perishable Agricultural Commodities Act establishes a wide-ranging regulatory regime governing the wholesale trade in perishable goods such as fresh fruits and vegetables.¹ As Congress explained in enacting an amendment to PACA in 1956:

The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products-most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing-and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.

The law has fostered an admirable degree of dependability and fairness in this industry chiefly through the method of requiring the registration of all those who carry on an interstate business in perishable agricultural commodities and denying this registration to those whose business tactics disqualify them. S.Rep. No. 84-2507, at 3 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

¹ 7 U.S.C. § 499a(b)(4) provides that the term "perishable agricultural commodity ... [m]eans any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and ... [i]ncludes cherries in brine as defined by the Secretary in accordance with trade usages."

G & T TERMINAL PACKAGING CO., INC. v. USDA 1283
65 Agric. Dec. 1280

The Secretary of Agriculture is charged with implementing and enforcing this regulatory regime, which permits only persons and entities that hold a valid license from the Secretary to participate in this trade. 7 U.S.C. § 499c(a).² By statute, the Secretary is empowered to award damages to persons injured by PACA violations. *See* § 499e.³ In addition, the Secretary possesses authority to revoke a previously granted license if, after the filing of a complaint and subsequent administrative proceedings, *see generally* § 499f, the license holder is found to have committed “flagrant or repeated” violations of § 499b. *See* § 499h(a). This sanction is strong medicine, as it has the effect of exiling the violator from the portions of the produce trade governed by the PACA. However, it is also integral to Congress' goal of restricting participation in this critical interstate trade to honest businesspersons.

B.

Petitioners G & T Terminal Packaging Co., Inc. (“G & T”) and Tray-Wrap, Inc. (“Tray-Wrap”) are New York corporations that have held PACA licenses since 1964 and 1970, respectively. G & T deals in wholesale potatoes, while Tray-Wrap operates in the wholesale tomato

²This subsection provides that “no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time.” 7 U.S.C. § 499c; *see also* 7 U.S.C. § 499d(a) (providing that the issuance of a license “entitle[s] the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary.”). 7 U.S.C. § 499a(b)(5) defines the term “commission merchant” to mean “any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another.” The term “dealer” is defined to mean, with certain exceptions, “any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce.” 7 U.S.C. § 499a(b)(6). “Broker” is similarly defined under the PACA, again with limited exceptions, as “any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively.” 7 U.S.C. § 499a(b)(7).

³Under the terms of this section, “[i]f any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages ... sustained in consequence of such violation.” 7 U.S.C. § 499e(a). The section further provides that “[s]uch liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.” 7 U.S.C. § 499e(b).

1284 PERISHABLE AGRICULTURAL COMMODITIES ACT

trade. The two companies share a common mailing address, a common pool of employees, and operated out of the same office at the Hunts Point Terminal Market in the Bronx, NY.⁴ In addition, they share close ties to Anthony Spinale, who was the director, president and 100 percent owner of G & T, and Tray-Wrap's founder and principal manager.

In late 1996, the USDA Office of the Inspector General and the FBI launched an investigation into allegations of corruption in the USDA office in Hunts Point, tipped off by “complaints from a variety of growers that wholesalers seemed to be taking advantage of the inspection system at Hunts Point, forcing growers to make constant price concessions.” The investigators discovered that “corrupt inspectors ... were taking cash payments (usually \$50 per container of produce) from produce wholesalers in exchange for agreeing to ‘downgrade’ produce on inspection certificates, to the substantial financial detriment of growers.” The investigation also “revealed the existence of an ongoing, coordinated criminal organization operating within the Hunts Point USDA office. Supervisory inspectors used their positions to assign corrupt inspectors under them to conduct inspections that were likely to produce payoffs. These inspectors in turn often kicked back a percentage of the cash payments to the supervisors in exchange for the favorable assignments.”

William Cashin was one of the unscrupulous USDA inspectors. After his arrest, Cashin cooperated with the ongoing investigation into the Hunts Point corruption by surreptitiously making audio and video recordings of his interactions with various Hunts Point inspectors and merchants. Cashin's cooperation led to the arrest and indictment of seven other USDA inspectors. The dragnet also ensnared several merchants who were making payments to the inspectors, including Spinale, who was indicted in the Southern District of New York on October 21, 1999, and charged with nine counts of bribing a public official in violation of 18 U.S.C. §§ 201(b)(1)(A) and (2).⁵ On January

⁴The Hunts Point Terminal Market is the largest wholesale produce terminal in the United States, with annual revenues in excess of \$1.5 billion annually. See <http://www.terminalmarkets.com/huntspoint.htm> (last visited Sept. 26, 2006).

⁵The Hunts Point investigation and its conclusions are described in further detail in *Illegal Activities at the Hunts Point Market: Hearing Before the Subcomm. on Livestock and Horticulture of the H. Comm. on Agric.*, 106th Cong. 1-122 (2000), http://commdocs.house.gov/committees/ag/hag10658.000/hag10658_0.htm (last visited Oct. 9, 2006).

G & T TERMINAL PACKAGING CO., INC. v. USDA 1285
65 Agric. Dec. 1280

26, 2001, Spinale pleaded guilty to Count Nine of that indictment before Magistrate Judge Ronald Ellis. In the course of his allocution, Spinale admitted that “[o]n August 13, 1999, I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report. On the other dates in the Indictment, I paid Mr. Cashin \$100 per inspection to influence the outcome of the report.” Spinale immediately followed that statement by saying, “Your Honor, I would like to state I never intended to defraud the shippers who had sent me the produce.” Spinale then reiterated that he was “paying [Cashin] to dictate what he was putting into the report.” He also gave an affirmative response when the court asked, “[s]o it was [Cashin’s] job to make reports about the produce that he was inspecting, and you were trying to influence him to write things in the report?” On August 21, 2001, District Judge Richard C. Casey accepted Spinale’s plea and sentenced him, upon a downward departure, to a five-year term of probation, including twelve months of home confinement, and a \$30,000 fine.

On June 3, 2003, the government filed an administrative complaint charging G & T and Tray-Wrap with having “willfully, fragrantly, and repeatedly violated Section 2(4) of the PACA by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received and accepted in interstate or foreign commerce” by making payments, through Spinale, to Cashin. *See* 7 U.S.C. § 499p (providing that a regulated merchant is liable for the acts, omissions and failures of any of its agents and officers). Specifically, the complaint charged G & T with having “made illegal payments to a USDA inspector in connection with four federal inspections of perishable agricultural commodities” between July 1999 and August 1999. It similarly charged Tray-Wrap with having made six illegal payments to a USDA inspector between March 1999 and June 1999. The petitioners responded by filing a joint answer which, in sum and substance, denied the charges against them but admitted that Spinale had been indicted on federal bribery charges and subsequently pleaded guilty to a single count of that indictment.

ALJ William Moran presided over a six-day disciplinary hearing beginning on October 25, 2004, during which he heard extensive testimony from Cashin and Spinale, as well as other witnesses. Spinale testified that he began to make what became customary gratuity

1286 PERISHABLE AGRICULTURAL COMMODITIES ACT

payments in 1991, shortly after the petitioners moved to the Hunts Point Terminal market. According to Spinale, he and Lou Guerra, another produce merchant, “were talking and I had just-I don't know if somebody had handed me an inspection or had an inspection, and I turned around and told them that these people up here, they're just impossible to work with. They don't know what they're looking at, you can't get a fair inspection, you can't get a timely inspection, and Mr. Guerra made some kind of signal to me and basically he was going like this here [rubbing two fingers together], and I said, well, you know, look. If I have to do that, I have to do it. So he turned around and said he's going to send somebody to see me and the guy will mention my name and you'll know what you have to do.” Spinale testified that he understood Mr. Guerra to mean that he had to give somebody money “[t]o get a fair inspection or a fast inspection.” Spinale further described that “the next time I ordered an inspection, Mr. Cashin popped up, and he turned around and said Lou ... said that I should [say] hello to you, or something similar to that.... [A]fter he finished the inspection, I just turned around and slipped a hundred dollars, just gave him the hundred dollars.... I just gave him a hundred dollars, didn't ask him anything, he didn't say anything to me and I didn't say anything to him.”

Spinale stated that he continued to make cash payments to several inspectors thereafter, including Cashin. However, Spinale repeatedly denied that he had made the payments to induce the inspectors to make inaccurate inspections of the arriving produce.⁶ On the contrary, Spinale testified that, as a general matter, he gave the inspectors cash for the sole purpose of obtaining “fair, fast [and] accurate” inspections. Spinale described the inspectors' practice of withholding timely and accurate produce inspections unless they were paid as “soft extortion,” and contended that giving in to that “soft extortion” “was something you had to do if you wanted to run a successful business. It was just a necessity.”

Spinale's account was corroborated in several respects by the testimony of Paul Cutler and Edmund Esposito, two former Hunts Point USDA inspectors who, like Cashin, were active participants in the

⁶Spinale did admit that, on at least one occasion-which was caught on tape as part of the sting operation-he “dictated” the contents of an inspection report to Cashin. Spinale explained that “the reason I was dictating these reports was because, in my mind, the man was [in]capable of writing a fair inspection.... And I turned around and dictated these reports so that we could get a fair appraisal of what was actually in the car....” At another point in his testimony, Spinale asserted that he gave “in my opinion, what I thought was a correct and accurate report because Cashin wasn't able to do it. He was a nervous wreck.”

G & T TERMINAL PACKAGING CO., INC. v. USDA 1287
65 Agric. Dec. 1280

bribery scheme and pled guilty to bribery charges. Cutler explained that there was a chronic shortage of USDA inspectors in the Hunts Point office, and that because of this shortage it sometimes took “a day or two” to perform a requested inspection. As Cutler testified, this situation created a profit opportunity for inspectors willing to “put pressure” on merchants to extend gratuities in their direction: “a lot of times I would come down to do an inspection, like I had applicants would have to sell things, you know-you know, the produce is perishable and they would have to get an inspection in a timely manner.... And when we came down there, like I said, they would be yelling a lot and saying where were you, you know. And I would be so ticked off at them, because we have a big load, and here you have an applicant yelling at you, and I would try in some of these stores to say hey, if you want a right inspection, I would tell them to pay me.” Cutler was then asked what he would do if a merchant refused to pay him. “If he refused to pay me, it depends on the inspection on-you know, on what defects I found. If it was on the border ... I would pass it. If he paid me ... I would add maybe-say it was on the border, I add like two or three percentage points ... to fail it.” Cutler explained that he felt that he had significant power over the merchants in the market because “we could kind of force them to pay to get an inspection, or else they knew they wouldn't get the-a right inspection.”

Esposito similarly testified that when Hunts Point merchants refused to pay him, “I usually screwed them.” Asked to elaborate, Esposito stated: “I would adjust the inspection. If they had an inspection that might fail good delivery, I might go in there and change-you know, change the numbers and make sure that it passed a good delivery, and they would not get an adjustment on it. Or I would just change temperatures and make the inspection worthless.” Esposito also explained that although as many as “30, 35” merchants were paying the inspectors, not all of paying merchants received the same return on their investments. Instead, according to Esposito, “there were people that paid and you didn't do nothing for them, but they still paid. And then there was people that you did things for that paid, also.” Esposito clarified that for the first group “[y]ou just did the normal fair inspection. You gave them a fair inspection and they paid you,” but that he would write false inspection reports on behalf of the second group of merchants. Esposito did not explain why the inspectors treated some paying merchants differently than others. Esposito testified, however, that Spinale never asked him to alter, falsify or downgrade an inspection, though he also testified to having given Spinale “a benefit of

1288 PERISHABLE AGRICULTURAL COMMODITIES ACT

doubt on inspections” without having been asked to do so because he “got paid and [Spinale is] a nice guy.”

Cashin also testified at the hearing. Unlike Esposito, Cashin asserted that Spinale had paid the inspectors for more than just “fast, fair and accurate” inspections. Cashin testified that he and Spinale had an “understanding” that Spinale's payments were intended to influence, and in fact did influence, the outcome of Cashin's inspections. According to Cashin, this “understanding” originally arose from an agreement between Spinale and another USDA inspector, Bob Snolec, and that when Snolec left the USDA, Cashin took over at G & T and Tray-Wrap, telling Spinale, “I'll be coming here a lot, I think, and, you know, I'll help you like Bob helped you.” Cashin did not describe Spinale's response to that statement. Cashin explained that he provided “help” for Spinale and other merchants that paid him illegal gratuities “in any one of three ways, and it's a combination of any one of the three factors. The first factor is increasing the number of containers reported on a certificate.... The second way was to increase on the certificate, under the defects, the percentages of condition.... And the third way of help was the temperatures recorded on the certificate.” By inaccurately recording the quantity and quality of the produce received by the wholesaler, Cashin testified that an inspector could reduce the price that a wholesaler would have to pay a supplier for the produce he had received. Cashin further testified that he would “usually” help Spinale by adjusting the percentage of defects found in Spinale's favor, explaining that Spinale “would be very specific and tell me what he wanted written down,” “oftentimes” telling Cashin what to put in his inspection reports, and that when Cashin “helped” Spinale, his inspections did not accurately reflect the conditions of the produce received.

On March 28, 2005, Judge Moran issued a lengthy opinion dismissing the government's complaint against the petitioners. Judge Moran rejected Cashin's claim that Spinale had made the gratuity payments for the purpose of inducing him to make inaccurate inspections, and instead credited Esposito's testimony that Spinale “was paying only for a fair and accurate inspection,” also finding broadly that “in all aspects where [Cashin's] testimony conflicted with Mr. Spinale's testimony, Mr. Spinale's testimony was credible and Cashin's was not.” Judge Moran also took note of the substantial economic power that the inspectors wielded over the Hunts Point merchants. As Judge Moran colorfully put it, “Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel. The merchants could pay

G & T TERMINAL PACKAGING CO., INC. v. USDA 1289
65 Agric. Dec. 1280

them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would determine otherwise.” In light of these findings, Judge Moran determined that the payments made by Spinale to Cashin were a “personal fee” extracted by Cashin “for every *visit* to Mr. Spinale's place of business and that in no instance was Mr. Spinale benefitting from those visits [by obtaining] ... an inspection report which downgraded a load of produce from its actual condition.” Having found that Spinale did not benefit in this way, Judge Moran declined to extend preclusive effect to the fact or substance of Spinale's admission of guilt to a federal bribery charge, and found that Spinale “was not *bribing* Cashin but that unlawful gratuities were made.” To Judge Moran, this distinction was determinative, as he found that a licensee has an implied duty to refrain from paying bribes, but does not bear such a duty to refrain from paying illegal gratuities that do not benefit the licensee. He further found that even if the payment of illegal gratuities constitutes a breach of a PACA duty, the illicit payments that Spinale had made to Cashin did not “constitute sufficient cause to warrant revocation of the licenses of G & T and Tray-Wrap when the central contention of the [Petitioners] is that they were being extorted by the Agriculture inspectors in that, if they wanted an accurate inspection of the produce, they would have to pay off the inspectors to receive one.”

The government appealed Judge Moran's decision to Judicial Officer William G. Jenson who, pursuant to 7 C.F.R. § 2.35(a), is authorized to make final determinations on behalf of the Secretary of Agriculture in adjudicatory proceedings. The Judicial Officer adopted Judge Moran's credibility determinations with respect to the witnesses who had testified at the hearing, and did not explicitly overturn any of Judge Moran's other factual findings. He nonetheless reversed Judge Moran's ultimate decision and revoked the petitioners' PACA licenses, taking a very different view of both the scope of the petitioners' implied duties under the PACA and the circumstances under which extortionate pressure may constitute reasonable cause for the breach of an implied duty.⁷

With respect to the first, the Judicial Officer concluded that PACA licensees “have a duty to refrain from making payments to [USDA] inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers

⁷The Judicial Officer's order was stayed pending the outcome of this appeal.

1290 PERISHABLE AGRICULTURAL COMMODITIES ACT

place in the accuracy of the [USDA] inspection certificates and the integrity of [USDA] inspectors,” and that “[a] PACA licensee’s payment to a [USDA] inspector, whether caused by bribery or extortion and whether to obtain an accurate [USDA] inspection certificate or an inaccurate [USDA] inspection certificate, undermines the trust a produce seller places in the accuracy of the [USDA] inspection certificate and the integrity of the [USDA] inspector.” As such, he concluded that “the purpose and reasons for Anthony Spinale’s payments to William Cashin are not relevant to this proceeding. A payment to a [USDA] inspector in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery and whether to obtain accurate or inaccurate [USDA] inspection certificates, is a violation of section 2(4) of the PACA.”

The Judicial Officer also rejected the petitioners’ claim that the inspectors’ practice of “soft extortion” constituted reasonable cause for the payments made by Spinale, concluding that “[t]he extortion evidenced in this proceeding is not a ‘reasonable cause’ ... for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying [USDA] inspectors in connection with the inspection of perishable agricultural commodities. Moreover, avoidance of inspection delays and avoidance of the issuance of inaccurate [USDA] inspection certificates are not ‘reasonable causes’” for the commission of such a breach. The Judicial Officer offered no further explanation of what circumstances might be encompassed by the term “reasonable cause,” however.⁸

Relying on Spinale’s repeated admissions that he had made numerous payments⁹ to Cashin in connection with Cashin’s inspections of

⁸We also note that the respondent was not able to point us to any guiding principle articulated by the Secretary with respect to the meaning of “reasonable cause” in its main brief, upon our call for supplemental briefing, or at oral argument. The respondent instead principally defended the Secretary’s conclusion by analogizing to the manner in which this Court and others have treated the relationship between bribery and extortion in construing various federal criminal statutes. *See, e.g.,* Respondent’s Supp. Br. at 6-7 (citing, *inter alia, United States v. Barash*, 365 F.2d 395 (2d Cir.1966)). We need not and do not address the persuasiveness of these analogies here.

⁹ Spinale insisted during his testimony before the ALJ that he did not “pay” Cashin or make “payments” to him, and that he instead “gave” him money, explaining, “I told you, I gave them money which I considered to be soft extortion. I didn’t pay anybody to do anything.... I didn’t pay him, I keep on telling you that it wasn’t a payment. It was, (continued...) ”

G & T TERMINAL PACKAGING CO., INC. v. USDA 1291
65 Agric. Dec. 1280

agricultural commodities for the petitioners, the Judicial Officer concluded that Spinale, and therefore the petitioners, had “engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA ... by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.” He therefore ordered the petitioners' PACA licenses revoked.

This timely petition for review of the Secretary's decision followed.

II.

A.

The petitioners challenge two conclusions adopted by the Secretary in the course of a formal adjudication conducted pursuant to the agency's express statutory authority to administer and implement the PACA regulatory regime. *See* 7 U.S.C. § 499a(b)(2) (defining the term “Secretary” as used in the PACA to mean the Secretary of Agriculture); §§ 499d-f (empowering the Secretary of Agriculture to enact a PACA licensing scheme, enforce that scheme, and award damages to persons injured by PACA violations). First, the petitioners challenge the Secretary's generally applicable view that § 499b(4) encompasses a duty to refrain from making a payment to an inspector that only is intended to cause, and does in fact only cause, the inspector to create an accurate and timely inspection report. They argue that because a USDA inspector's duty is to provide timely and accurate inspections, the Secretary's construction is unreasonable. Second, they challenge the Secretary's case-specific determination, unaccompanied by a comprehensive discussion of the meaning of “reasonable cause,” that the inspectors' actions did not constitute “reasonable cause” for Spinale's payments. The petitioners claim that Spinale reasonably feared that the petitioners would suffer significant economic loss if he did not pay regular gratuities to the inspectors, and that such a fear must be

⁹(...continued)

as far as I'm concerned, soft extortion.” The petitioners pick up on this theme in their opening brief, claiming that the Judicial Officer erred in describing Spinale as having “paid” or made “cash payments” to inspectors when he in fact “gave” them money. Given the Judicial Officer's conclusion that the giving of any money in connection with a perishable commodities inspection violates PACA Section 2(4), we find it unnecessary to address this dispute.

1292 PERISHABLE AGRICULTURAL COMMODITIES ACT

encompassed by the term “reasonable cause.”

We consider both of the petitioners' arguments against the backdrop of the familiar two-step framework set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778 (footnotes omitted). As a result, unless we find the Secretary's construction of the statute to be “arbitrary, capricious, or manifestly contrary to the statute,” *id.* at 844, 104 S.Ct. 2778, we must yield to that construction of the statute even if we would reach a different conclusion of our own accord. See *Regions Hosp. v. Shalala*, 522 U.S. 448, 457, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998).

It is firmly established that we review under the *Chevron* standard an agency's binding and generally applicable interpretation of a statute that it is charged with administering when that interpretation is adopted in the course of a formal adjudicatory proceeding. See *United States v. Mead Corp.*, 533 U.S. 218, 230 n. 12, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citing prior Supreme Court cases applying *Chevron* to agency adjudicatory decisions); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 322 (2d Cir.2000) (“An agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rule-making, but also when it interprets through adjudication.”). The Supreme Court has indicated that because some “ambiguous statutory terms” can be given concrete meaning only “through a process of case-by-case adjudication,” the individual determinations reached by an agency engaged in that process also “should be accorded *Chevron* deference.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (citing *Chevron*) (“There is obviously some ambiguity in a term like well-founded fear which can only be

G & T TERMINAL PACKAGING CO., INC. v. USDA 1293
65 Agric. Dec. 1280

given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.”) (quotation marks omitted); *In re Sealed Case*, 223 F.3d 775, 779-80 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission's case-specific probable cause determination).

B.

Our task at the first step of the *Chevron* analysis is a simple one, as it is pellucidly clear that Congress has not spoken to the precise issues before us in this appeal: whether a PACA licensee bears an implied duty to refrain from paying illegal gratuities to a USDA inspector, and the scope of the circumstances that constitute “reasonable cause” for the breach of such a duty. 7 U.S.C. § 499b provides that “[i]t shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... (4) For any commission merchant, dealer, or broker ... to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any [transaction involving any perishable agricultural commodity].” This statutory language plainly leaves undelineated what implied duties and specifications a PACA licensee might be required to bear, and under what circumstances a breach owes its occurrence to a “reasonable cause,” and therefore must be excused. It is the province of the Secretary of Agriculture, who as we have noted above, has been charged with implementing and administering the PACA, to fill in these gaps. *Accord JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 614 n. 8 (D.C.Cir.2001) (“Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision.”). Therefore, in light of Congress' silence, we turn to step two of the *Chevron* analysis, asking whether the Secretary has filled these statutory gaps in a manner reasonably consonant with the language, structure and purposes of the Act.

C.

1.

We affirm as reasonable the Secretary's conclusion that the PACA imposes an implied duty upon licensees to refrain from making

1294 PERISHABLE AGRICULTURAL COMMODITIES ACT

payments to USDA inspectors in connection with produce inspections, irrespective of whether those payments induce, or are intended to induce, the inspectors to issue inaccurate inspection certificates. Indeed, given a statutory scheme which assigns government inspectors to protect the financial interests of distant shippers by providing impartial assessments of the condition of the produce upon arrival, *see* § 499n(a); *cf. R Best Produce, Inc. v. Shulman-Rabin Mktg., Corp.*, 467 F.3d 238, 241, 2006 WL 3040061, at *2 (2d Cir.2006) (noting that Congress amended PACA in 1984 to provide sellers with “additional protection”), we can hardly conceive of a duty more clearly implicated than the obligation of recipients not to make side-payments to these inspectors. As the Judicial Officer noted, such payments give rise to a strong inference that the inspector's loyalty has been purchased by the payor, and therefore “undermine[] the trust a produce seller places in the accuracy of the [USDA] inspection certificate and the integrity of the [USDA] inspector.” The facts of this case do not belie that presumption. Even accepting Judge Moran's conclusion that Spinale made his payments intending only to procure “fast, fair and accurate inspections,” the record suggests that Spinale received additional benefits from the inspectors he paid. Esposito testified, for example, that he sometimes gave Spinale “a benefit of doubt on inspections,” in part because he “got paid.” Cutler similarly testified that he would shade his inspection results to benefit the merchants that paid him. This undisputed testimony tends to confirm what common sense and common experience suggest: that strict impartiality and secret cash payments do not easily co-exist.

Given that a principal purpose of the PACA is to “protect[] ... the producers of perishable agricultural products-most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing,” *see* S.Rep. No. 84-2507, at 3, *as reprinted in* 1956 U.S.C.C.A.N. at 3701, we think it is appropriate for the Secretary to construe the implied duties owed by PACA licensees in a manner designed to secure shippers' confidence in the USDA agents hired, in effect, to stand in their shoes when the produce arrives at its destination. We therefore conclude that the Secretary has permissibly construed § 499b(4) as encompassing an implied duty to refrain from paying illicit gratuities to USDA inspectors in conjunction with inspections of perishable agricultural products, even where those payments are not intended to result, and do not result, in the filing of an inaccurate inspection certificate.

2.

We also affirm the Secretary's conclusion that the inspectors' practice of withholding "fast, fair and accurate" inspections from merchants who refused to pay illegal gratuities does not excuse the petitioners' decision to breach the implied duties owed under the PACA by making such payments. Once again we begin with the statute, which provides that "[i]t shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... (4) For any commission merchant, dealer, or broker ... to fail, *without reasonable cause*, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any [transaction involving any perishable agricultural commodity]." 7 U.S.C. § 499b (emphasis added). In construing this clause—the expansiveness of which suggests that Congress intended to grant the Secretary broad leeway to address the infinite variety of facts and circumstances that might surround a PACA violation—the Secretary rejected the petitioners' claim that "any violation of the statute was unavoidable due to extortion," instead finding that the "avoidance of inspection delays and avoidance of the issuance of inaccurate [USDA] inspection certifications are not 'reasonable causes' " for the payment of unwarranted gratuities to a USDA inspector.

We think the Secretary's case-specific determination that "reasonable cause" had not been demonstrated typically would be entitled to *Chevron* deference because agencies are generally accorded *Chevron* deference when they give "ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (internal quotation marks omitted); *In re Sealed Case*, 223 F.3d 775, 779-780 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission's case-specific probable cause determination). Although such case-by-case adjudication may ultimately be necessary to give concrete meaning to the term "reasonable cause" as used in 7 U.S.C. § 499b, our task in reviewing the Secretary's determination in this case would have been considerably aided had the Secretary provided some guiding principle for identifying what constitutes "reasonable cause," or at least a rationale for rejecting petitioners' alternative construction. However, we need not reach the question whether the Secretary's cursory treatment of the term "reasonable cause" is still entitled to *Chevron* deference, as we would reach the same conclusion as the Secretary under either a *de novo* or deferential standard.

1296 PERISHABLE AGRICULTURAL COMMODITIES ACT

Coercion, as the various hypotheticals drawn up by the parties in their written submissions and at oral argument reaffirm, exists in many degrees and can take many forms. We may presume that there are species of coercion so extreme that they rob an individual of any meaningful opportunity to resist, as well as varieties too moderate to ever excuse the performance of an illegal act. We need not engage these or other hypotheticals, however, because we have before us a well-developed factual record of the circumstances faced by Spinale. The facts in the record reveal that the “extortion” practiced by Cashin and his cohorts, while real, was indeed “soft” enough to support the view that no reasonable cause existed for the petitioners' breach of duty.

Spinale has never suggested that he was physically threatened, and Esposito specifically denied that the inspectors employed such threats to obtain their gratuities. Nor did the inspectors threaten Spinale with the loss or destruction of his business, harm to his family or employees, blackmail, or the outright denial of produce inspections. Indeed, Spinale's payment relationship with Cashin was not even initiated by an inspector's suggestion; rather, according to Spinale's own testimony, he decided of his own accord, at the suggestion of a fellow produce merchant, that it would be worthwhile to start making cash payments to the inspectors, and began to do so at the next available opportunity. We also note Cashin's testimony that while many of the Hunts Point merchants gave in to the inspectors demands, some twenty-five to forty percent of the merchants managed to resist. In the same vein, we note petitioners' concession at oral argument that Spinale never attempted to report the illegal activities at Hunts Point to the Bronx District Attorney's Office, the United States Attorney's Office for the Southern District of New York, the USDA Inspector General, the NYPD, or any other official body. While we need not and do not address whether he bore an affirmative obligation to do so, we simply point out that there were clearly available-and potentially anonymous-means of resisting the inspectors' illegal scheme that Spinale never explored. We think this fact serves to bolster the Secretary's decision to reject the petitioners' assertion that Spinale had no choice but to make cash payments to the inspectors for over a decade.

In short, we view the record as demonstrating that the inspectors' corrupt practices left Spinale with choices about how to respond to their demands for illegal payments-hard choices, perhaps, but meaningful ones all the same. Given that backdrop, we concur in the Secretary's view that “[t]he extortion evidenced *in this proceeding* is not a ‘reasonable cause’ ... for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying [USDA]

inspectors in connection with the inspection of perishable agricultural commodities.”(emphasis added). We therefore affirm the Secretary's decision to strip the petitioners of their PACA licenses.

III.

We have considered all of petitioners' other arguments and find them to be without merit. Therefore, for the reasons set forth above, the petition for review is **DENIED** and the decision of the Secretary of Agriculture is hereby **AFFIRMED**.

HUNTS POINT TOMATO CO., INC. v. USDA.
Case No. 06-1072-ag.
Filed November 13, 2006.

(Cite as: 204 Fed. Appx. 981).

PACA – License terminated – Prompt payment, failure to make - License lapse – Slow pay.

Appellant, lapsed licensee, repeatedly and flagrantly violated PACA when it failed to make full payment to its suppliers promptly. The court found that the “slow pay” provisions would not change the statutory sanction and PACA does not require “uniformity of sanctions” (cite: *Harry Klein Produce Corp.* 831 F.2d 407). The Judicial Officer's decision was affirmed.

**United States Court of Appeals,
Second Circuit.**

Appeal from the Secretary of Agriculture (William J. Jenson, Judicial Officer).

This cause came on to be heard on the transcript of record and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the Secretary of Agriculture be and it hereby is **AFFIRMED**.

Present: ROGER J. MINER, ROSEMARY S. POOLER, and ROBERT

1298 PERISHABLE AGRICULTURAL COMMODITIES ACT

A. KATZMANN, Circuit Judges.

SUMMARY ORDER

Petitioner Hunts Point Tomato Co., Inc. (“Hunts”) petitions for review of an order of the Secretary of the United States Department of Agriculture (“USDA”), which ordered publication of the facts and circumstances of its findings: that Hunts had repeatedly and flagrantly violated the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. §§ 499a-499s. Petitioner contends, *inter alia*, that the decision not to postpone its hearing after it promised to make full payment to its suppliers was an abuse of discretion, as was the USDA's failure to take into account the possibility of repayment and other relevant mitigating circumstances before going forward with the hearing and imposing sanctions.

On March 31, 2003, the USDA filed a complaint alleging that during the period between September 2001 and June 2002, Hunts failed to make prompt and full payment to sellers of agricultural commodities, as mandated by PACA, which requires all covered entities such as petitioner to make “full payment promptly” for all purchases of perishable agricultural commodities received in interstate commerce. 7 U.S.C. § 499b(4). “Full payment promptly” has been defined as, *inter alia*, payment “for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.” 7 C.F.R. § 46.2(aa)(5).

On August 5, 2004, five days before the hearing, Hunts requested a postponement, allegedly so that it might pay its creditors in full. The USDA declined. Hunts reiterated this request in its preliminary statement at the hearing, but offered no evidence that it had any funds available to make full payment.¹ The administrative law judge (“ALJ”) found that Hunts had failed to make timely payments of over \$795,000 to agricultural suppliers. The ALJ also found that Hunts' violations were repeated and willful, and since the appropriate punishment would have been license revocation, but for the fact that Hunts had allowed its license to lapse in June 2002, the appropriate sanction was to publish the facts and circumstances of Hunts' violations. *See Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777 (D.C.Cir.1983).

¹Two of Hunts' suppliers had filed an action in the United States District Court for the Southern district of New York under 7 U.S.C. § 499e(b)(2). Pursuant to a preliminary injunction entered in that case, all of Hunts' assets are held in trust for those creditors.

Hunts now argues that the USDA's actions deprived it of an opportunity to avail itself of the agency's "slow pay" policy, as set forth in *In re Scamcorp Inc.*, 57 Agric. Dec. 527, 548-49 (1998), in a manner that was arbitrary and capricious. Hunts argues that since PACA is designed to promote prompt payment to the suppliers of perishable agricultural commodities, that by refusing Hunts' settlement offer (and thereby delaying payment to Hunts' creditors until after the hearing) the USDA acted in a manner contrary to PACA's purpose.

This argument is without merit. While Hunts offered evidence that it had made partial repayment, it had failed to make full payment to those suppliers to which it was admittedly seriously in arrears within 120 days of being served with the complaint. Had the ALJ postponed the hearing (and had Hunts indeed been able to make full repayment to its suppliers, a fact which is not established by the record we have before us), the same sanctions as those actually imposed would still have been applicable, since Hunts would not have been able to retroactively avail itself of *Scamcorp's* "slow pay" provisions, as Hunts would have been making payment 17 months after having been served with the complaint. Hunts' argument that the decision not to postpone the hearing resulted in more serious sanctions is incorrect.

Furthermore, the USDA's purported decision to delay the repayment of creditors in order to impose sanctions was not contrary to PACA's purpose. PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility. See *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir.1987). "It is an intentionally rigorous law whose primary purpose is to exercise control over an industry 'which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.'" *Id.* (quoting S.Rep. No. 84-2507 at 3 (1956), reprinted in 1956 U.S.C.C.A.N. 3699, 3701). Contrary to the petitioner's arguments, PACA's primary purpose is not compensatory.²

²If, as petitioner seemingly alleges, PACA's requirements are inconsistent with industry custom or are counter-productive, "Congress is the body that must make that judgment." *Havana Potatoes*, 136 F.3d at 94. We do not find, given PACA's "prompt payment" requirement, that the application of the Secretary's regulations enforcing prompt payment are "arbitrary, capricious, or manifestly contrary to [PACA]." See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

(continued...)

1300 PERISHABLE AGRICULTURAL COMMODITIES ACT

While petitioner also contends that the ALJ's decision was not based on substantial evidence, this argument is without merit, given Hunts' own admission that they were at one point over \$1,000,000 in arrears to multiple agricultural suppliers. Accordingly, we find that the ALJ's factual findings are supported by substantial evidence, and that his conclusion that petitioner's violations were flagrant and repeated did not constitute an abuse of discretion. *See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91-92 (2d Cir.1997).

Finally, petitioner's argument that the sanction here was arbitrary because lesser sanctions have been imposed in similar cases is not convincing. *See Harry Klein Produce Corp.*, 831 F.2d at 407 (holding that "PACA does not require uniformity of sanctions for similar violations."). We have carefully considered petitioner's remaining arguments and find them to be without merit. Accordingly, the petition is DENIED and we direct enforcement of the USDA's order.

PERISHABLE AGRICULTURAL COMMODITIES ACT
DEPARTMENTAL DECISIONS

In re: EDWARD S. MARTINDALE.
PACA-APP Docket No. 04-0010.
Decision and Order.
Filed July 26, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer, director, and shareholder – Alter ego.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) decision concluding Edward S. Martindale (Petitioner) was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. The Judicial Officer found Garden Fresh Produce, Inc., violated the PACA during the period January 14, 2002, through February 26, 2003. During the violation period, Petitioner was the secretary, a director, and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite his being the secretary, a director, and a major shareholder of Garden Fresh Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that Petitioner was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Charles L. Kendall for Respondent.
P. Sterling Kerr, Las Vegas, NV, for Petitioner.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On May 10, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a

1302 PERISHABLE AGRICULTURAL COMMODITIES ACT

determination that Edward S. Martindale [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., during the period January 2002 through February 2003, when Garden Fresh Produce, Inc., violated the PACA.¹ On June 14, 2004, Petitioner filed a Petition for Review pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's May 10, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc.

On March 2, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in San Jose, California. P. Sterling Kerr, Kerr & Associates, Las Vegas, Nevada, represented Petitioner. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 27, 2006, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ concluded Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 1, 14).

On March 8, 2006, Petitioner appealed to the Judicial Officer. On March 28, 2006, Respondent filed a response to Petitioner's appeal petition. On April 28, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusion that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

¹During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., purchased, received, and accepted in interstate commerce, from five produce sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$379,923.25, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

TITLE 7—AGRICULTURE

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

....

§ 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

1304 PERISHABLE AGRICULTURAL COMMODITIES ACT

such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.]

(b) Refusal of license; grounds

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

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

(B) within two years prior to the date of application has

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

....

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

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

1306 PERISHABLE AGRICULTURAL COMMODITIES ACT

§ 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.

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

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

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

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

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

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be

conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Preliminary Statement

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.² The record establishes Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and

²7 U.S.C. § 499a(b)(9).

1308 PERISHABLE AGRICULTURAL COMMODITIES ACT

a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.³ As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden

³*In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439 (2006) (holding the petitioner, who was an owner of the violating PACA licensee could not raise the defense that he was not an owner of the licensee, which was the alter ego of its owners), *appeal docketed*, No. 06-11609-CC (11th Cir. Mar. 13, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004) (holding the petitioners, who were owners of the violating PACA licensee could not raise the defense that they were not owners of the licensee, which was the alter ego of its owners), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Facts

Petitioner Edward Shane Martindale⁴ has worked in the produce business for approximately 15 years. Petitioner began working at Martindale Distributing, a business run by his father in Salinas, California. When Petitioner began working at Martindale Distributing, his stepbrother, Donald R. Beucke, and his older brother, Wayne Martindale, were already involved in the business. Petitioner started in Martindale Distributing as a produce inspector and “on grounds” buyer. When Petitioner’s father retired from Martindale Distributing in 1999, Petitioner, along with his stepbrother and brother, purchased the company, with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, Petitioner has been the 100 percent owner of Martindale Distributing. (Tr. 36-39, 41-42.)

In late 1999 or early 2000, Wayne Martindale, who, with his stepbrother Donald Beucke, had already started Bayside Produce, a produce company with a warehouse in San Diego, “started talking about wanting to open another company in Las Vegas.” (Tr. 42.) Petitioner joined his brother and stepbrother, along with several others, and formed Garden Fresh Produce, Inc. Petitioner was a 20 percent shareholder of the new company and was listed as a director and the secretary. Petitioner was issued a stock certificate indicating that he owned 1,000 shares of stock in Garden Fresh Produce, Inc. (RX 10 at 4), although Petitioner stated he had never seen the stock certificate before the institution of the instant proceeding. Petitioner signed the original PACA license application and the check in payment of the PACA licensing fee. Petitioner submitted his resignation and reassigned his stock on April 4, 2003. By letter dated April 28, 2003, Petitioner notified the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, PACA Branch, that he was no longer connected with Garden Fresh Produce, Inc., and asked that his name be removed from Garden Fresh Produce, Inc.’s PACA

⁴Petitioner’s legal name is Edward Shane Martindale but he is generally known as Shane Martindale (Tr. 34).

1310 PERISHABLE AGRICULTURAL COMMODITIES ACT

license (RX 1 at 16).

Petitioner stated he originally decided to join Garden Fresh Produce, Inc., because he was good with bills and money management (Tr. 85). During the early days of Garden Fresh Produce, Inc.'s operations, Petitioner, working from Martindale Distributing's Salinas, California, office, handled much of Garden Fresh Produce, Inc.'s paperwork, even receiving a salary for handling Garden Fresh Produce, Inc.'s payables. Petitioner classified his principal duties with Garden Fresh Produce, Inc., as that of an accounts payable manager, but after Wayne Martindale moved Garden Fresh Produce, Inc.'s accounts payable operations to Las Vegas, Nevada, at the end of 2001, Petitioner issued only a small number of checks for Garden Fresh Produce, Inc. Petitioner stated he relinquished his role because of differences of opinion with his brothers, problems arising from the use of non-matching computer systems, and problems with coordination of purchase orders and bills. Petitioner told the other shareholders that he would no longer handle the payables for Garden Fresh Produce, Inc. All the Garden Fresh Produce, Inc., invoices that he had in his possession and had not been paid were taken by Wayne Martindale to Las Vegas, Nevada, in December 2001. (Tr. 48-50.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc., in the first year it did business, but did not recall purchasing produce after his brother took Garden Fresh Produce, Inc.'s payables to Las Vegas at the end of 2001 (Tr. 51). However, Joe Quijada, a produce seller, testified that, while he was not 100 percent certain of the year of the transactions, he dealt with Petitioner when selling produce to Garden Fresh Produce, Inc., in 2002 (Tr. 17-18). Petitioner issued checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." (Tr. 52, 95.) The record does not contain evidence that Petitioner was directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

Petitioner testified that, after December 2001, he did not actively monitor Garden Fresh Produce, Inc., on a regular basis, even though he was still a shareholder, an officer, and a director (Tr. 52). Petitioner took calls for Garden Fresh Produce, Inc., at his Salinas, California, office and became aware in 2002 that there were complaints about the way Garden Fresh Produce, Inc., handled accounts payable. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay (Tr. 52-53). Other than referring callers to his brother, Petitioner only could recall warning one company, Sun America Produce, that he had concerns about Garden Fresh Produce, Inc.'s failures to pay its bills promptly (Tr. 81). Even though Petitioner

knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see a financial statement or bank statements, relying on statements from Wayne Martindale and Donald Beucke “that things were getting better.” (Tr. 99.)

Before Petitioner resigned from Garden Fresh Produce, Inc., by letter dated April 4, 2003, Petitioner signed documents accepting the resignation of two of Garden Fresh Produce, Inc.’s directors, David N. Wiles and Bruce Martindale (RX 1 at 13, RX 9, RX 11). Joe Quijada and Steven Wood (the latter called by Respondent) each testified that Wayne Martindale was the primary contact when dealing with Garden Fresh Produce, Inc. (Tr. 25, 28). Mr. Quijada testified that he never had any slow-pay problems with Martindale Distributing and characterized Petitioner as “an upstanding individual.” (Tr. 22.)

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints instituted by produce sellers against Garden Fresh Produce, Inc. (Tr. 108-09). Mr. Gonzalez described his investigation, which primarily involved visiting Garden Fresh Produce, Inc.’s Las Vegas, Nevada, office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records (Tr. 110-11). Wayne Martindale indicated to Mr. Gonzalez that all the principals in Garden Fresh Produce, Inc., including the Petitioner, had equal authority and could sign checks and pay payables (Tr. 112).

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file and identified the documents (RX 1-RX 10) contained in the responsibly connected file maintained by the PACA Branch (Tr. 117-40).

Findings of Fact

1. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. On April 28, 2000, Petitioner signed the minutes of the organizational meeting of Garden Fresh Produce, Inc.’s board of directors. Petitioner was a 20 percent shareholder, a director, and the secretary of Garden Fresh Produce, Inc. (Tr. 42; RX 8.)

2. Petitioner signed Garden Fresh Produce, Inc.’s application for a PACA license and was authorized to sign checks on behalf of Garden Fresh Produce, Inc. As the money manager of Garden Fresh Produce, Inc., Petitioner handled a significant portion of the payables in 2001. Even after the payables were transferred to Las Vegas, Nevada, in late

1312 PERISHABLE AGRICULTURAL COMMODITIES ACT

2001, Petitioner handled occasional payments as directed by Wayne Martindale. In 2002, Petitioner purchased some produce for Garden Fresh Produce, Inc. (Tr. 17-18, 48-50, 91-96.)

3. On October 8, 2002, Petitioner signed the board of directors resolution accepting the resignation of director David N. Wiles. On October 8, 2002, Petitioner signed the waiver of notice and action by written consent of the shareholders of Garden Fresh Produce, Inc., accepting the resignation of director David N. Wiles. (RX 9, RX 11.)

4. On March 3, 2003, Petitioner signed the board of directors resolution accepting the resignation of director Bruce Martindale (RX 1 at 13).

5. Petitioner resigned as a director of Garden Fresh Produce, Inc., on April 4, 2003. Petitioner also assigned his stock in the company back to Garden Fresh Produce, Inc., on April 4, 2003. (RX 1 at 18, 20.)

6. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., failed to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25 (RX 12).

7. During the period January 14, 2002, through February 26, 2003, Petitioner was a director, the secretary, and 20 percent stockholder of Garden Fresh Produce, Inc. (RX 1, RX 7, RX 8, RX 10 at 4; Tr. 134-36). The record does not contain evidence that Petitioner was directly involved in any of the transactions described in Finding of Fact number 6.

8. At all times material to this proceeding, Petitioner had the same authority as all other principals in Garden Fresh Produce, Inc. (Tr. 112).

9. At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 8 at 4, 5).

10. Petitioner notified the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, PACA Branch, by letter dated April 28, 2003, that he was no longer connected with Garden Fresh Produce, Inc. In that letter, Petitioner requested that the United States Department of Agriculture remove his name from Garden Fresh Produce, Inc.'s PACA license. (RX 1 at 16.)

11. Petitioner has extensive experience in the produce industry. At the time of the hearing, Petitioner had worked in the produce industry for over 15 years; Petitioner had held a number of positions, including sole ownership of Martindale Distributing; Petitioner was particularly knowledgeable in the areas of money management and bill paying in the produce industry; and Petitioner was thoroughly knowledgeable in

produce industry operations. (Tr. 35-36, 83-85.)

12. With respect to his employment at Martindale Distributing, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions (Tr. 22).

13. Petitioner received compensation for his services in the first year of Garden Fresh Produce, Inc.'s operations (Tr. 45).

14. At all times material to this proceeding, Petitioner knew that Garden Fresh Produce, Inc., was not making full payment promptly for produce. In 2002, a number of Garden Fresh Produce, Inc.'s produce sellers, who were not being paid promptly by Garden Fresh Produce, Inc., contacted Petitioner in order to obtain payment for produce. Petitioner only warned one of these produce sellers, Sun Valley Produce, that Petitioner had concerns about the manner in which Garden Fresh Produce, Inc., was paying its bills. (Tr. 52-53, 81.)

Discussion

I. Introduction

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25.⁵ Thus, an individual who was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected

⁵*In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

1314 PERISHABLE AGRICULTURAL COMMODITIES ACT

with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.⁶ As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong responsibly connected test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., at the time Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. Petitioner Was Actively Involved In Activities Resulting In PACA Violations

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 *Agric. Dec.* 604, 610-11 (1999), as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Petitioner was actively involved in the activities resulting in the PACA violations committed by Garden Fresh Produce, Inc. Although

⁶See note 3.

Petitioner did not directly participate in the specific transactions resulting in Garden Fresh Produce, Inc.'s PACA violations, Petitioner issued checks in 2002, usually at the direction of Wayne Martindale, at a time when Petitioner knew Garden Fresh Produce, Inc., was not paying produce sellers promptly (Tr. 52, 55). Also, Petitioner made some purchases for Garden Fresh Produce, Inc., in 2002 (Tr. 17-18). By making payments at a time when he knew Garden Fresh Produce, Inc., was not paying some of its produce sellers, Petitioner was in effect choosing which debts to pay, even though it was ostensibly under the "direction" of Wayne Martindale or Donald Beucke. As a co-owner, an officer, and a director, Petitioner cannot avoid his responsibilities under the PACA by characterizing himself as an individual powerless to disobey these directives. Petitioner's executing these checks at a time when he knew Garden Fresh Produce, Inc., was having financial problems is just the kind of conduct referred to in *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), when I held that check writing and choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1488-89. Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

*III. Petitioner Was Not Merely A Nominal Officer,
Director, Or Shareholder*

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20 percent shareholder, director, and secretary. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to

1316 PERISHABLE AGRICULTURAL COMMODITIES ACT

counteract or obviate the fault of others.⁷ The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

Petitioner was a co-founder of Garden Fresh Produce, Inc., and was actively involved in managing the money and paying the bills of the company at its outset. Petitioner's relationship to Garden Fresh Produce, Inc., is much different than an individual who is listed as an owner because his or her spouse or parent put him or her on corporate records and had no involvement in the corporation or experience in the produce business. Rather, Petitioner is an experienced, savvy individual who has worked in the produce business for at least 15 years, who has worked for years with some or all of the principals in Garden Fresh Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 20 percent owner does not serve in a nominal capacity.⁸

There is no evidence that Petitioner was other than a voluntary investor, who undertook the responsibilities associated with being a director, the secretary, and a co-owner in an attempt to establish a profitable business. Petitioner presumably would have shared in the company's profits when there were some. Petitioner participated in a

⁷*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

⁸*Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 *Agric. Dec.* 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 *Agric. Dec.* 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 *Agric. Dec.* 1464 (1998).

number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh Produce, Inc., the record indicates only one occasion when Petitioner exercised authority consistent with his positions as 20 percent owner, a director, and the secretary to counteract or obviate the fault of others. Despite being contacted by numerous unpaid produce sellers, Petitioner, on only one occasion, warned a produce seller, Sun America Produce, that he had concerns about the way Garden Fresh Produce, Inc., was paying its bills (Tr. 81). That Petitioner chose not to act does not establish that his role was nominal.

Petitioner's Appeal Petition

Petitioner raises three issues in "Petitioner Martindale's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the facts established in the record do not support the Chief ALJ's conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 3-9).

Petitioner states "Judge Hillson, specifically found in his statement of facts in the opinion that '. . . He (Shane Martindale) was *not directly involved* in any of the transactions that were the subject of the Default Decision I entered against Garden Fresh.' Opinion p. 4, p. 8. In his legal conclusions, Judge Hillson then states that during the period Garden Fresh was in violation of PACA that '. . . Petitioner was actively involved in the activities resulting in a violation of the PACA.' Opinion p. 14 (Conclusion 4)." (Petitioner's Appeal Pet. at 4-5.) I infer Petitioner contends the Chief ALJ could not properly conclude Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and also find Petitioner was not directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

I disagree with Petitioner's contention. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA does not require that the petitioner must have been directly

1318 PERISHABLE AGRICULTURAL COMMODITIES ACT

involved in the violative transactions.⁹ Thus, I do not find that, in order to conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I must first find Petitioner actually purchased the produce for which Garden Fresh Produce, Inc., failed to make full payment promptly. In *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474, 1488-89 (1998), I found erroneous an administrative law judge's conclusion that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of the PACA, as follows:

The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.

On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce.

I concluded the petitioner, Lawrence D. Salins, was actively involved in the activities resulting in Sol Salins, Inc.'s violations of the PACA even though the petitioner did not purchase any produce. *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1454 (1998).

Petitioner also asserts that "[i]t is quite apparent from Judge Hillson's decision that Petitioner Martindale is being punished not for acts of commission, but rather, for acts of omission." (Petitioner's Appeal Pet. at 5.)

I disagree with Petitioner's contention that the Chief ALJ based his conclusion that Petitioner was actively involved in activities resulting in a violation of the PACA solely on Petitioner's acts of omission. The Chief ALJ based his conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA both on Petitioner's acts of commission, as well as, Petitioner's

⁹See *In re Michael Norinsberg* (Decision and Order on Remand), 58 *Agric. Dec.* 604, 610-11 (1999).

acts of omission. The Chief ALJ found Petitioner issued checks and may have made some purchases for Garden Fresh Produce, Inc., during the period when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 11). The record supports the Chief ALJ's finding that Petitioner issued checks, and I find Petitioner made some purchases on behalf of Garden Fresh Produce, Inc., during the period when Garden Fresh Produce, Inc., violated the PACA (Tr. 17-18, 29-30, 33, 52, 55). Check writing and choosing which debts to pay can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.¹⁰ Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

As for Petitioner's acts of omission, I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. The Chief ALJ, citing *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000), states "[t]he failure to exercise powers inherent in [Petitioner's] various positions with Garden Fresh, 'because he chose not to use the powers he had' has previously been found a basis for finding active participation." (Initial Decision at 12.) However, the passage from *Thomas* quoted by the Chief ALJ relates to issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

Even if I accept Petitioner's claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner's actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, "the crucial inquiry is whether an individual has an 'actual significant nexus with the violating company,' rather than whether the individual has exercised real authority." Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he

¹⁰*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998).

1320 PERISHABLE AGRICULTURAL COMMODITIES ACT

had.

In re Anthony L. Thomas, 59 *Agric. Dec.* 367, 387-88 (2000).

Similarly, the Chief ALJ quotes *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994), to support his conclusion that Petitioner's inaction constitutes active involvement in activities resulting in a violation of the PACA (Initial Decision at 12). *Bell* makes clear that the passage quoted by the Chief ALJ relates to the issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could only establish by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d at 409. Where responsibility was not based on the individual's "personal fault", *id.* at 408, it would have to be based at least on his "failure to 'counteract or obviate the fault of others'", *id.*

Bell v. Department of Agriculture, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (footnote omitted).

While I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner's acts of omission do not constitute active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Second, Petitioner contends the Chief ALJ erroneously concluded Petitioner was not a nominal officer, director, and shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated the PACA (Petitioner's Appeal Pet. at 3-4, 9-12).

I agree with the Chief ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Garden Fresh Produce, Inc. In order for a petitioner to show that he or she was only nominally an

officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.¹¹ The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

During the period when Garden Fresh Produce, Inc., violated the PACA, Petitioner owned a substantial percentage of the outstanding stock of Garden Fresh Produce, Inc. Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.¹² Petitioner has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Garden Fresh Produce, Inc.

Moreover, Petitioner had the appropriate business experience to be a corporate officer and director. At the time of the March 2, 2005, hearing, Petitioner had 15 years of experience in the produce business. Petitioner began working at Martindale Distributing, a business run by Petitioner's father in Salinas, California. Petitioner started in Martindale Distributing as a produce inspector and "on grounds" buyer. When Petitioner's father retired from the Martindale Distributing in 1999, Petitioner, along with his stepbrother and brother, purchased the company, with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, Petitioner has been the 100 percent owner of Martindale Distributing. (Tr. 36-39, 41-42.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.¹³ In late 1999 or early 2000, Petitioner, along with several others, formed Garden Fresh Produce, Inc.

¹¹See note 7.

¹²See note 8.

¹³*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

1322 PERISHABLE AGRICULTURAL COMMODITIES ACT

(Tr. 42). Petitioner was a 20 percent shareholder of the new company, a director, and the secretary. Petitioner signed the original PACA license application and the check in payment of the PACA licensing fee. Petitioner remained a stockholder, a director, and the secretary until he submitted his resignation and reassigned his stock in April 2003 (RX 1 at 16, 18, 20).

Petitioner joined Garden Fresh Produce, Inc., because he was good with bills and money management (Tr. 85). During the early days of Garden Fresh Produce, Inc.'s operations, Petitioner, working from Martindale Distributing's Salinas, California, office, handled much of Garden Fresh Produce, Inc.'s paperwork, even receiving a salary for handling the payables. Petitioner classified his principal duties with Garden Fresh Produce, Inc., as that of an accounts payable manager. (Tr. 48-50.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc., in the first year it did business, and continued making a small number of purchases in 2002 (Tr. 17-18). Petitioner issued checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." (Tr. 52, 95.) Petitioner took calls for Garden Fresh Produce, Inc., at his Salinas, California, office and became aware in 2002 that there were complaints about the way Garden Fresh Produce, Inc., handled accounts payable. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay (Tr. 52-53). Even though Petitioner knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see a financial statement or bank statements, relying on statements from Wayne Martindale and Donald Beucke "that things were getting better." (Tr. 99.)

Before Petitioner resigned from Garden Fresh Produce, Inc., Petitioner signed documents accepting the resignation of two directors, David N. Wiles and Bruce Martindale (RX 1 at 13, RX 9, RX 11). At all times material to this proceeding, all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. 112). At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 8 at 4, 5).

In short, I find Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc. Petitioner was a major stockholder of Garden Fresh Produce, Inc.; Petitioner had the appropriate business experience to be a corporate officer and director; and Petitioner participated in corporate decision-making.

Third, Petitioner contends the Chief ALJ erroneously concluded, because Petitioner owned 20 percent of the stock in Garden Fresh Produce, Inc., Petitioner had to make a particularly compelling case in order to establish that he was not responsibly connected (Petitioner's Appeal Pet. at 4, 12-13).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first alternative of the second prong of the responsibly connected test, a petitioner, who is a holder of more than 10 percent of the outstanding stock of a company, must demonstrate by a preponderance of the evidence that he or she was only nominally a shareholder of the company. Petitioner bases his contention that the Chief ALJ held Petitioner to a higher standard of proof than preponderance of the evidence on the following statement: "[t]he fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof." (Initial Decision at 13.) I do not find that the Chief ALJ's reference to "a particular compelling case" indicates the Chief ALJ applied the incorrect standard of proof in this proceeding.

The Chief ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 7). Moreover, the Chief ALJ explicitly applies the standard of proof in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), stating: "Even if [Petitioner] was not actively involved in the violation, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director, and secretary." (Initial Decision at 12.) The Chief ALJ does not apply an alternative standard of proof in this proceeding. Therefore, I reject Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that he was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Conclusions of Law

1. Petitioner was a 20 percent shareholder, a director, and the secretary of Garden Fresh Produce, Inc., from its inception in April 2000 until he resigned from Garden Fresh Produce, Inc., in April 2003.

2. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five

1324 PERISHABLE AGRICULTURAL COMMODITIES ACT

produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25.

3. Petitioner failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period January 14, 2002, through February 26, 2003.

4. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

I affirm Respondent's May 10, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and

Order.¹⁴ The date of entry of the Order in this Decision and Order is July 26, 2006.

In re: RAY JUSTICE.
PACA-APP Docket No. 05-0004.
Decision and Order.
Filed August 11, 2006.

PACA – Actively involved – Nominal director, when not.

Mary Hobbie for Complainant.
Andrew Hellenger and Meland Russin for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision, I find that Ray E. Justice, Sr. was responsibly connected with Do Ripe Farms, Inc., when Do Ripe committed disciplinary violations of the Perishable Agricultural Commodities Act (PACA). I find that Mr. Justice was both actively involved in the activities that lead to the violations committed by Do Ripe, and that he was not only a nominal shareholder of Do Ripe.

Procedural History

On July 20, 2004, Ray Justice was notified by a letter from Karla Whalen, Head of the Trade Practice Section, PACA Branch, Fruit and Vegetable Programs, that an initial determination had been made that as a 50 percent stockholder and director of Do Ripe, he was “responsibly connected” to Do Ripe during the period of time when it committed violations of the PACA. RX 2. Mr. Justice was informed that if he did not contest the initial determination letter within thirty days by requesting that the Chief of the PACA Branch review the initial determination, he would be subject to licensing and employment restrictions under the PACA.

By letter of August 19, 2004, Mr. Justice, through his counsel, denied that he was responsibly connected to Do Ripe. RX 3. After review of documentation supplied by counsel for Mr. Justice, a final determination

¹⁴28 U.S.C. § 2344.

1326 PERISHABLE AGRICULTURAL COMMODITIES ACT

was made on January 4, 2005 by Bruce W. Summers, Acting Chief, PACA Branch, Fruit and Vegetable Programs, that Mr. Justice was responsibly connected with Do Ripe during the period Do Ripe violated the PACA. The letter informed Mr. Justice of his right to seek review of the final decision by filing a petition for review within thirty days from receipt of the letter.

Meanwhile, the PACA Branch had filed a disciplinary complaint against Do Ripe Farms, Inc. on July 9, 2004, alleging that Do Ripe, during the period from September 2002 through April 2003, failed to make full payment promptly to sixteen sellers in the amount of over one million dollars for one hundred lots of perishable agricultural commodities that Do Ripe had purchased, received, and accepted in interstate commerce. Upon failure of Do Ripe to file an answer to the complaint, the Complainant moved on February 10, 2005 for a default decision, which I issued on August 10, 2005, finding that the violations alleged were established as willful, flagrant and repeated violations of section 2(4) of the PACA.

On February 4, 2005, Mr. Justice filed a timely Petition for Review with the USDA's Office of the Hearing Clerk seeking to reverse the determination that he was responsibly connected to Do Ripe. I conducted a hearing in this matter in Atlanta, Georgia on December 13, 2005. Andrew B. Hellinger, Esq. and Coralee G. Penabad, Esq. represented Petitioner, and Christopher Young-Morales, Esq., represented Respondent.

Petitioner testified on his own behalf and also called Robert Hoch to testify. Respondent called Josephine E. Jenkins to testify as its sole witness. Petitioner introduced exhibits PX 1 through PX 12, and Respondent introduced exhibits RX 1 through RX 8. Both parties submitted Proposed Findings of Fact and Conclusions of Law and accompanying briefs.

Facts

Ray Justice is an astute and experienced businessman who has owned and invested in a number of businesses over the past 35 years. Tr. 14-15, 31. At the time of the hearing, he had been acquainted with Robert Hoch, president of Do Ripe Farms, for over 30 years. Tr. 31. He had loaned Hoch money many times over the years and had always been paid back. Tr. 32. However, in early 2002, Hoch owed him \$600,000 and indicated he needed more funds. Tr. 22-23. A series of transactions occurred which resulted in Justice owning 50% of Do Ripe. The significance of this 50% ownership, and some of the transactions which Justice participated in during the period during which Do Ripe

committed violations, are the key to my determination as to whether Justice was responsibly connected to Do Ripe at the time Do Ripe committed violations of the PACA.

At the time that Do Ripe Farms, Inc. originally received its PACA license on March 24, 2000, Robert Hoch was the sole shareholder and president of the company. RX 1, pp. 3-5. License number 2000-0951 was issued to Do Ripe on that date and was terminated on March 24, 2002 for failure to pay the required annual license fee. RX 1, p. 1. Thus, Do Ripe was operating without a PACA license during the entire time period when the violations occurred. Do Ripe was in the produce business and 95% of its business was in tomatoes. Tr. 64. Hoch handled the company's day-to-day business. Hoch's family had been in the produce business and Hoch had been involved in the business for approximately 30 years. Tr. 31-32.

Hoch described Justice as a "fatherly type" who frequently gave him advice on business during the course of their thirty-year acquaintance. Tr. 73-74. Their relationship began as a result of Hoch having gone to school with Justice's children. Tr. 35. When Hoch founded Do Ripe he would occasionally have conversations with Justice as to how his business was doing. Hoch borrowed money from a number of financial institutions, and also began borrowing money from Justice, and paying it back with interest to help him pursue his business. Tr. 49, 88. There came a point in early 2002 when the debt of Do Ripe to Justice was approximately \$600,000, and the company was unable to pay back the loans. Tr. 16-17. Hoch represented to Justice that he needed up to another \$500,000 to "get to the next stage" and make his tomato business a success. Tr. 32. Rather than simply loaning Hoch and Do Ripe the additional funds, Justice insisted that some sort of measures be taken to safeguard his investment. Tr. 17, 22. On January 14, 2002, he set up a line of credit with Hoch (and Hoch's wife) for \$1.1 million, representing the \$600,000 he was already owed and the additional \$500,000 Hoch wanted to borrow on behalf of Do Ripe. PX 6. As part of the collateral for this line of credit, the Hochs secured the loan with their personal residence. Tr. 39. In addition, he conditioned the series of transactions on his being made a 50 per cent shareholder in the company.¹ Justice considered the stock as part of the collateral he was

¹ As a result of these transactions, Justice became a 50% shareholder in both Do Ripe Farms, Inc and DRF, which was a related company set up to handle some of the aspects of financing. When DRF was set up in early 2002, Justice was made a 50% shareholder in both Do Ripe and DRF. Tr. 17. When Hoch wanted to borrow money on behalf of Do Ripe, he would request it of DRF who would request it from Justice, who would "draw it down" and send it to DRF who would then send it to Do Ripe. *Id.*

(continued...)

1328 PERISHABLE AGRICULTURAL COMMODITIES ACT

receiving for his \$1.1 million loan. Tr. 50. There is no dispute that Justice was a 50 per cent shareholder of Do Ripe throughout the period Do Ripe was found to have violated the PACA.

Justice throughout this proceeding has characterized his role as that of a “passive investor.” Tr. 30. He stated that other than providing the funds to Do Ripe so that Hoch could improve the company’s ability to do business, he had no role in the day to day operations of the company. Tr. 25, 27. While he stopped by the office on occasion to have lunch, it was generally a fairly casual event, based on his proximity to Do Ripe, and most of his conversations with Hoch about business were fairly general in nature, according to both Hoch and Justice. Tr. 35-36, 74-75. Justice testified that he did not review Do Ripe’s bills; that he did not decide which bills to pay; that he did not review Do Ripe’s invoices; that he did not sign any contracts on behalf of Do Ripe; and that he did not receive compensation from Do Ripe or sign any loan documents for Do Ripe. Tr. 28-29. On the other hand, Justice was generally aware of the financial condition of the company; knew generally why Hoch needed to borrow the additional funds; and was receiving statements regarding the financial condition of Do Ripe--although not always on a timely basis. Tr. 51.

Further, for a period of time during the violation period, Justice loaned Do Ripe additional funds--\$70,000--above and beyond the \$1.1 million to tide the company over during the holiday season to cover expenses at a time when the company was being slow paid by some of its customers. Tr. 41-45, 50-51. Not only were these loans repaid by Do Ripe during the very period the company was committing violations of the PACA, but in February 2003, when Justice was made aware that he was on the company’s bank signature card, he signed the company’s checks to himself paying off the \$70,000 loan, including interest. Tr. 42-43, 49.²

With respect to the produce business, Justice generally claimed ignorance as to how the produce business functioned. As he put it, when he first began loaning Hoch money, “I never really got into his business.” Tr. 16. At the time of making his initial loans and the loans through DRF, Justice had no familiarity with the PACA. Tr. 20. However, he did not loan the additional funds to Hoch blindly. He was

¹(...continued)

It is only Justice’s relationship with Do Ripe Farms, Inc. that is material to the responsibly connected determination.

²The “Payment to insiders” attachment to Do Ripe’s bankruptcy filing, RX 6, p. 64, indicated that Petitioner received four checks from the company, totaling over \$84,000, in February and March, 2003. Apparently the first three checks, totaling over \$77,000, were for the repayment of the loans to tide Do Ripe over the holiday season, with the additional \$7,000 check for a loan covering some telephone equipment. Tr. 46.

given to understand that Do Ripe needed to expand geographically; that they needed to retool and rent more space; that Hoch told him that he had additional commitments from companies who wished to purchase produce from Do Ripe; and that additional equipment, including a machine that cost \$125,000 to sort tomatoes, needed to be purchased in order to successfully compete. Tr. 21-23. Hearing this information from Hoch convinced him to make the additional funds available to Do Ripe in exchange for the ownership share in the company. Justice testified that he never actually received any stock certificate with his name on it indicating that he was a 50% shareholder, Tr. 23, but there is no dispute that he was such a shareholder throughout the relevant time period. Tr. 31. He also indicated that he never considered himself to be an officer or director of Do Ripe. Tr. 24.

His failure to look into the details of the produce business before investing so heavily in Do Ripe appears to be inconsistent with his prior practice as an astute businessman. As he stated during cross-examination, "To make that large of an investment in any business you should know the ins and outs of the business, I agree, but I had a lot of faith in that individual." Tr. 34. Because of his then apparent faith in Hoch, Justice did not follow his normal precautions before investing, choosing to rely instead on Hoch's representations and periodic updates as to the state of the business.

Matters came to a head for Do Ripe when their assets were frozen as a result of a PACA Trust action initiated by Six L's Packaging Co. in March 2003. Tr. 75-79. Shortly thereafter, Do Ripe ceased doing business and filed a voluntary petition for Chapter 11 bankruptcy protection. PX 3F, RX 6. Both Hoch and Justice signed the relevant documents as the holders of 100% of the outstanding shares of Do Ripe. The bankruptcy filings also listed Justice as a director of the company, PX 3F, p. 53, although Justice testified that he never was informed that he was a director and that he was basically presented the forms to sign by the bankruptcy attorney. Tr. 41.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

1330 PERISHABLE AGRICULTURAL COMMODITIES ACT

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, which in this case would be Do Ripe, the Act also imposes severe sanctions against any person “responsibly connected” to an establishment that has had its license revoked or suspended.³ 7 U.S.C. §499h(b). The Act prohibits any licensee from employing any person who was responsibly connected with any other licensee whose license “has been revoked or is currently suspended” for as long as two years, and then only upon approval of the Secretary. *Id.*

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

³ Since Do Ripe’s license had already been terminated for failure to pay the required fee, my default ruling did not include an order revoking or suspending its license. Instead, I ordered that “the facts and circumstances of the violation shall be published.” The Judicial Officer has ruled that “Publication of the facts and circumstances of Respondent’s violations has the same effect on Respondent and persons responsibly connected with Respondent as revocation of Respondent’s PACA license.” *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1903 (2005).

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.

Discussion

I conclude that Petitioner has failed to meet his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a 50% shareholder of a violating licensee or entity subject to license.

Petitioner Justice was actively involved in the activities resulting in a violation of this chapter. Even though Justice and Hoch both considered Justice to be a “passive investor;” (a) the degree of his knowledge of Do Ripe’s condition at the time he assumed half-ownership; (b) his general knowledge of the business’s problems; (c) his knowledge of how his investment was going to be used; (c) his failure to investigate the regulations and laws pertinent to the produce business; and (d) his decision, at a time when he knew the company was unable to pay its creditors, to pay the company’s debt to him for the short term loan—in effect a decision by a co-owner to grant his claim a higher priority than other claims, all constituted active involvement under the statute.

The burden of proof is on the Petitioner to demonstrate that he was not actively involved in the activities resulting in Do Ripe’s violations. Although Hoch was clearly in charge of running the business, and made the day-to-day decisions, Petitioner’s decision to invest in the business in exchange for half ownership of the business, when he had very good knowledge as to how his investment was going to be used, and when he knew the business was not doing well, convinces me, and I so find, that his role within the company was active under the statute. An individual does not have to be the major corporate decision maker to be actively involved. As the Judicial Officer held in *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998), “. . . there are many functions within the company, e.g., corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to promptly pay for produce, even though the individual does not ever actually purchase produce.” Indeed, Justice had a far lesser role in the activities of Do Ripe than did Salins who, as Petitioner points out in his reply brief, was extensively

1332 PERISHABLE AGRICULTURAL COMMODITIES ACT

and regularly involved in his company's business. There is no evidence that Justice was involved in Do Ripe's day-to-day activities; or that he did buying or selling of produce; or did sign or write checks (with the exception of paying back his short term holiday loan to the company); or was generally aware of who Do Ripe's creditors were prior to the time the accounts were frozen; or was a part of many of the decisions that are traditionally linked with high-level management.

However, that he was less involved than the petitioner in the *Salins* case does not necessarily warrant a finding that Justice was not actively involved. While he apparently made the unusual decision to forego the type of investigation that he normally would conduct into the affairs of a business in which he was about to invest a substantial amount of money, due to his long-term acquaintance with Hoch, he did know enough to realize that the business was in trouble and that it was continually borrowing money even before he became half-owner. He knew generally what his investment was going to be used for. He had to personally authorize each increment of the loan that was financed through DNF, and his multiple exercise of that authority, particularly in light of his awareness of Do Ripe's financial conditions, is not consistent with being a "passive investor," but rather indicates active participation in the company's decisions. And the decision to pay back his own short term loan at a time when Do Ripe was in trouble with a number of creditors is utterly inconsistent with "passive" investment, while being an extremely strong indicator of active involvement.

Petitioner was not merely a nominal shareholder in Do Ripe.

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 50 percent shareholder of Do Ripe. In order to show that his 50% ownership was only nominal, Justice would have to demonstrate, by a preponderance of the evidence, that he did not have an "actual, significant nexus" with Do Ripe during the period Do Ripe was violating the PACA. *In re Anthony Thomas*, 59 *Agric. Dec.* 367, 386 (2000), *In re Edward S. Martindale*, *Agric. Dec.* (slip op. p. 28)(July 26, 2006).

I am basing my finding that Justice was responsibly connected to Do Ripe on his role as 50% shareholder, and not on his being an officer or director of the company. While Justice did sign a bankruptcy document indicating that he was a director, neither he nor Hoch had any recollection of him being made a director or an officer. The bankruptcy filing papers, signed by Justice at the request of the bankruptcy attorney, appear to be the only mention of Justice being a director. The evidence does not support a finding that Justice was a director or officer of Do Ripe. However, Justice's stock ownership is more than sufficient to

establish his responsibly connected status, particularly in view of his overall business background, his knowledge of Do Ripe's financial condition, and his involvement in financial transactions during the violation period.

Respondent contends, correctly, that the basic fact that Petitioner owned 50% of the corporate stock of Do Ripe at the time the violations were committed is strong evidence that Petitioner was not a nominal shareholder. Resp. brief at 16. With Congress setting 10% ownership as the threshold for an individual to be found responsibly connected based on percentage ownership of a violating entity, 50% ownership is a rather powerful indication that an individual is responsibly connected to a company. As the Judicial Officer stated in *In re Edward S. Martindale*, supra, at slip op. p. 29, "Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder." The "substantial percentage" referred to in *Martindale* was 20 per cent, far less than the 50% ownership of Petitioner in this case.⁴ Simply by virtue of his ownership interest in Do Ripe, Justice could have taken measures to investigate further the problems the company was having in paying its debts, monitored the company more closely, and simply paid more attention to the business. Instead, he decided to trust Hoch and Do Ripe's employees, and to make no attempts to fix the conduct that was leading the company to PACA violations and bankruptcy.

In making a determination as to whether a shareholder is nominal, it is appropriate to look at his overall business background and knowledge. It has been recognized that a person may be in a nominal position, even if they are a more than 10% shareholder, if they have little or no training and experience. Thus, in *Minotto v. USDA*, 711 F. 2d 406, 409, the court found that Minotto, who was only a bookkeeper and had very little training or experience, was only a nominal director. Although Petitioner here had little knowledge of the produce business, he had a long history of owning successful businesses and in investing. He testified that he had been a businessman for 35 years prior to investing in Do Ripe, and that he had owned approximately twenty businesses during that time. While he remained relatively unaware of the details of Do Ripe's business, he was well aware that the company was having severe financial difficulties at the time he became a shareholder. Indeed, the failure of Do Ripe to repay \$600,000 in loans was both a crystal clear indicator that the company was in trouble, as well as the inducement for

⁴ See, also, the cases cited in footnote 8 of *Martindale*, where the Judicial Officer and the courts have held that ownership of 20 to 33.3 percent of the stock of a violating entity was "strong evidence" that a person was responsibly connected to that entity.

1334 PERISHABLE AGRICULTURAL COMMODITIES ACT

Justice to seek further protection, in the form of a 50% share of Do Ripe, before he would set up the mechanism to loan additional funds. He knew the purpose of the additional funding, and approved each incremental advance of funds until the additional \$500,000 was distributed. As an experienced businessman, he certainly had the capability of inquiring further into the details of a business he knew was losing money, and as a 50% stockholder he had the obligation, even if he was not actively involved in the activities resulting in the violations of the PACA, to take action to counteract or obviate the fault of Hoch. Instead, Justice was content to stay away from learning about the details of the business, and to not take any measures to correct the situation. His situation is a far cry from that in *Minotto*, where a bookkeeper with no real business knowledge or ownership role in the company was put on the board to essentially cast a figurehead vote in favor of every resolution supported by the company's ownership. Rather, as a successful businessman who actively sought ownership as a condition of advancing further loans to Do Ripe, and who hoped to make a profit with his investment in the company, Tr. 50, 52-53, Justice's position with Do Ripe contrasts sharply with the facts of the *Minotto* case.

Two other factors deemed significant by the Judicial Officer in determining whether an individual's stock ownership was "merely nominal" are active participation in corporate decision making and knowledge of the company's financial condition. Once again, Petitioner's actions are inconsistent with those of a nominal shareholder. In *Salins*, the Judicial Officer stated that active participation in corporate decision making was another indicia whether an individual was serving in a nominal capacity. While Justice clearly was not participating in day-to-day decision-making at Do Ripe, he played a significant role in corporate finance decision making. Thus, if he did not advance the funds to purchase the tomato sorter and to otherwise finance Do Ripe's anticipated expansion of business, it is likely that those events would not have occurred. His approval of the additional funding on an incremental basis confirms that he gave his individual approval to numerous steps in the company's financing decisions. He also participated in the company's decision to file for bankruptcy, a rather pivotal decision. In addition, he made the decision to repay loans that he made to the corporation, that were above the \$1.1 million, Tr. 50, even when he knew the company was suffering financially. The fact that he issued four separate checks to repay himself contradicts his claim that his involvement in the company was only passive.

In *Salins*, the Judicial Officer also stated that knowledge of the company's financial condition was an additional factor to be looked at in determining whether a shareholder was only serving in a nominal

capacity. Justice's knowledge of Do Ripe's financial condition was clearly established—he discussed the company's condition numerous times with Koch even before he became a shareholder; was well-aware there were significant problems as his loans were not being repaid; and saw numerous financial statements reflecting the company's troubles before and during the violation period. Rather than attempt to take action to learn more about the produce business or otherwise apply his considerable business savvy towards taking measures to improve the company's practices, Petitioner appeared to be content to let Hoch and his employees run the business without interference. As a major shareholder in the company, Petitioner cannot avoid his responsibilities under the PACA. As a major shareholder he knew, or should have known, that the company was delinquent in paying for its purchases, and should have taken prompt measures to correct this situation. While he became a shareholder in part in order to secure his loaning Do Ripe additional funds, he at the same time became a person who was responsible for assuring that Do Ripe was compliant with the PACA, a responsibility he did not fulfill.

Petitioner invested in Do Ripe to make money. While he originally loaned the company money with the goal of getting repaid with interest, the series of transactions that lead him to become a 50% shareholder was entered into as a means of assuring he could get all his money back with interest and to make a profit as well. He was a voluntary investor who received money from Do Ripe during the time Do Ripe was committing violations of the PACA. The receipt of compensation from the violating company is another factor cited by the Judicial Officer in *Salins*, and the voluntary investment of substantial funds with the expectation of eventually receiving compensation in the way of profits and increased value of his investment interest is consistent with my finding that he is responsibly connected to Do Ripe.

Findings of Fact

1. Petitioner Ray Justice is an experienced businessman, who has owned over 20 companies.
2. Do Ripe Farms, Inc. held PACA license 2000-0951 from March 24, 2000 through March 24, 2002, when the license terminated for non-payment of the annual fee. During this period Robert Hoch was the sole owner and president of Do Ripe.
3. Even though it was unlicensed, Do Ripe continued its produce

1336 PERISHABLE AGRICULTURAL COMMODITIES ACT

operations until it filed for voluntary bankruptcy on April 18, 2003. Between September 2002 and April 2003, Do Ripe failed to make full payment promptly for 100 lots of perishable agricultural commodities to 16 sellers in the amount of over \$1 million.

4. Petitioner has been acquainted with Robert Hoch for over 30 years, since his children went to school with Hoch. Hoch had discussed Do Ripe's tomato business with Petitioner on numerous occasions, and had borrowed, and subsequently repaid with interest, funds from Petitioner on a number of occasions.

5. In early 2002, at a time when Do Ripe owed Petitioner approximately \$600,000, he requested that Petitioner loan him an additional \$500,000. Petitioner indicated that he needed some sort of collateral to safeguard his investment, and agreed to set up a \$500,000 line of credit through a newly created entity called DRF in exchange for being made a 50% shareholder in Do Ripe.

6. From February 2002 until the company filed for bankruptcy protection, Petitioner was a 50% shareholder in Do Ripe.

7. Before investing in Do Ripe, Petitioner did not investigate or learn about the workings of the produce business. He was unaware of the PACA and the requirement of a PACA license. He was aware that Do Ripe was having financial difficulties, and was further aware of some or most of the purposes for which Hoch desired to borrow the additional funds.

8. While a shareholder in Do Ripe, Petitioner incrementally advanced funds to the company from DRF.

9. While a shareholder in Do Ripe, Petitioner made additional loans, above and beyond the \$1.1 million, to tide the company over during the holiday season. On four different occasions during the period Do Ripe was violating the PACA, Petitioner, having found out that he was authorized to sign checks, wrote checks to himself to pay off loans he had made to Do Ripe.

Conclusions of Law

Petitioner was a 50% shareholder in Do Ripe Farms, Inc. from February 2002 through the time the company filed for bankruptcy in April 2003.

Between September 2002 and April 2003 Do Ripe Farms, Inc. committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to sixteen sellers in the amount of over one million dollars for one hundred lots of perishable agricultural commodities Do Ripe had purchased, received, and accepted in interstate commerce.

Petitioner was actively involved in the violations committed by Do Ripe.

Petitioner was not a nominal 50% shareholder in Do Ripe.

Petitioner was responsibly connected to Do Ripe during the time Do Ripe committed violations of the PACA.

Conclusion and Order

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Do Ripe Farms, Inc. at a time when Do Ripe committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 50% shareholder. Wherefore, I affirm the finding of the Chief of the PACA Branch that Ray Justice was responsibly connected with Do Ripe at the time the violations were committed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

In re: WILLIAM DUBINSKY & SON, INC.
PACA Docket No. D-02-0002.
Decision without Hearing.
Filed August 21, 2006.

PACA – General denial – Show cause order – Prompt payment, failure to make.

David Richardson for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

1338 PERISHABLE AGRICULTURAL COMMODITIES ACT

Decision Without Hearing

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 October 23, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 1999 through December 2000 Respondent purchased, received, and accepted, in interstate and foreign commerce, from 138 sellers, 967 lots of perishable agricultural commodities in the course of interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,795,045.82.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. During the period of March through June 2005, a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of June 2005, at least 20 of the sellers listed in the Complaint were still owed \$90,024.65.¹ Based on the results of the investigation, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued ; Respondent did not answer the Motion. Hearing no objection, in January 2006, the Chief Administrative Law Judge issued a Notice To Show Cause Why A Decision Without Hearing Should Not Be Issued, based upon Complainant's allegation in its Motion, substantiated by affidavit, that Respondent failed to pay the produce debt alleged in the Complaint within 120 days of the service of the Complaint. Service of that Order to the addresses listed in the file in the Hearing Clerk's Office was unsuccessful. On May 16, 2006 Complainant made a motion for Decision Without Hearing. Complainant argued in its motion that as Respondent was properly served with the disciplinary complaint in this case, was on notice of the

¹ Mr. Nefferdorf attempted to contact 32 out of the 138 sellers listed in the complaint. 12 out of 32 sellers never responded to Mr. Nefferdorf's inquiries. As indicated in his affidavit, Mr. Nefferdorf tried numerous times to contact the remaining 12 sellers to no avail.

proceedings against it, and filed an answer to the complaint, Respondent was obligated to keep the Hearing Clerk's Office apprised of its current mailing addresses and relevant contact information. Respondent failed to do so. Accordingly, and as Respondent's failure to fulfill its obligation resulted in unsuccessful service of the January 2006 Order to Respondent to Show Cause, I am persuaded by Complainant's arguments and grant its motion for the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and publishing Respondent's violations.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998),

"PACA requires *full payment promptly*, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times....In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked."

Id. at 548-549.

According to the Judicial Officer's policy set forth in *Scamcorp*, in this case, Respondent had 120 days from the date the complaint was served upon it, or on or about March 15, 2002, to come into full compliance with the PACA. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and ordering that Respondent's violations be published.

As Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1340 PERISHABLE AGRICULTURAL COMMODITIES ACT

1. Respondent is a corporation organized and existing under the laws of the state of Connecticut. Its mailing address is 101 Reserve Road, Hartford, Connecticut 06114.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 770517 was issued to Respondent on January 14, 1977. This license terminated on January 14, 2001, when Respondent failed to pay the required annual fee.

3. As more fully set forth in paragraph III of the Complaint, during the period October 1999 through December 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 138 sellers, 967 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of \$1,795,045.82.

4. Respondent failed to pay the produce debt described above and to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

Conclusions

Respondent's failure to make full payment promptly with respect to the 967 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the violations of Respondent shall be published.

This order shall take effect on the 11th 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 and 1.145). Copies hereof shall be served upon parties.

**In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0009.
Decision and Order.
Filed September 28, 2006.**

PACA-APP – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer, director, and shareholder – Alter ego – Standard of proof – Timing of employment bar – Multiple petitions for review consolidated for hearing.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) decision concluding Donald R. Beucke (Petitioner) was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. The Judicial Officer found Garden Fresh Produce, Inc., violated the PACA during the period January 14, 2002, through February 26, 2003. During the violation period, Petitioner was a vice president, a director, and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite his being a vice president, a director, and a major shareholder of Garden Fresh Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that Petitioner was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc. Finally, the Judicial Officer rejected Petitioner's contention that the bar on his employment by PACA licensees should have commenced on the day that Garden Fresh Produce, Inc., was found to have violated the PACA.

Charles L. Kendall, for Respondent.
Effie F. Anastassiou and Paul Hart, Salinas, CA, for Petitioner.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On April 28, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a

1342 PERISHABLE AGRICULTURAL COMMODITIES ACT

determination that Donald R. Beucke [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., during the period January 2002 through February 2003, when Garden Fresh Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On June 2, 2004, Petitioner filed “Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status” pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent’s April 28, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc.

On March 1 and 2, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anastassiou & Associates, Salinas, California, represented Petitioner. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 19, 2006, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ concluded Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 1, 14).

On February 8, 2006, Petitioner appealed to the Judicial Officer. On March 6, 2006, Respondent filed a response to Petitioner’s appeal petition and a cross-appeal. On April 6, 2006, Petitioner filed a response to Respondent’s cross-appeal. On April 27, 2006, Respondent filed a reply to Petitioner’s response to Respondent’s cross-appeal, and on May 15, 2006, Petitioner filed a declaration in response to Respondent’s April 27, 2006, filing. On May 15, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ’s conclusion that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. Respondent’s exhibits are designated by “RX.” The transcript is divided into two volumes, one volume for each day of the 2-day hearing. References to “Tr. I” are to the volume of the transcript

¹During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., purchased, received, and accepted in interstate commerce, from five produce sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$379,923.25, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Garden Fresh Produce, Inc.*, 63 *Agric. Dec.* 1032 (2004).

that relates to the March 1, 2005, segment of the hearing, and references to “Tr. II” are to the volume of the transcript that relates to the March 2, 2005, segment of the hearing.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

....

§ 499b. Unfair conduct

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

1344 PERISHABLE AGRICULTURAL COMMODITIES ACT

interstate or foreign commerce:

....
(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

(b) Refusal of license; grounds

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

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

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

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

....

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

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

1346 PERISHABLE AGRICULTURAL COMMODITIES ACT

bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

. . . .

§ 499h. Grounds for suspension or revocation of license

(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.

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

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

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

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

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

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

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Facts

Petitioner has worked in the produce business for over 25 years. Petitioner began working for his stepfather at Martindale Distributing Company, first as an inspector and later as a buyer. At one point, Petitioner was president of Martindale Distributing Company. During

1348 PERISHABLE AGRICULTURAL COMMODITIES ACT

this period, Petitioner worked with other family members, including his stepbrothers Wayne Martindale and Edward Shane Martindale. (Tr. I at 59-60, 82-84.)

At the beginning of the year 2000, Wayne Martindale asked Petitioner to invest in Garden Fresh Produce, Inc., a produce company Wayne Martindale intended to operate in Las Vegas, Nevada. Petitioner invested \$20,000 in Garden Fresh Produce, Inc., and was listed as a 20 percent stockholder of the company. (Tr. I at 61.) Wayne Martindale and Edward Shane Martindale were also listed on the PACA license certificate as 20 percent stockholders (RX 1 at 1-2, 5-6, 9). Nevada corporate records list Petitioner as a director and vice president of marketing (RX 3 at 9, 11, 13). Petitioner was authorized to sign checks on behalf of Garden Fresh Produce, Inc., but there is no evidence that he did so after the first few months the company was operating (RX 13; Tr. I at 63). Petitioner was one of the signatories on Garden Fresh Produce, Inc.'s application for a PACA license and was listed on the application as a director, a vice president, and a 20 percent shareholder (RX 12; Tr. I at 87-89). Petitioner was issued a stock certificate in Garden Fresh Produce, Inc., indicating that he owned 1000 shares in the company (RX 8 at 3).

Petitioner maintained his positions with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of the PACA. Petitioner testified that Wayne Martindale ran Garden Fresh Produce, Inc., and that he (Petitioner) had virtually no role in Garden Fresh Produce, Inc.'s operations other than making his initial \$20,000 investment. (Tr. I at 60-67.) Petitioner testified that, while Garden Fresh Produce, Inc., was operating out of Las Vegas, Nevada, he maintained his position working full-time at Martindale Distributing Company in Salinas, California. He remembered attending a single meeting of the board of directors in Las Vegas, but had no recollection of receiving a stock certificate or signing the PACA license application (until his recollection was refreshed on viewing a copy of the application at the hearing) (Tr. I at 62-64, 85-88). He stated he wrote a single check on the company's behalf but otherwise wrote no checks for Garden Fresh Produce, Inc., never saw any tax or financial books or records, and had virtually no duties (Tr. I at 62-64). Petitioner stated he was never involved in any business decisions for Garden Fresh Produce, Inc. (Tr. I at 64-66). However, Petitioner ordered produce for Garden Fresh Produce, Inc. (Tr. I at 20, 65; Tr. II at 16-18, 29-30), and was involved in decision-making with respect to which of Garden Fresh Produce, Inc.'s debts to pay (Tr. II at 52, 55). Petitioner also received approximately \$1,500 in compensation for his duties as an officer of Garden Fresh Produce, Inc., during the first year

of operation of Garden Fresh Produce, Inc. (Tr. I at 65).

Beginning in December 2002, Petitioner began receiving calls from Garden Fresh Produce, Inc.'s produce sellers, who stated Garden Fresh Produce, Inc., was not paying for produce timely. Petitioner referred the callers to Wayne Martindale and also told some of the callers they should stop doing business with Garden Fresh Produce, Inc., if payment was not timely. Petitioner placed calls to Garden Fresh Produce, Inc.'s office in Las Vegas, Nevada, to determine the status of payments, but had difficulty reaching Wayne Martindale, and, when he did talk to him, Petitioner was told that checks were in the mail, that business would be improving, or that new accounts had been obtained—information which was not true. (Tr. I at 69-73.)

There is no evidence that Petitioner had any direct involvement in the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004). Several witnesses testified that they viewed Wayne Martindale as the person running Garden Fresh Produce, Inc., and they only called Petitioner to obtain advice about contacting Wayne Martindale and to inform Petitioner of Garden Fresh Produce, Inc.'s failures to pay for produce (Tr. I at 17, 29-30, 41-42). During the violation period, Petitioner never saw Garden Fresh Produce, Inc.'s books. Before he resigned from Garden Fresh Produce, Inc., by letter dated April 4, 2003, Petitioner signed documents accepting the resignation of two of Garden Fresh Produce, Inc.'s directors, David N. Wiles and Bruce Martindale (RX 1 at 11-13, RX 7).

Petitioner's witnesses generally corroborated Petitioner's testimony that Wayne Martindale ran Garden Fresh Produce, Inc., as far as they were concerned. Petitioner's witnesses also testified that Petitioner enjoyed a good reputation in the produce industry and had a reputation for paying the bills of Martindale Distributing Company on a timely basis.

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints initiated by produce sellers against Garden Fresh Produce, Inc. Mr. Gonzalez described his investigation, which primarily involved visiting Garden Fresh Produce, Inc.'s Las Vegas, Nevada, office. No one was at the premises when he first arrived, but he eventually gained access to the premises and requested a variety of records. (Tr. I at 136-39.) Wayne Martindale informed Mr. Gonzalez that all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. I at 139-41).

Phyllis Hall, a senior marketing specialist for the PACA Branch,

1350 PERISHABLE AGRICULTURAL COMMODITIES ACT

reviewed the file and identified the documents contained in the responsibly connected file maintained by the PACA Branch (RX 1-RX 9) (Tr. I at 145-64).

Discussion

I. Introduction

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25.² Thus, an individual who was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.³ Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA.

²*In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

³7 U.S.C. § 499a(b)(9).

If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.⁴ As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

*II. Petitioner Was Actively Involved in Activities
Resulting in PACA Violations*

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved

⁴*In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439 (2006), *aff'd per curiam*, No. 06-11609-CC (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

1352 PERISHABLE AGRICULTURAL COMMODITIES ACT

in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s PACA violations. Although Petitioner did not directly participate in the specific transactions resulting in Garden Fresh Produce, Inc.'s PACA violations, Petitioner directed payment of certain creditors in 2002, at a time when Petitioner knew Garden Fresh Produce, Inc., was not paying produce sellers promptly (Tr. II at 52, 55). Also, Petitioner purchased produce for Garden Fresh Produce, Inc., in 2002 (Tr. I at 20, 65; Tr. II at 16-18, 29-30). By directing the payment of certain creditors at a time when he knew Garden Fresh Produce, Inc., was not paying some of its produce sellers, Petitioner was in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1488. Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

III. Petitioner Was Not Merely a Nominal Officer, Director, or Shareholder

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20 percent shareholder, director, and vice president. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because

their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.⁵ The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

Petitioner was a co-founder of Garden Fresh Produce, Inc., who invested \$20,000 as part of the initial capitalization of Garden Fresh Produce, Inc. Petitioner's relationship to Garden Fresh Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner is an experienced, savvy individual who has worked in the produce business for over 25 years, who has worked for years with some or all of the principals in Garden Fresh Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 20 percent owner does not serve in a nominal capacity.⁶

There is no evidence that Petitioner was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a co-owner in an attempt to establish a

⁵*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

⁶*Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

1354 PERISHABLE AGRICULTURAL COMMODITIES ACT

profitable business. Petitioner presumably would have shared in the company's profits when there were some. Petitioner participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh Produce, Inc., the record indicates Petitioner exercised authority consistent with his positions as 20 percent owner, a director, and a vice president to counteract or obviate the fault of others only by responding to telephone calls made by unpaid produce sellers. That Petitioner chose not to take further action to counteract or obviate the fault of others does not establish that his role was nominal.

Petitioner's Appeal Petition

Petitioner raises six issues in "Petitioner Beucke's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the facts established in the record do not support the Chief ALJ's conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 3, 10-15).

Petitioner states the Chief ALJ found there is no evidence that Petitioner was directly involved in any of the transactions resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 11). I infer Petitioner contends the Chief ALJ could not properly conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and also find Petitioner was not directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

I disagree with Petitioner's contention. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA does not require that the petitioner must have been directly involved in the violative transactions.⁷ Thus, I do not find that, in order to conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I must first find Petitioner actually purchased the produce for which Garden Fresh

⁷See *In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 24 (July 26, 2006); *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999).

Produce, Inc., failed to make full payment promptly. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488-89 (1998), I found erroneous an administrative law judge's conclusion that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of the PACA, as follows:

The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.

On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce.

I concluded the petitioner, Lawrence D. Salins, was actively involved in the activities resulting in Sol Salins, Inc.'s violations of the PACA even though the petitioner did not purchase any produce. *In re Lawrence D. Salins*, 57 Agric. Dec. 1454 (1998).

Petitioner also contends he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA because: (1) he did not handle any of Garden Fresh Produce, Inc.'s finances; (2) Garden Fresh Produce, Inc., was located in Las Vegas, Nevada, and Petitioner did not have an office at the Las Vegas, Nevada, facility; (3) Petitioner did not make decisions regarding Garden Fresh Produce, Inc., debt payments; and (4) Petitioner did not participate in corporate decisions (Petitioner's Appeal Pet. at 11-13).

The evidence establishes that Petitioner was involved in Garden Fresh Produce, Inc.'s finances, payment decisions, and corporate decision-making. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000 (Tr. I at 60-61); Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license (RX 12; Tr. I at 87-88); Petitioner signed the board of directors' resolutions accepting the resignation letters of directors David N. Wiles and Bruce W. Martindale (RX 1 at 11-13, RX 7); Petitioner ordered produce for Garden Fresh Produce, Inc. (Tr. I at 20, 65; Tr. II at 16-18,

1356 PERISHABLE AGRICULTURAL COMMODITIES ACT

29-30); and Petitioner was involved in decisions regarding which of Garden Fresh Produce, Inc.'s debts to pay (Tr. II at 52, 55). Petitioner had equal authority with all the other principals of Garden Fresh Produce, Inc.; Petitioner was authorized to sign checks, pay payables, negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc.; and Petitioner, along with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5; Tr. I at 139-41). Moreover, while I agree with Petitioner's assertions that Garden Fresh Produce, Inc., was located in Las Vegas, Nevada, and that Petitioner did not have an office in Las Vegas, Nevada, I do not find that Petitioner's proof of these facts is sufficient to conclude that Petitioner proved by a preponderance of the evidence that Petitioner was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Petitioner also argues that his circumstance is similar to that of the petitioner in *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner's active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Second, Petitioner contends the Chief ALJ erroneously concluded Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA based upon Petitioner's failure to prevent Wayne Martindale's misconduct (Petitioner's Appeal Pet. at 3, 15-20).

I agree with Petitioner's contention that the Chief ALJ erroneously based his conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA on Petitioner's failure to counteract or obviate the fault of Wayne Martindale. The Chief ALJ, citing *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000), states "[t]he failure to exercise powers inherent in [Petitioner's] various positions with Garden Fresh, 'because he chose not to use the powers he had' has previously been found a basis for finding active participation." (Initial Decision at 12.) However, the passage from *Thomas* quoted by the Chief ALJ relates to issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

Even if I accept Petitioner's claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner's actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, "the crucial inquiry is whether an individual has an 'actual significant nexus with the violating company,' rather than whether the individual has exercised real authority." Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he had.

In re Anthony L. Thomas, 59 Agric. Dec. 367, 387-88 (2000).

Similarly, the Chief ALJ quotes *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994), to support his conclusion that Petitioner's inaction constitutes active involvement in the activities resulting in a violation of the PACA (Initial Decision at 12). *Bell* makes clear that the passage quoted by the Chief ALJ relates to the issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could only establish by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d at 409. Where responsibility was not based on the individual's "personal fault", *id.* at 408, it would have to be based at least on his "failure to 'counteract or obviate the fault of others'", *id.*

Bell v. Department of Agriculture, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (footnote omitted).

While I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA.

1358 PERISHABLE AGRICULTURAL COMMODITIES ACT

I only conclude, based on the record before me, that Petitioner's acts of omission do not constitute active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Third, Petitioner contends the Chief ALJ erroneously concluded Petitioner was not a nominal officer, director, and shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated the PACA (Petitioner's Appeal Pet. at 3, 20-24).

I agree with the Chief ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Garden Fresh Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.⁸ The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

During the period when Garden Fresh Produce, Inc., violated the PACA, Petitioner owned a substantial percentage of the outstanding stock of Garden Fresh Produce, Inc. Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.⁹ Petitioner has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Garden Fresh Produce, Inc.

Moreover, Petitioner had the appropriate business experience to be a corporate officer and director. At the time of the March 2005 hearing, Petitioner had over 25 years of experience in the produce business. Petitioner began working at Martindale Distributing Company, a business run by Petitioner's stepfather in Salinas, California. Petitioner started in Martindale Distributing Company as a produce inspector and later became a buyer. At one point, Petitioner was the president of Martindale Distributing Company. (Tr. I at 59-60, 82-84.) Petitioner

⁸See note 5.

⁹See note 6.

was also an officer, a director, and a stockholder of Bayside Produce, Inc. (Tr. I at 95, 102-03).

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.¹⁰ At the beginning of the year 2000, Petitioner, along with several others, founded Garden Fresh Produce, Inc. Petitioner invested \$20,000 in Garden Fresh Produce, Inc., and became a 20 percent shareholder, a director, and a vice president of the new company. Petitioner signed the original PACA license application and was given authority to sign checks. Petitioner remained a stockholder, a director, and a vice president until he submitted his resignation and reassigned his stock in April 2003. (RX 1 at 1-2, 5-6, 9, RX 3 at 9, 11, 13, RX 8 at 3, RX 12, RX 13; Tr. I at 61, 87-89.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc. Petitioner made decisions about which Garden Fresh Produce, Inc., debts to pay. Petitioner took calls for Garden Fresh Produce, Inc., and became aware in 2002 that produce sellers were complaining about Garden Fresh Produce, Inc.'s failures to pay for produce timely. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay. Even though Petitioner knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see financial statements or bank statements, relying on statements from Wayne Martindale that Garden Fresh Produce, Inc.'s finances were improving.

Before Petitioner resigned from Garden Fresh Produce, Inc., Petitioner signed documents accepting the resignation of two directors, David N. Wiles and Bruce Martindale (RX 1 at 11-13, RX 7). At all times material to this proceeding, all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. I at 139-41). At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and Petitioner, along with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5).

In short, I find Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc. Petitioner was a major stockholder of Garden Fresh Produce, Inc.; Petitioner had the appropriate business experience to be a corporate officer and director; and Petitioner

¹⁰*In re Edward S. Martindale*, 65 Agric. Dec. ____, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

1360 PERISHABLE AGRICULTURAL COMMODITIES ACT

participated in corporate decision-making.

Fourth, Petitioner contends the Chief ALJ erroneously concluded, because Petitioner owned 20 percent of the stock in Garden Fresh Produce, Inc., Petitioner had to make a particularly compelling case in order to establish that he was not responsibly connected (Petitioner's Appeal Pet. at 3, 24-27).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first alternative of the second prong of the responsibly-connected test, a petitioner, who is a holder of more than 10 percent of the outstanding stock of a company, must demonstrate by a preponderance of the evidence that he or she was only nominally a shareholder of the company. Petitioner bases his contention that the Chief ALJ held Petitioner to a higher standard of proof than preponderance of the evidence on the following statement: "[t]he fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof." (Initial Decision at 12-13.) I do not find that the Chief ALJ's reference to "a particular compelling case" indicates the Chief ALJ applied the incorrect standard of proof in this proceeding.

The Chief ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 7). Moreover, the Chief ALJ explicitly applies the standard of proof in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), stating: "[e]ven if [Petitioner] was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director, and vice president." (Initial Decision at 12.) The Chief ALJ does not apply an alternative standard of proof in this proceeding. Therefore, I reject Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that he was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Fifth, Petitioner contends the Chief ALJ erroneously failed to address Petitioner's argument that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief ALJ filed *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004) (Petitioner's Appeal Pet. at 3, 27-30).

I agree with Petitioner's contention that the Chief ALJ did not address Petitioner's argument that the bar on Petitioner's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on Petitioner's employment by PACA licensees would have become effective 35 days

after service of the Initial Decision on Petitioner had Petitioner not appealed the Chief ALJ's decision to the Judicial Officer (Initial Decision at 14). I find this effective date clearly establishes that the Chief ALJ rejected Petitioner's contention regarding the timing of the employment bar, and I find no purpose would be served by remanding this proceeding to the Chief ALJ to address Petitioner's timing issue.

Sixth, Petitioner contends the Chief ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner began August 25, 2004, the date the Chief ALJ filed *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004). Petitioner argues the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner's reading of the PACA, the bar on Petitioner's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., had not been issued. (Petitioner's Appeal Pet. at 3, 27-30.)

Petitioner's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a determination is made that the principals were responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

Zwick v. Freeman, 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert.*

1362 PERISHABLE AGRICULTURAL COMMODITIES ACT

denied, 389 U.S. 835 (1967). Petitioner's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner cites two cases, *Frank Tambone, Inc. v. United States Dep't of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of his argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

The Judicial Officer rendered his decision on February 2, 1994. By that time *Tambone, Inc.* already had been without a license for more than a year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective—why, in other words, the effective date cannot be made retroactive—is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. See *Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

Frank Tambone, Inc. v. United States Dep't of Agric., 50 F.3d 52, 56 n.† (D.C. Cir. 1995).

Tambone does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

Farley and Calfee, Inc. v. U.S. Dep't of Agric., 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had

violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Respondent's Cross Appeal

Respondent asserts the instant proceeding and *In re Edward S. Martindale*, __ Agric. Dec. ____ (July 26, 2006), were consolidated for hearing. Respondent contends the Chief ALJ erroneously held the March 1, 2005, hearing in the instant proceeding and the March 2, 2005, hearing in *Martindale* were severed and erroneously refused to consider evidence introduced during the March 2, 2005, segment of the consolidated hearing. (Respondent's Reply to Petitioner Buecke's Appeal to the Judicial Officer at 25-27.)

Section 1.137(b) of the Rules of Practice explicitly provides, where there is no pending proceeding alleging a licensee's violation of the PACA, but multiple petitions for review of determinations of responsible connection with that licensee have been filed, the petitions for review must be consolidated for hearing, as follows:

§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.

.....
(b) *Joinder*. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b).

The proceeding alleging Garden Fresh Produce, Inc., violated the

1364 PERISHABLE AGRICULTURAL COMMODITIES ACT

PACA, had been decided on August 25, 2004, and was not pending on March 1 and 2, 2005, when the Chief ALJ conducted the hearing in the instant proceeding and in *Martindale*. Two petitions for review of Respondent’s determinations of responsible connection with Garden Fresh Produce, Inc., had been filed, one by Petitioner, on June 2, 2004, the other by Edward S. Martindale on June 14, 2004. The Rules of Practice are binding on administrative law judges;¹¹ therefore, the Chief ALJ was required by section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) to consolidate for hearing Petitioner’s and Edward S. Martindale’s petitions for review of Respondent’s determinations that they were responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA.

Moreover, the Chief ALJ appears to have consolidated the instant proceeding and *Martindale*, as required by section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)). In a Notice of Hearing filed February 11, 2005, the Chief ALJ explicitly notifies the parties of single 3-day hearing to be conducted in the instant proceeding and in *Martindale* and a single transcript of that hearing, as follows:

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

In re:) PACA-APP Docket No. 04-0009
Donald R. Beucke,)
Petitioner)
and
Edward S. Martindale,) PACA-APP Docket No. 04-0010
Petitioner)

NOTICE OF HEARING

The hearing will be held as follows:

Date: _____ March 1-3, 2005

Time: 9 a.m., local time

Location: U.S. District Court
280 S 1st Street

¹¹*In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000), *aff’d per curiam*, 39 F. App’x 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 538 U.S. 979 (2003); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989).

1366 PERISHABLE AGRICULTURAL COMMODITIES ACT

proceeding. In order to prevail, Petitioner must prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and that he was only a nominal vice president, director, and 20 percent shareholder of Garden Fresh Produce, Inc. While I base my conclusion that Petitioner failed to prove that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA on evidence introduced during the March 2, 2005, segment of the hearing, I do not base my conclusion that Petitioner failed to prove that he was only a nominal vice president, director, and 20 percent shareholder of Garden Fresh Produce, Inc., on evidence introduced during the March 2, 2005, segment of the hearing.

Findings of Fact

1. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner invested \$20,000 in Garden Fresh Produce, Inc., and was the vice president of marketing, a director, and a 20 percent shareholder of Garden Fresh Produce, Inc. (RX 1 at 1-2, 5, 9, RX 3 at 9, 11, 13, RX 12 at 2; Tr. I at 60-61, 87-89.)

2. Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license and was authorized to sign checks on behalf of Garden Fresh Produce, Inc., although there is no evidence that he signed any checks other than in the period shortly after Garden Fresh Produce, Inc., was formed (RX 12, RX 13; Tr. I at 63, 87-89).

3. On October 8, 2002, Petitioner signed the board of directors' resolution accepting the resignation letter of director David N. Wiles (RX 7).

4. On March 18, 2003, Petitioner signed the board of directors' resolution accepting the resignation letter of director Bruce W. Martindale (RX 1 at 11-13).

5. Petitioner resigned from his positions as a director and vice president of Garden Fresh Produce, Inc., on April 4, 2003. Petitioner also assigned his stock in the company back to Garden Fresh Produce, Inc., on April 4, 2003. (RX 1 at 17-19, 21.)

6. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., failed to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25. *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

7. During the period January 14, 2002, through February 26, 2003, Petitioner was a director, a vice president, and 20 percent stockholder of Garden Fresh Produce, Inc. (RX 1 at 1-2, 5-6, 9, 17-20).

8. The record does not contain evidence that Petitioner was directly involved in any of the transactions described in Finding of Fact number 6.

9. At all times material to this proceeding, Petitioner had the same authority as all other principals in Garden Fresh Produce, Inc., including the authority to sign checks and pay payables (Tr. I at 139-41).

10. At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5).

11. Petitioner purchased produce for Garden Fresh Produce, Inc., and some of Petitioner's produce purchases occurred in 2002, when Garden Fresh Produce, Inc., was in violation of the prompt payment provision of the PACA (Tr. I at 20, 65; Tr. II at 16-18, 29-30).

12. Petitioner was involved in decision-making with respect to which of Garden Fresh Produce, Inc.'s debts to pay, and some of Petitioner's decision-making occurred in 2002, when Garden Fresh Produce, Inc., was in violation of the prompt payment provision of the PACA (Tr. II at 52, 55).

13. Petitioner notified the PACA Branch by letter dated April 28, 2003, that he was no longer connected with Garden Fresh Produce, Inc. In that letter, Petitioner requested that the United States Department of Agriculture remove his name from Garden Fresh Produce, Inc.'s PACA license. (RX 1 at 17.)

14. Petitioner has extensive experience in the produce industry. At the time of the March 2005 hearing, Petitioner had worked in the produce industry for over 25 years; Petitioner had held a number of positions, including president at Martindale Distributing Company; Petitioner had co-founded Garden Fresh Produce, Inc.; Petitioner was a stockholder, an officer, and a director of Bayside Produce, Inc.; and Petitioner was thoroughly knowledgeable in produce industry operations. (Tr. I at 59-60, 82-84, 95, 102-03.)

15. With respect to his employment at Martindale Distributing Company, Petitioner enjoys a good reputation in the produce business, including timely payment for produce.

16. Petitioner received approximately \$1,500 from Garden Fresh Produce, Inc., for his services in the first year of Garden Fresh Produce, Inc.'s operations (Tr. I at 65).

17. At all times material to this proceeding, Petitioner should have known that Garden Fresh Produce, Inc., was not making full payment promptly for produce. Beginning no later than December 2002,

1368 PERISHABLE AGRICULTURAL COMMODITIES ACT

Petitioner knew that Garden Fresh Produce, Inc., was not making full payment promptly for produce. A number of Garden Fresh Produce, Inc.'s produce sellers, who were not being paid promptly by Garden Fresh Produce, Inc., contacted Petitioner in order to obtain payment for produce. (Tr. I at 69-73.) Petitioner did not sufficiently exercise his authority as 20 percent shareholder, a vice president, and a director to prevent or correct the violations committed by Garden Fresh Produce, Inc.

Conclusions of Law

1. Petitioner was a 20 percent shareholder, a director, and a vice president of Garden Fresh Produce, Inc., from its inception in April 2000, until he resigned from Garden Fresh Produce, Inc., in April 2003.

2. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25. *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

3. Petitioner failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period January 14, 2002, through February 26, 2003.

4. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

JUDITH'S FINE FOODS INTERNATIONAL., INC. 1369
65 Agric. Dec. 1369

I affirm Respondent's April 28, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹³ The date of entry of the Order in this Decision and Order is September 28, 2006.

**In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.
PACA DOCKET NO. D-06-0012.
Decision and Order.
Filed October 25, 2006.**

PACA – Admissions, failure to deny – Prompt payment, failure to make – No pay.

Jonathan Gordy for Complainant.
John Lohner for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport

**DECISION WITHOUT HEARING
BY REASON OF ADMISSIONS**

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a-§ 499f) ("PACA"), instituted by a complaint filed on May 2, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs,

¹³28 U.S.C. § 2344.

1370 PERISHABLE AGRICULTURAL COMMODITIES ACT

Agricultural Marketing Service, United States Department of Agriculture (“Complainant”) alleging that Respondent Judith’s Fine Foods International, Inc. (“Respondent”) has willfully violated the PACA.

The Complaint alleged that Respondent willfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of January 2005 through August 2005, by failing to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (“Rules of Practice”). *See* 7 C.F.R. § 1.139.

A copy of the Complaint was sent to Respondent’s business mailing address by certified mail on May 2, 2006, and Respondent received it on June 3, 2006. On July 10, 2006, Respondent filed, through its Vice President John M. Lohner, a “Response to Complaint” (“Answer”). The Answer generally denied the allegations of the Complaint pertaining to its failure to make full payment promptly.¹ (Answer at 1.) On October 10, 2005, Respondent had filed a Voluntary Petition under Chapter 7, in the U.S. Bankruptcy Court of Puerto Rico 05-10629-SEK7. Complainant has now filed a “Motion for a Decision without Hearing Based on Admissions.” Complainant’s motion will be granted and the following decision is issued in the disciplinary case against Respondent without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

Respondent has failed to deny or otherwise respond to the jurisdictional allegations in the complaint, including an allegation that it was operating subject to a PACA license at the time of the alleged violations. Complainant is not required to summon witnesses to a hearing for the purpose of proving that Respondent was licensed under the Act during the relevant period simply because Respondent has declined to answer these allegations. Pursuant to the Rules of Practice, if an answer fails to deny or otherwise respond to specific complaint allegations, they are deemed admitted. *See* 7 C.F.R. § 1.136(c).

In Respondent’s bankruptcy proceeding in the District of Puerto Rico Bankruptcy Court, case no. 05-10629-SEK7, Respondent admitted that

¹As the Respondent’s *pro se* Answer failed to allege that it would make full payment within 120 days of June 3, 2006, it must be considered a “no pay” case. Moreover, there is no indication that any payment has been made which might have converted the case to a “slow pay” as opposed to a “no pay” case.

it owed \$338,942.07 to the eight sellers of produce listed in the Complaint. Amended schedules: E and F, *In re: Judith's Fine Food International, Inc.*, Case No. 05-10629-SEK7 (January 16, 2006) (ECF Docket No. 16). Bankruptcy documents are judicially noticed in proceedings before the Secretary. *See, e.g., In re: Five Star Food Distributors*, 56 Agric. Dec. 880, 893 (1997).

The Department's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

In re Furr's Supermarkets Inc., 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)). In this instance, Respondent has made an admission in a Bankruptcy proceeding that it has failed to pay \$338,942.07 to the same produce creditors named in the Complaint. Respondent has failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA, and it has not asserted that it will achieve full compliance with the PACA by making full payment within 120 days of the service of the complaint. This is a "no-pay" case.

The only appropriate sanction in a "no-pay" case is license revocation, or where there is no longer any license to revoke, as is the case here, where Respondent's license has terminated, the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violation of the PACA and publication of the facts and circumstances of the violations. *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. at 386-87. A civil penalty is not appropriate in this case because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA," and it would not be consistent with the Congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid. *See In re Scamcorp, Inc.*, 57 Agric. Dec. at 570-71. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See* 7 C.F.R. § 1.139.²

Findings of Fact

² A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R. § 1.141(b); *Veg. Mix, Inc. v. U. S. Dep't of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987).

1372 PERISHABLE AGRICULTURAL COMMODITIES ACT

1. Judith's Fine Foods International, Inc. ("Respondent") is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. Its physical business address was Urb Ind El Commandante, San Marcos Avenue, Carolina, Puerto Rico 00087. Its mailing address was P.O. Box 13301, Santurce, Puerto Rico 00908.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19961052 was issued to the Respondent on March 5, 1996. On September 5, 2006, the license was terminated for failure to pay the annual renewal fee.
3. During the period of January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,942.07 for 115 lots of perishable agricultural commodities, which it purchased, received and accepted in the course of interstate and foreign commerce.

Conclusions of Law

Respondent's failure to make full payment promptly with respect to the 115 transactions set forth in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary 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 and 1.145).

Copies of this Decision shall be served upon the parties.

In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
In re: KEITH K. KEYESKI.
PACA-APP Docket No. 04-0020.
Decision and Order.
Filed November 8, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer, director, and shareholder – Alter ego – Opportunity to achieve compliance – Joinder of responsibly connected and disciplinary proceedings – Service of default decision –

DONALD R. BEUCKE
KEITH K. KEYESKI
65 Agric. Dec. 1372

1373

Due process clause of 14th Amendment inapplicable – Timing of employment bar – Statement of witness called by respondent not covered by rules of practice.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding Donald R. Beucke and Keith K. Keyeski (Petitioners) were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. The Judicial Officer found Bayside Produce, Inc., violated the PACA during the period November 23, 2002, through February 7, 2003. During the violation period, Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., and Petitioner Keyeski was a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc. The Judicial Officer stated the burden was on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite his being the vice president, the secretary, a director, and a major shareholder of Bayside Produce, Inc., and on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite his being a major shareholder of Bayside Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioners failed to prove by a preponderance of the evidence that they met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioners' contentions that the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent), violated the Rules of Practice and the due process clause of the Fourteenth Amendment of the Constitution of the United States. Further, the Judicial Officer rejected Petitioners' contention that the bar on their employment by PACA licensees should have commenced on the day that Bayside Produce, Inc., was found to have violated the PACA. Finally, the Judicial Officer rejected Petitioner Beucke's contention that the ALJ erroneously failed to order Respondent to produce prior written and recorded statements of Respondent's witness.

Charles L. Kendall for Respondent.

Effie F. Anastassiou and Paul Hart, Pismo Beach and Salinas, CA, for Petitioner Donald R. Beucke.

Paul W. Moncrief, Salinas, CA, for Petitioner Keith K. Keyeski.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

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

PROCEDURAL HISTORY

On August 13, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a

1374 PERISHABLE AGRICULTURAL COMMODITIES ACT

determination that Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On August 17, 2004, Respondent issued a determination that Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the PACA² and when Bayside Produce, Inc., failed to pay three reparation awards issued against it.³

On August 25, 2004, Petitioner Beucke instituted PACA-APP Docket No. 04-0014 by filing “Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status” pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent’s August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc. On September 13, 2004, Petitioner Keyeski instituted PACA-APP Docket No. 04-0020 by filing “Petition for Review” pursuant to the PACA and the Rules of Practice seeking reversal of Respondent’s August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc.

On October 12 and 13, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anastassiou & Associates, Pismo Beach and Salinas, California, represented Petitioner Beucke. Paul W. Moncrief, Lombardo & Gilles, P.C., Salinas, California, represented Petitioner Keyeski. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

¹During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., purchased, received, and accepted in interstate commerce, from 22 produce sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$163,102.70, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

²See note 1.

³One reparation order issued against Bayside Produce, Inc., became effective August 26, 2003, the other two reparation orders issued against Bayside Produce, Inc., became final September 2, 2003.

On December 20, 2005, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA (Initial Decision at 2, 12).

On January 23, 2006, Petitioner Beucke and Petitioner Keyeski appealed to the Judicial Officer. On February 15, 2006, Respondent filed a response to Petitioner Beucke's appeal petition and Petitioner Keyeski's appeal petition. On April 7, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's conclusion that Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. References to the transcript are designated "Tr." References to Petitioner Beucke's exhibits are designated "CX." References to Petitioner Keyeski's exhibits are designated "KK." References to Respondent's exhibits are designated "RX" and "EX."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

1376 PERISHABLE AGRICULTURAL COMMODITIES ACT

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

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

(b) Refusal of license; grounds

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

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

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

. . . .

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

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond

1378 PERISHABLE AGRICULTURAL COMMODITIES ACT

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

....

§ 499h. Grounds for suspension or revocation of license

(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.

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

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

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

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

1380 PERISHABLE AGRICULTURAL COMMODITIES ACT

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

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Preliminary Statement

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of \$163,102.70.⁴ Thus, an individual who was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.⁵ Petitioner Beucke was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce,

⁴*In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

⁵7 U.S.C. § 499a(b)(9).

Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski was a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite being a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner Beucke failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Beucke also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Keyeski also failed to carry his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Moreover, as Petitioner Beucke and Petitioner Keyeski were owners of Bayside Produce, Inc., the defense that they were not owners of Bayside Produce, Inc., which was the alter ego of its owners, is not available to Petitioner Beucke or Petitioner Keyeski.⁶ As Petitioner Beucke and

⁶*In re Donald R. Beucke*, 65 Agric. Dec. ___, slip op. at 13-14 (Sept. 28, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439(2006), *aff'd per curiam*, 2006 WL 2351839 (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, (continued...)

1382 PERISHABLE AGRICULTURAL COMMODITIES ACT

Petitioner Keyeski have failed to carry their burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke and Petitioner Keyeski are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Facts

During the period when Bayside Produce, Inc., was violating the PACA, Petitioner Beucke was the vice president, the secretary, and a director of Bayside Produce, Inc. (RX 1). Petitioner Keyeski had been a vice president and a director of Bayside Produce, Inc., but resigned those positions prior to November 23, 2002 (EX 1 at 3; KK 5). Petitioner Keyeski did however continue to manage the San Diego, California, office of Bayside Produce, Inc., until December 13, 2002. Petitioner Beucke and Petitioner Keyeski each held 33-1/3 percent of the outstanding shares of Bayside Produce, Inc. (RX 1; EX 1 at 3; KK 1).

Petitioner Beucke and Petitioner Keyeski argue they were not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, asserting the financial aspects of the business were handled exclusively by Wayne Martindale, the president of Bayside Produce, Inc., and owner of the 33-1/3 percent of the shares of the corporation not owned by Petitioner Beucke and Petitioner Keyeski. The testimony of numerous witnesses called by Petitioner Beucke and Petitioner Keyeski supports their position only to the extent that it establishes Wayne Martindale was the individual that those that did business with Bayside Produce, Inc., regarded as responsible for payment of invoices.

Petitioner Beucke and Petitioner Keyeski have significant experience and lengthy involvement with the produce industry. Petitioner Beucke has approximately 26 years of experience in the produce industry, starting initially as a field inspector and later progressing to the positions of buyer and broker (Tr. 213-14). Petitioner Beucke has served as the president of Martindale Distributing Company, a produce business

⁶(...continued)

63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

founded by his late stepfather, Dale Martindale (Tr. 218, 312), and as vice president of another produce company, Garden Fresh Produce, Inc. In addition to his ownership interest in Bayside Produce, Inc.,⁷ Petitioner Beucke owned 33-1/3 percent of the outstanding stock of Martindale Distributing Company and 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 312-14; RX 1).

Petitioner Beucke acknowledged that he was authorized to sign and did sign Bayside Produce, Inc., checks (Tr. 234-35),⁸ but testified he only signed checks when directed to do so by Wayne Martindale or Edward Shane Martindale, both of whom are his stepbrothers, or Kathy Walker, the executive coordinator of Bayside Produce, Inc. (Tr. 235-40). Petitioner Beucke testified his involvement with Bayside Produce, Inc., was limited to purchases and sales for one account, Produce People, and that he last took an order from Produce People in February 2003 (Tr. 243-47). Petitioner Beucke resigned as vice president and director of, and from any position of employment with, Bayside Produce, Inc., by letter dated April 11, 2003, and executed a document entitled "Resignation and Acknowledgment of Stock Redemption" dated October 23, 2003, which surrendered his shares in Bayside Produce, Inc., effective April 4, 2003 (CX 6, CX 7).

Petitioner Keyeski started his career in the produce business in 1985 or 1986 working in the warehouse and later working in sales. Petitioner Keyeski had become acquainted with Wayne Martindale and Petitioner Beucke through his industry contacts and sometime around August of 1997 started working for them out of his home and later opening an office for Bayside Produce, Inc., in San Diego, California. Petitioner Keyeski testified that he joined Bayside Produce, Inc., in an arrangement that was "[b]asically a three-way partnership" with "equal duties, equal opportunity, equal money, equal everything." (Tr. 358-62, 393.) Except for writing checks for produce and other major expenses, Petitioner Keyeski ran Bayside Produce, Inc.'s day-to-day operation in the San

⁷Petitioner Beucke testified that he initially owned 50 percent of the outstanding stock of Bayside Produce, Inc., before he and Wayne Martindale each sold enough shares to Petitioner Keyeski to enable Petitioner Keyeski to acquire a one-third interest in Bayside Produce, Inc. (Tr. 312-14).

⁸CX 39 contains 20 checks written by Petitioner Beucke during the period November 23, 2002, through February 7, 2003, on Bayside Produce, Inc.'s Community Bank of Central California account, including two payable to himself (Tr. 239-40).

1384 PERISHABLE AGRICULTURAL COMMODITIES ACT

Diego, California, office.⁹ Once Petitioner Keyeski managed to accumulate a necessary \$7,000 investment, he became a shareholder, a director, and an officer of Bayside Produce, Inc., in February 2000; however, Petitioner Keyeski testified nothing really changed after he became a shareholder, director, and officer of the corporation (Tr. 361-68; RX 4). The San Diego, California, operation grew significantly and by 2002 the San Diego operation generated the bulk of Bayside Produce, Inc.'s sales (Tr. 376).¹⁰ In October 2002, by then convinced that Wayne Martindale was not "pulling his weight" and unhappy with the monetary return from his own efforts, Petitioner Keyeski contacted William Trask, an attorney, for advice (Tr. 374). Mr. Trask drafted a letter for Petitioner Keyeski to Wayne Martindale and Petitioner Beucke dated October 18, 2002, which confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002,¹¹ he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski's October 18, 2002, letter also proposed that Petitioner Beucke, Wayne Martindale, and Petitioner Keyeski continue to contribute to the business as usual and suggested three alternatives, one of which was Petitioner Keyeski's offer to purchase Bayside Produce, Inc. (Tr. 374-75; KK 5). Petitioner Keyeski did not receive a written response to his October 18, 2002, letter, but sometime in November 2002 Wayne Martindale advised that he had conferred with Petitioner Beucke and that they wanted to retain Bayside Produce, Inc. (Tr. 375-78). Thereafter, Petitioner Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Wayne Martindale (Tr. 377-78). As he had suggested in his October 18, 2002, letter, Petitioner Keyeski continued to run Bayside Produce, Inc.'s San Diego, California, office and processed orders as usual until December 13, 2002 (Tr. 385). On December 15, 2002, Petitioner Keyeski obtained his own PACA license and commenced operation from Bayside Produce, Inc.'s former San Diego, California, location as New Horizon Distributing, Inc. (Tr. 380-81). Still anticipating some return from his investment, as he thought Bayside

⁹Bayside Produce, Inc., did have an account at Bank of America on which Petitioner Keyeski was able to write checks; however, only a minimal balance was maintained in the account which was used only for payroll, rent, and incidental expenses (Tr. 362-63).

¹⁰According to Petitioner Keyeski, Petitioner Beucke generated income for Bayside Produce, Inc., but Wayne Martindale did not (Tr. 371-72).

¹¹Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002 (KK5).

Produce, Inc., was financially sound, Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 2003 (KK 1, KK 2).¹²

The evidence introduced through multiple witnesses called by Petitioner Beucke and Petitioner Keyeski demonstrates that the produce sellers that dealt with Bayside Produce, Inc., lodged the blame for Bayside Produce, Inc.'s payment problems on Wayne Martindale's misconduct and not on either Petitioner Beucke or Petitioner Keyeski. Those witnesses professed to remain willing to do business with both Petitioner Beucke and Petitioner Keyeski. Both Petitioner Beucke and Petitioner Keyeski are regarded as honorable and have contributed significant amounts of money to attempt to correct Bayside Produce, Inc.'s failures to pay for produce in accordance with the PACA. There is no evidence that either Petitioner Beucke or Petitioner Keyeski personally engaged in any affirmative action designed to leave produce suppliers unpaid. Neither Petitioner Beucke nor Petitioner Keyeski however acted upon the reports to them that invoices were not being paid in a timely manner.¹³ The failure to exercise their oversight obligations owed by them to Bayside Produce, Inc., as shareholders, if not as officers and directors, does not establish that Petitioner Beucke's and Petitioner Keyeski's roles were nominal.

Discussion

I. Petitioner Beucke and Petitioner Keyeski Were Actively Involved in Activities Resulting in Bayside Produce, Inc.'s PACA Violations

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

¹²Petitioner Keyeski's letter of March 11, 2003, requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside Produce, Inc., "other than as a shareholder" after December 14, 2002 (KK 1).

¹³Petitioner Keyeski denied hearing any reports of nonpayment until the second or third week of January 2003, which was after he had resigned as vice president and director of Bayside Produce, Inc. (Tr. 385). Petitioner Keyeski however remained a shareholder until March 2003, noting in his letter dated March 11, 2003, that "as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1).

1386 PERISHABLE AGRICULTURAL COMMODITIES ACT

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke was authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 and, during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed 20 checks on that account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow money from Community Bank of Central California for a loan dated January 31, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44). In addition, during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing

payroll and paying rent and other incidental expenses.

Petitioner Beucke's and Petitioner Keyeski's purchases of produce for which Bayside Produce, Inc., failed to pay produce sellers in accordance with the PACA constitutes active involvement in activities resulting in Bayside Produce, Inc.'s violations of the PACA. Moreover, by payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1489.

II. Petitioner Beucke Was Not Merely a Nominal Officer, Director, and Shareholder of Bayside Produce, Inc.; Petitioner Keyeski Was Not Merely a Nominal Shareholder of Bayside Produce, Inc.

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33-1/3 percent shareholder, director, secretary, and vice president of Bayside Produce, Inc. Similarly, Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33-1/3 percent shareholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.¹⁴ The record establishes Petitioner Beucke and Petitioner Keyeski each had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

Petitioner Beucke was a co-founder of Bayside Produce, Inc., who invested \$7,000 as part of the initial capitalization of Bayside Produce,

¹⁴*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

1388 PERISHABLE AGRICULTURAL COMMODITIES ACT

Inc. (RX 1-RX 3). Petitioner Beucke's relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Beucke is an experienced, savvy individual who has worked in the produce business for approximately 26 years, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33-1/3 percent owner does not serve in a nominal capacity.¹⁵

There is no evidence that Petitioner Beucke was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, the secretary, and a co-owner in an attempt to establish a profitable business. Petitioner Beucke presumably would have shared in Bayside Produce, Inc.'s profits when there were some. Petitioner Beucke participated in a number of corporate matters, including the initial board of directors' meeting on September 15, 1997 (RX 2), the board of directors' meeting on February 22, 2000 (RX 4), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Bank of America account number 01719-21437 (RX 23), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 (RX 24 at 17), signing Bayside Produce, Inc.'s resolution to borrow from Community Bank of Central California (RX 24 at 18-25),

¹⁵*Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

purchasing produce on behalf of Bayside Produce, Inc. (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35), and deciding which Bayside Produce, Inc., debts to pay (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). The record indicates Petitioner Beucke failed to exercise authority consistent with his positions as 33-1/3 percent owner, a director, the secretary, and a vice president to counteract or obviate the fault of others. That Petitioner Beucke chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

In approximately August 1997, Petitioner Keyeski entered into an arrangement with Wayne Martindale and Petitioner Beucke with respect to Bayside Produce, Inc., that was “[b]asically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything.” (Tr. 358-59.) In February 2000, after Petitioner Keyeski invested \$7,000 in Bayside Produce, Inc., Petitioner Keyeski attended a Bayside Produce, Inc., board of directors’ meeting in which he became a vice president, a director, and holder of 33-1/3 percent of the outstanding shares of Bayside Produce, Inc. (RX 4; EX 6). Petitioner Keyeski’s relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Keyeski is an experienced, savvy individual who has worked in the produce business since 1985 or 1986, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress’ utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33-1/3 percent owner does not serve in a nominal capacity.¹⁶

There is no evidence that Petitioner Keyeski was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a co-owner in an attempt to establish a profitable business. Petitioner Keyeski presumably would have shared in Bayside Produce, Inc.’s profits when there were some. Petitioner Keyeski participated in a number of corporate matters,

¹⁶See note 15.

1390 PERISHABLE AGRICULTURAL COMMODITIES ACT

including the board of directors' meeting on February 22, 2000 (RX 4), controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). The record establishes Petitioner Keyeski resigned as director and officer of Bayside Produce, Inc., prior to Bayside Produce, Inc.'s violations of the PACA. However, Petitioner Keyeski retained his ownership of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., until March 2003 because of what Petitioner Keyeski believed to be its economic value (KK 1; Tr. 190-91). Moreover, Petitioner Keyeski continued his role as general manager of Bayside Produce, Inc.'s San Diego, California, office until December 13, 2002 (Tr. 364-65, 397). The record indicates Petitioner Keyeski failed to exercise authority consistent with his position as 33-1/3 percent owner to counteract or obviate the fault of others. That Petitioner Keyeski chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

Petitioner Beucke's and Petitioner Keyeski's Appeal Petitions

Petitioner Beucke and Petitioner Keyeski raise 12 issues in "Petitioner Beucke's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner Beucke's Appeal Petition] and "Petitioner Keyeski's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner Keyeski's Appeal Petition].

First, Petitioner Beucke and Petitioner Keyeski state the ALJ used an incorrect legal standard as the basis for his determination that they were responsibly connected with Bayside Produce, Inc. Specifically, Petitioner Beucke and Petitioner Keyeski assert the ALJ based his conclusion that they were responsibly connected with Bayside Produce, Inc., on the findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., was committing violations of the PACA. (Petitioner Beucke's Appeal Pet. at 4, 14-15; Petitioner Keyeski's Appeal Pet. at 2, 4-5.)

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first prong of the responsibly-connected test, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Petitioner Beucke and Petitioner Keyeski base their contention that the

ALJ erroneously used an incorrect legal standard on the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11). I do not find the ALJ's findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA indicates the ALJ applied an incorrect legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

The ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 3). Moreover, the ALJ, citing *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1487-88 (1998), states the first prong of the two-prong test requires a petitioner to demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA (Initial Decision at 3-4). Finally, the ALJ cites case law relevant to the proper statutory standard. After reading the entire Initial Decision, I find the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11) are merely the ALJ's shorthand manner of stating Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA and the ALJ applied the proper legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

Second, Petitioner Beucke and Petitioner Keyeski contend the facts established in the record do not support the ALJ's conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke and Petitioner Keyeski assert the record supports the ALJ's finding that there is no evidence Petitioner Beucke or Petitioner Keyeski engaged in any affirmative action designed to leave suppliers unpaid. (Petitioner Beucke's Appeal Pet. at 4, 15-19; Petitioner Keyeski's Appeal Pet. at 2, 6-8.)

I agree with the ALJ's finding that the record does not contain evidence that Petitioner Beucke or Petitioner Keyeski engaged in activities designed to leave Bayside Produce, Inc.'s produce suppliers

1392 PERISHABLE AGRICULTURAL COMMODITIES ACT

unpaid. However, evidence that a petitioner has not engaged in activities designed to leave produce suppliers unpaid is not sufficient to prove by a preponderance of the evidence that the petitioner was not actively involved in activities resulting in a violation of the prompt payment provision of the PACA. The record establishes that Petitioner Beucke and Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68, 248-52, 300-05, 323-24; CX 16, CX 21, CX 23, CX 26, CX 28, CX 32, CX 33, CX 35, CX 41, CX 44). Purchasing produce when there are insufficient funds to pay for that produce leads to a violation of the prompt payment provision of the PACA,¹⁷ even if the person purchasing the produce fully intends to make full payment promptly in accordance with the PACA. The record also establishes that during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed checks on Bayside Produce Inc.'s Community Bank of Central California account (Tr. 239-40; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619), and during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing payroll and paying rent and other incidentals. By the payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay; thus, Petitioner Beucke and Petitioner Keyeski were actively involved in activities resulting in Bayside Produce, Inc.'s violations of the prompt payment provision of the PACA.¹⁸

Petitioner Beucke also argues that his circumstance is similar to that of the petitioner in *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner Beucke's active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

¹⁷*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488 (1998).

¹⁸*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998).

Third, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously concluded they were responsibly connected with Bayside Produce, Inc., based on the theory that Petitioner Beucke and Petitioner Keyeski failed to constrain Wayne Martindale's misconduct and that such failure resulted in Bayside Produce, Inc.'s PACA violations (Petitioner's Beucke's Appeal Pet. at 4, 19-22; Petitioner Keyeski's Appeal Pet. at 8-9).

The ALJ states Petitioner Beucke's and Petitioner Keyeski's "failure . . . to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid." (Initial Decision at 7.) Based on that statement, I infer the ALJ concluded Petitioner Beucke's and Petitioner Keyeski's failure to constrain Wayne Martindale's misconduct constitutes active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. I disagree with the ALJ. Generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission.¹⁹ While I disagree with the ALJ's assertion that Petitioner Beucke's and Petitioner Keyeski's acts of omission support the conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner Beucke's and Petitioner Keyeski's acts of omission do not constitute active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

Fourth, Petitioner Beucke contends the ALJ erroneously concluded Petitioner Beucke was not a nominal officer, director, and shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated the PACA (Petitioner Beucke's Appeal Pet. at 4, 23-26).

I agree with the ALJ's conclusion that Petitioner Beucke failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual,

¹⁹See generally *In re Donald R. Beucke*, 65 Agric. Dec. ___, slip op. at 22-23 (Sept. 28, 2006) (discussing the Judicial Officer's disagreement with the Chief Administrative Law Judge's assertion that the petitioner's acts of omission support the conclusion that the petitioner was actively involved in the activities resulting in violations of the PACA).

1394 PERISHABLE AGRICULTURAL COMMODITIES ACT

significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.²⁰ The record establishes Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

During the period when Bayside Produce, Inc., violated the PACA, Petitioner Beucke owned 33-1/3 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Beucke's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.²¹ Petitioner Beucke has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc.

Moreover, Petitioner Beucke had the appropriate business experience to be a corporate officer and director. At the time of the October 2005 hearing, Petitioner Beucke had approximately 26 years of experience in the produce industry. Petitioner Beucke began working at Martindale Distributing Company. Petitioner Beucke started in Martindale Distributing Company as a field inspector and later progressing to the positions of buyer and broker. At one point, Petitioner Beucke was the president of Martindale Distributing Company and held 33-1/3 percent of the outstanding shares of Martindale Distributing Company. Petitioner Beucke was also the vice president and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 213-14, 218, 312-14.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.²² In 1997, Petitioner Beucke, along with Wayne Martindale, founded Bayside Produce, Inc. Petitioner invested \$7,000 in Bayside Produce, Inc., and became a 50 percent shareholder, a director, the vice president, and the secretary of the new company. Petitioner Beucke remained a stockholder, a director, a vice

²⁰See note 14.

²¹See note 15.

²²*In re Donald R. Beucke*, 65 Agric. Dec. ____, slip op. at 25 (Sept. 28, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. ____, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

president, and the secretary until he submitted his resignation and reassigned his stock in April 2003. (RX 1-RX 6; Tr. 222, 313-14.)

Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the prompt payment provision of the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23). Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on the account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Beucke made decisions about which Bayside Produce, Inc., debts to pay. Petitioner Beucke became aware in December 2002 that Bayside Produce, Inc., was not making full payment promptly for produce (Tr. 72, 268-70). Even though Petitioner Beucke knew Bayside Produce, Inc., was failing to pay for produce in accordance with the prompt payment provision of the PACA, Petitioner Beucke continued purchasing produce and issuing checks on Bayside Produce, Inc.'s Community Bank of Central California account.

In short, I find Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc. Petitioner Beucke was a major stockholder of Bayside Produce, Inc.; Petitioner Beucke had the appropriate business experience to be a corporate officer and director; and Petitioner Beucke participated in corporate decision-making.

Fifth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner

1396 PERISHABLE AGRICULTURAL COMMODITIES ACT

Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke and Petitioner Keyeski that the ALJ did not address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. However, I find, based upon the ALJ's disposition of the proceeding, the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Sixth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the Rules of Practice. Petitioner Beucke and Petitioner Keyeski contend Respondent failed, prior to instituting the formal disciplinary complaint against Bayside Produce, Inc., on April 26, 2004, to provide Petitioner Beucke and Petitioner Keyeski with written notice of the facts involved and to provide Petitioner Beucke and Petitioner Keyeski an opportunity to correct Bayside Produce, Inc.'s PACA violations, as required by section 1.133 of the Rules of Practice (7 C.F.R. § 1.133). (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Section 1.133(b)(3) of the Rules of Practice provides that the administrator²³ attempt to effect settlement of proceedings, as follows:

§ 1.133 Institution of proceedings.

....
(b) *Filing of complaint or petition for review.* . . .

....
(3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding

²³The term *administrator* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the administrator of the agency administering the statute involved or any officer or employee of the agency to whom authority has been delegated, or may be delegated, to act for the administrator. The statute involved in the administrative disciplinary proceeding instituted against Bayside Produce, Inc., is the PACA, and the administrator of the agency administering the PACA is the Administrator, Agricultural Marketing Service, United States Department of Agriculture.

which may result in the withdrawal, suspension, or revocation of a “license” as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3).

As an initial matter, Respondent is not the Administrator, Agricultural Marketing Service, United States Department of Agriculture, and Respondent is not the United States Department of Agriculture employee who was delegated authority to institute the disciplinary proceeding against Bayside Produce, Inc.²⁴ Therefore, even if I were to find Petitioner Beucke and Petitioner Keyeski were entitled to written notice of the facts regarding the disciplinary proceeding instituted against Bayside Produce, Inc., and an opportunity to demonstrate or achieve Bayside Produce, Inc.’s compliance with the PACA, I would not find Respondent responsible for providing Petitioner Beucke and Petitioner Keyeski with the notice and opportunity to demonstrate or achieve compliance, as Petitioner Beucke and Petitioner Keyeski assert.

Further, I find section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) inapplicable to the disciplinary proceeding instituted against Bayside Produce, Inc. The requirement in section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) that the administrator attempt to effect a settlement is not applicable to cases involving willfulness. The Chief Administrative Law Judge explicitly concluded that Bayside Produce, Inc., willfully violated the prompt payment

²⁴The Chief Administrative Law Judge states *In re Bayside Produce, Inc.*, was instituted by a complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1030 (2004).

1398 PERISHABLE AGRICULTURAL COMMODITIES ACT

provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)).²⁵ Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent failed to comply with section 1.133 of the Rules of Practice (7 C.F.R. § 1.133).

Petitioner Beucke and Petitioner Keyeski also contend Respondent failed to join the instant responsibly connected proceeding with the disciplinary proceeding instituted against Bayside Produce, Inc., as required by section 1.137 of the Rules of Practice (7 C.F.R. § 1.137) (Petitioner Beucke's Appeal Pet. at 31; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.137(b) of the Rules of Practice requires the administrative law judge to consolidate for hearing any proceeding alleging a PACA licensee's violation of the PACA, with any petitions for review of determinations of responsible connection with that PACA licensee, as follows:

§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.

....
(b) *Joinder*. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b).

As an initial matter, Respondent was not the judge²⁶ in the disciplinary proceeding instituted against Bayside Produce, Inc.

²⁵*In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1031 (2004).

²⁶The term *judge* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as any administrative law judge appointed pursuant to 5 U.S.C. § 3105 and assigned to the proceeding involved.

Therefore, even if I were to find the disciplinary proceeding instituted against Bayside Produce, Inc., and the instant proceeding were required to be consolidated for hearing, I would not find Respondent had any duty to consolidate the proceedings, as Petitioner Beucke and Petitioner Keyeski assert.

The Chief Administrative Law Judge issued a decision without hearing by reason of default in the disciplinary proceeding instituted against Bayside Produce, Inc., for violations of the payment provision of the PACA on August 25, 2004, and the decision became final on September 29, 2004.²⁷ Since the Chief Administrative Law Judge never conducted a hearing in the disciplinary proceeding instituted against Bayside Produce, Inc., I reject Petitioner Beucke's and Petitioner Keyeski's contention that *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004), was required to be consolidated for hearing with the instant proceeding.

Further, Petitioner Beucke and Petitioner Keyeski contend Respondent failed to serve the proposed default decision in *In re Bayside Produce, Inc.*, on Petitioner Beucke and Petitioner Keyeski, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Petitioner Beucke's Appeal Pet. at 31-32; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.139 of the Rules of Practice requires that the Hearing Clerk serve the respondent with any proposed default decision, as follows:

§ 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.

7 C.F.R. § 1.139.

²⁷*In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1031-32 (2004).

1400 PERISHABLE AGRICULTURAL COMMODITIES ACT

Respondent was not the Hearing Clerk²⁸ and Petitioner Beucke and Petitioner Keyeski were not the respondents²⁹ in the disciplinary proceeding instituted against Bayside Produce, Inc. Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent was required to serve Petitioner Beucke and Petitioner Keyeski with the proposed default decision filed in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

Seventh, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;³⁰ it is not a state. Therefore, as a matter of law, Respondent could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Petitioner Beucke and Petitioner Keyeski contend.³¹

Eighth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertion that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004) (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke's and Petitioner Keyeski's contention that the ALJ did not address their assertion that the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees would have become effective as to

²⁸The term *Hearing Clerk* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

²⁹The term *respondent* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the party proceeded against. The party proceeded against in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004), was Bayside Produce, Inc.

³⁰See 5 U.S.C. §§ 101, 551(1).

³¹*In re Glenn Mealman*, 64 Agric. Dec. 1987, 1990 (2005) (Order Denying Pet. to Reconsider); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 303-04 (2005).

Petitioner Beucke 35 days after service of the Initial Decision on Petitioner Beucke and as to Petitioner Keyeski 35 days after service of the Initial Decision on Petitioner Keyeski had Petitioner Beucke and Petitioner Keyeski not appealed the ALJ's decision to the Judicial Officer (Initial Decision at 12). I find this effective date clearly establishes that the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's contention regarding the timing of the employment bar, and I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's timing issue.

Ninth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner Beucke and Petitioner Keyeski began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004). Petitioner Beucke and Petitioner Keyeski argue the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner Beucke's and Petitioner Keyeski's reading of the PACA, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., had not been issued. (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Petitioner Beucke's and Petitioner Keyeski's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner Beucke's and Petitioner Keyeski's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a determination is made that the principals were responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose

1402 PERISHABLE AGRICULTURAL COMMODITIES ACT

licenses had been revoked and who, by the subterfuge of acting as an “employee” of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

Zwick v. Freeman, 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert. denied*, 389 U.S. 835 (1967). Petitioner Beucke’s and Petitioner Keyeski’s reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner Beucke and Petitioner Keyeski cite two cases, *Frank Tambone, Inc. v. U.S. Dep’t of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc. v. U.S. Dep’t of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of their argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

The Judicial Officer rendered his decision on February 2, 1994. By that time *Tambone, Inc.* already had been without a license for more than a year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective—why, in other words, the effective date cannot be made retroactive—is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. See *Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

Frank Tambone, Inc. v. U.S. Dep’t of Agric., 50 F.3d 52, 56 n.† (D.C. Cir. 1995).

Tambone does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the

proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

Farley and Calfee, Inc. v. U.S. Dep't of Agric., 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Tenth, Petitioner Beucke contends the ALJ failed to order Respondent to produce prior written and recorded statements of Respondent's witness, as required by the Rules of Practice (Petitioner Beucke's Appeal Pet. at 5, 36-45).

Section 1.141(h)(1)(iii) of the Rules of Practice provides that a party may request and obtain the production of any statement, or part of a statement, of a witness called by the complainant and in the possession of the complainant, as follows:

§ 1.141 Procedure for hearing.

...
(h) *Evidence*—(1) *In general*. . . .

...
(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii). Petitioner Beucke seeks an investigation report written by Everet Gonzales and in the possession of Charles L. Kendall (Petitioner Beucke's Appeal Pet. at 39). The record clearly establishes that Evert Gonzales was a witness called by Respondent, not the complainant, and Charles L. Kendall represents Respondent, not the

1404 PERISHABLE AGRICULTURAL COMMODITIES ACT

complainant (Tr. 2, 205, 405-06). Therefore, by its terms, section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)) is not applicable since it provides that a party is entitled only to statements of a witness called by the *complainant* in the possession of the *complainant*.

Eleventh, Petitioner Keyeski contends the ALJ erroneously concluded, because Petitioner Keyeski was actively involved with Bayside Produce, Inc., he cannot be considered a nominal shareholder (Petitioner Keyeski's Appeal Pet. at 6).

The ALJ concludes "[b]y reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a . . . shareholder of Bayside during the period November 23, 2002 to February 7, 2003" (Initial Decision at 12). I agree with the ALJ's conclusion that Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). In order for a petitioner to show that he or she was only nominally an officer, a director, or a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Active involvement with a company is one indicator of an actual, significant nexus with that company. Here, the record establishes that Petitioner Keyeski participated in a number of corporate matters, including controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). I agree with the ALJ that active involvement of the nature displayed by Petitioner Keyeski is a basis for concluding that Petitioner Keyeski was not only nominally a shareholder of Bayside Produce, Inc.

Twelfth, Petitioner Keyeski contends the ALJ erroneously found that he (Petitioner Keyeski) was a shareholder of Bayside Produce, Inc., until March 11, 2003. Petitioner Keyeski asserts the record establishes that he ceased being a shareholder of Bayside Produce, Inc., November 8, 2002. (Petitioner Keyeski's Appeal Pet. at 9-10.)

I disagree with Petitioner Keyeski's contention that the record establishes that he ceased being a shareholder of Bayside Produce, Inc., on November 8, 2002. While Petitioner Keyeski testified that he did not consider himself an owner of Bayside Produce, Inc., after November 8,

2002, and introduced some evidence to indicate that by December 18, 2002, he was no longer a stockholder of Bayside Produce, Inc. (Tr. 380; KK 8), the preponderance of the evidence supports the ALJ's finding that Petitioner Keyeski retained his shares of Bayside Produce, Inc., until March 2003 (KK 1, KK 2; Tr. 190-96). Therefore, I reject Petitioner Keyeski's contention that the ALJ erroneously found Petitioner Keyeski was a shareholder of Bayside Produce, Inc., until March 11, 2003.

Findings of Fact

1. Bayside Produce, Inc., is a California corporation, incorporated on August 6, 1997. Bayside Produce, Inc., applied for and received PACA license number 19981824. Bayside Produce, Inc., annually renewed PACA license number 19981824 on or before its annual anniversary date through 2002 for the year ending August 26, 2003. (RX 1, RX 2.)

2. Bayside Produce, Inc.'s shareholders and directors consisted of Wayne Martindale and Petitioner Beucke, with each of them owning 50 percent of the shares of outstanding stock until February 22, 2000, when Bayside Produce, Inc., amended its bylaws to increase the number of directors from two to three and added Petitioner Keyeski as an equal shareholder, an officer, and a member of the board of directors (RX 4; EX 6).

3. Chief Administrative Law Judge Marc R. Hillson found that Bayside Produce, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to timely pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002, through February 7, 2003 (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned, and held positions as a corporate officer in, two other produce companies, in addition to Bayside Produce, Inc. Petitioner Beucke was listed on Bayside Produce, Inc.'s PACA license and PACA license certificate as a vice president, the secretary, a director, and a 33 percent shareholder during the period November 23, 2002, through February 7, 2003. Petitioner Beucke's signature appears on the minutes of Bayside Produce, Inc.'s initial board of directors' meeting on September 15, 1997, the stock certificate issued in his name, and the minutes of Bayside Produce, Inc.'s board of directors' February 22, 2000, meeting. (Tr. 213-14, 218, 312; RX 1-RX 4; CX 9-CX 12.)

1406 PERISHABLE AGRICULTURAL COMMODITIES ACT

5. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which the suppliers of the produce were not paid (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23).

7. Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on Bayside Produce, Inc.'s Community Bank of Central California account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619).

8. Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

9. By letter dated April 30, 2003, from his attorney, Lester W. Shirley, to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and vice president of Bayside Produce, Inc., as well as from any position of employment with Bayside Produce, Inc. (RX 1 at 2; CX 6).

10. On October 23, 2003, Petitioner Beucke executed documents entitled "Resignation and Acknowledgment of Stock Redemption" and "Stock Assignment Separate From Certificate," both of which purported to be effective April 4, 2003 (RX 5, RX 6; CX 7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, Petitioner Keyeski was the sales manager of Coast Citrus Distributors, a San Diego, California, company. (Tr. 357, 393.)

12. Starting in approximately August 1997, Petitioner Keyeski joined Bayside Produce, Inc., in an arrangement with Wayne Martindale and Petitioner Beucke that was "basically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything." (Tr. 358-59.)

13. Once he managed to accumulate the necessary \$7,000 investment

on February 22, 2000, Petitioner Keyeski attended a Bayside Produce, Inc., board of directors' meeting in Salinas, California, and became a 33-1/3 percent shareholder, vice president, and director of Bayside Produce, Inc. (KK 6; Tr. 368).

14. Petitioner Keyeski ran the San Diego, California, office of Bayside Produce, Inc., as a general manager, controlling all aspects of its operation, including managing the payroll and paying the rent and other incidental expenses, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which suppliers of the produce were not paid (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002, he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002. (Tr. 375; KK 5; EX 5.)

17. Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 3, 2003, when he executed a document entitled "Declaration of Lost Stock and Assignment of Shares," which was forwarded to Bayside Produce, Inc., by letter dated March 11, 2003 (Tr. 386; KK 1, KK 2; EX 8).

Conclusions of Law

1. During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of \$163,102.70. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

2. Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

3. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in

1408 PERISHABLE AGRICULTURAL COMMODITIES ACT

Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

4. Petitioner Beucke failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner Beucke was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

7. Petitioner Keyeski was a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

8. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

9. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only nominally a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

10. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

11. Petitioner Keyeski was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

1. I affirm Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Keyeski is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Keyeski.

2. I affirm Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Beucke.

RIGHT TO JUDICIAL REVIEW

Petitioner Beucke and Petitioner Keyeski have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner Beucke and Petitioner Keyeski must seek judicial review within 60 days after entry of the Order in this Decision and Order.³² The date of entry of the Order in this Decision and Order is November 8, 2006.

In re: DENNIS E. HUTCHINS, d/b/a HUTCHINS DISTRIBUTING COMPANY.

PACA. Docket No. D-05-0014.

Decision Without Hearing by Reason of Admissions.

Filed November 24, 2006.

PADA – Admission – Failure to pay, no defense to – Willful – No pay status.

Kristna Ramarju for Complainant.

Respondent Pro se.

Decision and Order by Administrative Law Judge Jill S. Clifton.

³²28 U.S.C. § 2344.

1410 PERISHABLE AGRICULTURAL COMMODITIES ACT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter “PACA”) and the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-46.45), instituted by a Complaint filed on June 6, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter “Complainant”).

Complainant alleged that Respondent Dennis E. Hutchins, an individual doing business as Hutchins Distributing Company (hereinafter “Respondent”), committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 46 sellers in the amount of \$317,520.55 for 175 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period October 2003 through February 2004. Since Respondent’s license had terminated due to Respondent’s failure to pay the required annual renewal fee, Complainant requested the issuance of a finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances be published. Complainant has filed a Motion for a Decision Without Hearing by Reason of Admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139; hereinafter “Rules of Practice”).

On August 5, 2005, Respondent, acting through counsel, filed an Answer to Complaint admitting that Respondent failed to make full payment promptly to the 46 sellers listed in the Complaint for produce purchases. (Answer ¶ 4.) Respondent set forth no defenses to the nonpayment allegations in the Complaint, nor did he make any assertion that he had achieved compliance with the PACA. However, Respondent did deny that his failures to pay were intentional, willful, or flagrant. (*Id.*)

Respondent’s failures to pay are willful, flagrant, and repeated as a matter of law. A finding of repeated violations is warranted when there are multiple, non-simultaneous violations of the PACA. *See Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *In re: Scarpaci Bros.*, 60 Agric. 874, 882 (2001); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (1997). Whether a violation is flagrant is determined by looking at “the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.” *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895; *see also Reese Sales Co. v. Hardin*, 458 F.2d 183, 185, 187 (9th Cir. 1972) (finding that a respondent who failed to pay \$19,059.08 to nine sellers involving 26 separate transactions over two and one-half months committed repeated

and flagrant violations of the PACA). Decisions have held “that whenever the total amount due and owing for produce exceeds \$5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act.” *In re: Veg-Mix., Inc.*, 48 Agric. Dec. 595, 599 (1989) (citing *Fava & Co.*, 46 Agric. Dec. 79, 81 (1984)). By failing to pay \$317,520.55, a sum well over \$5,000, to 46 sellers in 175 separate transactions over a five month period, Respondent committed repeated and flagrant violations of the PACA.

The Department’s policy regarding willfulness is that “[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.” *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996). Willfulness is determined by looking at a respondent’s violations of PACA provisions and the Regulations, the length of the time period in which the violations occurred, and the number and total dollar amount of the transactions at issue. *In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998). Based on the large number of transactions, the size of the debt, and the continuation of these violations over a five month period, Respondent knew or should have known that he could not make full payment promptly for the large amount of produce that he ordered. As a licensee under the PACA since 1989 (Compl. ¶ II(b).; Answer ¶ 3.), “Respondent was aware of the requirements of the PACA, or should have been aware of the requirements of the PACA, yet [he] continued to buy, knowing that each purchase would result in another violation.” *In re: PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 789 (1991); see also 7 C.F.R. § 46.26 (“The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.”). Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment requirements of the PACA. See *In re: Tolar Farms and/or Tolar Sales, Inc.*, 57 Agric. Dec. 775, 782-83 (1998) (finding that a respondent who failed to pay seven sellers for 46 lots of produce totaling \$192,089.03 over a three month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of its payment requirements); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 896-97 (finding that a respondent who failed to pay 14 sellers for 174 lots of produce totaling \$238,374.08 over an 11 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of its payment requirements).

1412 PERISHABLE AGRICULTURAL COMMODITIES ACT

The Secretary's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows: In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In re: Scamcorp, Inc., 57 Agric. Dec. at 562 n.13. In this instance, Respondent has admitted in his Answer that he has failed to pay the 46 sellers referenced in the Complaint for the produce that he purchased, and over 120 days have elapsed since the service of this Complaint without any assertion from Respondent that he has achieved compliance with the requirements of the PACA. Therefore, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's license. *See id.* However, since Respondent's license was terminated due to his failure to pay the required annual renewal fee, the appropriate sanction is a finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the publication of the facts and circumstances of the violations. *E.g., In re: D & C Produce, Inc.*, 62 Agric. Dec. 373, 379 (2002); *In re: Scarpaci Bros.*, 60 Agric. Dec. at 886; *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. at 633.

Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's Motion for a Decision Without Hearing by Reason of Admissions is granted and the following Decision and Order is issued in the disciplinary case against Respondent 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. Dennis E. Hutchins is an individual doing business as Hutchins Distributing Company (hereinafter "Respondent"), a company organized and existing under the laws of the state of Oklahoma. Respondent's business mailing address for Hutchins Distributing Company was 3632 NW 51st Street, Suite 208, Oklahoma City, Oklahoma 73112-5672.

Respondent's mailing address, through counsel, is c/o Gary D. Hammond, Hammond & Associates, P.L.L.C., 1320 E. 9th Street, Suite 4, Edmond, Oklahoma 73034.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19891585 was issued to Respondent on July 18, 1989. This license was suspended on February 6, 2004, when Respondent failed to satisfy a reparation order. This license subsequently terminated on July 18, 2004, 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. Respondent failed to make full payment promptly to 46 sellers in the amount of \$317,520.55 for 175 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period October 2003 through February 2004.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Findings of Fact 3 above constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th 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 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).

Copies hereof shall be served upon the parties.

1414 PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: LUSK ONION, INC.
PACA Docket No. D-06-0007.
Decision and Order Based upon Admissions.
Filed November 29, 2006.

PACA – Admission of monies owed– Bankruptcy not a bar to sanction.

Gary Ball for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Decision Without Hearing Based on Admissions

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), Complainant has filed a Motion for Decision Without Hearing Based on Admissions, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.139) (hereinafter, "Rules of Practice").

This proceeding was initiated by a complaint filed on March 14, 2006, alleging that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to two sellers in the amount of \$256,943.25 for 43 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce. Respondent accepted produce shipments from September 2004 through March 2005 with payments due during the period of October 2004 through April 2005. The Complaint requested the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and the revocation of Respondent's PACA license.

Respondent, through counsel, filed an answer admitting the jurisdictional allegations of the Complaint. In the Answer, Respondent admitted that the two sums owed to two produce suppliers alleged in the Complaint have not been paid. Respondent further admitted a Voluntary Petition filed pursuant to a Chapter 11 bankruptcy proceeding, that it owes the two produce sellers listed in the Complaint a total of \$225,076.25.

Respondent's actions were willful, repeated, and flagrant as a matter of law. 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 if it is done with careless disregard of statutory requirements. *In re: PMD Produce Brokerage Corp.*, 60 Agric. Dec 780 (2001). *See also Cox v. United States Department of Agriculture*, 925

F. 2d 1102 (8th Cir. 1991). Respondent knew, or should have known, that it could not make full payment promptly for the large amounts of perishable agricultural commodities it ordered, yet Respondent continued to make purchases. Respondent was aware of, or should have been aware of, the payment requirements of the PACA, yet continued to buy, knowing that each purchase would result in another violation. Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment provisions of the PACA.

The violations were flagrant due to the number of violations, the amount of money involved and the length of time over which the violations occurred. As stated in *In re: Veg-Mix, Inc.*, 48 Agric. Dec. 595, 599 (1989), “[Relevant decisions] hold that whenever the total amount due and owing exceeds \$5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act.” *Id.* (citing *In re: Fava & Co.*, 46 Agric. Dec. 79, 81 (1984)). Because Respondent’s failure to pay violations involve numerous, non-simultaneous instances, they are also repeated. *See, e.g., Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967).

The Department’s policy in PACA disciplinary cases with respect to the alleged failure to make full payment promptly is set forth in *In re: Scamcorp, Inc.*, 57 Agric. Dec 527, 549 (1988), as follows:

“In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “no-pay” case. In any “no-pay” case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

Respondent has admitted in its Answer that it failed to pay the sellers the amount alleged in the Complaint, and confirmed through its Chapter 11 bankruptcy filing that it failed to pay produce creditors in amounts similar to the amounts alleged in the Complaint. Because 120 days have elapsed since the service of the Complaint, without any assertion from Respondent that it has achieved compliance with the requirements of the PACA, this case must be treated as a “no-pay” case, which warrants the

1416 PERISHABLE AGRICULTURAL COMMODITIES ACT

revocation of Respondent's PACA license. Since Respondent's license terminated pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), Complainant requests a finding of willful, repeated, and flagrant violations of the Act and the publication of the facts and circumstances of the violations.

Based on careful consideration of the facts of this case and relevant precedent, Respondent's admissions in both its Answer and bankruptcy filing warrant the immediate issuance of a Decision Without Hearing Based on Admissions.

Finding of Fact

1. Respondent, Lusk Onion, Inc., is a corporation organized and existing under the laws of the State of New Mexico. Respondent's business mailing address is 5700 Mabry Drive, Clovis, New Mexico 88101.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1988-0844 was issued to Respondent on March 15, 1988. Based on Respondent's bankruptcy adjudication, in accordance with section 4(e) of the Act, Respondent's license was terminated on August 1, 2006.

3. Respondent filed a bankruptcy schedule, Schedule F- Creditors Holding Unsecured Non-Priority Claims, in which Respondent admitted that it owes both sellers named in paragraph III of the Complaint a total of \$255,076.25.

4. Respondent failed to make full payment promptly to two sellers in the amount of \$256,943.25 for lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce during the period September 2004 through March 2005.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 4 above, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

Pursuant to the Rules of Practice governing procedures under the PACA, 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).

Copies hereof shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT
REPARATION DECISIONS

STEVE ALMQUIST d/b/a STEVE ALMQUIST SALES & BROKERAGE V. MOUNTAIN HIGH POTATOES & ONION, INC.

PACA -R-05-095.

Decision and Order.

Filed July 26, 2006.

PACA-R - Reparations – Jurisdiction - Interstate Commerce- Movement of a commodity across a state border not a prerequisite.

Respondent, located in Oregon, purchased one trucklot of onions from Complainant, whose business was located in the southern part of California. Complainant arranged for the shipment to be sent from Brawley, California to Respondent's customer located in Bakersfield, California.

The jurisdictional prerequisite of interstate commerce was found even though the commodity never physically left the state of California during the course of this transaction. When parties to a transaction are located in different states PACA jurisdiction exists even if there is no evidence that the commodity physically crossed a state line. Additional factors, including the type of commodity shipped, the interstate nature of the businesses involved, and the contemplation of interstate commerce, combined with the PACA's status as remedial legislation to be broadly interpreted, contributed to a finding of interstate commerce jurisdiction.

Presiding Officer Gary Ball.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks an award of reparation in the amount of \$1,350.00 in connection with the sale of one trucklot of 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 \$30,000.00, and therefore the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. ' 47.20) is applicable. 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 verified statements, and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Neither party elected to submit a Brief.

Findings of Fact

1. Complainant is an individual, Steve Almquist, doing business as Steve Almquist Sales & Brokerage, whose post office address is 14510 S. Broadway, Blythe, California 92226.
2. Respondent, Mountain High Potato & Onion, Inc., is a corporation whose post office address is 440 McVary Heights Drive, N.E., Kaizer, Oregon 97303. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about May 6, 2004, Complainant, by oral contract, sold to Respondent, and shipped from loading point in Brawley, California, to Respondent's customer in Bakersfield, California, 250-50 lb. bags of medium white onions at \$5.75 per bag, or \$1,437.50, and 200-50 lb. bags of medium white onions at \$5.75 per bag, or \$1,150.00, for a total f.o.b. contract price of \$2,587.50.
4. On May 13, 2004, Respondent issued a ATrouble Notification@ for the onions mentioned in Finding of Fact 3, advising Complainant to re-invoice for the onions at a price of \$2.75 per bag, net f.o.b., to account for market decline.
5. On June 4, 2004, Respondent paid Complainant \$1,237.50 for the onions with check number 09747, based on a price of \$2.75 per bag.
6. The informal complaint was filed on September 23, 2004, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one trucklot of onions sold to Respondent. Complainant states that Respondent accepted the onions in compliance with the contract of sale, but that he has been paid only \$1,237.50 of the agreed purchase price of \$2,587.50. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the onions for the amount claimed, but alleges that, following delivery, the parties orally agreed to modify the terms of the original sales contract. Respondent asserts that the oral agreement was

1420 PERISHABLE AGRICULTURAL COMMODITIES ACT

to reduce the sales price per bag from \$5.75 to \$2.75 to account for a significant decline in the market price of white onions.

Before considering the merits of this claim the Department must establish whether it has jurisdiction, under the Act, over the disputed transaction. Relevant to establishing the existence of jurisdiction in this case, we must determine whether the subject transaction was in interstate commerce. The term “interstate commerce” is defined in section 1 of the Act as: “...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.” (7 U.S.C. § 499a (3)).

Under the same section the Act states:

A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

(7 U.S.C. § 499a (8))

As an initial matter, the jurisdictional question in this case can be readily resolved by looking at the business transaction that gave rise to this dispute. Respondent, located in Oregon, entered into an agreement with Complainant, located in California, to purchase a load of onions.¹ (Answer at 1). In *Tulelake Potato Distributors, Inc. v. John M. Guistino, d/b/a Grand Slam Produce*, 52 Agric. Dec. 752, 757 (1993), the Department established that: “[w]hen the parties to a transaction are in different states, the purchase or sale transaction is in interstate commerce even if there is no evidence that the commodity physically

¹ Though Respondent apparently has business locations in Oregon, California, and Idaho, the subject transaction was entered into out of Respondent’s Keizer, Oregon office.

crossed a state line.” Under *Tulelake*, because the Complainant and Respondent were in two different states when they entered into their transaction, the shipment resulting from that transaction is deemed to be in interstate commerce, regardless of whether it actually moved between states.

While the interstate nature of the transaction itself triggers Departmental interstate commerce jurisdiction, there are a number of other elements of this transaction that cause this shipment to come under PACA jurisdiction.

It is reasonable to conclude that the shipment in this case was made in the course of interstate commerce. The Respondent is a PACA licensee and appears to regularly conduct business in interstate commerce. This transaction was arranged between offices in California and Oregon, and the record indicates that a subsequent transaction between the Complainant and Respondent involved a shipment to Saskatchewan, Canada. (Answer Ex. 5) Additionally, this transaction involves onions, a commodity that regularly moves in interstate commerce. These factors, combined with the fact the Respondent has business locations in three different states, reasonably indicates that the Respondent does a significant part of its business in interstate commerce. Under the D.C. Circuit court’s decision in *The Produce Place v. United States Department of Agriculture*, 319 U.S. App. D.C. 369 (1996), the Department need only show that the commodity was of the type that regularly moves in interstate commerce and was shipped to or from a dealer that does a substantial portion of its business in interstate commerce. The transaction between Complainant and Respondent satisfies both of these jurisdictional elements and, thus, properly falls within the Department’s jurisdiction under the Act.

The jurisdictional issue in this matter was only briefly addressed by the Complainant and Respondent. In his Complaint, Complainant asserts that the agreement to sell to the Respondent and the subsequent shipment under that agreement were made “in the contemplation and the course of interstate commerce.” (Complaint at 1) As discussed above, if this contemplation were reasonably held by the Complainant, then this shipment can be fairly considered to have been “in commerce” for the purpose of establishing Departmental jurisdiction under the Act.

Respondent acknowledges Complainant’s interstate commerce claim in its Answer, but provides very little in the way of amplifying information or persuasive argument on the matter. Respondent states: “the load of onions never moved into or out of the State of California therefore was not in the course of interstate commerce.” (Answer at 1) As noted

1422 PERISHABLE AGRICULTURAL COMMODITIES ACT

above, in *The Produce Place*, the U.S. Court of Appeals for the D.C. Circuit made it quite clear that actual movement between states is not required for PACA jurisdiction to exist. Likewise, the notion that “limiting the provisions of PACA to commodities that have physically crossed state lines, or to situations where the parties specifically envisioned such a crossing” has been soundly rejected. *Fishgold v. Onbank & Trust Co.*, 43 F. Supp. 2d 346 (1999). Without some additional information suggesting that the transaction in question was not entered into in the course of interstate commerce, we are not persuaded by Respondent’s argument.

Given all of the information above, it was reasonable for the Complainant to view the Respondent’s company as an interstate business, and it was similarly reasonable for him to conclude that the transaction in question would be considered “in commerce” as defined by the PACA. The sale in this case was not explicitly “for shipment to another State” and, therefore, is not covered by that portion of the definition of interstate commerce requiring such actual interstate movement. However, this shipment would be within our jurisdiction if it were made in contemplation of interstate commerce. The Department has determined that the provisions of the PACA apply to intrastate transactions that contemplate future movement in interstate commerce. *Bacon Brothers v. Cad Heaton Fruit Co.*, 5 *Agric. Dec.* 547 (1946). Based on this concept, it is now well settled that any transaction in which interstate movement is contemplated is considered in interstate commerce under the PACA. *Tulelake* at 757.

The bill of lading for the shipment shows that the Complainant sourced the onions from a shipper located in Brawley, California, and that the onions were destined for Respondent’s customer in Bakersfield, California. (Complaint Ex. 4) The record in this proceeding does not reveal the place of origin of this commodity, nor does it tell us the ultimate destination of the 450 bags of onions in this shipment. The record does show that the Complainant, located in California, and the Respondent, located out-of-state in Keizer, Oregon, entered into an agreement for the sale of produce. (Complaint at 1; Answer at 1) Respondent, according to its own letterhead, operates a multi-state business having its main office in Oregon and additional operations in Idaho and California. (See Respondent correspondence dated 7/2/2004 & 10/12/2004 in ROI) The Department’s decision in *Tulelake* states: “[t]he Department reasoned that if a party sells a commodity to someone who does business in other states, the selling party could not argue that it was sold without contemplating interstate commerce.” *Tulelake* at 756-757 (referencing *Troyer v. Blue Star Potato Chip Corp.*, 27 *Agric. Dec.* 301 (1968)). Because Complainant entered into a transaction with

a business operating in several different states, under Tulelake, it is reasonable to conclude that the Complainant, arranged and dispatched this produce shipment "in contemplation of interstate commerce." In addition to finding jurisdiction based on the interstate nature of the sales transaction, there is ample evidence to find, as asserted in Complainant's sworn Complaint, that the transaction was entered into in contemplation of interstate commerce under the Act. As such, the Complainant may rightly make use of the protections afforded him by the PACA, and the Department may properly exercise its jurisdiction in resolving this matter.

The basic facts regarding the transaction between Complainant and Respondent are fairly simple and are not in controversy. The Complainant and Respondent agree that 450 bags of onions of the kind, quality, and size called for under the contract were delivered to, and accepted by, the Respondent. (Answer at 1-2) Having accepted the produce, Respondent became liable for the full purchase price thereof, less any damages resulting from any breach of warranty by Complainant. *Norden Fruit Co. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing Inc. v. Jos. Notarianni & Co.*, 47 Agric. Dec. 329 (1988); *Jerome M. Mathews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). Respondent does not allege a breach by Complainant. As previously stated, the dispute between the Complainant and Respondent revolves around a conversation that took place between Complainant's sales representative, Mike Cyr, and Respondent's sales representative, Lance Renfrow, after the delivery and acceptance of the shipment in question. Keeping in mind that the party alleging the modification of original contract terms has the burden of proof in establishing its existence, the essential question in this case is whether the conversation between the two sales representatives effectively modified the original contract. *F. H. Hogue Produce Company v. M. Singer's Sons Corp.*, 33 Agric. Dec. 451 (1974).

Respondent's President, Paul B. Butler, filed the sworn Answer to the formal Complaint. Mr. Butler does not assert that he was personally involved in this particular produce transaction. With respect to the contract terms, the Respondent's Answer asserts that three days after the shipment was accepted, "Respondent's salesman, Lance Renfrow, and Complainant's salesman, Mike Cyr, verbally agreed to modify the terms of the original sales contract and reduce the sales price from \$5.75 per sack to \$2.75." (Answer at 2) According to Mr. Butler, Mr. Cyr consented to this reduction based on Respondent's agreeing to purchase additional loads at \$2.75 per sack. In the Answer, Mr. Butler

1424 PERISHABLE AGRICULTURAL COMMODITIES ACT

additionally states that sales representative Renfrow “confirmed the adjustment on the first load in writing by faxing to Complainant a memorandum showing the agreed upon price and the reason for the adjustment.”

As its Opening Statement, Complainant submitted a sworn affidavit of his sales associate, Mike Cyr. Mr. Cyr confirms that he negotiated the contested sales transaction with Respondent’s sales representative, Lance Renfrow. (Opening Statement at 1) Mr. Cyr states that, while he discussed the possibility of making a market-decline adjustment on the load shipped to the Respondent, no such adjustment was promised or granted. (Opening Statement at 2) Mr. Cyr asserts that he told Respondent’s sales representative, Lance Renfrow, that, “if [Mr. Renfrow] would order another load for the same customer; [he] would consider adjusting this particular invoice.” Mr. Cyr goes on to state that because Mr. Renfrow did not order another load for that customer, no adjustment was granted on the previous contract. Mr. Cyr further points out that there is nothing documented in the record indicating that the adjustment alleged by the Respondent was ever actually granted. There is no indication that Mr. Cyr dealt with anyone at Respondent’s business other than Lance Renfrow.

In its Answering Statement, Respondent’s President, Paul Butler points out that the market was in decline around the time of this transaction, that Complainant’s sales representative did grant market declines for some contracts, and that there was a post-delivery discussion between the two sales representatives about market adjustments. (Answering Statement at 1) Respondent also notes that it has submitted a “Trouble Memo detailing the adjustment and fax logs confirming the memo was sent...” (Answering Statement at 1) In Complainant’s Statement in Reply, Complainant’s sales associate, Mike Cyr, points out two significant facts. First, Mr. Cyr notes that, though he dealt with Lance Renfrow on the disputed shipment, Respondent did not submit any evidence from Mr. Renfrow regarding the contract modification allegedly agreed to by the two sales representatives. Second, Mr. Cyr denies receiving any trouble memo from the Respondent and notes that there is nothing in the record indicating that Mr. Cyr agreed to a post-delivery price reduction on the shipment in question. (Statement in Reply at 1-2)

Respondent contends that Mr. Cyr and Mr. Renfrow agreed to an oral modification that reduced Respondent’s obligation under the original contract. Though the Respondent submitted a copy of a trouble memo purportedly sent to the Complainant, there is nothing to suggest that the memo was acknowledged, or agreed to, by the Complainant. (Answer Ex. 2) In fact, the Respondent’s trouble notification form has a space

for the recipient to sign in acknowledgment and fax back to Respondent. The copy submitted by Respondent is unsigned and not acknowledged by the Complainant. (Answer Ex. 2). Assertions made by the Respondent that the market was in decline around the time of this transaction, that Complainant's sales representative did grant market declines for some contracts, and that there was a post-delivery discussion between the two sales representatives about market adjustments are of little assistance in determining the actual existence of an enforceable contract-modifying agreement between Mr. Cyr and Mr. Renfrow.

In claiming the existence of an agreement between two parties, testimony from the parties themselves can be a critical factor in determining whether a binding agreement was or was not reached. *See Senter Bros. v. Rene N. Moreau*, 18 Agric. Dec. 145 (1959). While Complainant submitted a sworn affidavit with a first-hand account of the conversation between Mr. Cyr and Mr. Renfrow, Respondent did not put forth testimony from Mr. Renfrow as to the contents of his disputed communication with Mr. Cyr. Because this matter turns on the very contents of the conversation between the two sales representatives, the importance of testimony from Mr. Renfrow cannot be overstated. Because he was not directly involved in the disputed transaction or subsequent communications between the two sales representatives, Mr. Butler's statements are not of his own knowledge and should be afforded very little weight. Applying case precedent to this dispute we can conclude, with regard to Mr. Butler's testimony, that "[i]n the absence of written testimony by [Mr. Renfrow] or any other person having actual knowledge of the facts, such statements are insufficient to satisfy respondent's burden of proof with respect to proving his allegations." *Id.* at 147.

The Respondent has failed to meet its burden in proving the existence of a modification of the original contract. Therefore, Respondent is obligated to perform in accordance with the original contract terms.

The Complainant was due a total of \$2,587.50 under the terms of the contract with Respondent. Respondent paid Complainant \$1,237.50 of that amount on June 4, 2004. Therefore, Respondent owes Complainant the difference between these two sums, or \$1,350.00.

Respondent's failure to pay Complainant \$1,350.00 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. *Louisville & Nashville Railroad Co. v.*

1426 PERISHABLE AGRICULTURAL COMMODITIES ACT

Sloss-Sheffield Steel & Iron Co., 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. ., 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 Agric. Dec. 66 (1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, i.e., the rate of interest will equal the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week ending prior to the date of the Order.

Complainant was required to pay a \$300.00 handling fee to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, \$1,350.00 with interest thereon at the rate of 5.22% per annum from June 1, 2004, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

**AMERIFRESH, INC., V. WILLIAMS AG COMMODITIES
BROKERAGE, INC.
PACA Docket No. R-05-076.
Decision and Order.
Filed October 31, 2006.**

PACA-R – Jurisdiction – Interstate Commerce.

Where there is no indication that the commodity involved in the complaint ever physically crossed state lines, the transaction is nevertheless considered as entering the current of interstate and foreign commerce where the commodities involved are commodities that commonly move in interstate commerce, and where the parties involved regularly engage in interstate purchases and sales of produce.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$3,000.00 in connection with one trucklot of cherries shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. 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 to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Respondent also submitted a Brief.

Findings of Fact

1. Complainant, Amerifresh, Inc., is a corporation whose post office address is 4025 Delridge Way S.W., Suite 550, Seattle, Washington, 98106. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent, Williams AG Commodities Brokerage, Inc., is a corporation whose post office address is 698 Anita Street #A, Chula Vista, California, 91911-4020. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about May 4, 2004, Complainant, by oral contract, sold to Respondent, and shipped from loading point in the state of California, to Respondent in Chula Vista, California, 300 cartons of cherries at \$10.00 per carton, for a total f.o.b. contract price of \$3,000.00.
4. On May 6, 2004, Respondent sold and shipped the cherries mentioned in Finding of Fact 3 to Premier Produce Company, Inc., who reported selling the cherries for gross proceeds of \$1,300.00, \$800.00 of

1428 PERISHABLE AGRICULTURAL COMMODITIES ACT

which was returned to Respondent as the net proceeds from the resale.

5. Respondent has not made any payments to Complainant toward the agreed purchase price of the cherries.

6. The informal complaint was filed on August 7, 2004, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the agreed purchase price for one trucklot of cherries sold and shipped to Respondent. Complainant states Respondent accepted the cherries in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price of \$3,000.00. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the cherries for the amount claimed, but alleges that Complainant breached the contract by shipping 300-18 pound cartons of "bulk double cc" cherries, rather than the 300 cartons of "11 row USA-A" 20-pound cartons of cherries called for in the contract of sale.

Before we consider Respondent's allegation of a breach of contract on the part of Complainant, we must first consider whether the Department has jurisdiction to adjudicate this claim.¹ Although Complainant is headquartered in the state of Washington, it secured the cherries through its branch office located in the state of California, from Grower Direct Marketing, LLC, of Stockton, California. Complainant then resold the cherries to Respondent, who is also located in California, and shipped the cherries to Respondent's customer, Produce Plus, in Chula Vista, California. This means that the shipment of cherries from Complainant to Respondent's customer never physically left the state of California. Goods must be sold in or in contemplation of interstate [or foreign] commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967).

The term "interstate or foreign commerce" is defined in the Act (7 U.S.C. § 499a (3)), as meaning:

...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.

Section 1(a)(8) of the Act provides further that:

¹ Jurisdictional issues are raised by the Secretary *sua sponte*. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770 (1998); *Provincial Fruit Company Limited v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514 (1980).

... a transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another ... (7 U.S.C. § 499a (8)).

As we mentioned, the cherries were shipped to a receiver located in Chula Vista, California, which is near the California border with Mexico. Based on the receiver's close proximity to Mexico, the parties could reasonably expect that at least some of the fruit would be purchased and carried across the border into Mexico. This expectation is sufficient to establish that the cherries were shipped in contemplation of interstate or foreign commerce. Moreover, the fact that cherries regularly move in interstate commerce, and that the parties involved regularly engage in interstate purchases and sales of produce, suggests that the cherries entered the "current of commerce" mentioned in the statute. On this basis we conclude that the transaction was in interstate or foreign commerce, and that the Secretary therefore has jurisdiction to consider this claim.

There is no dispute that Respondent accepted the subject load of cherries. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). Where goods are accepted the buyer has the burden of proof to establish a breach of contract. See UCC 2-607(4). See also *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

As we mentioned, Respondent alleges that Complainant breached the contract by shipping 300-18 pound cartons of "bulk double cc" cherries, rather than the 300 cartons of "11 row USA-A" 20-pound cartons of cherries called for in the contract of sale. The record contains a sworn statement from Respondent's Mr. Clint Williams², wherein Mr. Williams asserts, in pertinent part, as follows:

On May 5, 2004 Williams AG had ordered and picked up 11 Row Cherries. Williams AG unloaded cherries May 6th and called Jim Anderson at Amerifresh/Fresno and reported problems. Spur, doubles and decay were factors. Jim Anderson advised work for Grower's

² See Report of Investigation, Exhibit Nos. 4a and 4b.

1430 PERISHABLE AGRICULTURAL COMMODITIES ACT

account.

Complainant's Sales Associate Mr. James M. Anderson, in an affidavit submitted as Complainant's Opening Statement, states that when he described the cherries to Respondent's Clint Williams, he advised that the cherries had doubles and spurs. Mr. Anderson states that if nothing else, this is evidenced by the \$10.00 per carton sales price, since 11-row cherries were selling for \$30.00 to \$33.00 per carton on the Los Angeles Wholesale Market at the time of sale. Mr. Anderson also denies receiving timely notice from Respondent of the alleged breach.

Upon review, we note first that the evidence submitted by Respondent is insufficient to establish that Complainant authorized Respondent to handle the cherries for Complainant's account. The only proof submitted by Respondent in this regard is the sworn allegation of Mr. Clint Williams that he received such authorization from Complainant's James Anderson. This allegation is, in effect, denied by Mr. Anderson in an affidavit submitted as Complainant's Statement in Reply, wherein Mr. Anderson denies receiving verbal or written notice regarding any problems with the cherries and states the telephone conversations he had with Mr. Williams during the time period in question regarded a problem with a load of onions shipped to Canada. The record also fails to substantiate Respondent's allegation of a breach of contract by Complainant. While we note that the passing issued by Complainant describes the packaging of the cherries as "20# CTN" and the size as "11 ROW,"³ whereas the bill of lading describes the cherries as "BULK 18 DBL CC,"⁴ Respondent has not complained that the cherries were not shipped in the correct packaging, or that they were not the correct size. Rather, Respondent asserts that the cherries had doubles, spurs and decay. Complainant has acknowledged that the cherries had spurs and doubles. Complainant also alleges that Respondent was aware of these defects at the time of sale. Respondent denies this allegation. Nevertheless, spurs and doubles are considered quality or "grade" defects, which are only applicable where goods are sold with a U.S. Grade specification, and there is no indication in the record that a U.S. Grade was specified in the contract in question. An exception is made where the quality defects are so severe so as to establish that the goods were not merchantable at the time of shipment;⁵

³ See Formal Complaint, Exhibit No. 2.

⁴ See Formal Complaint, Exhibit No. 3.

⁵ See, e.g., *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc.*, 53 *Agric. Dec.* 887 (1994), where a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, with a range of 7 to 79%, was held to show a
(continued...)

however, Respondent did not secure a USDA inspection to show the extent to which the cherries were affected by doubles and spurs. Without an inspection, there is also no proof to substantiate Respondent's allegation that the cherries were affected by decay.

Having failed to sustain its burden to prove a breach of contract on the part of Complainant, Respondent is liable to Complainant for the cherries it accepted at the agreed purchase price of \$3,000.00. Respondent's failure to pay Complainant \$3,000.00 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. *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 at a reasonable rate as a part of each reparation award. 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$3,000.00, with interest thereon at the rate of _____% per annum from June 1, 2004, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

⁵(...continued)

breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade.

1432 PERISHABLE AGRICULTURAL COMMODITIES ACT

VINCENT CHIODO, D/B/A CHIODO FARMS V. FARMING TECHNOLOGY, INC.

PACA Docket No. R-05-132.

Decision and Order.

Filed November 2, 2006.

PACA-R – Jurisdiction-Interstate Commerce.

Where Complainant shipped commodities that commonly move in interstate commerce, and the evidence establishes that the Respondent ships a substantial portion of the produce it purchases in interstate commerce, all of the transactions at issue in the complaint are considered as entering the current of interstate commerce, regardless of whether each individual shipment ever physically crossed state lines. The Secretary is therefore able to exercise P.A.C.A. jurisdiction over the complaint in its entirety.

Goode, Casseb, Jones for Complainant.

Presiding Officer Patricia Harps.

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

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 with the Department within nine months from the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$48,654.01, in connection with Complainant's 2003 South Texas potato crop.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

Although the amount claimed in the formal Complaint exceeds \$30,000.00, the parties waived oral hearing and elected to follow the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). 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 to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Respondent also submitted a Brief.

Following the submission of evidence and briefs, the Department advised Complainant by letter dated December 6, 2005, that a forum selection clause included in the written contract signed by both parties appeared to limit jurisdiction in this case to the civil courts of Harris

VINCENT CHIODO d/b/a CHIODO FARMS v. 1433
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

County, Texas. Both parties subsequently advised the Department in writing of their intent to waive their right to enforce the forum selection clause in the contract and to submit to the jurisdiction of the Secretary. Accordingly, the case is now ripe for decision.

Findings of Fact

1. Complainant is an individual, Vincent Chiodo, doing business as Chiodo Farms, whose post office address is 1415 County Road 4857, Dilley, Texas, 78017. Complainant is not licensed under the Act.
2. Respondent, Farming Technology, Inc., is a corporation whose post office address is 6950 Neuhaus, Houston, Texas, 77061. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. During the month of January 2003, Complainant and Respondent entered a written contract involving the sale by Complainant to Respondent of Complainant's 2003 South Texas potato crop, the details of which are set forth below:

**2003 PURCHASE AGREEMENT
SOUTH TEXAS POTATO CROP**

Buyer: Farming Technology, Inc.
6950 Neuhaus
Houston, Texas 77061

Seller: Chiodo Farms
Route 1 Box 28
Dilley, Texas 78017

Variety: Red LaSoda, Yukon Gold, Asterix, and Bildstar Potatoes

Quantity: Approximately 39,000 CWT. of Red LaSodas (approximately 208 acres), 30,000 CWT. of Yukon Golds (approximately 160 acres), 1000 CWT. of Asterix (approximately 5 acres), and 2600 CWT. of Bildstars (approximately 14 acres). Seller agrees to deliver and Buyer agrees to purchase all of the potatoes harvested from all the acreage described above even if those quantities exceed the CWT. listed above.

Delivery Dates: Approximately April 28, 2003 – May 31, 2003 at

1434 PERISHABLE AGRICULTURAL COMMODITIES ACT

Buyer's option provided growing conditions permit.

Grade Standards: 85% or better US #1 – with no more than 15% US #2 – practically no skinning.

Size Standards: Red LaSodas – No minimum diameter with 3 ½ " maximum diameter. All other varieties – 2 " minimum diameter with 3 ½ " maximum diameter.

Price: Red LaSodas – Market price on the date of arrival in Houston, Texas (as determined by price paid by Farming Technology, Inc. on the same date for comparable potatoes).

Yukon Golds, Asterix, and Bildstar potatoes - \$10.50 per CWT. fob Dilley, Texas.

Special Terms: (A) Seller will harvest potatoes as per the schedule and instruction of Buyer. Seller agrees to use its best efforts to plant and grow the potatoes such that, to the extent growing conditions permit, the Red LaSodas can be harvested and shipped at the rate of approximately 7,000 CWT. for each of the weeks that begin April 28, 2003, May 5, 2003, and May 12, 2003; at the rate of 11,000 CWT. for the week that begins May 19, 2003, and at the rate of 7,000 CWT. for the week that begins May 26, 2003.

Seller further agrees to use its best efforts to plant and grow the Yukon Golds so they can be harvested at the rate of 10,000 CWT. per week for each of the weeks that begin May 12, 2003, May 19, 2003, and May 26, 2003.

The harvest schedule for the other varieties covered under this Agreement will be based on growing conditions and crop maturity.

Seller warrants that it is capable of harvesting and loading a minimum of 14 trailer loads (450 CWT./load) of potatoes per day. Buyer shall have no obligation to accept any potatoes not harvested by May 31, 2003. Seller agrees to load potatoes on trucks furnished by Buyer and in accordance with Buyer's instructions.

(B) Buyer shall pay Seller within ten (10) days after receipt and acceptance of potatoes and payment shall be based on the weight received in Houston, Texas.

(C) Seller hereby authorizes Buyer to deduct from its

VINCENT CHIODO d/b/a CHIODO FARMS v. 1435
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

remittance to Seller the cost of the Asterix and Bildstar potatoes provided to Seller at a price of \$12.25 per CWT. delivered to Dilley, Texas. Buyer makes no warranty as to the merchantability or fitness of the potatoes sold to Seller and Seller's only remedy shall be a refund of the FOB purchase price paid.

In the event the Parties agree that the growing conditions in the Dilley, Texas area are not suitable for growing one or both of the varieties set out in C above, then the cost of the potatoes provided by Buyer to Seller for the specific variety(ies) that is (are) unsuitable to grow will not be deducted from Seller's payment.

(D) Seller agrees to apply Ridomil, in compliance with the product label for control of Pink Rot and Pythium Leak to all of the potato acreage under this agreement.

(E) Buyer agrees to make its agronomist Dr. Robert Thornton available to Seller to assist in growing the potatoes under this agreement. All costs and expenses of Dr. Thornton will be paid by Buyer.

(F) This Agreement shall be governed by and construed in accordance with the laws of the State of Texas and the applicable laws of the United States of America. This Agreement has been entered into and is performable in Harris County, Texas. Seller hereby irrevocably: (a) submits to the nonexclusive jurisdiction of such courts; and (b) waives any objection it may now or hereafter have as to the venue of any such action or proceeding brought in such court or that such court is an inconvenient forum. Any action or proceeding on this Agreement shall be brought only in a court located in Harris County, Texas.

(G) Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

(H) This Agreement embodies the final, entire agreement among the parties hereto and supersedes any and all prior commitments, agreements, relating to the subject matter hereof and may not be contradicted or varied by evidence or prior, contemporaneous, or

VINCENT CHIODO d/b/a CHIODO FARMS v. 1437
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

agreement; and (3) by improperly deducting from the remittance to Complainant freight charges in the amount of \$7,773.00, without Complainant's authorization and without any contractual right to do so under the agreement.

Turning first to Complainant's allegation that Respondent failed to pay \$35,666.26 for potatoes it received and accepted, Complainant states specifically that Respondent accepted eighteen truckloads of potatoes between May 20 and 22, 2003 (Respondent's purchase order numbers 119481, 119482, 119488, 119489, 119490, 119491, 119510, 119514, 119515, 119521, 119522, 119526, 119533, 119534, 119535, 119536, 119537 and 119554), after which Respondent made a determination of the percentage of damaged potatoes in each shipment and sold the potatoes without paying Complainant for the potatoes purchased.

In response to this allegation, Respondent states in its Answer that during the processing of Complainant's potatoes, Respondent determined that the potatoes involved were not suitable for shipping to destinations beyond a few hundred miles. Respondent states further that it was compelled to use extra labor in order to process the potatoes, and that the sales and shipments of the potatoes were made intrastate to retail customers who used a volume of product and made prompt retail sales. On this basis, Respondent asserts that the transactions were not involved in interstate commerce.

Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967). Respondent has thus raised a jurisdictional challenge to this portion of Complainant's claim. In response, Complainant submitted additional evidence in the form of an Opening Statement, attached to which are copies of the bills of lading and trucking invoices for all loads of Yukon Gold, Red, and Asterix potatoes shipped from Respondent's facility between May 1 and 31, 2003.¹ Slightly more than half of the bills of lading supplied list consignees located outside the state of Texas.

The Act defines "interstate commerce" as "...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia." 7 U.S.C. § 499a(b)(3). The Act also contains a guide to its interpretation:

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity

¹See Opening Statement Exhibit A, pages 1 through 437.

1438 PERISHABLE AGRICULTURAL COMMODITIES ACT

is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. 7 U.S.C. § 499a(b)(8).

The language of the statute has been subject to interpretation in several federal court cases and in published reparation decisions issued by the Department. In *Troyer v. Blue Star Potato*, 27 *Agric. Dec.* 301 (1968), we held that there is interstate commerce when there is evidence that a substantial portion of the buyer's products are eventually sold out of state, even if the commodity subject to the particular transaction in question never left the state. Similarly, in *In re: The Produce Place*, 53 *Agric. Dec.* 1715 (1994), we held that the six shipments of strawberries and raspberries in question entered the current of interstate commerce because: (1) strawberries and raspberries regularly move in interstate commerce; (2) the petitioner regularly engaged in interstate purchases and sales of produce; and (3) some of the strawberries and raspberries were sold to a national hotel chain. On appeal, the D.C. Circuit Court of Appeals concurred, concluding that to establish jurisdiction over a transaction, the Department need only show that the commodity was of the type that regularly moves in interstate commerce and was shipped to or from a dealer that does a substantial portion of its business in interstate commerce. *The Produce Place v. United States Department of Agriculture*, 91 F.3d 173, 175-76 (D.C. Cir. 1996).

The various types of potatoes at issue here regularly move in interstate commerce. Moreover, as we already mentioned, the record contains evidence showing that approximately half of Respondent's business, at least during the time period in question, consisted of shipping potatoes to customers located outside the state of Texas. The same evidence also shows that many of Respondent's customers were large retailers with locations in multiple states. On this basis, we conclude that the preponderance of the evidence supports Complainant's contention that the subject potatoes were sold in the current of interstate commerce. Therefore, the Secretary has jurisdiction to consider Complainant's claim.

There is no dispute that Respondent accepted the eighteen truckloads of potatoes in question. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages

VINCENT CHIODO d/b/a CHIODO FARMS v. 1439
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

resulting from any breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). Although Respondent did not supply any evidence of a breach of contract by Complainant with respect to these shipments, Complainant submitted copies of thirty-one USDA inspection certificates for inspections performed at Respondent's place of business², five of which pertain to the shipments in question. For those five shipments, the inspection results show that the potatoes failed to meet the grade requirements set forth in the written contract signed by the parties, i.e., the potatoes failed to grade 85% U.S. No. 1 or better due to excessive soft rot. Complainant's failure to ship potatoes in compliance with the contract requirements constitutes a breach of contract for which Respondent is entitled to recover provable damages.

The general measure of damages for a breach of contract 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. UCC § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent did not submit any accounts of sales or other proof to show the prices at which these potatoes were sold.

Absent an accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994).³ We note, however, that Complainant has based the amount of its claim on the much more generous "percentage write downs" reflected on the accounting prepared by Respondent.⁴ Specifically, the record shows that for each of the shipments in question, as well as the other thirteen shipments that comprise this portion of Complainant's claim, Respondent claimed an

² See Report of Investigation, Exhibits 1h through 1ll.

³ See also *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).

⁴ See Formal Complaint, Paragraph 15.

1440 PERISHABLE AGRICULTURAL COMMODITIES ACT

allowance for the percentage of soft rot in the potatoes, as well as an additional allowance of 50% for heat and water damage.⁵ Since Complainant has apparently acquiesced to these allowances, we will determine Respondent's liability for the potatoes accordingly. Moreover, since Complainant applied the allowance to each of the eighteen shipments, including those that were not federally inspected, we will do so as well.

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 price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 *Agric. Dec.* 1193 (1990). We look at the Market News prices for the nearest reporting location to the Respondent, which in this case is the Dallas Terminal Market. The reports issued during the time period in question, however, do not show prices for Yukon Gold or Asterix potatoes produced in the state of Texas. Alternatively, we will use the contract price of \$10.50 per cwt. as the value these potatoes would have had if they had been as warranted.

For the 454.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119481, we will reduce the contract price of \$10.50 per cwt. by 61% (11% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.10 per cwt., or a total of \$1,861.40.

For the 501.60 cwt. of Yukon Gold potatoes shipped under purchase order number 119482, we will reduce the contract price of \$10.50 per cwt. by 58% (8% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.41 per cwt., or a total of \$2,212.06.

For the 579.60 cwt. of Yukon Gold potatoes shipped under purchase order number 119488, we will reduce the contract price of \$10.50 per cwt. by 59% (9% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.31 per cwt., or a total of \$2,495.18.

For the 390.40 cwt. of Yukon Gold potatoes shipped under purchase order number 119482, we will reduce the contract price of \$10.50 per cwt. by 59% (9% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.31 per cwt., or a total of \$1,682.62.

⁵ See Formal Complaint, Exhibit 7.

VINCENT CHIODO d/b/a CHIODO FARMS v. 1441
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

For the 474.80 cwt. of Yukon Gold potatoes shipped under purchase order number 119490, we will reduce the contract price of \$10.50 per cwt. by 56% (6% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.62 per cwt., or a total of \$2,193.58.

For the 516.80 cwt. of Yukon Gold potatoes shipped under purchase order number 119491, we will reduce the contract price of \$10.50 per cwt. by 57% (7% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.52 per cwt., or a total of \$2,335.94.

For the 447.00 cwt. of Asterix potatoes shipped under purchase order number 119510, we will reduce the contract price of \$10.50 per cwt. by 52% (2% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$5.04 per cwt., or a total of \$2,252.88.

For the 335.40 cwt. of Yukon Gold potatoes shipped under purchase order number 119514, we will reduce the contract price of \$10.50 per cwt. by 70% (20% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$3.15 per cwt., or a total of \$1,056.51. For the 120.00 cwt. of Asterix potatoes shipped under the same purchase order number, we will reduce the contract price of \$10.50 per cwt. by 52% (2% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$5.04 per cwt., or a total of \$604.80. The total contract price for this shipment of potatoes is therefore \$1,661.31.

For the 448.80 cwt. of Yukon Gold potatoes shipped under purchase order number 119515, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$1,884.96.

For the 491.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119521, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$2,062.20.

For the 501.20 cwt. of Yukon Gold potatoes shipped under purchase

1442 PERISHABLE AGRICULTURAL COMMODITIES ACT

order number 119522, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$2,105.04.

For the 456.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119526, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$1,915.20.

For the 486.20 cwt. of Yukon Gold potatoes shipped under purchase order number 119533, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$2,042.04.

For the 436.20 cwt. of Yukon Gold potatoes shipped under purchase order number 119534, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$1,832.04.

For the 537.40 cwt. of Asterix potatoes shipped under purchase order number 119535, we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$2,257.08.

For the 431.00 cwt. of Asterix potatoes shipped under purchase order number 119536 we will reduce the contract price of \$10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$4.20 per cwt., or a total of \$1,810.20.

For the 420.40 cwt. of Yukon Gold potatoes shipped under purchase order number 119537, we will reduce the contract price of \$10.50 per cwt. by 65% (15% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$3.68 per cwt., or a total of \$1,547.07.

For the 479.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119554, we will reduce the contract price of \$10.50 per cwt. by 65% (15% for soft rot and 50% for heat and water damage) in

VINCENT CHIODO d/b/a CHIODO FARMS v. 1443
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of \$3.68 per cwt., or a total of \$1,762.72.

The total amount due Complainant for the eighteen loads of potatoes that Respondent received and accepted and reported a zero return without supplying sufficient proof to establish that the potatoes were without commercial value is \$35,913.52.⁶

We next turn to Complainant's allegation that Respondent breached the contract by improperly deducting from the remittance to Complainant \$16,229.50 for the cost of the Asterix and Bildstar seed potatoes supplied by Respondent. Under the terms of the written contract, Complainant states Respondent was not entitled to a deduction for the cost of these potatoes if the parties agreed that the growing conditions in the Dilley, Texas area were not suitable for growing these varieties. Complainant states further that prior to the harvest of the potatoes, Respondent sent an agronomist, Dr. Robert Thornton, to the fields to inspect the potato crop. During his inspection, Complainant states Dr. Thornton met with Complainant's Vincent Chiodo and Grayson Wilmeth in one of Complainant's fields. Complainant states they discussed the Asterix and Bildstar potatoes that Respondent had previously provided Complainant pursuant to the agreement, and Mr. Chiodo advised Dr. Thornton that the Asterix and Bildstar potatoes were not producing. According to Complainant, Dr. Thornton agreed and acknowledged that the conditions in the area were not suitable for growing those varieties of potatoes.⁷

In its sworn Answering Statement, Respondent refutes Complainant's contention that the parties agreed that the conditions in the Dilley, Texas area were not suitable for growing the Asterix and Bildstar potatoes. Respondent asserts to the contrary that Dr. Thornton stated the Asterix and Bildstar potatoes could be grown in the Dilley, Texas area. In support of this contention, Respondent attached to its Answering Statement an affidavit from Dr. Robert Thornton, wherein Dr. Thornton states, in relevant part, as follows:

...I visited the Chiodo facility at the direction of Farming Technology, Inc. during the early months of 2003 (February - May)...I talked to

⁶ This figure differs slightly from the amount sought by Complainant because in some instances, Respondent's accounting showed a percentage of soft rot that differed from the percentage shown on the USDA inspection certificate. We used the figures shown on the certificate.

⁷ Formal Complaint, Paragraph 17.

1444 PERISHABLE AGRICULTURAL COMMODITIES ACT

Grayson Wilmeth and Jack Chiodo on each and every visit. On an early visit I noted that the planting of the Asterix, Bildstar, Illona, and Yukon Golds in Field #11 was late for planting in that area. I came to that conclusion based on conversations with other growers in that area. I commented to Mr. Chiodo and Mr. Wilmeth that for the Asterix and Bildstar to reach their full yield and size potential, they should have been planted earlier. However, samples I hand dug in late April and early May indicated that the yield of both varieties was high for the area or at least normal compared to the other varieties I sampled...

...At no time did I ever tell Mr. Chiodo, Mr. Wilmeth, or anyone else employed by Mr. Chiodo, that the Asterix and Bildstar were not suitable for growing in the area where Mr. Chiodo was growing and in my opinion, these varieties could have been successfully grown in the Dilley, Texas area had they not been planted late.

In response to the Answering Statement and Thornton affidavit, Complainant submitted a sworn Statement in Reply with attached affidavits from Vincent Chiodo and Grayson Wilmeth. The Chiodo affidavit reads, in relevant part, as follows:

... As part of the contract FTI [Respondent] requested and I agreed to plant and attempt to produce certain varieties of potatoes, Asterix and Bildstar, which are not typically grown in this area, to determine whether the climate and other growing conditions in the area are suitable for producing these varieties ("experimental potatoes"). Pursuant to the terms of the contract I authorized FTI to deduct from my remittance the cost of the experimental potatoes provided by FTI, unless we agreed that the growing conditions in the Dilley area are not suitable for growing these varieties, in which case the cost of the experimental potatoes would not be deducted from the remittance.

FTI agreed to make its agronomist, Rob Thornton, available to assist us in growing the potatoes under the contract, including the experimental potatoes. FTI was responsible for timely delivering the experimental potatoes to us for planting. The planting period for potatoes in the Dilley, Texas area is from on or about January 10 through about mid-February.

In January, 2003, after the potato planting season was well underway, I contacted FTI because we had not received the experimental potatoes, to ask when we could expect to receive them for planting. My copies of the Loading/Delivery Report, Bill of Lading, and Federal-State Inspection Certificate relating to FTI's shipment of the experimental potatoes show that they were shipped by FTI from its farm in Colorado to Chiodo Farms on Wednesday, January 22, 2003, and therefore were

delivered to us at the earliest on Thursday, January 23, 2003, or Friday, January 24, 2003. Attached as Exhibits 1, 2 and 3 are copies of the Loading/Delivery Report, Bill of Lading, and Federal-State Inspection Certificate. After the potatoes were received they had to be prepared for planting and left out for at least a day before planting to allow them to wake up.

I keep a journal in which I record on a daily basis the activities on the farm, including the planting and harvesting of crops. My daily journal shows that the Asterix potatoes were planted on Monday, January 27, 2003, in field 11, and the Bildstar potatoes were planted in the same field on the next day, January 28, 2003. Attached as Exhibit 4 is a copy of the page of my journal for the week of January 27, 2003, showing the farm activities which took place that week, including the planting of the Asterix potatoes on January 27 and the planting of the Bildstar potatoes on the following day.

I have read the affidavit of Rob Thornton (“Thornton”) attached to FTI’s Verified Answering Statement. Thornton’s statement that the experimental potatoes were planted late is false. They were planted well within the window for the planting of potatoes in this area. Moreover, if there was any delay in the planting of the experimental potatoes it was the result of FTI’s delay in shipping them to us, not from any delay on our part in planting them after delivery.

Thornton claims he came to the conclusion that the potatoes were planted late based on conversations he had with other growers in the area, however, he does not identify any of these growers; nor does he identify any grower in the area who successfully produced these experimental potatoes in 2003. I am not aware of any grower in the area who successfully produced Asterix or Bildstar potatoes in 2003; nor am I aware of any grower in the area who has successfully produced these experimental potatoes since 2003.

Thornton’s statement that he commented to me “that for the Asterix and Bildstar potatoes to reach their full yield and size potential, they should have been planted earlier,” is also false. He never indicated to me that the experimental potatoes were planted late. As I stated in the verified Formal Complaint, while conducting an inspection during the 2003 season, Thornton did admit to Grayson Wilmeth and me that the climate conditions in the area were not suitable for growing the experimental potatoes...

The Wilmeth affidavit reads, in relevant part, as follows:

...Vincent R. Chiodo is my great uncle. From June 1, 2002, until

1446 PERISHABLE AGRICULTURAL COMMODITIES ACT

January 1, 2005, we were partners in the agricultural business, growing and producing various crops in Frio County, including potatoes.

I grew up in the Dilley area and have been involved in farming in Frio County, including planting and producing potatoes, for most of my life. I am familiar with the planting period for potatoes in the Dilley, Texas area, which is from on or about January 10 through about mid-February. I have read the affidavit of Rod Thornton (“Thornton”) attached to FTI’s Verified Answering Statement. Thornton’s statement that the Asterix and Bildstar potatoes (“experimental potatoes”) were planted late is false. They were planted well within the window for the planting of potatoes in this area. My recollection is that we were waiting for FTI to deliver the experimental potatoes to us for planting and that they were planted within two (2) days after they were delivered to Chiodo Farms. After the potatoes were received they had to be prepared for planting and left out for at least a day before planting to allow them to wake up. FTI was responsible for timely delivering the experimental potatoes to Chiodo Farms for planting. Therefore, if there was any delay in the planting of the experimental potatoes it was the result of FTI’s delay in shipping them to us, not from any delay on our part in planting them after delivery.

Thornton claims he came to the conclusion that the potatoes were planted late based on conversations he had with other growers in the area, however, he does not identify any of these growers; nor does he identify any grower in the area who successfully produced these experimental potatoes in 2003. I am not aware of any grower in the area who successfully produced Asterix or Bildstar potatoes in 2003; nor am I aware of any grower in the area who has successfully produced these experimental potatoes since 2003.

Thornton’s statement that he commented to me that for the Asterix and Bildstar potatoes to reach their full yield and size potential, they should have been planted earlier, is also false. He never indicated to me that the experimental potatoes were planted late. As I stated in my previous affidavit dated January 27, 2005, while conducting an inspection during the 2003 season, Thornton did admit to my great uncle and me that the climate conditions in the area were not suitable for growing the experimental potatoes because they cannot survive the south Texas heat...

Notwithstanding the dispute between Dr. Thornton and Complainant’s Vincent Chiodo and Grayson Wilmeth concerning whether the “experimental potatoes” were planted late, Complainant’s allegation that Dr. Thornton agreed that the climate conditions in the Dilley, Texas area are not suitable for growing Asterix and Bildstar potatoes is refuted by the sworn testimony of Dr. Thornton. Moreover,

VINCENT CHIODO d/b/a CHIODO FARMS v. 1447
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

Dr. Thornton was not employed by Respondent, but was merely acting as a consultant, so any agreement reached between Dr. Thornton and Complainant would not be legally binding upon Respondent in the absence of proof that the scope of Dr. Thornton's agreement with Respondent included the authority to decide contractual matters on Respondent's behalf. Since Complainant offers no further proof aside from the alleged agreement with Dr. Thornton to substantiate its claim that Respondent agreed that conditions in the Dilley, Texas were not suitable for growing the Asterix and Bildstar potatoes, we find that Complainant has failed to sustain its burden to prove the existence of such an agreement. Respondent is therefore entitled to deduct from its remittance to Complainant the cost of the Asterix and Bildstar potatoes, or a total of \$16,229.50.⁸

Finally, Complainant alleges that Respondent breached the contract by improperly deducting freight charges in the amount of \$7,773.00, without Complainant's authorization and without any contractual right to do so under the agreement. The freight expenses deducted by Respondent were incurred in connection with nine loads of potatoes that were rejected to Complainant. In the formal Complaint, Complainant states that on or about May 21, 2003, Vincent Chiodo spoke with Respondent's Kent Ellsworth and asked him whether he had any concerns about the condition of the potatoes shipped that day. Complainant states Mr. Chiodo also advised Mr. Ellsworth that the remaining potatoes looked bad and questioned whether any more potatoes should be shipped. According to Complainant, Mr. Ellsworth denied having any concerns about the quality or condition of the recently shipped potatoes and instructed Mr. Chiodo to ship the remaining potatoes. Complainant states Mr. Ellsworth failed to tell Mr. Chiodo that Respondent had rejected a load delivered the same day and had written down the purchase prices for the potatoes it accepted by an average of approximately 65%. Had Mr. Chiodo been informed of the rejected loads and write-downs, Complainant states he would not have loaded and shipped any more potatoes. On May 22, 2003, in accordance with Mr. Ellsworth's instructions, and without knowledge of Respondent's rejection and write-downs, Complainant states Mr. Chiodo shipped nine truckloads of potatoes to Respondent, eight of which were

⁸ Respondent apparently billed Complainant this amount for the seed under invoice numbers 8883-A and 11347-A (see Formal Complaint Exhibit 9). Although copies of the invoices were not submitted, Complainant's claim does not concern the amount of the deduction, but merely whether Respondent was entitled to make such a deduction under the terms of the written contract. We therefore accept the deduction amount as stated.

1448 PERISHABLE AGRICULTURAL COMMODITIES ACT

rejected. Complainant states Respondent failed to inform Mr. Chiodo of the rejections or dispose of the potatoes. Instead, Complainant states that Respondent, without authorization or any contractual right to do so under the agreement, shipped most of the rejected potatoes back to Complainant and deducted freight charges from the amount due Complainant in the sum of \$7,773.00.

In response to Complainant's allegations, Respondent asserts in its Answer that Complainant made the decision to ship the loads, and as such Respondent was justified in deducting the freight on the rejected loads. Respondent is at least partially correct in this assertion. Complainant acknowledges that it was aware that the potatoes in question were in poor condition prior to shipment, and asserts that it advised Respondent of this fact. Nevertheless, in the absence of proof that Complainant renegotiated the grade terms of the contract to provide, for example, that the sale of the potatoes in question would be "as is" or "with all faults," Complainant was still obligated to ship potatoes that complied with the grade requirements of the contract. Therefore, assuming Respondent promptly notified Complainant that it was rejecting the potatoes, and without any evidence showing that the potatoes complied with the contract requirements thereby making the rejection unlawful, Complainant is responsible for the expenses Respondent incurred in connection with the rejected potatoes, including freight.

Complainant has alleged, however, that it was not given timely notice of the rejections. In response to this allegation, Respondent attached to its sworn Answering Statement an affidavit from its Vice President of Field Operations, Mr. Kent Ellsworth, wherein Mr. Ellsworth states, in relevant part, as follows:

After the first week of harvest, Mr. Chiodo and I discussed the quality problems. I asked Mr. Chiodo if he had a different field he could get into and if so, did he think the quality would improve. He told me he did have a new field but that I should talk to Grayson in the morning to see about the quality. We agreed to that plan and decided to switch fields. The next morning, I called Grayson early and asked his opinion on the new field. He said that although it looked better, it still had some problems. He said he was running slow and trying to grade out the problems. I immediately contacted Mr. Chiodo and gave him Grayson's report. We decided to continue to harvest. We were harvesting eight to fourteen (8-14) loads per day at this time to keep up with the ad commitments.

Two days later, the quality of the potatoes quickly worsened to the point that we could no longer use them. I called Mr. Chiodo and told him of the situation. He agreed that it was time to quit. At that point I

informed him that we had some loads that we could not use and would have to reject. We discussed the options. The best cost alternative was to send the rejected loads to the food bank in San Antonio. However, they could only take two loads. The disposal cost in Houston was higher than the return freight to Dilley, Texas so Mr. Chiodo and I decided to send the remaining loads back to Dilley for him to unload. After the fifth (5th) truck was sent back, Mr. Chiodo notified me not to send any more back to Dilley. The remaining two (2) trucks were disposed of in Houston.

In response to Mr. Ellsworth's statements, Vincent Chiodo states in the affidavit submitted with Complainant's Statement in Reply, the following, in pertinent part:

... Ellsworth's statements that I agreed to the shipment of the rejected potatoes from FTI's facility in Houston back to Dilley, and did not object to the deduction of the freight charges from the remittance, are false.

What actually happened is that toward the end of the potato harvest, on May 21 or 22, 2003, Grayson Wilmeth and I called Ellsworth on a speaker phone from our produce shed. We told Ellsworth that the quality of the remaining potatoes was bad and questioned whether any more potatoes should be shipped. Ellsworth instructed us to ship the rest of the potatoes, told us he needed them and they would cull them out at the other end, and sent purchase orders for the potatoes. In accordance with these instructions and the purchase orders, on May 22, 2003, we shipped nine (9) loads of potatoes to FTI.

On Friday, May 23, 2003, which was Memorial Day weekend, Ellsworth called me, stated that the potatoes were no good, had been rejected, and the rejected loads were being sent back to Dilley. I objected to FTI shipping the rejected potatoes back to Dilley but Ellsworth stated they were already in transit. As a result, I had to hire a crew to unload and dispose of the rejected potatoes. We spent most of Memorial Day weekend unloading and disposing of these potatoes. Later, when I found out FTI had deducted from my remittance the freight charges for the shipment of the rejected loads, I complained about the deduction to Ellsworth, to no avail.

Contrary to the statements in Ellsworth's affidavit, I never agreed to the shipment of the rejected loads back to Dilley and never agreed to pay the freight charges for the rejected loads.

The Regulations (7 C.F.R. § 46.2(bb)) provide that a rejection must

1450 PERISHABLE AGRICULTURAL COMMODITIES ACT

be made within a reasonable amount of time. For truck shipments, a reasonable amount of time is defined as not exceeding eight hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection. 7 C.F.R. § 46.2(cc)(2). In computing this time period, for shipments arriving on non-work days or after the close of regular business hours on workdays when a representative of the receiver having authority to reject shipments is not present, non-working hours preceding the start of regular business hours on the next working day are not included. For shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period runs without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period is extended and runs from the start of regular business hours on the next working day. (See 7 C.F.R. § 46.2(cc)(4)).

Of the nine loads of potatoes rejected by Respondent, one was reportedly received on May 22, 2003, and the remaining eight loads were reportedly received on May 23, 2003.⁹ Complainant's Vincent Chiodo has testified that he was told on May 23, 2003 that the potatoes were being rejected. Such notice, in the absence of evidence to the contrary, seems to fall within the parameters outlined above for timely notice of a rejection. Moreover, notwithstanding Mr. Chiodo's alleged objection to the return of the potatoes to Dilley, Texas, Mr. Chiodo does not assert that this was not the most cost effective means of disposing of the potatoes under the circumstances. Mr. Chiodo's frustration at incurring the associated freight cost seems to stem primarily from the fact that the potatoes were ever shipped, given that they were already in poor condition prior to shipment. However, as we already mentioned, in the absence of proof that the contract terms were renegotiated, Complainant was still obligated to ship potatoes that complied with the grade requirements of the contract. Therefore, if Complainant made the decision to ship based on Respondent's acceptance of previous shipments, rather than its own estimation as to whether the potatoes in question were suitable for shipment, it did so at its own peril. Accordingly, we conclude that Complainant is responsible for the freight charges incurred by Respondent for the nine loads of potatoes that Respondent rejected, which total \$7,773.00.

We have determined that Respondent is entitled to deduct from its remittance to Complainant the seed cost of the Asterix and Bildstar potatoes in the amount of \$16,229.00, and the freight charges incurred in connection with the rejected potatoes in the amount of \$7,773.00. These deductions were already taken when Respondent made its

⁹ See Formal Complaint, Exhibit 7.

VINCENT CHIODO d/b/a CHIODO FARMS v. 1451
FARMING TECHNOLOGY, INC.
65 Agric. Dec. 1432

remittance to Complainant in the amount \$117,991.31.¹⁰ This remittance does not, however, include any return on the eighteen loads of potatoes that we have considered here and determined an amount due of \$35,913.52. Therefore, there remains a balance due Complainant from Respondent of \$35,913.52.

Respondent's failure to pay Complainant \$35,913.52 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$35,913.52, with interest thereon at the rate of 5.07 % per annum from July 1, 2003, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

¹⁰ See Formal Complaint, Exhibit 9.

1452 PERISHABLE AGRICULTURAL COMMODITIES ACT

**FRU-VEG MARKETING, INC V. J. F. PALMER & SONS
PRODUCE, INC.
PACA Docket No. R-06-083.
Decision and Order.
Filed November 15, 2006.**

PACA-R – Damages – Not Proven.

Where Complainant sought damages for Respondent's repudiation, but failed to establish that its resale of the goods was commercially reasonable, Complainant was relegated to the measure of damages set forth in U.C.C. § 2-708, i.e., the difference between the prevailing market price at the time and place for tender and the unpaid contract price. Complainant was, however, unable to prove it was damaged according to this method because the relevant prices reported by U.S.D.A. Market News were higher than the contract price. Accordingly, the complaint was dismissed.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$13,724.10 in connection with two trucklots of asparagus shipped in the course of foreign commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. 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 to file Briefs. Complainant filed an Opening Statement. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Fru-Veg Marketing, Inc., is a corporation whose post office address is 2300 N.W. 102nd Avenue, Miami, Florida, 33172-2220. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, J. F. Palmer & Sons Produce, Inc., is a corporation whose post office address is P.O. Box 518, Pharr, Texas, 78577-0518. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On April 26, 2005, Respondent faxed to Complainant purchase order number 281903, listing 1,200 cartons of standard/large asparagus at \$18.00 per carton, to be picked up on Monday, May 2, 2005, under pick up number 25862.
4. On April 27, 2005, Respondent faxed to Complainant purchase order number 281933, listing 480 cartons of standard/large asparagus at \$18.00 per carton. This asparagus was also scheduled to be picked up on Monday, May 2, 2005, under pick up number 25875. On the same date, the quantity for purchase order number 281903 was changed to 840 cartons, and the quantity for purchase order number 281933 was changed to 720 cartons.
5. On April 29, 2005, 1,835 cartons of asparagus were shipped via airfreight from the country of Peru to Complainant in Miami, Florida.
6. Respondent did not send a truck to pick up the asparagus referenced in Findings of Fact 3 and 4 on Monday, May 2, 2005, as scheduled.
7. On Tuesday, May 3, 2005, Complainant agreed to reduce the price of the asparagus to \$17.25 per carton.

1454 PERISHABLE AGRICULTURAL COMMODITIES ACT

8. On Wednesday, May 4, 2005, at 9:22 a.m., Complainant's Steve White faxed Respondent's John Backer a message stating as follows:

After our phone conversation late Tuesday afternoon to cancel our contracts to load 1560 cases of asparagus, Palmer PO#'s 219933 [sic] and 281903, I am putting you on notice that I will sell the above-mentioned asparagus, for your account, to recover my losses, and will seek damages for the difference of our final sale price and our agreed price of \$17.25 FOB Miami.

9. Between May 4, 2005, and May 6, 2005, Complainant sold 1,835 cartons of large and standard asparagus as detailed below:

FRU-VEG MARKETING, INC. v.
 J. F. PALMER & SONS PRODUCE, INC.
 65 Agric. Dec. 1452

1455

<u>Invoice No.</u>	<u>Ship Date</u>	<u>Description</u>	<u>Qty.</u>	<u>Price</u>	<u>Amount</u>
10025939-4	05/04/05	Green Asparagus Large	120	\$16.00	\$1,920.00
10025937-4	05/04/05	Green Asparagus Standard	78	\$12.00	\$936.00
		Green Asparagus Standard	28	\$12.00	\$336.00
		Green Asparagus Standard	192	\$0.00	\$0.00
		Green Asparagus Large	372	\$12.00	\$4,464.00
		Green Asparagus Large	50	\$1.00	\$50.00
10025968-3	05/04/05	Green Asparagus Large	40	\$15.00	\$600.00
10025969-3	05/04/05	Green Asparagus Standard	50	\$16.00	\$800.00
		Green Asparagus Large	50	\$16.00	\$800.00
10025954-3	05/06/05	Green Asparagus Standard	60	\$15.50	\$930.00
		Green Asparagus Large	60	\$15.00	\$900.00
10025999-4	05/06/05	Green Asparagus Standard	140	\$9.75	\$1,365.00
		Green Asparagus Large	140	\$2.10	\$294.00

1456 PERISHABLE AGRICULTURAL COMMODITIES ACT

10025995-4	05/06/05	Green Asparagus Standard	140	\$1.00	\$140.00
		Green Asparagus Large	55	\$5.00	\$275.00
10025997-3	05/06/05	Green Asparagus Standard	40	\$12.00	\$480.00
		Green Asparagus Large	20	\$12.00	\$240.00
		Green Asparagus Large	35	\$12.00	\$420.00
		Green Asparagus Large	25	\$15.50	\$387.50
10026003-4	05/06/05	Green Asparagus Large	140	\$4.75	\$665.00
		Totals	1,835		\$16,002.50
		Average \$8.72 per carton			

10. The informal complaint was filed on July 8, 2005, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover damages allegedly suffered as a result of Respondent's failure to pick up 1,560 cartons of asparagus that Respondent contracted to purchase from Complainant in the course of foreign commerce. Complainant states specifically that Respondent agreed to purchase 1,560 cartons of asparagus at an agreed price of \$18.00 per carton, f.o.b., which was later amended to \$17.25 per carton, for a total contract price of \$26,910.00. Complainant states further that following Respondent's failure to pick up the asparagus, Complainant notified Respondent on May 4, 2005, that it did not have a choice but to sell the 1,560 cartons for their account. Complainant states it sold the asparagus for total proceeds of \$13,185.90, or \$13,724.10 less than the contract price negotiated with Respondent. Complainant seeks to recover the latter amount as damages resulting from Respondent's breach.

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it denies all of the allegations of the formal Complaint, including its alleged agreement to purchase the two lots of asparagus in question. In addition, Respondent specifically denies Complainant's claim for damages on the basis that Complainant did not segregate and assign a lot number to the asparagus allegedly sold to Respondent in order to establish that the subsequent sales of asparagus were of the same cartons that were originally intended for shipment to Respondent. Respondent also asserts that Complainant failed to secure a U.S.D.A. inspection to justify sales at less than half the market price, or to show that the cartons that were dumped had no commercial value.

First, with respect to Respondent's denial that it contracted to purchase the asparagus, we find that the two purchase orders issued by Respondent, which also include pick up numbers, are sufficient evidence to establish Respondent's agreement to purchase the two lots of asparagus in question.¹ Respondent's failure to pick up the asparagus that it contracted to purchase constitutes a breach of contract for which Complainant is entitled to recover provable damages. Complainant seeks to recover \$13,724.10 based on its resale of the asparagus to

¹ See Formal Complaint, Exhibits A and A-1

1458 PERISHABLE AGRICULTURAL COMMODITIES ACT

various receivers between May 4 and May 6, 2005. The Uniform Commercial Code, section 2-706, provides, in relevant part, that:

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. . . .

While Complainant's resale of the asparagus was certainly prompt, we must nevertheless consider whether the resale was proper in light of Respondent's concerns regarding the identity of the product that was resold, and the failure of Complainant to secure a U.S.D.A. inspection to justify below-market sales and dumped product.

As we mentioned, Respondent maintains that Complainant failed to properly segregate the asparagus intended for sale to Respondent by assigning a lot number that could be traced through the subsequent resale of the product. In response, Complainant asserts in its Opening Statement that the asparagus in question was assigned lot number 16669.² In addition, Complainant attached to the Opening Statement a copy of an airway bill allegedly referring to the asparagus in question, which shows that Complainant imported 1,835 cartons of asparagus from Peru on April 29, 2005.³ The number 16669 is handwritten on the airway bill. Complainant also submitted copies of its invoices showing that it sold 1,835 cartons of large or standard asparagus between May 4 and May 6, 2006.⁴ Although Complainant fails to explain why it imported 1,835 cartons of asparagus when Respondent's order was only for 1,560 cartons, we nevertheless find that the evidence submitted by Complainant is sufficient to establish that the documented resales were from the same lot of asparagus that Complainant originally sold to

² See Opening Statement, paragraph 4.

³ See Opening Statement, Exhibit #4.

⁴ See Report of Investigation, Exhibits 6-F through 6-M.

Respondent.⁵

The invoices submitted by Complainant show that the asparagus was sold at prices ranging from \$0.00 to \$16.00 per carton. By comparison, Respondent submitted copies of the Miami Wholesale Fruit and Vegetable Reports issued by U.S.D.A. Market News for May 4, 2005 though May 6, 2005, which show that standard and large asparagus originating from Peru were selling for \$20.00 to \$22.00 per carton.⁶ In response to this evidence, Complainant's Chief Executive Officer, Conchita Espinosa, asserts in her sworn Opening Statement that "[t]he Miami 'wholesale' market report does not represent the FOB market at that time. I have included copies of the actual e-mail correspondence sent to our growers along with market reports for the same days. The e-mail price lists are documents that are used by Fru-Veg Marketing, Inc. in the course of day-to-day business to inform our growers of market conditions."⁷ Upon reviewing these documents, we note that the e-mailed price lists, like Complainant's invoices, only establish the prices at which Complainant was selling asparagus. If those prices are significantly below the prices reported by U.S.D.A. Market News, Complainant must still secure independent evidence, such as a U.S.D.A. inspection, to show that the condition of the asparagus was such that prevailing market prices could not be obtained.

In this regard, Complainant submitted one U.S.D.A. inspection certificate covering 140 cartons of standard asparagus and 140 cartons of large asparagus shipped to Cooseman's Tampa Inc., in Tampa, Florida, on May 6, 2005.⁸ The inspection, which took place on May 9, 2005 at 2:00 p.m., and disclosed 4% average decay in the standard asparagus and 15% average defects, including 9% limp and wilted and 6% decay, in the large asparagus, is not sufficiently timely for a May 6th shipment from Miami to Tampa, Florida. Absent any other evidence to justify Complainant's failure to sell a substantial portion of the lot of asparagus in question, 857 cartons, at more than half of the prevailing market price, we conclude that Complainant has failed to establish that its resale of the asparagus was commercially reasonable.

⁵ Subsection 2 to U.C.C. § 2-706 states that "[t]he resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach."

⁶ See Answer, Exhibits A through C.

⁷ See Opening Statement, paragraph 7.

⁸ See Opening Statement, Exhibit 7.

1460 PERISHABLE AGRICULTURAL COMMODITIES ACT

As stated in Comment 2 to U.C.C. § 2-706, failure to act in a commercially reasonable manner “deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.” Section 2-708 provides in relevant part:

(1) Subject to subsection (2) and to the provisions of the Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

As we mentioned, the prevailing market price in Miami, Florida for standard and large asparagus imported from Peru during the time period in question was \$20.00 to \$22.00 per carton, or an average of \$21.00 per carton. The contract price of the asparagus was \$17.25 per carton. Since the market price of the asparagus at the time of the breach was greater than the contract price, Complainant should have been able to resell the asparagus for as much or more than the price negotiated with Respondent. Consequently, Complainant has not established that it was damaged as a result of Respondent's failure to pick up the asparagus. The Complaint should, therefore, be dismissed.

Order

The Complaint is dismissed.

Copies of this Order shall be served upon the parties

HARVEST LOGISTICS, INC. V. MOBILE PRODUCE, INC.

PACA Docket No. R-06-093.

Decision and Order.

Filed December 20, 2006.

PACA-R – Suitable Shipping Condition – When Applicable at a Secondary Destination.

Where the contract destination for a load of watermelons was Houston, Texas, and Respondent diverted the shipment to South Carolina, held that the inspection of the watermelons in South Carolina nevertheless established a breach of warranty by Complainant, as the inspection was performed only a day later than it would have been if the watermelons had been delivered to Texas, and the inspection report disclosed such condition defects that it could be concluded with assurance that if the watermelons had been delivered to, and inspected at the contract destination, a breach of the suitable shipping condition warranty would have been found.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$5,820.00 in connection with one truckload of watermelons shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. 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 to file Briefs. Neither party elected to file any additional evidence. Respondent submitted a Brief.

Findings of Fact

1. Complainant, Harvest Logistics, Inc., is a corporation whose post office address is 557 E. Frontage Road #27, Nogales, Arizona, 85621-9504. At the time of the transaction involved herein, Complainant was not licensed, but was operating subject to license under the Act.
2. Respondent, Mobile Produce, Inc., is a corporation whose post office address is 9402 Big Bear Lake Court, Bakersfield, California, 93312. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about March 5, 2006, Complainant, by oral contract, sold to Respondent 39,240 pounds (616 cartons) of U.S. No. 1 seedless watermelon 3's at \$0.20 per pound, for a total contract price of \$7,848.00. On the same date, the watermelons were shipped from loading point in Nogales, Arizona to Houston, Texas.
4. On March 7, 2006, a U.S.D.A. inspection was performed on the

1462 PERISHABLE AGRICULTURAL COMMODITIES ACT

watermelons mentioned in Finding of Fact 3 at the place of business of Country Fresh, in Mauldin, South Carolina, the report of which disclosed the following, in pertinent part:

HARVEST LOGISTICS, INC. v.
MOBILE PRODUCE, INC.
65 Agric. Dec. 1460

1463

TEMPERATURE	PRODUCT	BRAND/MARKINGS	ORIGIN	NO. of CONTAINERS
58 TO 59 F.	Watermelons	"Tommy Brand," 3 count, seedless	MX	616 cartons
AVERAGE DEFECTS	including SER DAM.	OFFSIZE/DEFECTS		
29%	17%	Quality (25 to 35%)(Hollow heart, second growth)		
20%	20%	Overripe (10 to 30%)		
03%	01%	Bruising	Size not determined.	
04%	04%	Decay (0 to 10%)		
56%	42%	Checksum		

GRADE: Fails to grade U.S. No. 1 account quality defects.

REMARKS: Inspected on U.S. No. 1 basis at applicant's request.

1464 PERISHABLE AGRICULTURAL COMMODITIES ACT

5. Respondent paid Complainant \$2,028.00 for the watermelons with check number 6524, dated April 12, 2006.

6. The informal complaint was filed on April 17, 2006, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one truckload of watermelons sold to Respondent. Complainant states Respondent accepted the watermelons as agreed in the contract of sale, but that it has since paid only \$2,028.00 of the agreed purchase price, leaving a balance due Complainant of \$5,820.00. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing and accepting the subject load of watermelons, but asserts that the watermelons were not in suitable shipping condition at the time of shipment.

There is no dispute that the watermelons were sold under f.o.b. terms. The Regulations (7 C.F.R. § 46.43(i)) 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 in the Regulations (7 C.F.R. § 46.43(j)) 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.¹

¹The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). 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 the 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
(continued...)

By definition, the warranty of suitable shipping condition only extends to the contract destination agreed upon between the parties. According to Complainant, Respondent re-routed the load from the contract destination in Houston, Texas, first to San Antonio, Texas, and then to Mauldin, South Carolina. On this basis, Complainant refuses to recognize the inspection performed in South Carolina as evidence of a breach of warranty. In its sworn Answer, Respondent acknowledges that the load was “misdirected” to South Carolina. Hence, we conclude that the load was diverted from the contract destination of Houston, Texas, to Mauldin, South Carolina.

Nevertheless, in *A. A. Corte & Sons v. J. Lerner & Son*, 14 Agric. Dec. 320 (1955), where a shipment of potatoes was diverted from Chicago to Pittsburgh, thereby extending the transit time for approximately one day, the Judicial Officer stated:

It is a misinterpretation of the regulation quoted above to hold that the diversion of a shipment to any point other than the destination specified in the contract of sale automatically and arbitrarily voids the implied warranty of suitable shipping condition. If it can be established by reliable evidence that a shipment which has been so diverted is so deteriorated upon arrival that it can be concluded with assurance that it would also have been abnormally deteriorated had it been delivered at the destination specified in the contract, the requirements of the regulation are met and the implied warranty is applicable. Cf. *United Packing Co. v. Schoenburg*, 13 A.D. 175. (emphasis supplied).

The U.S.D.A. inspection of the watermelons in Mauldin, South Carolina, which took place at 11:00 a.m., on March 7, 2006, or

¹(...continued)

delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. 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. See *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).

1466 PERISHABLE AGRICULTURAL COMMODITIES ACT

approximately one day after the watermelons would have arrived and been available for inspection in Houston, Texas, disclosed 56% average defects, including 29% quality defects, 20% overripe, 3% bruising, and 4% decay.² The United States Standards for Grades of Watermelons³ provide a tolerance at shipping point for watermelons sold under a U.S. Grade designation of 10% for watermelons in any lot that fail to meet the requirements of the grade, including therein not more than 5% for defects causing serious damage, and not more than 1% for watermelons that are affected by decay. For watermelons sold f.o.b., we increase these percentages to allow for normal deterioration in transit, up to a maximum of 15% for average defects for a shipment in transit for five days. Since the inspection of the watermelons in question disclosed more than triple this percentage of defects after only two days in transit, we can be reasonably certain that an inspection performed one day earlier at the contract destination in Houston, Texas would have revealed defects in excess of the applicable suitable shipping condition allowance. We therefore find that the preponderance of the evidence supports Respondent's contention that the watermelons were not in suitable shipping condition.

We also note that even if the diversion had prevented us from concluding that the watermelons were not in suitable shipping condition, the U.S.D.A. inspection would still show a breach of contract on the part of Complainant because the inspection shows that the watermelons failed to grade U.S. No. 1 due to excessive quality defects. Complainant sold the watermelons under the terms f.o.b. U.S. No. 1, which means that Complainant warranted that the watermelons were U.S. No. 1 at shipping point. The quality defects disclosed by the inspection are permanent defects that were also present at shipping point. Hence, the failure of the watermelons to grade U.S. No. 1 at destination on account of quality defects means that the watermelons also failed to meet the requirements of the U.S. No. 1 grade at shipping point.

Complainant's failure to ship watermelons that complied with the contract requirements constitutes a breach of warranty for which Respondent is entitled to recover provable damages. The general measure of damages for a 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

² See Report of Investigation, Exhibit No. 6a.

³ The United States Standards for Grades of Watermelons, § 51.1970 through 51.1987, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at <http://www.ams.usda.gov/standards/stanfrfv.htm>.

circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent reported a return from its customer of \$2.48 per carton for the watermelons.⁴

Respondent did not, however, submit a detailed account of sales to show how its customer arrived at this return.⁵ Without such evidence, we cannot accept the reported return as evidence of the value of the watermelons as accepted.

Absent an accounting, the value of goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. See, e.g., *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994). Under this method, the value of the goods as warranted is reduced by the percentage of condition defects disclosed by a prompt inspection to arrive at the value of the goods as accepted. In the instant case, since the watermelons were sold as U.S. No. 1, we will use the combined percentage of quality and condition defects for this calculation. See *C. J. Prettyman, Jr., Inc. v. American Growers, Inc.*, 55 Agric. Dec. 1352 (1996).

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 price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990). The reports issued on or around March 6, 2006 for Dallas, Texas, the nearest reporting location to the contract destination of Houston, Texas, does not show list prices for 3-count seedless watermelons originating from Mexico. A less precise means of ascertaining the value the goods would have had if they had been as warranted is to use the delivered price of the commodity (f.o.b. plus freight). *Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983). The f.o.b. contract price of the watermelons was \$7,848.00, to which we will add \$1,900.00 for freight, which is the rate listed on the Market News Fruit and Vegetable Truck Rate Report for the week ending March 7, 2006, for a shipment from Nogales, Arizona, to Dallas, Texas, the latter of which is approximately the same distance from Nogales as Houston. This results in a value for the watermelons if they had been as warranted of \$9,748.00.

⁴ See Formal Complaint, Exhibit No. 6.

⁵ The settlement sheet prepared by Respondent's customer (see Report of Investigation , Exhibit No. 6b) shows only the price at which the parties settled, less freight, but does not list individual sales prices or dates of sale.

1468 PERISHABLE AGRICULTURAL COMMODITIES ACT

To determine the value of the watermelons as accepted, we will reduce the value they would have had if they had been as warranted by 56%, or \$5,458.88, to account for the quality and condition defects disclosed by the U.S.D.A. inspection. This results in a value for the watermelons as accepted of \$4,289.12. As we mentioned, Respondent's damages are measured as the difference between the value of the watermelons as accepted, \$4,289.12, and the value they would have had if they had been as warranted, \$9,748.00, or \$5,458.88. In addition, Respondent may recover the \$150.00 U.S.D.A. inspection fee as incidental damages. Respondent's total damages therefore amount to \$5,608.88. When we deduct Respondent's damages of \$5,608.88 from the contract price of the watermelons of \$7,848.00, there remains an amount due Complainant for the watermelons of \$2,239.12. Respondent paid Complainant \$2,028.00 for the watermelons. Therefore, there remains a balance due Complainant from Respondent of \$211.12. Respondent's failure to pay Complainant \$211.12 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

HARVEST LOGISTICS, INC. v.
MOBILE PRODUCE, INC.
65 Agric. Dec. 1460

1469

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$211.12, with interest thereon at the rate of _____% per annum from April 1, 2005, until paid, plus the amount of \$300.00.
Copies of this Order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

**In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Order Denying Petition to Reconsider.
Filed August 21, 2006.**

**PACA – Perishable agricultural commodities – Motive for bribery irrelevant –
Publication of facts and circumstances appropriate sanction.**

The Judicial Officer denied KOAM Produce, Inc.'s (Respondent) petition to reconsider *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006). The Judicial Officer concluded: (1) the Judicial Officer's conclusion that Respondent violated 7 U.S.C. § 499b(4) was not based exclusively on a plea of guilty to bribery; (2) Complainant's witness, William Cashin, testified truthfully regarding the reasons for Respondent's bribery; (3) the Judicial Officer did not erroneously omit Respondent's material and relevant proposed findings of fact; and (4) the publication of the facts and circumstances of Respondent's violations of the PACA was an appropriate sanction.

Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

James R. Frazier, Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted this administrative proceeding by filing a Complaint on September 17, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). On May 3, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed an Amended Complaint.

Complainant alleges: (1) during the period April 1999 through July 1999, KOAM Produce, Inc. [hereinafter Respondent], through its employee, Marvin Friedman, made illegal payments to a United States

Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities which Respondent purchased from 11 sellers in interstate or foreign commerce; (2) on September 20, 2000, the United States District Court for the Southern District of New York entered a judgment in which Marvin Friedman pled guilty to 10 counts of bribery of a public official, relating to the illegal payments to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities; (3) Respondent made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions prior to April 1999; and (4) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Amended Compl. ¶¶ III-VI). On July 29, 2002, Respondent filed an "Answer to Amended Complaint" denying the material allegations of the Amended Complaint.

On March 25, 2003, and November 17 and 18, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted an oral hearing in New York, New York. Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Paul T. Gentile, Gentile & Dickler, LLP, New York, New York, represented Respondent.

On April 18, 2005, after Complainant and Respondent filed post-hearing briefs, the ALJ issued a decision. On June 1, 2005, Respondent filed a "Petition to Rehear and Reargue," and on July 1, 2005, Complainant filed "Complainant's Response to Respondent's Petition to Rehear and Reargue." On January 6, 2006, the ALJ issued a Decision and Order Following Reargument [hereinafter Initial Decision] which supercedes the ALJ's April 18, 2005, decision. The ALJ: (1) concluded, during the period April 1999 through July 1999, Respondent, through its employee and agent, Marvin Friedman, paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce; (2) concluded Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving

1472 PERISHABLE AGRICULTURAL COMMODITIES ACT

perishable agricultural commodities received or accepted in interstate or foreign commerce; and (3) revoked Respondent's PACA license (Initial Decision at 25-27).

On March 30, 2006, Respondent appealed to the Judicial Officer, and on April 18, 2006, Complainant filed a response to Respondent's appeal petition. On April 19, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On June 2, 2006, I issued a Decision and Order: (1) concluding Respondent, through its employee and agent, Marvin Friedman, paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce; (2) concluding Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce; and (3) ordering the publication of the facts and circumstances of Respondent's violations of the PACA.¹

On July 17, 2006, Respondent filed a Petition to Reconsider. On August 9, 2006, Complainant filed a response to Respondent's Petition to Reconsider. On August 11, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider. References to Complainant's exhibits are designated in this Order Denying Petition to Reconsider by "CX." References to the transcript are designated in this Order Denying Petition to Reconsider by "Tr."

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises four issues in its Petition to Reconsider. First, Respondent contends my conclusion that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is exclusively based on Marvin Friedman's plea of guilty to bribing a United States Department of Agriculture produce inspector to influence the outcome of inspections of perishable agricultural commodities conducted for Respondent (Respondent's Pet. to Reconsider at 2-3).

Respondent fails to cite any portion of *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), in which I indicate my conclusion that Respondent violated the PACA is exclusively based on Marvin

¹*In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 596, 621 (2006).

Friedman's guilty plea. While I reference Marvin Friedman's guilty plea in *In re KOAM Produce, Inc.*, I also make clear that my conclusion that Respondent violated the PACA is not exclusively based on Marvin Friedman's guilty plea:

I disagree with Respondent's contention that Complainant did not prove Marvin Friedman bribed William Cashin. The only testimony as to the reason for Marvin Friedman's payments to William Cashin is the testimony of William Cashin that he was being paid bribes to provide Respondent "help" with respect to the inspections. William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to help Respondent with respect to 75 percent to 80 percent of the inspections he conducted for Respondent (Tr. 125-32). Marvin Friedman, the person who actually made the payments, did not testify to contradict William Cashin. Moreover, Marvin Friedman pled guilty to 10 counts of bribery in connection with his payments to William Cashin for inspections of Respondent's produce (CX 4, CX 18).

In re KOAM Produce, Inc., 65 Agric. Dec. 589, 596, 621(2006).

Therefore, I reject Respondent's contention that my conclusion that Respondent violated the PACA is exclusively based on Marvin Friedman's guilty plea.

Second, Respondent asserts William Cashin testified untruthfully because he did not state "Respondent had no choice but to pay him or otherwise the inspections would have been very slow and never in the Respondent's favor." (Respondent's Pet. to Reconsider at 4.)

The only testimony as to the reason for Marvin Friedman's payments to William Cashin is the testimony of William Cashin that he was being paid bribes to provide Respondent "help" with respect to the inspections. William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to help Respondent with respect to 75 percent to 80 percent of the inspections he conducted for Respondent (Tr. 125-32). Marvin Friedman, the person who actually made the payments, did not testify to contradict William Cashin. Moreover, Marvin Friedman pled guilty to a 10-count indictment for bribery which charges that Marvin Friedman made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Respondent's place of business (CX 3, CX 4, CX 18).

1474 PERISHABLE AGRICULTURAL COMMODITIES ACT

The ALJ found William Cashin credible (Initial Decision at 3). The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).² The

²See also *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (stating while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § (continued...)

Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

....
(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

²(...continued)
17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

1476 PERISHABLE AGRICULTURAL COMMODITIES ACT

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.³

I have examined the record and find no basis to reverse the ALJ's credibility determination with respect to William Cashin. Therefore, I reject Respondent's contention that William Cashin testified untruthfully with respect to the reasons for Respondent's payments.

Even if I were to find Marvin Friedman made payments to William Cashin to obtain prompt inspection of Respondent's produce and to avoid receipt of false, unfavorable United States Department of Agriculture inspection certificates, I would conclude Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). A commission merchant's, dealer's, or broker's payment of bribes to a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector.

³*In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 608 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities and an accurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes and gratuities to United States Department of Agriculture produce inspectors.⁴

Third, Respondent contends I erroneously omitted findings of fact previously proposed by Respondent that are material and relevant (Respondent's Pet. to Reconsider at 5).

I infer the omitted proposed findings of fact to which Respondent refers are the same proposed findings of fact which Respondent asserts in Respondent's Appeal Petition the ALJ erroneously omitted, namely: (1) William Cashin was unable to identify which United States Department of Agriculture inspection certificates he falsified for Respondent; (2) when William Cashin inspected produce at Respondent's premises, Marvin Friedman made payments to William Cashin even on occasions in which Marvin Friedman had not requested inspection; (3) William Cashin received gifts from wholesalers for his birthday, for Christmas, and upon leaving the Hunts Point Terminal Market; (4) William Cashin spent large sums of money on a car, care for his 19 cats, payments to his supervisor, and gifts for his girlfriend and sister; (5) William Cashin accepted money from wholesalers during his entire 20-year career as a United States Department of Agriculture produce inspector; (6) the United States Department of Agriculture permitted William Cashin to retire with a pension; and (7) William

⁴*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006); *In re M. Trombetta & Sons, Inc.*, 65 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 65 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Tack, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

1478 PERISHABLE AGRICULTURAL COMMODITIES ACT

Cashin is a felon.⁵

Respondent fails to cite the portions of the record that support the above-listed proposed findings of fact, and I cannot locate evidence that supports findings that: (1) William Cashin received gifts from wholesalers for his birthday, for Christmas, and upon leaving the Hunts Point Terminal Market and (2) William Cashin spent large sums of money on a car, care for his 19 cats, payments to his supervisor, and gifts for his girlfriend and sister. Moreover, I do not find any of the above-listed proposed findings of fact relevant to the issue of whether Respondent violated the PACA.

Respondent also contends I erroneously failed to note that Complainant conceded Respondent's proposed findings of fact by not disputing them (Respondent's Pet. to Reconsider at 5). However, the record reveals Complainant has continually and consistently disputed Respondent's proposed findings of fact.⁶

Fourth, Respondent contends the publication of the facts and circumstances of Respondent's violations of the PACA is not an appropriate sanction because: (1) Marvin Friedman's principal was not aware that Marvin Friedman was making payments to William Cashin; (2) Marvin Friedman's motive for making payments to William Cashin may have been to benefit himself; (3) Marvin Friedman's payments to William Cashin may have been mere gratuities and not bribes; and (4) none of the United States Department of Agriculture inspection certificates that are the subject of the instant proceeding was false (Respondent's Pet. to Reconsider at 6).

Publication of the facts and circumstances of Respondent's PACA violations is commensurate with the seriousness of Respondent's violations of the PACA. Respondent's violations were so egregious as to warrant publication of the facts and circumstances of Respondent's PACA violations whether Marvin Friedman's unlawful cash payments (a) were bribes or gratuities; (b) were associated with United States Department of Agriculture inspection certificates that were falsified or with United States Department of Agriculture inspection certificates that were accurate; (c) were paid to benefit Marvin Friedman or Respondent; and (d) were or were not known to Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent.

For the foregoing reasons and the reasons set forth in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), Respondent's Petition to Reconsider is denied.

⁵Respondent's Appeal Pet. at 3-4.

⁶See Complainant's Reply Brief at 4-10; Complainant's Response to Appeal Pet. at 2-8; and Complainant's Response to Respondent's Petition to Rehear and Reargue at 4.

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 to reconsider. Respondent's Petition to Reconsider was timely filed and automatically stayed *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order issued in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Respondent must seek judicial review within 60 days after entry of the Order issued in this Order Denying Petition to Reconsider.⁷ The date of entry of the Order in this Order Denying Petition to Reconsider is August 21, 2006.

⁷See 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT
DEFAULT DECISIONS

In re: WR FOODS, INC., d/b/a WESTERN ROSE FOODS.
PACA Docket No. D-06-0005.
Decision Without Hearing by Reason of Default.
Filed August 2, 2006.

PACA-Default.

Eric Paul for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

Decision

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on February 13, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period January 1998 through March 2003, failed to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of \$422,421.54 for 457 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and or foreign commerce or in contemplation of interstate or foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested that the Administrative Law Judge find that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances of Respondent's violations be published.

Respondent, on April 30, 2003, filed a Voluntary Petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court, Middle District of Pennsylvania, Case No. 03-02568, and the complaint was mailed, by certified mail, to Respondent's bankruptcy trustee, Leon P. Haller, Bankruptcy Trustee, Purcell, Krug and Haller, 1719 North Front Street, Harrisburg, Pennsylvania 17102.¹ The complaint was received and

¹ When a respondent is no longer operating and has filed for bankruptcy, service of the complaint by certified mail upon the respondent's bankruptcy trustee is considered proper service. See *In re: Scarpaci Brothers, Inc.*, 60 Agric. Dec. 874 (2001); *In re:* (continued...)

accepted on February 21, 2006. According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.136(a)) (hereinafter, "Rules of Practice"), an answer is due within 20 days after service of the complaint. No answer to the complaint has been received. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. WR Foods, Inc., d/b/a Western Rose Foods (hereinafter "Respondent"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Respondent ceased operations in April 2003. While Respondent was operating, its business address was 1302 Slate Hill Road, Camp Hill, Pennsylvania 17011. Respondent's current business address is c/o Leon P. Haller, Bankruptcy Trustee, Purcell, Krug and Haller, 1719 North Front Street, Harrisburg, Pennsylvania 17102.

2. At all times material herein, Respondent was licensed or operating subject to license under the provisions of the PACA. PACA license number 19941063 was issued to Respondent on April 22, 1994, which terminated on April 22, 1996, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee. Respondent was issued PACA license number 19970355, on November 25, 1996, which terminated on November 25, 1997, when Respondent failed to pay the required renewal fee. Respondent was issued PACA license number 19980726, on March 3, 1998, which terminated on March 3, 2000, when Respondent failed to pay the required renewal fee. Respondent was issued PACA license number 20001299, on June 27, 2000, which terminated on June 27, 2003, when Respondent failed to pay the required renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period January 1998 through March 2003, failed to make full payment promptly to four sellers the agreed purchase

¹(...continued)
Golden Phoenix Trading, Inc., 59 Agric. Dec. 894 (2000).

1482 PERISHABLE AGRICULTURAL COMMODITIES ACT

prices, or balances thereof, in the total amount of \$422,421.54 for 457 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and or foreign commerce or in contemplation of interstate or foreign commerce.

4. On April 30, 2003, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court, Middle District of Pennsylvania. This petition was designated Case No. 03-02568. The Petition contains Schedule F, "Creditors Holding Unsecured Nonpriority Claims", in which Respondent admits that three of the four produce sellers set forth in Paragraph III herein have claims that are equal to the amounts alleged in Paragraph III, and admits that the fourth seller, Penn Produce, Inc., has a claim of \$325,000, which is less than the \$388,816.54 alleged in Paragraph III. Respondent does not allege in Schedule F that any of the claims set forth therein are disputed.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 3 above constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th 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 35 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, 1.145). Copies hereof shall be served upon the parties.

In re: ADAMS APPLE PRODUCE, INC.
PACA Docket No. D-05-0016.
Default Decision.
Filed August 5, 2006.

PACA – Default.

Chris Young-Morales for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport

Decision Without Hearing by Reason of Default

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 July 22, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period May 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$887,507.77.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail and was signed for by Respondent's representative on August 3, 2005. Subsequently, however, a copy of the complaint was returned by the U.S. Postal Service with a forwarding address. Although the complaint had already been signed for by certified mail, Complainant re-served the complaint to that forwarding address by certified mail, and the complaint was signed for by Respondent's representative on April 11, 2006. Therefore, the Hearing Clerk served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice"), as of August 3, 2005. Respondent did not file an answer to the complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As Respondent failed to answer the complaint within the 20 day time period prescribed by the Rules of

1484 PERISHABLE AGRICULTURAL COMMODITIES ACT

Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Tennessee. Its business address is 3625 County Road, Flatrock, Alabama 35966. Its mailing address is P.O. Box 219, Higdon, Alabama 35979-0219. The corporation's Registered Agent is Paul Thornton. Mr. Thornton's address is 719 Kentucky Avenue, Signal Mountain, Tennessee 37377. Mr. Thornton's alternate address is 1107 Montvale Circle, Signal Mountain, Tennessee 37377.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 1997-2047 was issued to Respondent on August 25, 1997. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on August 25, 2004.

3. During the period May 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$887,507.77.

Conclusions

Respondent's failure to make full payment promptly with respect to the 164 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th 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 and 1.145).

Copies hereof shall be served upon parties.

In re: JOE'S VEGETABLES, INC.
PACA Docket No. D-06-0008
Decision Without Hearing by Reason of Default.
Filed October 25, 2006.

PACA- Default.

Jonathan Gordy for Complainant.
Respondent Pro se.

Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) ("PACA"), instituted by a Complaint filed on July 26, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of November 2002 through March 2004, Respondent Joe's Vegetables, Inc. ("Respondent") failed to make full payment promptly to a seller of the agreed purchase prices in the total amount of \$473,641.53 for 36 invoices of perishable agricultural commodities which Respondent sold in the course of interstate and foreign commerce.

A copy of the Complaint was sent to Respondent by certified mail on April 5, 2006, and it was returned to the Hearing Clerk as "unclaimed" on May 11, 2006. Accordingly, pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) ("Rules of Practice"), the Hearing Clerk re-mailed the Complaint using regular mail on May 22, 2006. That mailing by regular mail is deemed to constitute service on Respondent pursuant to section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)). Respondent has not answered the Complaint. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a decision without hearing by reason of default, the following decision and order is issued without further investigation or hearing pursuant to section 1.139 (7 C.F.R. §

1486 PERISHABLE AGRICULTURAL COMMODITIES ACT

1.139) of the Rules of Practice.

Findings of Fact

1. Joe's Vegetables, Inc., ("Respondent") is a corporation organized and existing under the laws of the State of California. Respondent ceased operating on January 31, 2005. Its business address was 454 San Felipe Road, Hollister, California 95023. Its mailing address was P. O. Box 2494, Hollister, California 95024-2494.

2. At all times material to this Decision, Respondent was licensed under the provisions of the PACA. License number 1994-1439 was issued to Respondent on June 20, 1994. This license terminated on June 20, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499(a)) when Respondent failed to pay the required annual renewal fee.

3. Respondent picked, and took delivery in the field, of multiple lots of mixed vegetables, which are perishable agricultural commodities, from the grower, Mission Ranches, in King City, California, during the period of November 2002 through February 2004. The grower later invoiced Respondent for those vegetables on dates from November 19, 2002, through March 10, 2004. Respondent has failed to make full payment promptly of the agreed purchase prices in the total amount of \$473,641.53 for those 36 invoices of perishable agricultural commodities, which Respondent processed and sold in the course of interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 78 transactions set forth in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary 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 and 1.145).

Copies of this Decision shall be served upon the parties.

In re: MCGEE PRODUCE, INC.
PACA Docket No. D-05-0012.
Default Decision.
Filed November 28, 2006.

PACA – Default.

Christopher Young-Morales for Complainant.
Respondent Pro se.

Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision Without Hearing by Reason of Default

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 May 23, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period August 31, 2003 through July 23, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 7 sellers, 148 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$392,289.31.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on May 24, 2005, and was returned as undeliverable. On February 13, 2006, a copy of the complaint was personally served upon Respondent's registered agent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice"). "Respondent "did not file an answer to the complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As Respondent failed to answer the complaint within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

1488 PERISHABLE AGRICULTURAL COMMODITIES ACT

Findings of Fact

1. McGee Produce, Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the state of North Carolina. Its business address is 4423 Wilkinson Boulevard, Charlotte, North Carolina 28208-5528. Its mailing address is P.O. Box 19323, Charlotte, North Carolina 28219-9323. The address of Jeffrey A. McGee, Respondent's registered agent, is 5409 Pecan Bluff Court, Charlotte, NC 28216.

2. Respondent is not and has never been licensed under the PACA. At all times material herein, Respondent has conducted business subject to the PACA.

3. During the period August 31, 2003 through July 23, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 7 sellers, 148 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$392,289.31.

Conclusions

Respondent's failure to make full payment promptly with respect to the 148 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th 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 and 1.145).

Copies hereof shall be served upon parties.

Consent Decisions

PERISHABLE AGRICULTURAL COMMODITIES ACT

Flint River Foods, LLC PACA Docket No. D-06-0003 09/06/06

Keith A. Pillow d/b/a Fluvanna Fruits and Vegetables PACA Docket
No. D-06-0001 09/18/06

James O. Lewis PACA-APP Docket No 06-0001 10/16/06 and Jim M.

Snell PACA-APP Docket No 06-0003 10/16/06 and Robert Hawk, Jr.
PACA-APP Docket No 06-0004 10/16/06

Watermelon & Produce, Inc. PACA-D-06-0016 10/24/06

Robert D. Hawk, Jr PACA-APP Docket No 06-0001 10/30/06

Map Produce, LLC PACA Docket No. D-06-0014 11/17/xx