UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-02-0021
	)	
Kleiman & Hochberg, Inc.,	)	
	)	
Respondent	)	
	)	
	and	
	)	
Michael H. Hirsch,	)	PACA Docket No. APP-03-0005
	)	
Petitioner	)	
	)	
	and	
	)	
Barry J. Hirsch	)	PACA Docket No. APP-03-0006
	)	
Petitioner	)	

DECISION

In this decision I find that in PACA Docket No. D-02-0021, Respondent Kleiman & Hochberg, Inc.[1] willfully violated the Perishable Agricultural Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector on 12 occasions. However, because I find these violations were only committed in order to expedite inspections and not to gain an advantage over shippers or others in any of the specific transactions relied upon by Complainant, I am imposing a civil penalty of $180,000 for the violations in lieu of a ninety day license suspension, and I am not

[1] In PACA Docket No. D-02-0021, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and Kleiman & Hochberg is the Respondent. In PACA Docket No. APP-03-0005, Michael H. Hirsch is the Petitioner, and in PACA Docket No. APP-03-0006 Barry J. Hirsch is the Petitioner.

revoking Respondent's PACA license. I also find that both Michael H. Hirsch, in PACA Docket No. APP-03-005, and Barry J. Hirsch, in PACA Docket No. APP-03-0006, are responsibly connected to Respondent.

Procedural History

On July 16, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service issued a Complaint charging Respondents with "willfully, flagrantly and repeatedly" violating section 2(4) of the Act, and requesting that Respondent's PACA license be revoked. On September 16, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Meanwhile, on February 12, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Respondent. On March 17, 2003, Michael and Barry Hirsch each filed appeals of those determinations. On April 4, 2003, former Chief Judge James W. Hunt consolidated the disciplinary case against Respondent and the Petitions of the Hirsches for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

The consolidated matter was reassigned to me on July 16, 2003. I conducted a hearing in New York City from March 1 through 4, and from March 15 through 18, 2004. Christopher Young-Morales and Charles Kendall of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and David Gendelman represented Respondent in the disciplinary case and the Petitioners in

the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make

informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the

FBI. Tr. 50[2]. To avoid a prison term, Cashin agreed to wear or carry devices allowing him to record, either through audio or visual means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 51, CX 19. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the days events, principally which inspections he received bribes for and for how much. Tr. 51-2, 55-6. He turned over the money he received as bribes during each of these meetings.[3] These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing. CX 10. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by misreporting some aspect of what he observed, there is no evidence on these forms as to what Cashin did in exchange for the bribes.

Cashin testified that he received bribes on numerous occasions over a number of years from John Thomas, a 31.6 % shareholder and vice-president of Respondent. CX 1, Tr. 41-48, 243. Cashin specifically accounted for 12 inspections where he received

[2] "Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's exhibits are marked RX and are sequentially lettered (A-Z, AA-UU). The exhibits for the responsibly connected cases are marked RCMH and RCBH for Michael and Barry Hirsch respectively.

[3] While it is undisputed that Cashin turned over the bribes paid for the 12 inspections at issue here, there is some dispute as to whether he turned over other bribes paid by Respondent.

bribes from Thomas during the pendency of the Forbidden Fruit investigation. These 12 inspections are cited in the Complaint. Cashin testified that in each of these 12 inspections, he "helped" Respondent by altering one or more aspects of the inspection certificate, but that he had no recollection as to what he did in any specific inspection to "help" Respondent. Tr. 44-5. He testified that he would have "helped" Respondent by overstating the defects, overstating the number of produce containers he inspected, and misstating the temperature of the produce. Tr. 46-50. However, he could not state what he did in any particular instance. Tr. 49.

At the conclusion of Operation Forbidden Fruit, Cashin resigned his position. Tr. 30. John Thomas, Respondent's part owner and vice-president, was indicted on October 21, 1999, for Bribery of a Public Official, a crime for which he eventually pled guilty on October 17, 2001. However, there are significant differences between the initial indictment and the superseding information to which he pled. Initially, Thomas was charged with seven counts of Bribery, based on the payments he made to Cashin in connection with 12 inspections. CX 8A. The indictment alleged that Thomas "made cash payments to a United States Department of Agriculture produce inspector *in order to influence the outcome of inspections* of fresh fruits and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York." (emphasis added). The superseding information to which Thomas pled guilty to one count of bribery alleged that Thomas "made cash payments to a United States Department of Agriculture produce inspector *in order to obtain expedited inspections*." (emphasis added). CX 8. As I discuss below, while I hold Respondent responsible under the Act for the crimes committed by Thomas, the motivation for the crimes, and the impact of the crimes on the

shippers and growers involved, are factors I am considering in terms of the appropriate remedy against Respondent.

Thomas freely admitted to paying bribes for the inspections in question. Tr. 509-12, 529. Thomas has been with Respondent for approximately 30 years, and basically runs the night shift. Tr. 509. He testified that in the 1980's he had been visited by USDA inspector Danny Arcery. Tr. 510. This visit was in response to complaints he had made about late produce inspections. Tr. 509-10. He testified that Arcery told him that in order to avoid late inspections, he had to "tip" the inspector $25 to get him "to come quicker rather than purposely later." Tr. 510, 529-32, and that if these instructions were not complied with the produce would be allowed to rot before an inspector would show up. Id., at 511. He testified that while he paid bribes to inspectors and their supervisors, he never asked for "help" and no "help" was ever offered. Tr. 513. He further testified that he never asked for nor received a falsified inspection report, and that the only reason he was paying the inspectors and their supervisors was "to get a quicker inspection as opposed to being purposely delayed." Tr. 518. He further testified that while he was somewhat involved in the sales of the produce, he did not deal with the shipper in settling accounts and had no role in going back to the shipper and adjusting prices. His partners, Barry and Michael Hirsch, handled prices with the shippers. Tr. 535. He also testified that all the bribes came out of his own pocket, and not from company funds and that no one else at Respondent knew he was making these payments. Tr. 519.

I heard a great deal of testimony, presented mostly by Respondent, concerning the significance of the 12 inspection reports that were issued for the inspections where bribes

were paid to Cashin, which were the subject of the initial indictment, and which form the basis of Complainant's case. Through the testimony of Barry and Michael Hirsch, as well as the testimony of many of the shippers who supplied the produce that was inspected, Respondents presented the circumstances behind each of these transactions.

Michael Hirsch testified that Respondent is primarily in the business of buying and selling produce, purchasing from shippers, growers and brokers. Respondent employs up to ninety people, and is a 24-hour a day operation, with the Hirsch brothers principally running the daytime portions of the business. Tr. 573-82. Most contact with suppliers occurs during the daytime. Tr. 576-7. Buying and selling of produce involves a constant give and take, trying to balance the needs of his customers with the produce available. Tr. 576-9. Handling of distressed produce, including produce that is rejected by other houses or by wholesale customers, is a part of their business. Tr. 582-3. Frequently, a shipper will call stating that it is bringing in some distressed and/or rejected merchandise with the request that Respondent do the best it can in selling the produce. Id. In many cases, an inspection is called in even before an order arrives, if they know they will need an inspection. Michael Hirsch estimated that 5% of the loads they receive are inspected. Tr. 583-4.

The most common arrangement between Respondent and its shippers, particularly with merchandise that they know in advance has some problems is "price-after-sale" or "pas." Under these circumstances, there is no price fixed upon delivery of the product, although shipping documents frequently have "price ideas" on them. Tr. 578-80. Rather, Respondent records the price it received for each box of produce, factoring in any boxes

lost due to repacking or dumping. This account of sale document may also reflect expenses, such as the fee[4] paid the USDA for the inspection. When the entire load is sold or otherwise disposed of, the average net sales price is calculated, at which point Respondent agrees upon a final price for the load with the shipper. Other pricing arrangements are also made, such as consignment, where Respondent would get an agreed upon percentage of whatever the final sale price was. Also, invoices will generally indicate which party pays the freight.

There are also a few more nebulous factors that are used to reach a final price between Respondent and its shippers. Thus, Lawrence Kroman of I. Kunik Company, who has worked with Respondent for approximately 18 years, explained that " . . . the settlement price depends on basically . . . my assessment or our assessment of what that price on that particular file needs to be. Some files the prices are close to what I want, sometimes the prices are more than I want, sometimes the prices are less than what I want. It's based on our relationship, I guess, and our long term goals together, I'd call it." Tr. 962. Other witnesses similarly testified that the final price paid by Respondent for a shipment of produce would be affected by such relationship factors, which frequently affect the final price paid. Tr. 624, 639.

With respect to the individual loads that are the subject of the 12 inspections at issue for which bribes were admittedly paid, Complainant provided undisputed evidence that Thomas bribed Cashin in connection with each of the inspections. However, the only evidence supporting Cashin's claim that in each of these 12 inspections he falsified the inspection reports to "help" Respondent is Cashin's uncorroborated word. Indeed,

[4] The legal inspection fee, as opposed to any bribes.

Cashin was unable to point to a specific instance regarding any of these inspection certificates where he falsified the information. Tr. 49. He only stated that he falsified each report. Even in his daily briefings with the FBI, there is not one single instance where Cashin told the agents of any specific falsification he made in any inspection certificate. In response, Respondent's witnesses testified that in each of the inspections at issue, the inspection report accurately depicted the produce described. Not only was this testified to in great detail by Respondent's principals Michael and Barry Hirsch, but the shippers and suppliers involved in these transactions also testified that the inspection certificates were generally consistent with their perception of the produce, and that since the produce was priced after sale, the inspection certificate was of little moment to the transaction in any event. Tr. 962-3.

For example, one of the cited inspection certificates, for which Cashin was paid, involved a shipment of cantaloupes from I. Kunik Co. This certificate, dated 4/15/99 and signed by Cashin, RX D, p. 5 (also CX 11, p. 4) indicates that 10% of the produce has sunken areas, and a like proportion suffered from some decay. The sunken area is an indentation caused by age and dehydration. Tr. 804. Barry Hirsch testified that all business with Kunik is done as pas, which was confirmed by Lawrence Kroman, vice president of Kunik. Tr. 797, 961. Although the manifest for the load, RX D, p. 2, listed a price that would appear to be inconsistent with a pas, Kroman confirmed that the $14.25 per box on the manifest was "what I am shooting for as a return on the product" and that it was indeed a pas. Tr. 974. The report of sale sheet, RX D, p. 4, indicates that after the 1064 boxes were fully disposed of, and factoring in the cost of dumping some boxes and the cost of the inspection, the average box was sold by Respondent for $12.10.

Respondent paid Kunik $11.75 per box for the entire load, making a “profit” of only 35 cents per box, not even enough to cover its costs when labor is factored in. Kroman admitted that no company in the business “could remain viable at 35 cents a carton,” Tr. 978, and went on to explain, much as Barry Hirsch did, that in the course of a relationship lasting decades, where sometimes Kroman would ask Hirsch to “work a little close,” Tr. 979, and sometimes the margin is bigger than would be justified by the particular load in question. There was no indication that the inspection certificate was not reflective of the condition of the produce, and the inspection certificate appeared not to be a factor in the settling of the price of the load.

Barry Hirsch was asked, regarding a different load, “Why would you even bother getting an inspection? “ He replied, “When the work came in and it was really bad, every once in a while we’d call to get inspected, just in case the shipper needed the inspection for one of his growers or the shipper called me and asked me to get them inspected, we would get them inspected.” Tr. 789. With respect to the Kunik load of cantaloupes that are the subject of RX D, the inspection certificate was never even sent to Kunik, Tr. 808, nor was it discussed with Kroman. Tr. 988-9.

In another shipment, Fisher Bros. Sales, Inc., pertinently contracted with Respondent to sell 479 cartons of South African Bonheur grapes. RX F. This, too, was pas, as were all transactions between Respondent and Fisher. The grapes were not in the best condition, as Mr. Galo, who was Fisher’s Director of Sales at the time, testified that “they’d probably been in the warehouse for a good four or five weeks,” and that they were probably cleaning out the cooler at the warehouse. Tr. 1005. Fisher had a target

price for the grapes and, when Respondent was able to sell the grapes for a higher price, Fisher received its full target price. Galo testified that the USDA inspection performed by Cashin played no part in Fisher's dealings with Respondent. Tr. 1026.

Similar scenarios were testified to regarding the other transactions that were the subject of the inspection certificates. With respect to each inspection certificate, either Michael or Barry Hirsch, and in most cases a representative of the shipper as well, testified that the inspection certificate accurately reflected the condition of the produce, that the certificate had no impact on the financial aspects of the transaction because the shipper knew in advance that the produce had some problems, and the final settlement of the load was based on the sales price of the produce more than anything else.

Cashin was also questioned as to his role regarding three other inspections that he stated he conducted, at Respondent's location, but for which he told the FBI investigators he did not receive any payment. These inspections were conducted at Respondent's facility on 4/15/99, and are mentioned in the 302 forms at CX 10, page 4. Cashin testified that he conducted these inspections for "J Scott"—who Cashin said was a buyer who kept an office at Respondent's location. Tr. 148-9. Cashin testified he was never paid bribes for these three inspections. John Thomas, during the course of his testimony, stated that the three inspections Cashin claimed he conducted on 4/15/99 for Scott were in fact conducted for Respondent, and that he paid him a $50 bribe for each inspection. Tr. 516. Subsequently, Helene Traeger, Respondent's assistant office manager, testified that Scott had left Respondent's facilities after an argument in July 1998 and never returned. Tr. 736-8, 740-2. Barry Hirsch, too, confirmed that Scott would not have

called for these three inspections, since Scott no longer worked there at the time of the inspections, and that these suppliers were not people Scott worked with even when he was there. Tr. 870-3. Indeed, James Scott himself testified that he left Respondent in mid-July of 1998 and that he had never called for any inspections when he was working at Respondent's facility. Tr. 1047-52.

Carolyn Shelby, a marketing specialist, testified as to her role in the investigation. She basically reviewed a large number of documents, although she discovered that many sales records were lost in a fire at Respondent's facility. Tr. 287. She documented the license records of Respondent, and particularly looked at reparation complaints filed against Respondent. She testified that she did not know what were the outcomes of the reparation complaints against Respondent, nor did she know if the inspections affected the price of the produce at all. Tr. 324-6.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant's sanctions witness. Koller testified that by Thomas's paying of bribes to Cashin, Respondent had committed willful, repeated and flagrant violations of PACA. Tr. 350-1. He testified that bribery destroyed the integrity of the inspection process, and constituted a failure by Respondent to perform duties described in Section 2(4) of the Act. He recommended that the license of Respondent be revoked, contending that, due to the seriousness of the violations, civil penalties were not adequate. On cross-examination, Koller admitted that it was generally desirable for inspections to be conducted as close to arrival time of the produce as possible. Tr. 368. He based his sanction recommendation on the commission of bribery, finally concluding that bribing a

produce inspector is an unfair practice under the Act, and one for which license revocation was the appropriate sanction. Tr. 349-50.

With respect to whether Michael and Barry Hirsch were responsibly connected to Respondent, Thomas and the Hirsches consistently testified that Thomas acted on his own in paying bribes, and that neither of the brothers was aware that anything illegal was going on until Thomas was arrested. However, there was no dispute that Michael Hirsch was the President and a director of Respondent, as well as a 31.6 % stockholder, and that during the period that is the subject of this case he played a major role in the day to day management of the company, that he worked there from 7:30 a.m. to 6 p.m. every day, that he played a significant role in determining the prices that would be paid for produce, and that his role in the company's operations was far from ministerial or nominal. Similarly, it was undisputed that Barry Hirsch served as treasurer, director and a 31.6 % stockholder, and that he, too, had significant day to day management roles with Respondent, including buying and selling of produce, overseeing warehouse operations, and generally running the daytime operations of the business with his brother. CX 1.

Statutory and Regulatory Background

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

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.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker "has violated any of the provisions of section 499b," the Secretary may, "if the violation is flagrant and repeated . . . revoke the license of the offender." 7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. "In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues . . .giv[ing] due consideration to the size of the business, the number of employees, and the seriousness, nature and amount of the violation." 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides: . . . the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office,

shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person 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, 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.

Findings of Fact

1. Kleiman & Hochberg, Inc. (Respondent) is a New York Corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 30.

3. Cashin was one of numerous USDA produce inspector's who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 50. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 50, CX 19.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI agents would prepare a "302" report summarizing what Cashin told them about that day's activities. Tr. 51-52; CX 10.

5. Beginning at least in the late 1980's, and continuing through August 1999, John Thomas paid bribes to William Cashin and other USDA inspectors. Tr. 509-512. The purpose of these bribes was to expedite inspections. Id.

6. John Thomas paid Cashin a $50 bribe to conduct each of the 12 inspections referred to in the Complaint.

7. The information reported in each of the inspection certificates referred to in the Complaint appears to be accurate.

8. There is no credible evidence in this record indicating that the bribes paid to Cashin for the 12 inspections referred to in the Complaint were used to gain a bargaining

or economic advantage over any of the suppliers of the produce involved in these 12 transactions.

9. During the period in which he paid bribes to Cashin, John Thomas was vice president, a director and a 31.6 % shareholder of Respondent. CX 1.

10. During the period described in paragraph 9, Michael Hirsch was president, a director and a 31.6 % shareholder of Respondent. CX 1.

11. During the period described in paragraph 9, Barry Hirsch was treasurer, a director and a 31.6 % shareholder of Respondent. CX 1.

12. Both Michael and Barry Hirsch were actively involved in the day-to-day management of Respondent's business. There is no evidence that they knew or should have known that Thomas was paying bribes.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by John Thomas constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 12 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 90 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of $180,000.

5. Michael H. Hirsch is responsibly connected to Respondent.
6. Barry J. Hirsch is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, John Thomas, paid bribes to William Cashin in each of the 12 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that the preponderance of the evidence shows that these bribes were not paid to gain any advantage over produce shippers and sellers, but were paid in order to obtain inspections in a timely manner. Therefore, I am not granting Complainant's request to revoke Respondent's PACA license, but I am instead requiring that Respondent pay a civil penalty of $180,000 in lieu of a 90-day suspension of their license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Michael or Barry Hirsch by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Michael and Barry Hirsch are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 12 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. John Thomas, an officer and major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 12 occasions.

Both Thomas and Cashin freely acknowledged that Thomas did indeed make $50 payments to Cashin on the 12 occasions alleged in the Complaint. In fact there was no dispute that these 12 occasions were representative of a long-standing practice that went back at least until the 1980's. In fact, Thomas even testified that he paid Cashin an additional $150 for three inspections that were not included in the Complaint even though they occurred on the same day as two other inspections that were included in the Complaint.

It is likewise undisputed that Thomas was vice-president of Respondent at the time the violations alleged in the Complaint were committed, and that he was a 31.6 % shareholder of Respondent.

B. Respondent is liable for the violative acts of Thomas that were committed within the scope of his employment or office.

Section 16 (U.S.C. §499p) of the Act that states that "in every case" "the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office," "shall be deemed the act, omission, or failure" of the employer. Thomas testified that he paid the bribes in order to insure that inspections he ordered were not delayed. Thomas stated that the money used to pay the bribes came out of his own pocket, and there was no paper trial indicating otherwise. He also stated, and the Hirsch brothers confirmed, that he acted without their knowledge or approval. However, the purpose behind the bribes, even as expressed by Thomas, was to benefit Respondent, as the alleged threat of delayed inspections would harm Respondent as an entity. Even though Thomas, as a nearly one-

third owner of Respondent, would obviously share in any benefit that Respondent received, it is evident that the bribes paid, whatever their motivation, were designed to benefit Respondent in the conduct of its business.

Thus, in Post & Tauback, Inc., 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 "provides an identity of action between a PACA licensee and the PACA licensee's agents and employees." Id., at 820. As long as Thomas was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if Michael and Barry Hirsch were unaware of Thomas' actions, the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In Post & Taback, Inc., the Judicial Officer unequivocally held that "as a matter of law, . . . violations by [an employee] . . .are . . . violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the . . . bribery . . . and would not have condoned [it]." Id., at 821. I agree with Complainant's contention that if a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company's officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. See Complainant's Initial Brief at 29. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction." Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in Post & Taback:

> A produce buyer's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

Id., at 825. Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, have recognized that there is a general commercial duty to deal fairly which is required of all PACA licensees. In Sid Goodman and Co., Inc., 49 Agric. Dec. 1169, 1183-4 (1990), aff'd, 945 F. 2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that "members of the produce industry have an obligation to deal fairly with one another" and goes on to hold that commercial bribery is "unfair" in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. See e.g., JSG Trading Corp., 58 Agric. Dec. 1041 (1999), aff'd 235 F. 3rd 608 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 458 (2001).

D. The bribery violations committed by Respondent were willful, flagrant and repeated.

While Thomas testified that the motivation for his payments to Cashin was to receive timely inspections, and while he essentially testified that Cashin was part of an extortion or shakedown ring among USDA inspectors, it is apparent that rather than complaining to other government officials, including the FBI, he opted to make the requested payments. There is no evidence, even from Thomas' own testimony, that he viewed the payments as anything more than an efficient means to get his work done. With the long standing nature of these payments, going back upwards of ten years based on Thomas' own testimony, Complainant easily meets its burden of showing that the illegal payments, or bribes, were willful, flagrant and repeated.

A violation is "willful" if "irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute." PMD Produce Brokerage Corp., 60 Agric. Dec. 780, 789 (2001). Here, Thomas, and therefore Respondent, knew that the payments made to Cashin in the 12 inspections involved in this case, as well as the countless illegal payments over at least the previous decade, were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were "flagrant." In Post & Taback, supra, the Judicial Officer found, citing the dictionary definition of "flagrant" as covering conduct "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned," that "payments of unlawful gratuities and bribes to a United States

Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry." Id., at 829-30. While there are some significant distinctions between the purposes of the bribes in this case versus those in Post and Taback, and other pertinent decisions, which I will discuss below in the context of sanctions, the long-standing practice of Respondent bribing Cashin and other inspectors easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Not only did Thomas admit making illegal payments to Cashin in at least the 12 instances cited by Complainant, he also alleged that he made three other payments to Cashin for inspections that Cashin did not report to the FBI, and admitted that he had made payments for inspections at least since his alleged meeting with Danny Arcery in the late 1980's. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of $180,000.

Although Respondent has committed at least 12 serious violations of the PACA by making illegal payments to Cashin, the sanction of license revocation, as urged by Complainant, is not appropriate under the facts of this case. I base my sanctions decision on a number of factors, including that the preponderance of the evidence establishes that

the illegal payments to Cashin in these specific 12 instances were not used to gain a competitive advantage over any shipper or grower and that there is no credible evidence that Thomas made these payments for any reason other than to receive expedited inspections. Looking at the cases cited that support PACA license revocation, I must conclude that these violations, while serious, warrant a lesser sanction than those cases where information was proven to be altered in order to take economic advantage of the suppliers of the produce involved.

A. The initial indictment of John Thomas cannot be used to demonstrate that he committed the violations alleged, since he pled to a superseding information, which is dispositive.

Complainant has contended, at some length, that even though John Thomas eventually pled to an information charging him with making illegal payments to a USDA produce inspector in order to receive expedited inspections, I should look at the original indictment in order to determine the acts he really committed. Not surprisingly, Respondent has vigorously contested this approach.

Complainant contended in its opening brief at pages 12-14, 21-22, that the "indictment . . . supports the weight of the evidence, to the effect that Mr. Thomas paid the bribes to Mr. Cashin in order to affect the outcome of produce inspections." While, as I discuss below, I disagree that the weight of the evidence indicates that Thomas was making the payments to influence the outcome of produce inspections, I further disagree with Complainant's contention that the indictment can be considered as evidence that the crimes/violations alleged were committed. While the indictment played a significant role in triggering the PACA Branch's investigation of Respondent, as it should have, I believe it would be inappropriate for me to consider it as an indication that its allegations are

correct, particularly where, as here, it has been superseded by an information to which Thomas pled guilty. Indeed, it appears that the government voluntarily dismissed the initial indictment as part of accepting Thomas' guilty plea on the information in open court.

The limited cases cited by Complainant on the issue provide no help to their position. The cases of Bousley v. U.S., 523 U.S. 614 (1998) and Peveler v. U.S., 269 F. 3d 693 (C.A. 6, 2001), merely hold that when a person elects to vacate a guilty plea which was entered into as a result of plea bargaining, they must make a showing of actual innocence not only for the charges to which they pled, but to the initial charges which the government dropped in order to reach a bargain. The necessary predicate to the application of the holding of these two cases is the existence of an action to vacate a guilty plea. In Thomas' case, he has strongly insisted that his plea was appropriate, and reflected the criminal acts that he actually committed. Bousley and Peveler are inapposite. With respect to Thomas' motivation for bribing Cashin, I give the initial indictment no weight at all.

B. The preponderance of the evidence establishes that the motivation for the bribes paid by Respondent to Cashin was to prevent delays in inspections, that the 12 inspections that were the subject of the Complaint were not falsified by Cashin, and that Respondent did not use the 12 inspections at issue here to gain any business or commercial advantages vis-à-vis the shippers or growers involved.

The only evidence concerning the motivation for paying bribes to Cashin comes from the testimony of Cashin and Thomas. Unsurprisingly, their testimony conflicts in a number of areas. Thomas stated that he began making payments to USDA produce inspectors for the sole purpose of getting timely inspections beginning when he was told by Arcery that failure to make these payments would result in seriously delayed

inspections. He testified that he never asked for "help" on any inspection and knew of no inspection certificates that reflected false information. Although he was indicted for paying bribes to influence the outcome of produce inspections, the only crime of which he stands convicted related to this case is for paying bribes to expedite inspections. In fact, Thomas essentially testified, and counsel argued, that he was really the victim of an organized extortion scheme involving a large number of USDA inspectors, including supervisors and management. Given the number of inspectors indicted and convicted as a result of Operation Forbidden Fruit, and the alleged involvement of supervisors and management, it is not difficult to see how an individual could reach this conclusion.

While Thomas, and thus Respondent, maintained that they never paid bribes to influence inspections, Cashin testified that in each of the 12 inspections he made alterations to the inspection certificate, to "help" Respondent. Unfortunately, Cashin's recollection was such that he could not recall a single specific instance of any alteration he made to any certificate. He testified that he might have changed various items reported on the certificate, including temperature, count, and condition of the produce. While it may be understandable that Cashin would not specifically remember what he wrote on an inspection form nearly five years after the fact, his version of events is further tainted by the absolute lack of mention, in any of the 302 forms compiled by the FBI, of any actions he had taken with regard to the inspections other than actually conducting the inspections and accepting his illegal payment. It is incomprehensible to me how the investigation team, which included members of USDA's OIG, would not have recorded any accounts offered by Cashin of alterations made in the inspection certificates if there was evidence that such alterations were made. Further, Cashin was

equipped with both video and audio recording equipment at various times, yet nothing was introduced into evidence which showed that Cashin "helped" Respondent in any way.

Cashin's recollection and/or credibility was greatly reduced by his account of the inspections he said he made for "J Scott." As discussed, supra, Cashin claimed that three inspections, for which he told the investigators he had not received illegal payments, were performed for "J Scott." Subsequent testimony from a number of witnesses, including James Scott himself, demonstrated that Scott had not worked at Respondent's produce house since approximately nine months before these three inspections took place, and that he had nothing to do with these inspections. Thomas testified that he had in fact paid Cashin for these three inspections, and Respondent suggested that Cashin simply pocketed the money himself. This does not demonstrate, as suggested by Respondent, that Cashin's testimony was false in its entirety, but it strongly impacts his credibility. When the most affirmative and emphatic statements offered about the circumstances of inspections on a particular date are so glaringly incorrect, it certainly casts doubt on the statements made by Cashin concerning his alteration of the certificates.

Additionally, Respondent devoted a significant portion of its case to showing that the inspection certificates were in fact reflective of the produce inspected by Cashin. Extensive testimony by Michael and Barry Hirsch, as well as the testimony of Lawrence Kroman of I.J. Kunik, Dino Gallo, former Director of Sales for Fisher, and Peter Silverstein, President of Northeast Trading, Inc., corroborated this assertion of Respondent. Many of the transactions involved in the 12 inspections were of shipments

known to be having "problems." Thus, for example, the Bonheur grapes that were the subject of Cashin's April 29, 1999 inspection (RX F, p. 3) were received by Respondent four to five weeks after the close of the season for Bonheur's, and were effectively the result of cleaning out Fisher's storage cooler. That the grapes were in less than ideal condition is consistent with their age. Similarly, the shipment of grape tomatoes received from NET and inspected by Cashin on May 28, 1999 (RX H, p. 9) had been rejected by the Stew Leonard's chain store. That 13% of the grape tomatoes were reported as defective by Cashin is not surprising; presumably that was the reason for the rejection. As a result, significant repacking had to be done by Respondent. Id., at 6. Further, NET had significant problems with the grower of these tomatoes, and believed that Cashin's inspection results were correct. Tr. 1106-7.

While Respondent did not have testimony from each and every supplier and grower whose produce was inspected by Cashin in these 12 instances, Complainant has offered no testimony, other than Cashin's generic statements that he "helped" Respondent on each inspection, that would allow me to find that, in any of the 12 instances, the produce was not in fact as Cashin described it in the inspection certificate. At the very least, the preponderance of the credible evidence supports the finding that the inspection certificates were generally accurate as to the condition of the produce inspected.

The preponderance of the evidence also supports a finding that Respondent's illegal payments were not used as a means of dealing unfairly with the suppliers of the produce, a factor which I find is important in imposing the appropriate sanction for these violations. Respondent's witnesses uniformly testified that the inspection certificates had

no bearing on the prices paid by Respondent for the produce, and that the ultimate price paid was based on the amount actually received by Respondent from its sales of the produce. Most of the contracts from the inspections at issue were based on price after sale, with a few others on consignment. There was no prearranged price, although there were price suggestions or goals on some of the shipping documents. Following the establishment of the selling price of the produce, which included factoring in produce that had been dumped or repacked, as well as the costs of inspections and, occasionally, freight and other charges, the final price was agreed to. Even here, there was no set formula for establishing prices, as Respondent and its suppliers testified that prices were often finalized based on long-term relationships, on what price was needed to get a return for a particular customer, and many other nebulous factors.

While Respondent's witnesses testified repeatedly that the purpose of the bribes paid by Thomas was to receive expedited inspections and that Respondent did not use the bribes to gain any advantage over the suppliers of the produce, Complainant provided little evidence to contradict this assertion. Thus, Complainant's sanctions witness testified that the bribes "tended to benefit Respondent . . . by Respondent making a bribery payment to a produce inspector to obtain false information for an inspection certificate . . . Respondent would be in a position to use the information that was reported on that inspection that is false to contact the shipper. And by presenting that certificate to the shipper to negotiate or obtain that kind of price adjustments or resolving disputes with the transaction." Tr. 345. But Complainant was unable to back this assertion up in the face of Respondent's evidence to the contrary.

C. A civil penalty of $180,000 is the appropriate sanction.

At the close of the hearing, I asked both Complainant and Respondent to discuss appropriate sanctions. In particular, I asked the parties to discuss options available to me that were less onerous than the license revocation urged by Complainant and more onerous than the complete exoneration urged by Respondent. In their briefs, both parties chose to ignore my request and went for the all-or-nothing approach to sanctions. Neither party discussed other options available to me such as suspension of the license for a limited period and/or imposition of civil penalties, even though these options are explicitly available under the statute.

Even though Complainant has not met its burden of showing that the illegal payments made by Thomas were used to induce Cashin to alter inspection certificates, and even though Respondent has demonstrated to my satisfaction that it did not use these payments as part of a scheme to gain a financial advantage in produce transactions over their produce suppliers, this does not exonerate Respondent under the PACA. As discussed, supra, USDA case law strongly supports Complainant's contention that bribery of a USDA inspector constitutes a serious violation of the Act.

On the other hand, where the Judicial Officer has ultimately imposed the sanction of revocation, there has generally been a finding that the violator did commit the violation in order to gain a financial advantage, a circumstance not shown by the preponderance of the evidence in this case. Thus, several of the cases cited by Complainant to support revocation indicate that a significant factor leading to the imposition of the most severe sanction was that illegal payments were used to the

economic advantage of the payor vis-à-vis the party with whom the payor was transacting business. Thus, in the recent decision of Post & Taback, supra, the Judicial Officer affirmed the administrative law judge's finding that payments were made "to influence the outcome of United States Department of Agriculture inspections of fresh fruits and vegetables" and that the false information on the inspection certificates was used "to make false and misleading statements to produce sellers." These factual findings are considerably different than my findings in this case, as I have concluded that Complainant has neither shown that the inspection certificates were inaccurate nor that they were used to deceive or mislead the produce sellers. Similarly, in Sid Goodman and Co., Inc., supra, the payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. In Tipco, Inc., 50 Agric. Dec. 871 (1991), also cited by Complainant, the decision emphasized, among other things, that "members of the produce industry have an obligation to deal fairly with one another," Id., at 862, a significant factor in the Judicial Officer's decision to revoke a PACA license. Here, the testimony has been consistent that the Respondent did not deal unfairly with its suppliers, that the suppliers felt that the inspection certificates were accurate and that they had been dealt with fairly by Respondent, and that generally that Respondent has continued to maintain cordial business relationships with these suppliers at least through the date of these hearings.

In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into account . . . The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all

relevant circumstances." George A. Heimos Produce Company, Inc., 62 Agric. Dec. 763, 797 (2003). Respondent committed willful, flagrant and repeated violations by paying bribes to USDA inspectors, which in itself constitutes an extremely serious violation of the PACA. Respondent did not pay these bribes to gain an economic or transactional advantage over its produce suppliers. Thus, rather than imposing the "death penalty" of license revocation, I believe that an appropriate sanction would be a 90-day suspension of Respondent's license. Under the alternative assessment provisions of the PACA, Respondent is assessed a penalty of $180,000, based on $2,000 per day for 90 days of continuous violation. In assessing this penalty, I am factoring in the size of Respondent's business, and the number of employees. Looking at exhibits reflecting on Respondent's profitability, including the salaries paid to its principals, e.g., RCMH6-8, I am satisfied that a penalty of this amount is an adequate sanction to deter future violations for Respondent and others, without seriously impeding Respondent's ability to continue in business. In Heimos, the Judicial Officer determined that, where a suspension was the appropriate sanction, "a civil penalty with an equivalent deterring effect is an appropriate sanction." Id., at 797.

III. Both Barry and Michael Hirsch are Responsibly Connected to Respondent.

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 90-day license suspension in lieu of the payment of the $180,000 civil penalty.

Both Barry and Michael Hirsch are each officers, directors and holders of over 31% of the stock in Respondent. Both are intimately involved in the day-to-day activities of the company. Their principal defense to the finding of the PACA Branch that they are not responsibly connected is reliance on the exception for a "person not actively involved in the activities resulting in a violation of this chapter." While there has been no showing that the Hirsches were involved in the violative activities—a fact generally conceded by Complainant—this does not provide the Hirsches any relief. The statute requires not only a showing of non-involvement in the violative activities, but requires an additional showing that the person "was only nominally a partner, officer, director or shareholder."

The record establishes to a certainty that each of the Hirsches was fully involved in Respondent's business. Indeed, in their Proposed Finding of Facts in the responsibly connected case, the Hirsches ask me to find that "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 1) and "Michael Hirsch was the President and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 2). These facts refute any possible contention that either of the Hirsches could show that they were not responsibly connected either by showing they were not "actively involved" or that their positions were only "nominal." Under the statutory definition, the fact that the Hirsches might not have been involved in the violative activities does not exonerate them unless they show that they were not actively involved or that their position was purely nominal. The Hirsches simply cannot meet the second part of the statutory test for escaping the responsibly connected label.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of $180,000 in lieu of a 90-day suspension of its license.

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.

Done at Washington, D.C.
this 2nd day of December, 2004

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MARC R. HILLSON
Chief Administrative Law Judge