AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket 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. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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LIST OF DECISIONS REPORTED

JANUARY - JUNE 2000

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

REPARATION DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Late Appeal filed February 18, 2000.

Bench decision – Effective date – Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer held that, pursuant to 7 C.F.R. § 1.142(c), Judge Bernstein's (ALJ) decision, issued orally at the close of the hearing, became effective 35 days after the decision was issued orally by the ALJ. The Judicial Officer concluded that he had no jurisdiction to consider Respondent's appeal petition, filed after the ALJ's decision became effective.

Jane McCavitt, for Complainant.
Paul T. Gentile, Gentile & Dickler, New York, New York, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on November 16, 1998.

The Complaint alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV).

Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On September 7, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999, in New York, New York (Notice of Hearing). On November 12, 1999, Complainant filed Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)).

On November 17, 1999, the ALJ presided over an oral hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. The ALJ issued a decision orally at the close of the hearing in which the ALJ: (1) found that during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found that Respondent continued to owe approximately $769,000 to produce sellers listed in the Complaint; (3) concluded that Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the order (Tr. 95-101).

The ALJ excerpted from the transcript the decision orally announced at the close of the hearing, and on November 30, 1999, filed the written excerpt (Bench Decision). The Hearing Clerk furnished a copy of the written excerpt to each of the parties (Letter dated December 1, 1999, from Joyce A. Dawson, Hearing Clerk, to Paul T. Gentile).

On January 7, 2000, Respondent appealed to the Judicial Officer; on February 14, 2000, Complainant filed Complainant's Response to Respondent's Appeal; and on February 15, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Section 1.142(c)(1), (c)(2), and (c)(4) of the Rules of Practice provides that an administrative law judge may issue a decision orally at the close of the hearing, that the issuance date of an oral decision is the date that the oral decision is announced, and that the oral decision becomes effective, without further proceedings, 35 days

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[1]On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance).

after the issuance of the decision, as follows:

> **§ 1.142 Post-hearing procedure.**
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> . . . .
>
> (c) *Judge's decision*. (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.
>
> (2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.
>
> . . . .
>
> (4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(1)-(2), (4).

The ALJ announced the oral decision at the close of the hearing on November 17, 1999. Therefore, pursuant to section 1.142(c)(2) of the Rules of Practice (7 C.F.R. § 1.142(c)(2)), the issuance date of the ALJ's decision is November 17, 1999, and pursuant to section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the effective date of the ALJ's decision is December 22, 1999.

Respondent's Appeal Petition, filed January 7, 2000, was not filed before the ALJ's November 17, 1999, decision became effective. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes effective.[2]

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[2]*See In re Harold P. Kafka*, 58 Agric. Dec. ___ (Apr. 5, 1999) (dismissing respondent's appeal, filed 15 days after the initial decision and order became final), *appeal docketed*, No. 99-5313 (3d Cir. May 13, 1999); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing applicants' appeal, filed 23 days after the initial (continued...)

[2](...continued)
decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating that respondents' appeal, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3[d] Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing respondents' appeal, filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective
(continued...)

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides:

> **Rule 4. Appeal as of Right–When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> **(1) Time for Filing a Notice of Appeal.**
>
> **(A)** In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.
>
> **(B)** When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Fed. R. App. P. 4(a)(1), *reprinted in* 28 U.S.C.A. app. at 28 (West Supp. 1999).

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[3]

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[2](...continued)
date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

[3] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of (continued...)

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become effective. Rule 4(a)(5)(A) of the Federal Rules of Appellate Procedure provides that the district court may extend the time for filing a notice of appeal upon a showing of excusable neglect or good cause, as follows:

> **Rule 4. Appeal as of Right–When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> . . . .
>
> **(5) Motion for Extension of Time.**
>
> **(A)** The district court may extend the time to file a notice of appeal if:
>
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>
> (ii) that party shows excusable neglect or good cause.

Fed. R. App. P. 4(a)(5)(A), *reprinted in* 28 U.S.C.A. app. at 28-29 (West Supp. 1999).

The absence of a rule such as Rule 4(a)(5)(A) of the Federal Rules of Appellate Procedure in the Rules of Practice emphasizes that no such jurisdiction has been

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[3](...continued)
appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become effective.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes effective, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[4]

Accordingly, Respondent's Appeal Petition must be denied since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. § 1.142(c)(4).)

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

Order

Respondent's Appeal Petition, filed January 7, 2000, is denied. The decision issued orally by Administrative Law Judge Edwin S. Bernstein at the close of the hearing on November 17, 1999, is the final Decision and Order in this proceeding.

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[4] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Petition for Reconsideration filed March 31, 2000.

Petition for reconsideration – Late petition – Late appeal – Federal Register gives constructive notice – Administrative law judge authority to modify rules of practice – Hearing clerk authority to modify rules of practice – Bench decision – Effective date.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)). The Judicial Officer also stated that even if Respondent's Petition for Reconsideration had been timely filed, it would have been rejected because Respondent did not raise any meritorious basis for finding *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___ (Feb. 18, 2000) (Order Denying Late Appeal), erroneous. The Judicial Officer found that, under the Rules of Practice (7 C.F.R. § 1.142(c)), the date Judge Bernstein (ALJ) orally announced the decision at the close of the November 17, 1999, hearing, was the operative date for determining the timeliness of Respondent's appeal petition. The Judicial Officer rejected Respondent's contention that the operative date for determining the timeliness of Respondent's appeal petition was the date the Hearing Clerk furnished Respondent with a document entitled "Bench Decision." The Judicial Officer concluded that, under the Rules of Practice (7 C.F.R. § 1.142(c)), the document entitled "Bench Decision" was merely an excerpt from the portion of the transcript containing the orally-announced decision, and the date the Hearing Clerk furnished Respondent with the document entitled "Bench Decision" was not relevant to the determination of the time for filing Respondent's appeal petition.

Jane McCavitt, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on November 16, 1998.

The Complaint alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent

purchased, received, and accepted in interstate or foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV).

Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On September 7, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999, in New York, New York (Notice of Hearing). On November 12, 1999, Complainant filed Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. The ALJ issued a decision orally at the close of the hearing in which the ALJ: (1) found that during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found that Respondent continued to owe approximately $769,000 to produce sellers listed in the Complaint; (3) concluded that Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the order (Tr. 95-101).

The ALJ excerpted from the transcript the decision orally announced at the close of the hearing, and on November 30, 1999, filed a document entitled "Bench Decision," which is the written excerpt of the decision orally announced at the close of the hearing. On December 7, 1999, the Hearing Clerk furnished Respondent with a copy of the Bench Decision.[2]

On January 7, 2000, Respondent appealed to the Judicial Officer; on

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[1]On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance).

[2]See Domestic Return Receipt for Article Number Z 599 734 374.

February 14, 2000, Complainant filed Complainant's Response to Respondent's Appeal; and on February 15, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision. On February 18, 2000, I denied Respondent's Appeal Petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___ (Feb. 18, 2000) (Order Denying Late Appeal).

On February 25, 2000, the Hearing Clerk served Respondent with the Order Denying Late Appeal;[3] on March 15, 2000, Respondent filed Respondent's Petition for Reconsideration; on March 29, 2000, Complainant filed Complainant's Response to Respondent's Motion for Reconsideration; and on March 30, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___ (Feb. 18, 2000) (Order Denying Late Appeal).

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent filed Respondent's Petition for Reconsideration 19 days after the date the Hearing Clerk served the Order Denying Late Appeal on Respondent. Respondent's Petition for Reconsideration is not timely filed, and Respondent's

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[3]See Domestic Return Receipt for Article Number PO93174767.

Petition for Reconsideration must be denied.[4]

Moreover, even if Respondent's Petition for Reconsideration had been timely filed, I would deny it because Respondent raised no meritorious basis for finding the Order Denying Late Appeal erroneous.

First, Respondent contends that the Hearing Clerk served Respondent with a copy of the Bench Decision on December 7, 1999, and Respondent filed a timely appeal on January 7, 2000 (Respondent's Pet. for Recons. at 2).

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[4]*See In re Mary Meyers*, 58 Agric. Dec. ___ (Oct. 14, 1999) (Order Denying Pet. for Recons.) (denying, as late filed, a petition for reconsideration filed 2 years 5 months and 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. ___ (Aug. 30, 1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months and 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. ___ (Aug. 4, 1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

The record establishes that the ALJ excerpted from the transcript the decision orally announced at the close of the November 17, 1999, hearing, and on November 30, 1999, filed a document entitled "Bench Decision," which is the written excerpt of the decision orally announced at the close of the November 17, 1999, hearing. The Hearing Clerk furnished Respondent with a copy of the Bench Decision on December 7, 1999,[5] and on January 7, 2000, Respondent filed its Appeal Petition. However, Respondent's reliance on the date on which the Hearing Clerk furnished Respondent with a copy of the Bench Decision to determine the timeliness of Respondent's Appeal Petition is misplaced. Section 1.142(c)(1), (c)(2), and (c)(4) of the Rules of Practice provides that an administrative law judge may issue a decision orally at the close of the hearing, that the issuance date of an oral decision is the date that the oral decision is announced, and that the oral decision becomes effective, without further proceedings, 35 days after the decision is announced orally, as follows:

> **§ 1.142 Post-hearing procedure.**
>
> . . . .
>
> (c) *Judge's decision*. (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.
>
> (2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.
>
> . . . .
>
> (4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(1)-(2), (4).

The record establishes that the ALJ announced the decision orally at the close of the hearing on November 17, 1999. Therefore, pursuant to section 1.142(c)(2)

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[5]See Domestic Return Receipt for Article Number Z 599 734 374.

of the Rules of Practice (7 C.F.R. § 1.142(c)(2)), the issuance date of the ALJ's decision is November 17, 1999, and pursuant to section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the effective date of the ALJ's decision is December 22, 1999. Respondent's Appeal Petition, filed January 7, 2000, was not filed before the ALJ's November 17, 1999, decision became effective, and the Judicial Officer has no jurisdiction under the Rules of Practice to hear an appeal that is filed after an administrative law judge's decision becomes effective.[6]

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[6]*See In re Harold P. Kafka*, 58 Agric. Dec. ___ (Apr. 5, 1999) (dismissing the respondent's appeal, filed 15 days after the initial decision and order became final), *appeal docketed*, No. 99-5313 (3d Cir. May 13, 1999); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal, filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that the respondent's appeal, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating that the respondents' appeal, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal, filed with the hearing clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal, filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec.

(continued...)

Respondent had notice of the Rules of Practice. The Rules of Practice are published in the *Federal Register*; thereby constructively notifying Respondent of the time within which Respondent was required to file its Appeal Petition.[7] Moreover, the record establishes that the Hearing Clerk served Respondent with a copy of the Rules of Practice at the commencement of this proceeding;[8] thereby providing Respondent with actual notice of the time within which Respondent was required to file its Appeal Petition.

Second, Respondent asserts that neither the ALJ nor the Hearing Clerk would intentionally misinform Respondent as to the time for filing an appeal petition and that the ALJ's Bench Decision and the Hearing Clerk's December 1, 1999, letter to Respondent, which accompanied a copy of the Bench Decision, each indicate that Respondent had 30 days after the date of service of the Bench Decision to file an appeal petition. Respondent contends that it reasonably relied on the ALJ and the Hearing Clerk. (Respondent's Pet. for Recons. at 2-3.)

The Bench Decision provides that the effective date of the decision is 35 days after service of the decision, unless there is an appeal to the Judicial Officer in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), as

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[6](...continued)
1173 (1983) (denying the respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the policy of the United States Department of Agriculture not to consider appeals filed more that 35 days after service of the initial decision).

[7]*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976).

[8]See the Hearing Clerk's November 16, 1998, letter to Respondent transmitting a copy of the Complaint and a copy of the Rules of Practice to Respondent.

follows:

> This decision will become final without further proceedings 35 days after service of this decision, unless Respondent appeals this decision, pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Bench Decision at 3.

Similarly, the Hearing Clerk's letter transmitting the Bench Decision to Respondent states that Respondent has 30 days from the date of service of the decision in which to file an appeal petition, as follows:

> December 1, 1999
>
> Mr. Paul T. Gentile
> Gentile & Dickler
> Attorneys at Law
> 15 Maiden Lane
> New York, New York 10038
>
> Dear Mr. Gentile:
>
> **Subject: In re: PMD Produce Brokerage Corp., Respondent**
> **PACA Docket No. D-99-0004**
>
> Enclosed is a copy of the Bench Decision, issued in this proceeding by Administrative Law Judge Edwin S. Bernstein, on November 30, 1999.
>
> Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.
>
> If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.
>
> In the event you elect to file an appeal, an original and four (4) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), referenced by the ALJ in the Bench Decision and the Hearing Clerk in the December 1, 1999, transmittal letter, states that an appeal petition must be filed within 30 days after receiving service of an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

The only decision issued by the ALJ in this proceeding is the decision orally announced at the close of the November 17, 1999, hearing. The document entitled "Bench Decision," filed by the ALJ on November 30, 1999, and furnished to Respondent on December 7, 1999, is merely an excerpt from that portion of the transcript that contains the ALJ's decision. Therefore, I find that, while not without ambiguity, the reference in the Bench Decision, at 3, to "this decision" is a reference to the November 17, 1999, decision orally announced at the close of the hearing and the references in the Hearing Clerk's December 1, 1999, letter to "this decision and order" and "the Decision and Order" are references to the November 17, 1999, decision orally announced at the close of the hearing.

The references in question are ambiguous because neither the ALJ nor the Hearing Clerk explicitly state whether the references are to the November 17, 1999, decision or to the document entitled "Bench Decision." Moreover, section

1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)) provides that the administrative law judge's decision becomes effective 35 days after issuance of the decision, if announced orally at the hearing or, if the decision is in writing, 35 days after the date of service of the decision upon the respondent. The ALJ and the Hearing Clerk state in the Bench Decision and the December 1, 1999, transmittal letter, respectively, that the decision becomes effective 35 days after service. These references to the effective date being contingent on the date of service, rather than the date of issuance, lend support to Respondent's position that the Hearing Clerk's and the ALJ's references to the decision are to the document entitled "Bench Decision," rather than to the decision announced orally at the close of the November 17, 1999, hearing. Nevertheless, I find that, since the only decision issued by the ALJ in this proceeding is the November 17, 1999, decision, the ALJ's Bench Decision references and the Hearing Clerk's December 1, 1999, transmittal letter references to the "decision" must be references to the November 17, 1999, decision and not references to the document entitled "Bench Decision." Moreover, I find that the ALJ's and Hearing Clerk's statements that the decision becomes effective 35 days after service, rather than 35 days after issuance, are error.

Even if I agreed with Respondent and found that the ALJ and the Hearing Clerk intended to indicate that the timeliness of Respondent's Appeal Petition would be determined by the date of service on Respondent of the document entitled "Bench Decision," that finding would not cause me to conclude that Respondent's Appeal Petition was timely filed.

As an initial matter, section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an appeal must be filed within 30 days after receiving service of the administrative law judge's decision. The Hearing Clerk furnished Respondent with the Bench Decision on December 7, 1999.[9] Respondent did not file its Appeal Petition until January 7, 2000, 31 days after the Hearing Clerk furnished Respondent with the Bench Decision. Thus, even if the date the Hearing Clerk furnished Respondent with the document entitled "Bench Decision" was used to determine timeliness, Respondent's Appeal Petition would be late.[10]

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[9]See Domestic Return Receipt for Article Number Z 599 734 374.

[10]The Judicial Officer has jurisdiction to hear an appeal petition filed after the 30-day appeal time has elapsed but before the administrative law judge's decision becomes final. If an appeal is inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, the Judicial Officer can grant an extension of time for filing a late appeal. *See In re Scamcorp, Inc.*, 55 Agric. Dec. 1395, 1405-06 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal); *In re Sandra L. Reid*, 55 Agric. Dec. 996, 999-1000 (1996); *In re Rinella's Wholesale, Inc.*,
(continued...)

Moreover, it is well settled that the administrative law judges are bound by the Rules of Practice.[11] Likewise, the Hearing Clerk is bound by the Rules of Practice. Neither the ALJ nor the Hearing Clerk has the authority to modify the Rules of Practice to allow Respondent additional time within which to appeal the ALJ's decision orally announced at the close of the hearing in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)). Therefore, even if I found that the ALJ and the Hearing Clerk intended to indicate that the timeliness of Respondent's Appeal Petition would be determined by the date the Hearing Clerk furnished Respondent with the document entitled "Bench Decision," that finding would not cause me to conclude that Respondent's Appeal Petition was timely. Despite the language in the Bench Decision and the Hearing Clerk's December 1, 1999, letter, which arguably indicate otherwise, the ALJ's decision announced

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[10](...continued)
44 Agric. Dec. 1234, 1236 (1985) (Order Denying Pet. for Recons.); *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985) (Order Denying Late Appeal); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985) (Order Denying Late Appeal), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984) (Order Denying Late Appeal), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 315 (1975) (Order Granting Motion to Withdraw Appeal). Thus, if the operative date for determining the timeliness of Respondent's Appeal Petition had been December 7, 1999, I could grant Respondent an extension of time and consider Respondent's Appeal Petition.

[11]*See In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the judicial officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders). *Cf. In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

orally at the close of the November 17, 1999, hearing became effective on December 22, 1999. Respondent's Appeal Petition, filed on January 7, 2000, after the ALJ's November 17, 1999, decision became effective, is too late to be considered.

Third, Respondent notes that, while Complainant filed a lengthy response to Respondent's Appeal Petition, Complainant did not argue that Respondent failed to file a timely appeal (Respondent's Pet. for Recons. at 3). I agree with Respondent's assessment of Complainant's Response to Respondent's Appeal. However, the litigants' failure to raise a jurisdictional issue does not give the Judicial Officer jurisdiction to hear an appeal petition filed after the administrative law judge's decision becomes effective.

Fourth, Respondent correctly points out that the decisions, which I cited for support of my conclusion that I have no jurisdiction to hear an appeal after an administrative law judge's decision becomes effective,[12] were all issued by the Judicial Officer and, with two exceptions, have not been appealed (Respondent's Pet. for Recons. at 3-4). However, the dearth of appeals from the Judicial Officer's decisions regarding the Judicial Officer's jurisdiction to hear appeal petitions under the Rules of Practice does not affect the precedential value of these decisions in administrative proceedings instituted under the Rules of Practice. Moreover, none of the Judicial Officer's decisions which have been appealed has resulted in a reversal of a decision regarding the Judicial Officer's jurisdiction to hear an appeal filed after an administrative law judge's decision becomes effective.[13]

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[12]*See In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___ , slip op. at 5 n.2 (Feb. 18, 2000) (Order Denying Late Appeal).

[13]The United States Court of Appeals for the Third Circuit has not yet ruled on the respondent's appeal of the Judicial Officer's order in *In re Harold P. Kafka*, 58 Agric. Dec. ___ (Apr. 5, 1999) (Order Denying Late Appeal), *appeal docketed*, No. 99-5313 (3d Cir. May 13, 1999). The respondent in *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984), sought judicial review of the Judicial Officer's order denying late appeal. The United States District Court for the District of New Jersey reviewed the merits notwithstanding the respondent's late administrative appeal, but did not reverse the Judicial Officer's holding that the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision becomes effective. *Toscony Provision Co. v. Block*, No. 81-1729 (D.N.J. Mar. 11, 1985), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished). Respondent notes that my citations to *Toscony* in *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___(Feb. 18, 2000) (Order Denying Late Appeal), appear to be error (Respondent's Pet. for Recons. at 4 n.1). The case history reveals that my citations are not error: *In re Toscony Provision Co.*, 40 Agric. Dec. 533 (1981), *aff'd*, 538 F. Supp. 318 (D.N.J. 1982), *remanded by consent*, No. 82-5354 (3d Cir. Dec. 27, 1982), *decision on remand*, 43 Agric. Dec. 791 (1984), *order denying late appeal*, 43 Agric. Dec. 1106 (1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), (continued...)

Fifth, Respondent contends that the Rules of Practice are consistent with Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, but the Rules of Practice are not consistent with Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, as follows:

> The Judicial Officer also alleges [in *In re PMD Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 6-9 (Feb. 18, 2000) (Order Denying Late Appeal),] that the U.S.D.A.'s construction of the Rules of Practice [with respect to the Judicial Officer's jurisdiction to hear an appeal filed after an administrative law judge's decision becomes effective] are [sic] consistent with the Federal Rules of Appellate Practice [sic], specifically citing Fed. R. App. P. 4(a)(1), as follows:
>
> **Rule 4. Appeal as of Right–When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> **(1) Time for Filing a Notice of Appeal.**
>
> **(A)** In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.
>
> **(B)** When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.
>
> Thus, the Rules of Practice are consistent with Rule 4(a)(1)(A); however, they are not consistent with Rule 4(a)(1)(B), because there is no Rule of Practice that deals with the case of the United States, its officer or agency being a party, even though that is precisely the case in all cases before the Secretary, including this case.

Respondent's Pet. for Recons. at 4.

I agree with Respondent that the Rules of Practice do not contain a provision

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[13](...continued)
aff'd, 782 F.2d 1031 (3d Cir. 1986) (unpublished). For a discussion of the history of *Toscony* prior to March 11, 1985, see *Toscony Provision Co. v. Block*, No. 81-1729, slip op. at 2-7 (D.N.J. Mar. 11, 1985).

regarding the time for filing an appeal petition only if the United States, its officer, or agency is a party. However, the purpose for my discussing Rule 4(a)(1) of the Federal Rules of Appellate Procedure in *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 6-9 (Feb. 18, 2000) (Order Denying Late Appeal), was merely to note that the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes effective, is consistent with the judicial construction of Rule 4(a)(1) of the Federal Rules of Appellate Procedure.[14]

Sixth, Respondent contends that the Rules of Practice are not consistent with the Administrative Orders Review Act, as follows:

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[14] *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating that since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating that under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating that under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993) (stating that we have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating that filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating that Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating that the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam) (stating that so strictly has Rule 4(a) of the Federal Rules of Appellate Procedure been applied, that even a notice of appeal filed 5 minutes late has been deemed untimely); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating that the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985) (stating that an untimely appeal leaves the reviewing court without jurisdiction to hear the appeal); *Sofarelli Associates, Inc. v. United States*, 716 F.2d 1395, 1396 (Fed. Cir. 1983) (stating that Rule 4(a) of the Federal Rules of Appellate Procedure requires, *inter alia*, that when the United States is a party, a notice of appeal must be filed with the trial court within 60 days from the date of entry of the judgment, and it is well settled that this requirement is mandatory and jurisdictional).

> The Judicial Officer further argues that his interpretation of the Rules of Practice [with respect to the Judicial Officer's jurisdiction to hear an appeal filed after an administrative law judge's decision becomes effective] is consistent with the Administrative Orders Review Act, 28 U.S.C. § 2344 (1976). [*In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 9 (Feb. 18, 2000) (Order Denying Late Appeal)]. As the Judicial Officer is aware, the Administrative Orders Review Act requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order. In fact, the decision in the instant case is from an initial decision by the ALJ, and not a final decision which can only be rendered by a Judicial Officer.

Respondent's Pet. for Recons. at 5.

The purpose for my discussing the Administrative Orders Review Act in *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 9 (Feb. 18, 2000) (Order Denying Late Appeal), was to note that the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes effective, is consistent with the judicial construction of the Administrative Orders Review Act.[15]

Seventh, Respondent contends that sections 1.142(c)(4) and 1.145(a) of the Rules of Practice (7 C.F.R. §§ 1.142(c)(4) and 1.145(a)) are not consistent (Respondent's Pet. for Recons. at 5-6). Section 1.142(c)(4) provides that an administrative law judge's decision announced orally at the hearing becomes effective 35 days after issuance, as follows:

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[15] *See Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating that the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Administrative Orders Review Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating that the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990); *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (stating that the Administrative Orders Review Act requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order and this 60-day time limit is jurisdictional in nature and may not be enlarged by the courts); *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981) (stating that the purpose of the time limit in the Administrative Orders Review Act is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations).

§ 1.142 Post-hearing procedure.

. . . .

(c) *Judge's decision*.

. . . .

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

Section 1.145(a) of the Rules of Practice provides that an appeal petition must be filed within 30 days after receiving service of the administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

Section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)) provides the methods by which documents and papers are served on a party other than the Secretary. However, there is no provision for service of a decision orally announced at the close of the hearing by an administrative law judge. Section 1.142(c)(2) of the Rules of Practice (7 C.F.R. § 1.142(c)(2)) provides that the date

of issuance of a decision orally announced at the close of a hearing is the date that it is announced by the administrative law judge and not the date that the Hearing Clerk furnishes the respondent with a copy of the decision excerpted from the transcript. Moreover, section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)) provides that an oral decision announced at the close of the hearing is effective 35 days after the oral decision is announced and not 35 days after the excerpt is furnished to the respondent. The record establishes that Respondent's counsel was present when the ALJ orally announced the decision at the close of the November 17, 1999, hearing. Under these circumstances, I find that for purposes of the time for filing its Appeal Petition in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondent was "served" with the ALJ's decision on November 17, 1999, at the close of the hearing. Therefore, Respondent's Appeal Petition, filed on January 7, 2000, was filed 51 days after the ALJ "served" Respondent with the decision, and Respondent's Appeal Petition was filed too late to be considered.

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

Order

Respondent's Petition for Reconsideration is denied.

In re: ANTHONY L. THOMAS.
PACA-APP Docket No. 98-0001.
Decision and Order filed February 22, 2000.

Responsibly connected – Active involvement in violations – Nominal officer and director – Alter ego – Shareholder and owner distinguished.

The Judicial Officer affirmed Judge Baker's decision that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the time that Sanford violated the PACA. The Judicial Officer found that Petitioner was a knowing "front man" who purchased produce; issued corporate checks; entered into contracts; leased office, warehouse, and cooler space; serviced produce sellers seeking payment; and collected monies from Sanford's customers. The Judicial Officer rejected Petitioner's contentions that he was an officer, director, and shareholder in name only and that he acted at the direction of Mr. Giuffrida, the real owner, who placed Petitioner out front to deal with customers who would have shunned Sanford, if aware of Mr. Giuffrida's involvement. The Judicial Officer found that Petitioner's deceit successfully induced produce sellers to sell to Sanford when they otherwise would not have. The Judicial Officer concluded that Petitioner was actively involved in activities resulting in Sanford's failure to pay violations and therefore responsibly connected with Sanford, within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)). The Judicial Officer

also rejected Petitioner's argument that he meets both parts of the second prong of the "responsibly connected" test, in that Petitioner was only nominally an officer of Sanford and in that Petitioner was not an owner of a violating entity which was the alter ego of its owners.

Andre Allen Vitale and Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, DC, for Petitioner.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Anthony L. Thomas [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing, on June 23, 1998, a Petition for Review. Petitioner seeks reversal of the determination by J.R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the period the corporation violated the PACA's prompt payment requirement.

J.E. Servais, Head, Trade Practices Section, PACA Branch, wrote a letter dated February 13, 1998, advising Petitioner that a disciplinary complaint had been filed against Sanford Produce Exchange, Inc., and informing Petitioner that United States Department of Agriculture [hereinafter USDA] records indicate he was responsibly connected with Sanford Produce Exchange, Inc., as president, vice president, director, and 25 percent shareholder during the period of Sanford Produce Exchange, Inc.'s alleged violations. Petitioner was given 30 days to deny that he was responsibly connected and to provide evidence supporting his position. In a letter dated April 3, 1998, counsel for Petitioner responded by denying that Petitioner was responsibly connected during the violation period because Petitioner had resigned as an officer and director of Sanford Produce Exchange, Inc., and had surrendered his shares of stock as of January 10, 1997.

On May 22, 1998, Respondent issued a determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the period that Sanford Produce Exchange, Inc., violated the PACA,[1] in that the PACA Branch's

[1]On October 16, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a decision in which the ALJ found that between August 1996 and June 1997, Sanford Produce Exchange, Inc., purchased, received, and accepted 91 lots of perishable agricultural commodities from 21 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $256,025.66, and concluded that Sanford Produce Exchange, Inc.'s failures to make full payment
(continued...)

records show that Petitioner continued to be active in managing and directing the business operations of the company subsequent to the January 10, 1997, date that Petitioner resigned as an officer and surrendered his stock (CARX 22).

On June 23, 1998, Petitioner filed Petition for Review, challenging Respondent's May 22, 1998, determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc. Pursuant to the Petition for Review, on November 23, 1998, the ALJ conducted an oral hearing in Washington, DC. Stephen P. McCarron, McCarron & Associates, Washington, DC, represented Petitioner. Andre Allen Vitale and Andrew Y. Stanton, Office of the General Counsel, USDA, Washington, DC, represented Respondent.

On February 1, 1999, Petitioner filed Brief of Petitioner; on March 15, 1999, Respondent filed Respondent's Brief; on April 6, 1999, Petitioner filed Petitioner's Reply Brief; and on May 12, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the time that it violated the PACA (Initial Decision and Order at 13).

On July 13, 1999, Petitioner appealed to the Judicial Officer; on August 5, 1999, Respondent filed Respondent's Response to Petitioner's Appeal Petition; and on August 6, 1999, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Petitioner, in this proceeding instituted under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), has the burden of proving by a preponderance of the evidence that: (1) he was not actively involved in the activities resulting in a violation of the PACA; and (2) he either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion and conclusions, as restated.

Petitioner introduced no exhibits; Respondent's exhibits are designated by the letters "RX"; the Certified Agency Record exhibits are designated by the letters "CARX"; and transcript references are designated by "Tr."

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[1](...continued)
promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Sanford Produce Exchange, Inc.*, 57 Agric. Dec. 1748 (1998). (RX 9.)

PERTINENT 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.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

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

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

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

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

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

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

§ 499h. Grounds for suspension or revocation of license

. . . .

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

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

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

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

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

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

> business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. 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), 499d(b)(A)-(B), (c), 499h(b) (1994 & Supp. III 1997).

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

Findings of Fact

1. Anthony L. Thomas, Petitioner, is an individual with a mailing address of 1 Camelot Circle, Berlin, Maryland 21811-2028 (CARX at Index of Exhibits).

2. Petitioner has worked in the produce industry since approximately 1986 (Tr. 137-40). Prior to Sanford Produce Exchange, Inc., Petitioner served as produce manager for Sandler Foods, Virginia Beach, Virginia, for 6 years (Tr. 77, 138). Before Sandler Foods, Petitioner worked for White Swan Corporation in Austin, Texas, as a produce manager for 3 years, and in Florida, as a produce manager for 1 year (Tr. 139-40). Petitioner's responsibilities as a produce manager for Sandler Foods and White Swan Corporation included purchasing produce and directing sales growth in, and profit management for, the produce department (Tr. 138-39). Prior to entering the produce business, Petitioner attended college for 3 years, concentrating on business courses (Tr. 140, 180).

3. Sanford Produce Exchange, Inc., a produce company, was formed by Vincent Giuffrida on September 26, 1995 (CARX 1 at 3; Tr. 23-24, 27). Approximately 6 months before he formed Sanford Produce Exchange, Inc., Mr. Giuffrida had closed another produce company he owned, Blue Chip Companies, Incorporated [hereinafter Blue Chip], owing approximately $200,000 to produce sellers (Tr. 20-23, 277-80). Mr. Giuffrida testified that, as a result of Blue Chip's failure to pay its produce sellers, he understood he was ineligible to operate in the produce business for at least 2 years (Tr. 23, 26). Therefore, in forming and participating in the operation of Sanford Produce Exchange, Inc., Mr. Giuffrida carefully concealed his involvement in the company (Tr. 27) by never signing any documents (Tr. 30, 80), by employing others in a capacity referred to by Petitioner's counsel as "front man" (Tr. 8), and by using a false name (Tr. 30, 79-80).

4. The so-called front men were Robbin Evans and Petitioner (Tr. 24, 28, 34-35, 81-82). Mr. Evans had no produce experience and was recruited by Mr. Giuffrida for the use of his name to start Sanford Produce Exchange, Inc. (Tr. 24). On September 26, 1995, Mr. Evans signed the initial corporate formation documents (CARX 2a at 3), and on October 3, 1995, Mr. Evans signed the PACA license application in which he was listed as president, vice president, secretary, treasurer, director, and 100 percent shareholder of Sanford Produce Exchange, Inc. (CARX 1 at 10-12). Mr. Evans also signed, as president of Sanford Produce Exchange, Inc., the required Florida Produce Dealer Bond on October 4, 1995 (CARX 9a) and the lease for Sanford Produce Exchange, Inc.'s office and stall at Sanford State Farmers' Market (CARX 10b). Mr. Giuffrida needed "somebody to do the buying" (Tr. 24) of produce for Sanford Produce Exchange, Inc. He could not do so because his failures to pay produce sellers when he operated Blue Chip meant that the produce sellers would not sell to him (Tr. 24, 26, 79-80).

5. Toward the end of 1995, Petitioner relocated to Florida (Tr. 79). Petitioner began his affiliation with Sanford Produce Exchange, Inc., on December 31, 1995, when he was elected president, vice president, and director (Tr. 79, 142-43; CARX 2b at 8-9). Petitioner also purchased 49 per centum of the company's shares for $10,000 (Tr. 144, 146-47; CARX 2e at 1, CARX 16)[2].

[2]However, an examination of the corporate records reveals a discrepancy in the number of shares authorized versus the number of shares purportedly issued. The Articles of Incorporation, Sanford Produce Exchange, Inc., Article IV: Capitol Stock, states unambiguously that "[t]his corporation is authorized to issue 500 shares of $1.00 par value common stock." (CARX 2a at 1.)

Nevertheless, recorded in the Minutes of the Organizational Meeting of Directors of Sanford (continued...)

Petitioner's intent in becoming affiliated with Sanford Produce Exchange, Inc., was to be an equal partner in ownership and operation (Tr. 144), being paid a weekly salary of $1,000 for the services he performed in the daily operation of Sanford Produce Exchange, Inc. (Tr. 89, 145), and splitting the firm's profits (Tr. 89, 144). Out of the total 500 authorized shares of Sanford Produce Exchange, Inc., Petitioner received 249 shares and Angelina Giuffrida, the secretary and treasurer of Sanford Produce Exchange, Inc., received 251 shares (Tr. 144; CARX 2b at 2, 4)[3]. Mr. Giuffrida's accountant, Joseph Clark, drafted corporate papers to effect these changes (Tr. 27-28, 37-38). Petitioner was also made the sole signatory on the company's bank account (Tr. 29).

6. Although Petitioner describes his association with Sanford Produce Exchange, Inc., as in the nature of an employee, who did not have any corporate or management decision-making authority (Tr. 81, 85), which he maintains was run by Mr. Giuffrida (Tr. 81), the evidence indicates that prior to January 10, 1997, Petitioner's primary responsibilities included: all of the purchasing of produce (Tr. 82, 141); issuing corporate checks (Tr. 144); entering into contracts (Tr. 145); leasing office, warehouse, and cooler space at the Sanford State Farmers' Market (Tr. 124, 145; CARX 10d, e); dealing with produce sellers seeking payments (Tr. 145, 200-01); and collecting monies from Sanford Produce Exchange, Inc.'s

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[2](...continued)
Produce Exchange, Inc., of December 31, 1995, are duly adopted resolutions, which purport to allow increases beyond 500 the total number of common shares issued by the corporation (CARX 2b at 2 at third unnumbered resolution and at 3 at first unnumbered resolution). The three directors issued themselves shares, as follows: Robbin Evans, 500 shares for $500; Anthony L. Thomas, 249 shares for $249; and Angelina Giuffrida, 251 shares for $251 (CARX 2b at 4 at first unnumbered resolution). These three directors approved these resolutions (CARX 2b at 5 at first unnumbered resolution) and subscribed to these resolutions (CARX 2b at 6).

Moreover, the three directors voted their shares as shareholders on Consent to Action Taken in Lieu of the Annual Meeting of Shareholders of Sanford Produce Exchange, Inc., as follows: director/shareholder Robbin Evans, 500 shares; director/shareholder Anthony L. Thomas, 249 shares; and director/shareholder Angelina Giuffrida, 251 shares (CARX 2b at 8), which purported to effectuate the changes in share ownership.

However, it is clear that Petitioner held 249 shares for about 1 year and whether those shares constituted approximately 49 per centum of the total shares or approximately 25 per centum of the total shares, Petitioner, in either event, held more than 10 per centum of the outstanding shares, which is all that is required under the definition of "responsibly connected" in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)). Therefore, there is no need to resolve the discrepancy of what percentage of the total shares issued is 249 shares.

[3]See note 2.

customers (Tr. 82, 145).

Notwithstanding such evidence, Petitioner maintains that during this entire time he was operating at the direction and under the control of Mr. Giuffrida (Tr. 81), that he actually had little or no responsibilities with respect to the actions taken by the corporation (Tr. 82, 86), and that his positions of officer, director, and shareholder were in name only (Tr. 85-87). This context had the effect of inducing vendors to sell their produce to Sanford Produce Exchange, Inc., when they might not have done so had they known Mr. Giuffrida was involved (Tr. 79-80, 169-71). To further this deception, Mr. Giuffrida carefully avoided signing any documents and even adopted the alias of "Jimmy Salvo" (Tr. 30, 79-80, 169-70).

7. In mid-1996, Petitioner invested an additional amount between $11,000 and $12,000 in Sanford Produce Exchange, Inc. (Tr. 90).

8. As a result of disagreements with Mr. Giuffrida (Tr. 84), on January 10, 1997, Petitioner submitted his resignation as president and as director of Sanford Produce Exchange, Inc. (CARX 14a at 2), and surrendered Petitioner's shares of stock (CARX 2e at 4, CARX 14a at 2-4), but was repaid neither the $10,000 purchase price nor the other $11,000 to $12,000 invested in Sanford Produce Exchange, Inc. (Tr. 90, 146-47).

9. Petitioner continued to serve as president of Sanford Produce Exchange, Inc., after January 10, 1997 (Tr. 82-88, 156-62; RX 8 at 1; CARX 5a-g).

10. Petitioner maintains that after he resigned from all corporate positions and returned his stock on January 10, 1997, he assumed the duties of dock supervisor (Tr. 85-86; Brief of Petitioner at 3) and that the company was run by Mr. Giuffrida under the alias "Jimmy Salvo" (Tr. 54, 123, 136). However, neither Mr. Giuffrida nor his accountant reported the corporate changes to the Florida corporations office or to the PACA Branch; hence, Petitioner continued to appear on the records of these offices as president of Sanford Produce Exchange, Inc. (Tr. 35, 42, 110-15; Brief of Petitioner at 3).

Petitioner describes the situation after January 10, 1997, as follows:

> On January 10, 1997, after many disagreements with Mr. G[iu]ffrida during 1996, Mr. Thomas resigned from all corporate positions, returned his stock and assumed the duties of dock supervisor. After Mr. Thomas resigned his corporate positions in January, 1997, Mr. G[iu]ffrida continued to run the company as Jimmy Salvo. However, neither Mr. G[iu]ffrida nor his accountant reported the corporate changes to the Florida corporations office or to the PACA. Hence, Mr. Thomas continued to appear on the records of these offices as the president of the Company. This was convenient for Mr. G[iu]ffrida because it continued to give Mr. G[iu]ffrida

> an excuse to request Mr. Thomas to sign documents as the president and thereby continue to conceal his operation with Sanford. These documents included a factoring agreement, certain tax returns and leases. Mr. G[iu]ffrida also kept Mr. Thomas as the signator [sic] on the bank account. However, Mr. Thomas made no decisions and merely signed his name to the checks and documents when they were presented to him by Mr. G[iu]ffrida.

Brief of Petitioner at 3.

11. Notwithstanding Petitioner's description of his situation after January 10, 1997, and attributing it to the convenience of Mr. Giuffrida and his description of his work as that of a dock supervisor, the evidence shows that Petitioner performed duties far beyond that of a dock supervisor, in that:

Acting as president, Petitioner signed a contract with Olympic Credit Fund, Inc., on March 4, 1997, whereby Sanford Produce Exchange, Inc., agreed to sell its accounts receivable to Olympic in return for payment equal to 90 per centum of the face value of each receivable purchased, referred to as the factoring agreement (CARX 5a); Petitioner signed additional documents in furtherance of the factoring agreement, including a signature authorization form dated March 5, 1997, and signed as president, authorizing Olympic to accept documents signed by Petitioner (CARX 5b); Notification Agreement to inform Sanford Produce Exchange, Inc.'s customers to make future payments to Olympic, on which Petitioner identified himself as president (CARX 5c); a document dated March 5, 1997, entitled "Factoring Procedures" setting forth the procedures used to calculate payments pursuant to the factoring agreement, on which Petitioner identified himself as president (CARX 5d); a Certified Copy of Resolutions, wherein Petitioner is listed as president and secretary/treasurer and which he signed as secretary on March 5, 1997 (CARX 5e); Uniform Commercial Code Financing Statements filed with the State of Florida (CARX 5f at 2-3); a blank accounts receivable schedule for Olympic to use to compare signatures on subsequent schedules (CARX 5f at 1); two completed accounts receivable schedules dated May 12, 1997, and May 13, 1997, respectively (CARX 5f at 4, 8); and an addendum to the factoring agreement dated May 9, 1997, on which Petitioner identified himself as president (CARX 5g). Petitioner's involvement in carrying out the factoring agreement, including serving as the primary contact person at Sanford Produce Exchange, Inc. (CARX 5f at 8, 25, 27, 30, 31), continued until at least June 23, 1997 (CARX 5f at 31).

12. Other significant corporate documents, which Petitioner signed as president after January 10, 1997, include the State of Florida Employer's Quarterly Tax Report signed and dated May 7, 1997 (CARX 13c); Employer's Quarterly

Federal Tax Return signed and dated May 7, 1997 (CARX 13d); and an amendment to Sanford Produce Exchange, Inc.'s lease of office, stall, and cooler space, signed and dated May 30, 1997 (CARX 10e at 8-10).

13. In addition, Petitioner continued to be involved in significant day-to-day operations of Sanford Produce Exchange, Inc., after January 10, 1997, carrying out such responsibilities as issuing corporate checks (Tr. 134-36, 215-16; CARX 19 at 1-20, 23-25, 32, 46, 53-58, 60, 63-64, 72, 74-75, 81-82, 89-90, CARX 20 at 9; RX 4 at 9); entering into contracts on behalf of Sanford Produce Exchange, Inc. (Tr. 60, 171); dealing with produce sellers seeking payments from Sanford Produce Exchange, Inc. (RX 4 at 8; Tr. 60, 87-88, 171-72, 178-80, 214-19); and dealing with creditors (Tr. 60, 88).

Three of the produce purchases for which Sanford Produce Exchange, Inc., failed to make full payment promptly in violation of the PACA, occurred before January 10, 1997 (CARX 4 at 3, items 1 and 2). Petitioner argues that these three transactions should not be considered as failure-to-pay violations, but rather disputes in PACA reparations proceedings (Brief of Petitioner at 4). The first two of those transactions, totaling $16,095 (CARX 4 at 3, item 1), were the subject of a reparation action between Sanford Produce Exchange, Inc., and the seller, Arkansas Valley Produce (CARX 3 at 18-76). That matter was not resolved until an Order Reinstating Default Order was issued on January 28, 1998 (CARX 3 at 25-26), 12 months after Petitioner had resigned as president and director of Sanford Produce Exchange, Inc., and 6 months after Petitioner had terminated his affiliation with Sanford Produce Exchange, Inc. (Findings of Fact 8-9, 11-14). Petitioner also claims that the third purchase for $2,847.10 from Martin Produce Co., Inc., was the subject of a reparation action (Brief of Petitioner at 4; CARX 3 at 15). However, all three transactions occurring before January 10, 1997, were disposed of by default orders, since Sanford Produce Exchange, Inc., did not answer either separate reparations complaint. Thus, these reparation proceedings have no evidentiary bases for showing that they involved valid disputes. Moreover, Petitioner did not present any other evidence that Sanford Produce Exchange, Inc.'s purchase of produce from either Martin Produce Co., Inc., or Arkansas Valley Produce was the subject of a valid dispute. Therefore, Petitioner's argument that these transactions could not result in failure-to-pay violations, because they were valid disputes resolved by reparations proceedings, is clearly without any merit.

14. Petitioner terminated his affiliation with Sanford Produce Exchange, Inc., in late June 1997 (Tr. 88; Brief of Petitioner at 3).

15. Neither Petitioner nor any other person affiliated with Sanford Produce Exchange, Inc., informed the Florida corporations office or the PACA Branch that Petitioner had resigned as an officer and director of Sanford Produce Exchange,

Inc., until after he terminated his affiliation with the company (Finding of Fact 10).

16. Petitioner served as either *de facto* or *de jure* president of Sanford Produce Exchange, Inc., from December 31, 1995, to late June 1997 (Findings of Fact 5-14).

17. Petitioner was actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA (Findings of Fact 11-14).

18. Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period and his association with Sanford Produce Exchange, Inc., was not nominal (Findings of Fact 5-16).

19. Although Mr. Giuffrida used an alias and employed Petitioner as a front man to disguise Mr. Giuffrida's association with Sanford Produce Exchange, Inc., the record does not reveal that USDA brought any disciplinary complaints against Mr. Giuffrida for violations of the PACA while Mr. Giuffrida owned Blue Chip or Sanford Produce Exchange, Inc., or if USDA ever cited Mr. Giuffrida as responsibly connected with Sanford Produce Exchange, Inc.

Discussion and Conclusions

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) defines "responsibly connected" as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation. Petitioner was president, vice president, director, and holder of 49 per centum of the outstanding stock[4] of Sanford Produce Exchange, Inc., as of December 31, 1995. But, Petitioner contends that he resigned as officer and director and surrendered his shares as of January 10, 1997. In fact, Petitioner continued to serve as an officer until Petitioner terminated his affiliation with the company in late June 1997. Petitioner's contention that he was acting only in a nominal capacity, because he acted under the control and direction of Vincent Giuffrida, alias Jimmy Salvo, is not supported by the facts of record; thus, his testimony is not credible. Petitioner was not a nominal officer, director, and shareholder. Prior to January 10, 1997, Petitioner was a holder of 49 per centum of the outstanding stock[5] and was directly involved in Sanford Produce Exchange, Inc.'s day-to-day operations, engaging in significant corporate activities, including signing corporate checks, entering into contracts, leasing business space, purchasing produce, and serving as the contact person in Sanford Produce Exchange, Inc., for produce sellers and creditors seeking payment. Petitioner's

[4]See note 2.

[5]See note 2.

direct involvement in significant corporate operations belies his contention that he was only nominal. In addition, the authorities and responsibilities he possessed as an officer, director, and holder of 49 per centum of the outstanding stock[6] establish that he was not nominal. Moreover, Petitioner did not effectively resign as an officer on January 10, 1997. Rather, Petitioner continued to serve as president in significant and substantial corporate operations from January 10, 1997, until he left the company in late June 1997. Thus, Petitioner maintained a significant nexus to Sanford Produce Exchange, Inc., during the entire violation period.

To rebut successfully Respondent's "responsibly connected" determination, Petitioner must demonstrate by a preponderance of the evidence that he was not actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The issue of active involvement is decided by looking at the extent and nature of a petitioner's activities with the violating company. Petitioner failed to establish by a preponderance of the evidence that he was not actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA between August 1996 and June 1997.

Assuming, *arguendo*, Petitioner was only operating as a "front man" for Mr. Giuffrida, that in itself would not support a conclusion that Petitioner was not actively involved in activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA. Petitioner admits that he served as president to conceal Mr. Giuffrida's involvement in Sanford Produce Exchange, Inc., because vendors would not have sold produce to Sanford Produce Exchange, Inc., if aware of Mr. Giuffrida's involvement. Further, Petitioner admits that he knew about Mr. Giuffrida's scheme from the inception of Petitioner's affiliation with Sanford Produce Exchange, Inc., and that his part in misleading produce sellers bothered him. Nevertheless, Petitioner did not inform produce sellers. Instead, Petitioner knowingly, and of his own free will, deceived produce sellers, which enabled Sanford Produce Exchange, Inc., to purchase produce from sellers who would not knowingly have done business with Mr. Giuffrida.

If Sanford Produce Exchange, Inc., had not been able to purchase produce on credit, it would not have left 21 sellers unpaid for $256,025.66 worth of produce. Therefore, by knowingly participating in the scheme to mislead produce sellers, Petitioner was actively involved in the activities which resulted in Sanford Produce Exchange, Inc.'s violations of the prompt payment provision of the PACA.

In order to establish that an allegedly responsibly connected individual was only a nominal officer, the individual must show by a preponderance of the evidence that

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[6]See note 2.

he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual and significant nexus standards, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have participated in the violative activities, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others. The record clearly establishes that Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period.

Petitioner relies upon *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), as dispositive of the issues in this proceeding. In *Maldonado*, the petitioner was held not responsibly connected under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), because the petitioner therein was found to have neither a significant nexus to the violating company nor active involvement in its activities. There are significant differences between the case, *sub judice*, and *Maldonado*. The affiliation of Mr. Maldonado with the violating company differed significantly from the nature of Petitioner's affiliation with Sanford Produce Exchange, Inc. Mr. Maldonado was found to lack the skill and training commensurate with his position as president, since he had only a sixth grade education, no experience or training in management, and lacked an understanding of corporate structures. Consequently, Mr. Maldonado did not understand the documents he signed because of his lack of education and experience. Petitioner herein has no such lack of education, training, skill, or experience.

In the recent *Norinsberg* remand decision, the Judicial Officer stated:

> 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.

In re Michael Norinsberg, 58 Agric. Dec.___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand).

Applying the standards enunciated by the Judicial Officer in *Norinsberg, supra,* I conclude that Petitioner was responsibly connected with Sanford Produce

Exchange, Inc., during the entire violation period.

Petitioner was an officer, director, and holder of 49 per centum of the outstanding stock of Sanford Produce Exchange, Inc.,[7] prior to January 10, 1997. After January 10, 1997, Petitioner continued to serve as the president until late June 1997. During the entire time he was affiliated with Sanford Produce Exchange, Inc., Petitioner was involved in corporate activities that had a significant influence upon the operation and the direction of Sanford Produce Exchange, Inc. These facts establish that he had an actual and significant nexus to Sanford Produce Exchange, Inc., during the entire violation period. Petitioner failed to prove by a preponderance of the evidence that he was acting only in a nominal capacity. Petitioner also failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA. Therefore, Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the entire violation period.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises four issues on appeal in support of a reversal of the ALJ's Initial Decision and Order affirming Respondent's determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc.

Petitioner's first issue is whether Petitioner was actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of section 2(4) of the PACA (Appeal Pet. at 8). Petitioner admits to signing checks, but argues that Mr. Giuffrida controlled all the company's money, deciding each payee and for how much each check would be written. Since Petitioner was given a fully completed check to sign, Petitioner argues that Petitioner exercised no judgment, discretion, or control over the checks. Therefore, Petitioner argues that, under *Maldonado* and *Norinsberg, supra,* Petitioner was not actively involved in the activities resulting in a violation of the PACA (Appeal Pet. at 8-9).

Guidance on active involvement is provided by my recent decision on remand in *Norinsberg*, 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

[7]See note 2.

> 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.

In re Michael Norinsberg, 58 Agric. Dec.___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand).

Respondent replies that Petitioner's argument fails, even if one allows that Mr. Giuffrida directed and controlled all corporate decisions and flow of money, because active involvement includes not only those who decide which, and how much, produce sellers are paid, but active involvement also includes those who freely and knowingly participate in a scheme to fail to pay produce sellers for produce, as Petitioner did (Respondent's Response to Petitioner's Appeal Pet. at 3-4).

I find that the facts are not disputed. Mr. Giuffrida's former produce company, Blue Chip, went under in 1995, owing produce sellers approximately $200,000. Thereafter, Mr. Giuffrida alleges that he believed he was not eligible to operate in the produce business for at least 2 years. Consequently, Mr. Giuffrida started a new company, Sanford Produce Exchange, Inc., adopting an alias, Jimmy Salvo, to conceal his involvement, and hiring people, including Petitioner, to front the new company, because Mr. Giuffrida believed that produce sellers who knew Mr. Giuffrida from his payment practices at Blue Chip would not sell to Mr. Giuffrida. Petitioner knowingly and freely joined the scheme, whereby Petitioner induced produce sellers to sell to Sanford Produce Exchange, Inc., even though Petitioner was fully cognizant of the duplicity of Mr. Giuffrida's occult involvement in the company.

I agree with Respondent's argument that Petitioner's active involvement exceeded *ministerial*, even if it is conceded that Petitioner was a mere puppet of Mr. Giuffrida's financial decisions and instructions, because Petitioner pretended on a daily basis to be the chief operating officer of Sanford Produce Exchange, Inc., knowing full well that produce sellers would not knowingly sell to a firm operated by Mr. Giuffrida. Petitioner's calculated effort to deceive produce sellers is the primary reason that Sanford Produce Exchange, Inc., was able to buy produce from sellers, who ultimately were not paid for produce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, Respondent argues that the undisputed record of Petitioner's activities on behalf of Sanford Produce Exchange, Inc., as its president, director, and holder of more than 10 per centum of the outstanding stock, establish that

Petitioner's active involvement far exceeded *ministerial*, irrespective of whether Petitioner was a "puppet" of Mr. Giuffrida (Respondent's Response to Petitioner's Appeal Pet. at 6). Respondent makes two major points in support of this argument. First, the only supporting evidence presented by Petitioner, that Petitioner was a "puppet" of Mr. Giuffrida, is Petitioner's self-serving testimony to this end, and Mr. Giuffrida's corroborating testimony at the hearing. However, little weight should be given to the testimony of Mr. Giuffrida because this testimony is directly contradicted by Mr. Giuffrida's statements on several occasions to Respondent's investigator, Mr. Swainhart, to the effect that Petitioner ran the company, not Mr. Giuffrida (Tr. 239-41, 248, 251-52). Therefore, since Petitioner's testimony that he was a mere "puppet" is self-serving and corroborated only by Mr. Giuffrida's contradictory statements, I agree with Respondent that this evidence deserves little weight.

Respondent's second argument is that Petitioner was just what he appeared to be, an officer, director, and holder of more than 10 per centum of the outstanding stock, and responsible for the activities of Sanford Produce Exchange, Inc. (Respondent's Response to Petitioner's Appeal Pet. at 9-11). I agree with Respondent that Respondent's list of activities shows that Petitioner's active involvement was way beyond *ministerial*. Further, Petitioner's activities listed by Respondent are essentially the same activities in which I find Petitioner engaged (Findings of Fact 6, 11-14).

Finally, Respondent contends that Petitioner's reliance on *Maldonado* and *Norinsberg*, *supra*, is misplaced. I agree with Respondent.

In *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), the only activity found to constitute active involvement was Mr. Norinsberg's signing 16 corporate checks. 56 Agric. Dec. at 1857. Mr. Norinsberg's involvement with the violating company is slight when compared to Petitioner's extensive participation in the scheme to defraud produce sellers by hiding Mr. Giuffrida's association with Sanford Produce Exchange, Inc., Petitioner's execution of lease and purchase documents, and Petitioner's active involvement in the factoring agreement, all of which enabled Sanford Produce Exchange, Inc., to continue to buy produce from sellers, who ultimately were not paid for the produce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), the court found that Mr. Maldonado was not actively involved in the activity that resulted in failure to pay for produce by his firm. The court noted that, although Mr. Maldonado was authorized to co-sign checks, he did not participate in the fraudulent activities that resulted in funds being siphoned from the firm. His duties

before and after he was named president remained the same; *viz.*, running the produce department. *Maldonado*, *supra*, 154 F.3d at 1088. In contrast with *Maldonado*, Petitioner knowingly participated in the fraudulent scheme to hide Mr. Giuffrida's involvement in Sanford Produce Exchange, Inc., so that produce suppliers would sell to the firm. Also, Petitioner's duties with Sanford Produce Exchange, Inc., were to act as its president, vice president, director, and owner of 49 per centum of Sanford Produce Exchange, Inc.'s stock,[8] until January 10, 1997. From January 10, 1997, until late June 1997, Petitioner acted as Sanford Produce Exchange, Inc.'s president. Moreover, in contrast to Mr. Maldonado's lack of education and management experience, Petitioner attended college for 3 years, concentrating on business courses (Tr. 140, 180), and had extensive experience as a produce manager for two other firms, Sandler Foods, Virginia Beach, Virginia, and White Swan Corporation, Austin, Texas, prior to his association with Sanford Produce Exchange, Inc. (Tr. 77, 138-40).

Therefore, the facts in this case are much different than those of *Norinsber*g and *Maldonado* and demonstrate that Petitioner used his position as president, vice president, director, and 49 percent stockholder to defraud Sanford Produce Exchange, Inc.'s produce sellers and was responsible for decisions that led to Sanford Produce Exchange, Inc.'s failure to pay produce sellers promptly. Petitioner was, therefore, actively involved in the activities which resulted in Sanford Produce Exchange, Inc.'s violations of the prompt payment provision of the PACA. For this reason alone, Petitioner was properly held to be responsibly connected with Sanford Produce Exchange, Inc.

Petitioner's second issue concerns the second prong of the "responsibly connected" test, in that Petitioner argues that he was a nominal officer (Appeal Pet. at 9). In support of Petitioner as a *nominal officer* only, Petitioner states that he made no policy decisions or business decisions; attended no board meetings; had no corporate duties; received no compensation for corporate positions which he held; signed documents as an officer solely as an administrative convenience to Mr. Giuffrida; signed corporate checks devoid of corporate policy; was an officer, director, and shareholder in name only; had no managerial authority; and did what Mr. Giuffrida told him to do (Appeal Pet. at 9).

The ALJ concluded that Petitioner was not nominal because he was a holder of 49 per centum of the outstanding stock of Sanford Produce Exchange, Inc., prior to January 10, 1997, and was directly involved in Sanford Produce Exchange, Inc.'s day-to-day operations, having engaged in significant corporate activities, including signing at least 45 corporate checks, entering into contracts and leases, purchasing

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[8]See note 2.

produce, and dealing with produce sellers and creditors seeking payment from Sanford Produce Exchange, Inc., through June 1997. Moreover, the ALJ found that Petitioner did not effectively resign as an officer on January 10, 1997, but continued to serve as president until he left Sanford Produce Exchange, Inc., in late June 1997. (Initial Decision and Order at 9.)

In order for alleged responsibly connected individuals to show that they are only nominal, they must establish by a preponderance of the evidence that they did not have an actual, significant nexus with the violating company during the violation period and, therefore, neither knew nor should have known of the corporation's misdeeds.[9] Responsibility is placed upon corporate officers, directors, and holders of more than 10 per centum of the outstanding stock because their status with the company requires that they know, or should know, about violations being committed and that they be held responsible for their failure to "counteract or obviate the fault of others." *Bell, supra*, 39 F.3d at 1201. The ALJ's conclusion that Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period (Initial Decision and Order at 11), is correct.

Again, Petitioner asserts that his situation is comparable to *Norinsberg* and *Maldonado* (Appeal Pet. at 8). However, the undisputed facts of this case show that Petitioner was far more involved in the business affairs of Sanford Produce Exchange, Inc., than were the petitioners in *Norinsberg* and *Maldonado* in their respective companies.

In *Norinsberg*, the Judicial Officer found that the petitioner was made secretary/treasurer by his father, the corporate president, solely for administrative convenience so the petitioner could sign corporate checks and other documents while his father was out of town. The Judicial Officer found that Mr. Norinsberg was nominal, as his sole involvement in the corporation was that he was listed as the firm's secretary, treasurer, director, and stockholder on two PACA license applications, his name had been signed to one of the applications, he was listed as a signatory of checks for three corporate bank accounts and signed 16 corporate checks, he signed one purchase agreement, he signed a proposed bank assignment and security agreement which was never ratified, and a state administrative agency addressed a letter to him as secretary/treasurer. *In re Michael Norinsberg*, *supra*, 56 Agric. Dec. at 1862-64. In *Maldonado*, the court found that Mr. Maldonado did not actually have any authority as president, because his duties never changed after he became president of the firm and he received no additional compensation for

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[9] *Maldonado v. Department of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998); *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).

being named to that position. The court also pointed out that he never attended any board meetings and "lacked the skill and training commensurate with his position as president," stressing that he only had a sixth grade education and had no experience or training in management, and lacked an understanding of corporate structures. *Maldonado*, *supra*, 154 F.3d at 1088-89.

In contrast to *Norinsberg* and *Maldonado*, Petitioner was a very experienced and well-educated manager of produce businesses, having served as a produce manager for over 10 years with two businesses other than Sanford Produce Exchange, Inc. Petitioner was well paid, as he received a salary of $1,000 per week and split the firm's profits with Mr. Giuffrida. (Tr. 77, 89, 138-40, 144-45.) Unlike Mr. Maldonado, who had only a sixth grade education, Petitioner attended college for 3 years, concentrating on business courses. Based on his education and experience, Petitioner knew, or should have known, about corporate structures, including the responsibilities and authority that come with holding the position of president. While Mr. Norinsberg and Mr. Maldonado might not have understood the documents they signed due to their lack of experience or, in the case of Mr. Maldonado, his lack of education, Petitioner knew, or should have known, the effect of the significant corporate documents he signed. It was Petitioner alone who signed away Sanford Produce Exchange, Inc.'s accounts receivable. Petitioner knew, or should have known, the significance of the factoring agreement and that his signature bound Sanford Produce Exchange, Inc., to its terms. Petitioner acted as Sanford Produce Exchange, Inc.'s contact with Olympic Credit Fund, Inc., on the factoring agreement and made decisions with regard to that agreement. Petitioner, by affixing his signature to Sanford Produce Exchange, Inc.'s state and federal tax filings, undertook responsibility for the information contained in those documents. Petitioner knew, or should have known, that he was undertaking significant authority by signing at least 45 corporate checks, many of them payable to non-produce creditors. Petitioner was directly and significantly involved in the day-to-day operations of Sanford Produce Exchange, Inc., and therefore, played an important role in the direction of the company. In light of his direct, knowing, and voluntary involvement in significant corporate activities, Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period.

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.

Petitioner's third issue is the question of alter ego, in that Petitioner argues that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., that Mr. Giuffrida negated its separate identity. Petitioner argues that Mr. Giuffrida controlled all operations; that Mr. Giuffrida decided who would work, who would be paid, and the amount of payments; that Mr. Giuffrida decided what titles would be held by whom; that Mr. Giuffrida used his personal accountant to draft documents reflecting his decisions; that there were never any shareholder or board meetings; that Sanford Produce Exchange, Inc., had no existence independent of Mr. Giuffrida; and that the corporate form was nothing more than a mask to cover Mr. Giuffrida's proprietorship (Appeal Pet. at 9).

Respondent replies that there is no evidence that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate identity (Respondent's Response to Petitioner's Appeal Pet. at 15).

I agree with Respondent that the evidence does not support the conclusion that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate identity. My examination of Petitioner's list of reasons in support of the third issue does not convince me that Mr. Giuffrida was dominant. Moreover, Petitioner fails to address the record facts militating against Petitioner's contention that Sanford Produce Exchange, Inc., was Mr. Giuffrida's alter ego, *inter alia*: that Petitioner had at least $21,000 invested in the corporation; that Petitioner was paid a salary of $1,000 per week and was due a share in the profits; that Petitioner not only held the titles of president, vice president, director, and shareholder, but also had duties commensurate with those titles; and that Petitioner held himself out to produce sellers to be president of Sanford Produce Exchange, Inc., and actually functioned as president (Findings of Fact 5-13). Moreover, Mr. Giuffrida, on several occasions in 1997, stated to Respondent's investigator, Mr. Swainhart, that Petitioner was the one in control of Sanford Produce Exchange, Inc. (Tr. 240-41, 248, 252), directly contradicting Mr. Giuffrida's testimony at the hearing (Tr. 28-29). I find that there is not a preponderance of the evidence that Mr. Giuffrida was so dominant that Sanford Produce Exchange, Inc., was the alter ego of Mr. Giuffrida.

Petitioner's fourth issue is that Petitioner can raise the alter ego defense for two reasons: (1) the Petitioner's shareholder status ended on January 10, 1997, before the prompt payment violations occurred; and (2) even if Petitioner is a shareholder, the amended definition of "responsibly connected" in section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 (Pub. L. No.

104-48, § 12(a), 109 Stat. 424, 430 (1995)) makes a distinction between "shareholder" and "owner" in the context of a company which is the alter ego of its "owners" (Appeal Pet. at 10-13).

In support of the first argument that Petitioner was not a shareholder when the prompt payment violations occurred, Petitioner states that the three transactions occurring prior to Petitioner's surrender of his stock on January 10, 1997, are legitimate reparations cases, not failures to pay promptly in accordance with the PACA.[10] Further, Petitioner argues that if Petitioner was not a shareholder after January 10, 1997, then Petitioner could not be an owner of a violating entity for the purposes of determining if Petitioner is an owner of a violating entity which is the alter ego of its owners. (Appeal Pet. at 10-11.)

I reject Petitioner's first argument on the fourth issue for three reasons.

First, the ALJ found that the three transactions occurring prior to Petitioner's surrender of his stock constitute failures to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Sanford Produce Exchange, Inc.*, 57 Agric. Dec. 1748 (1998) (RX 9).

Second, Petitioner has no credibility to now argue that the three transactions were good faith reparations disputes, when Petitioner's uncontested testimony is that the main reason that Petitioner could not adjust to the business practices and techniques of Mr. Giuffrida is that Petitioner was uncomfortable with "hammering" produce sellers, a technique utilized by Sanford Produce Exchange, Inc., to pay produce sellers less than the true value of their produce (Tr. 83). I find that it is more likely than not that these transactions are instances of "hammering" produce sellers. Moreover, Petitioner testified that at the end of his relationship with Mr. Giuffrida, Petitioner was in anguish over being required to perform the "shuck and jive," which was what Petitioner called Mr. Giuffrida's technique utilized to keep creditors at bay (Tr. 88). I find that Petitioner has failed to show by a preponderance of the evidence that the three transactions were good faith disputes which took the three transactions out of the prompt payment requirements.

Third, I find that neither the Arkansas Valley Produce transactions nor the Martin Produce Co., Inc., transaction could, in any event, be considered disputed transactions, as Petitioner argues, since Sanford Produce Exchange, Inc., failed to answer either the reparation complaint of Arkansas Valley Produce or the reparation complaint of Martin Produce Co., Inc. I signed, respectively, both the Default Order in favor of Martin Produce Co., Inc., on December 3, 1997 (CARX 3 at 15),

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[10]Two of the transactions involved Sanford Produce Exchange, Inc.'s purchase of produce from Arkansas Valley Produce and one of the transactions involved Sanford Produce Exchange, Inc.'s purchase of produce from Martin Produce Co., Inc.

and the Order Reinstating Default Order in favor of Arkansas Valley Produce on January 28, 1998 (CARX 3 at 25).

Petitioner's second argument on the fourth issue is that, even if Petitioner is a shareholder, the amended definition of "responsibly connected" in section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 (Pub. L. No. 104-48, § 12(a), 109 Stat. 424, 430 (1995)) makes a distinction between "shareholder" and "owner" in the context of a company which is the alter ego of its "owners," such that Petitioner is a shareholder but not an owner and therefore Petitioner may raise the alter ego defense (Appeal Pet. at 12).

Specifically, Petitioner argues that my decision in *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1864-65 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), *final decision on remand,* 58 Agric. Dec. ___ (Apr. 5, 1999), is incorrect insofar as that decision held that a shareholder of a corporation is an owner and thus barred from raising the alter ego defense available to non-owners in 7 U.S.C. § 499a(b)(9) (Supp. III 1997). However, Petitioner fails to cite legislative history, case law, or any other precedent or guidance to support Petitioner's position. Petitioner argues merely that the amended statutory definition "clearly makes a distinction between a 'shareholder' and an 'owner' of a company which is the alter ego of its 'owners'" (Appeal Pet. at 12).

When the United States Court of Appeals for the District of Columbia Circuit reviewed *Norinsberg*, the Court could have had the Judicial Officer adopt Petitioner's meanings of "owner" and "shareholder," but the court did not do so. The *Norinsberg* case turned on the meaning of "actively involved." Nonetheless, the court could have included its view of the definitions of "owner" and "shareholder" *vis-a-vis* the alter ego defense, if the court disagreed with me, but the court did not do so. As it now stands, the *Norinsberg* decision is the authority on this issue, and it left in place my views on the alter ego defense *vis-a-vis* shareholder versus owner. Therefore, I reject Petitioner's argument. Instead, I adhere to my view in *Norinsberg* that in order to avoid responsibly connected status, a petitioner must prove not only that the violating licensee or entity subject to the license is the alter ego of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license. As Petitioner was admittedly a holder of 49 per centum of the outstanding stock of Sanford Produce Exchange, Inc., he cannot utilize the alter ego defense.

Further, even if Petitioner were permitted to use the alter ego defense, the fact that Petitioner was a holder of 49 per centum of the outstanding stock, president, vice president, and director of Sanford Produce Exchange, Inc., and participated extensively in the control of Sanford Produce Exchange, Inc., as well as knowingly

engaged in a fraudulent attempt to conceal Mr. Giuffrida's involvement from produce sellers, shows that Petitioner had a significant role in managing Sanford Produce Exchange, Inc.'s affairs. Sanford Produce Exchange, Inc., was thus not the alter ego of Mr. Giuffrida.

Therefore, as there is insufficient evidence that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate personality, Petitioner's claim that Sanford Produce Exchange, Inc., was the alter ego of Mr. Giuffrida cannot prevail.

The ALJ's conclusion in the Initial Decision and Order that Petitioner was responsibly connected is affirmed. Petitioner was actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s PACA violations. Petitioner knowingly and voluntarily participated in a scheme to mislead produce sellers and hide Mr. Giuffrida's involvement. Petitioner participated extensively in the control of Sanford Produce Exchange, Inc. Petitioner was also not a nominal officer, due to active participation as president, vice president, and director of the company. Further, as an owner, Petitioner cannot claim that Sanford Produce Exchange, Inc., was the alter ego of Mr. Giuffrida. Moreover, even if Petitioner could assert an alter ego defense, there is insufficient evidence that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate existence.

Order

The May 22, 1998, determination by the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the period of time that Sanford Produce Exchange, Inc., violated the PACA, is affirmed.

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) (Supp. III 1997)).

This Order shall become effective 60 days after service of this Order on Petitioner.

_____

In re: MANGOS PLUS, INC.
PACA Docket No. D-98-0025.
Decision and Order filed June 15, 2000.

Failure to pay – Flagrant and repeated violations – Publication of facts and circumstances.

The Judicial Officer affirmed the decision by Chief Judge Hunt concluding that Respondent committed flagrant and repeated violations of the Perishable Agricultural Commodities Act, 1930 (PACA), by failing to make full payment promptly for produce. The Judicial Officer denied Respondent's petition to reopen the hearing. The Judicial Officer rejected Respondent's contention that the investigation conducted by the United States Department of Agriculture, Agricultural Marketing Service, to determine whether Respondent violated the PACA, was deficient. As Respondent no longer had a PACA license, the Judicial Officer ordered the publication of the facts and circumstances set forth in the Decision and Order.

Kimberly D. Hart, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49) [hereinafter the PACA Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on August 13, 1998.

The Complaint alleges that: (1) during the period March 1996 through July 1998, Mangos Plus, Inc. [hereinafter Respondent], failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV). On December 3, 1998, Respondent filed an Answer denying the material allegations of the Complaint.

On November 4, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New

York, New York, represented Respondent. On January 14, 2000, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief.

On March 14, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) found that, during the period March 1996 through June 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43; (2) found that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding; (3) concluded that Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling $942,742.43[1] constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances set forth in the Initial Decision and Order (Initial Decision and Order at 5).

On April 18, 2000, Respondent appealed to the Judicial Officer and petitioned to reopen the hearing; on May 30, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on June 1, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and for a decision.

Section 1.146(a)(2) of the Rules of Practice provides, as follows:

> § **1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . . .
>
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

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[1]I infer, based on the Findings of Fact in the Initial Decision and Order, the Chief ALJ's conclusion that Respondent failed to pay agreed purchase prices totaling "$942,742.43" is a typographical error and that the correct amount is "$922,742.43."

Respondent failed to set forth a good reason why the evidence, which it now wishes to introduce, was not adduced at the November 4, 1999, hearing. Therefore, Respondent's petition to reopen the hearing is denied.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusion of Law, as restated.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms

whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

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

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

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

Facts

Respondent was issued PACA license number 961267 on April 8, 1996. Respondent's business address was 434-436 New York City Terminal Market, Bronx, New York 10474. Respondent's PACA license was terminated on April 8, 1999, for failure to pay the annual license renewal fee. (Answer ¶ 2; CX 1 at 1, 16.)

After receiving several reparation complaints filed against Respondent, the United States Department of Agriculture, Agricultural Marketing Service, in March 1997, began an investigation to determine whether Respondent was complying with the PACA's "full payment promptly" requirement. This prompt payment provision requires a produce commission merchant, dealer, or broker to make full payment of the agreed purchase price for produce within 10 days after the day on which the produce is accepted. Carolyn Shelby, an investigator employed by the United States Department of Agriculture, Agricultural Marketing Service, found, after reviewing the records of Respondent's produce transactions, that Respondent had failed to pay approximately $550,000 for purchases of produce in interstate commerce. Respondent did not deny these findings. Respondent said the debt was caused by slow sales, legal fees, rent, and other expenses. Further investigation

revealed that, during the period March 1996 through July 1998, Respondent purchased, received, and accepted in interstate commerce 306 lots of perishable agricultural commodities from 30 produce sellers but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43. (Tr. 9-23; CX 3-CX 32.)

Respondent paid some of this debt, but, at the time of the hearing on November 4, 1999, approximately $228,000 was still outstanding. In addition, Respondent had incurred approximately $457,000 in new debt for produce. (Tr. 23-29; CX 33, CX 34, CX 35.)

Respondent contended at the hearing that Ms. Shelby's testimony relating to Respondent's alleged failure to make full and prompt payments should not be admitted because Ms. Shelby did not make a complete inquiry about Respondent's alleged debt (Tr. 68-69). This contention is rejected. Complainant has the burden, in establishing a *prima facie* case, to come forth with evidence that Respondent was not in compliance with the PACA's prompt payment requirement. Ms. Shelby's testimony on this point was reliable and sufficient to establish Complainant's case. Any evidence that Respondent had made full and prompt payments was as available, if not more so, to Respondent as it was to Complainant. Thus, once Complainant established a *prima facie* case of Respondent's failure to comply with the PACA's prompt payment requirement, the burden was on Respondent to show that it had paid its produce sellers in accordance with the PACA.

Discussion

The purpose of the PACA is to not only protect growers and producers from the "sharp practices of financially irresponsible and unscrupulous brokers" in the produce industry, but also to protect growers and producers from any produce dealer or broker who, regardless of the reason, fails to pay promptly for the produce it buys. *In re Tony Kastner and Sons Produce Co.,* 51 Agric. Dec. 741, 745 (1992); *In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. 1151, 1159 (1983). When there is more than one failure to make full payment promptly and the amount is more than *de minimis*, the violations of the PACA are repeated and flagrant. The penalty for failure to make full payment by the time of the hearing is revocation of the respondent's license or, if the license has expired, publication of a finding that the respondent has committed repeated and flagrant violations of the PACA. *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. at 1156. Accordingly, as Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in

interstate commerce, Respondent committed repeated and flagrant violations of the PACA. This finding will be published.

Findings of Fact

1. Respondent, Mangos Plus, Inc., is a New York corporation whose last known business address was 434-436 New York City Terminal Market, Bronx, New York 10474.

2. Respondent received PACA license number 961267 on April 8, 1996. Respondent's PACA license terminated on April 8, 1999, when Respondent failed to pay the annual license renewal fee.

3. During the period March 1996 through July 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43.

4. At the time of the hearing, on November 4, 1999, approximately $228,000 of the $922,742.43 debt was still outstanding.

Conclusion of Law

Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling $922,742.43 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends in its Appeal Petition that "[a]t the close of the hearing, and after evaluating the evidence, the [Chief] ALJ issued a decision that finds the investigation by the Complainant to be credible and reliable despite [four] deficiencies." (Appeal Pet. at 3.)

The Chief ALJ did not find that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable, as Respondent contends. Instead, the Chief ALJ addressed Respondent's motion to strike Ms. Shelby's testimony, based on Respondent's contention that Ms. Shelby's investigation was not complete, as follows:

> Respondent contended at the hearing that the investigator's testimony relating to Respondent's alleged failure to make full and prompt payments should not be admitted because the investigator did not make a complete

> inquiry about Respondent's alleged debt. (Tr. 68-69.) This contention is rejected. Complainant had the burden, in establishing a *prima facie* case, to come forth with evidence that Respondent was not in compliance with PACA's prompt payment requirement. The investigator's testimony on this point was reliable and sufficient to establish Complainant's case. Any evidence that Respondent had made prompt payments was as available, if not more so, to Respondent as it was to Complainant. Thus, once Complainant established a *prima facie* case of noncompliance, the burden was on Respondent to show that it had come into compliance by making payments to its creditors.

Initial Decision and Order at 2-3.

I agree with the Chief ALJ's rejection of Respondent's motion to strike. Respondent's focus on the extent of Ms. Shelby's investigation is misplaced. The issue in this proceeding is not whether Ms. Shelby should have conducted a more extensive investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), but rather the issue is whether Complainant proved by a preponderance of the evidence that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).[2]

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[2]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Sunland Packing House Company*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *reprinted in* 58 Agric. Dec. 474 (1999), *final decision on remand*, 58 Agric. Dec. ___ (Nov. 29, 1999), *appeal docketed*, No. 00-1011 (D.C. Cir. Jan. 13, 2000); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 120 S. Ct. 530 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1575 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (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 John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No.
(continued...)

Complainant established a *prima facie* case that, during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, and that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding. Respondent failed to rebut Complainant's evidence. Therefore, I agree with the Chief ALJ's conclusion that Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly for perishable agricultural commodities as alleged in the Complaint.

Even if I found that Ms. Shelby could have engaged in a more thorough investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), that finding would not cause me to reverse the Chief ALJ because Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly of the agreed purchase prices of perishable agricultural commodities, as alleged in the Complaint, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, Respondent's contention that Ms. Shelby's investigation was deficient, lacks merit. First, Respondent contends Ms. Shelby failed to examine the nature of the debt owed by Respondent to R & S Distributors, Inc. (Appeal Pet. at 3). Specifically, Respondent states:

> The largest creditor listed in the complaint is R&S Distributors, Inc. ("R&S") of Tomkins Grove, New York. The amount listed in the complaint is $157,002.29. The president of R&S, at the time of the alleged transaction, was Steve Hitchings. Steve Hitchings is also the president of

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[2](...continued)
94–4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94–70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

> Mangos Plus, Inc., the respondent in this action. In investigating the nature of the debt alleged to have existed between Mangos and R&S, the investigator for the Complainant failed to interview Mr. Hitchings. Instead, the investigator interviewed a James Corn, who has a vested interest in misstating the alleged debt. Mr. Corn presently owns and operates R&S and would presumably benefit from overstating the amount of debt between the two companies. The evidence supporting this assertion may be found in analyzing the contents of the federal lawsuit pending in the Southern District of New York. The Complainant failed to examine the pleadings and the claims in that lawsuit[.]

Appeal Pet. at 3.

Ms. Shelby obtained copies of R & S Distributors, Inc., invoices from Respondent's records. These invoices support a finding that Respondent failed to make full payment promptly to R & S Distributors, Inc., as alleged in paragraph III of the Complaint.[3] (CX 13.) After Complainant filed the Complaint, but before the hearing, Ms. Shelby contacted a representative of R & S Distributors, Inc., Mr. Jim Corn, who informed Ms. Shelby that Respondent had paid the debt to R & S Distributors, Inc., listed in the Complaint and had incurred new debt for produce totaling approximately $274,000. Ms. Shelby subsequently obtained R & S Distributors, Inc., invoices that confirm Mr. Corn's assertion that Respondent incurred new debt for produce totaling approximately $274,000. (Tr. 36-38; CX 33E, CX 34 at 1, CX 35 at 11.)

Respondent contends that "the pleadings and the claims" in a lawsuit filed in the United States District Court for the Southern District of New York support its assertion that Mr. Corn overstated Respondent's debt to R & S Distributors, Inc. Respondent could have introduced, but did not introduce, documents filed in this lawsuit to rebut Complainant's evidence regarding the amount that Respondent owed to R & S Distributors, Inc., for perishable agricultural commodities.

In addition, Respondent contends that Ms. Shelby should have interviewed Mr. Stephen Hitchings when investigating the amount of the debt Respondent owed to R & S Distributors, Inc. Mr. Stephen R. Hitchings is Respondent's president (CX 1 at 1). Respondent could have called, but did not call, Mr. Hitchings as a witness to rebut Complainant's evidence regarding the amount Respondent owed

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[3]The Complaint alleges that Respondent failed to make full payment promptly to R & S Distributors, Inc., of the agreed purchase prices in the total amount of $157,002.29 for 56 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III).

to R & S Distributors, Inc., for perishable agricultural commodities.

I do not find Ms. Shelby's investigation deficient merely because she did not review the pleadings and claims filed in the lawsuit in the United States District Court for the Southern District of New York referenced by Respondent and did not interview Mr. Hitchings regarding the amount Respondent owed to R & S Distributors, Inc., for perishable agricultural commodities. Complainant introduced reliable, probative, and substantial evidence that Respondent failed to make full payment promptly to R & S Distributors, Inc., of the agreed purchase prices in the total amount of $157,002.29 for 56 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce and that, at the time of the hearing, Respondent owed R & S Distributors, Inc., approximately $274,000 for produce. Respondent failed to rebut Complainant's evidence. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly to R & S Distributors, Inc., of the agreed purchase prices in the total amount of $157,002.29 for 56 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce and that, at the time of the hearing, Respondent owed R & S Distributors, Inc., approximately $274,000 for perishable agricultural commodities.[4]

Second, Respondent contends Ms. Shelby's deficient investigation caused Complainant to attribute Sciandra International's failures to comply with section 2(4) of the PACA (7 U.S.C. § 499b(4)) to Respondent (Appeal Pet. at 3-4). Specifically, Respondent states:

> In addition to the R&S blunder, the Complainant misconstrued other corporate matters as well. Included in the allegations against the respondent are outstanding unpaid invoices to a company named Sciandra. Sciandra and Mangos are separate corporate entities and each has held separate and distinct PACA licenses. However, Joseph DePieto was a responsibly connected person to both corporate entities. After Mr. DePieto left Mangos he was interviewed by the Complainant concerning debts of Mangos. Mr. DePieto included the unpaid produce debt of Sciandra as unpaid debt of Mangos. Mangos did not assume these debts and Mangos was not liable, under the PACA, for any of Sciandra's debts. It was in Mr. DePieto's self interest to overstate Mango's liabilities at the expense of lessening Sciandra's unpaid trust debt. Again, the Complainant never interviewed Mr. Hitchings in this regard.

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[4]See note 2.

Appeal Pet. at 3-4.

Ms. Shelby testified that she obtained several invoices (CX 3, CX 4, CX 6, CX 8, CX 19) from Respondent's records which identified Sciandra International as the produce purchaser (Tr. 32-33, 48-52, 64-66). Ms. Shelby asked Joseph P. DePietto, who, at the time, was the secretary, director, and 50 percent owner of Respondent (CX 1 at 5-13, 15-19), why these invoices were in Respondent's records. Mr. DePietto informed Ms. Shelby that Respondent had purchased two units on Row A of the New York City Terminal Market (Hunts Point Market) from Sciandra International and that five produce sellers (H. Schnell & Co., Green Pepper Farm, Inc., Kendall Foods, Inc., Banacol Marketing Corporation, and L & P Fruit Corporation) had mistakenly identified the former tenant of these units, Sciandra International, as the produce purchaser on the invoices in question. Neither Mr. DePietto nor Mr. Hitchings denied that Respondent purchased the produce described on the invoices in question (Tr. 31-32, 49-52).

Respondent contends Ms. Shelby interviewed Mr. DePietto after he terminated his relationship with Respondent and that Mr. DePietto was responsibly connected with Sciandra International. Therefore, Respondent argues it was in Mr. DePietto's self-interest to attribute Sciandra International's produce debt to Respondent. (Appeal Pet. at 4.) I find no evidence in the record that indicates Mr. DePietto was responsibly connected with Sciandra International. Moreover, Ms. Shelby interviewed Mr. DePietto in March 1997 (Tr. 10-11), and Mr. DePietto did not resign as secretary and director of Respondent until May 30, 1997, and did not relinquish his interest in Respondent until July 7, 1997 (CX 1 at 5-8). Finally, Mr. DePietto was responsible for providing Ms. Shelby with the documents necessary for her investigation and answering Ms. Shelby's questions regarding Respondent's record-keeping system (Tr. 10-14).

I do not find Ms. Shelby's investigation deficient because she interviewed Mr. DePietto, but did not interview Mr. Hitchings, regarding the invoices in Respondent's records which identify Sciandra International as the produce purchaser. Respondent could have called, but did not call, Mr. Hitchings as a witness to rebut Complainant's evidence that Respondent was the purchaser of produce described on the invoices which identify Sciandra International as the produce purchaser. Complainant introduced reliable, probative, and substantial evidence that Respondent was the purchaser of produce described on the invoices which identify Sciandra International as the produce purchaser (CX 3, CX 4, CX 6, CX 8, CX 19). Respondent failed to rebut Complainant's evidence. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondent purchased the produce described on the invoices which identify Sciandra

International as the produce purchaser (CX 3, CX 4, CX 6, CX 8, CX 19).[5]

Third, Respondent contends Ms. Shelby failed to review the disposition of the reparation proceedings that caused the United States Department of Agriculture, Agricultural Marketing Service, to initiate the investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Appeal Pet. at 4). Specifically, Respondent states:

> Despite the fact that the Complainant's investigation was initiated due to the number of reparation complaints that were filed with the Complainant, the testimony at the hearing revealed that the Complainant failed to review the results, if any, of the reparation complaints that were filed against Mangos. This fact is important because the evidence in the reparation cases, including the claims by . . . unpaid produce creditors, cover the same transactions that are alleged in this complaint. In fact, at least one of the reparation complaint decisions resulted in favor of the respondent Mangos.

Appeal Pet. at 4.

During the period November 1996 to February 1997, the United States Department of Agriculture received reparation complaints totaling approximately $500,000 which produce sellers filed against Respondent. These reparation complaints triggered the United States Department of Agriculture, Agricultural Marketing Service, investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Tr. 10.) However, there is no evidence that these reparation complaints form the basis for the Complaint issued in this proceeding or that these reparation complaints cover the same transactions that are alleged in the Complaint. To the contrary, the record establishes that the Complaint is based upon Ms. Shelby's independent review of Respondent's records.

I do not find Ms. Shelby's investigation deficient merely because she did not review reparation complaints filed against Respondent or the disposition of these reparation proceedings. Respondent could have introduced evidence regarding the disposition of these reparation proceedings to rebut Complainant's evidence that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), but chose not to do so.

Fourth, Respondent contends the alleged unpaid produce creditors filed an action to enforce their trust rights under the PACA against Respondent and Ms. Shelby failed to review any aspect of the case (Appeal Pet. at 4). Specifically, Respondent states:

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[5]See note 2.

> As it frequently occurs, the alleged unpaid produce creditors filed an action to enforce their trust rights under the PACA against Mangos in the United States District Court, Southern District of New York. In such an action claimants are required to file claims under oath and the defendant has the opportunity to oppose each claim. Despite the obvious relevance to the proof in this case, the Complainant failed to review any aspect of the federal case file.

Appeal Pet. at 4.

Respondent's creditors instituted an action against Respondent in the United States District Court for the Southern District of New York, and Ms. Shelby did not review the documents filed in that proceeding as part of her investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 45). I do not find Ms. Shelby's investigation deficient merely because she did not review documents filed in a civil action instituted by Respondent's creditors in the United States District Court for the Southern District of New York. Respondent could have introduced, but did not introduce, documents filed in this civil action to rebut Complainant's evidence that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Complainant introduced reliable, probative, and substantial evidence that, during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce. Moreover, the record establishes that Ms. Shelby contacted 24 of the 30 produce sellers identified in the Complaint and found that, at the time of the hearing, Respondent owed these produce sellers approximately $228,000 of the $922,742.43 alleged in the Complaint. In addition, the record establishes that Respondent incurred additional produce debt totaling $457,591.59 between the time the Complaint was filed and the date of the hearing. Respondent failed to rebut Complainant's evidence. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondent violated section 2(4) of the PACA as alleged in the Complaint (7 U.S.C. § 499b(4)).[6]

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

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[6]See note 2.

Order

The facts and circumstances set forth in this Decision and Order shall be published.

_____

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

A.P.S. MARKETING, INC. v. R.S. HANLINE & CO., INC.
PACA Docket No. R-99-0058.
Decision and Order filed on February 9, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $44,207.29 in connection with transactions in interstate commerce involving mixed perishable produce.

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

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, A.P.S. Marketing, Inc., is a corporation whose address is 1025 W. Sunnyside Ave., Visalia, California.

2. Respondent, R.S. Hanline & Co., Inc., is a corporation whose address is P.O. Box 494, Shelby, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about the dates set forth below Complainant sold to Respondent on an f.o.b. basis, and shipped from loading points in California to Respondent in Shelby, Ohio, or brokered on Respondent's behalf, perishable produce which Complainant invoiced as follows:

Inv./Cus PO/PO/ Shp.date	**Pkgs.**	**Commodity**	**Amount**
654	1110	Cantaloupes 12's @ 6.50	$ 7,215.00
59406		Cox Recorder	23.50
FC1042		Freight Charge	3,600.00
5/31/97			$10,838.50
658	1980	Superior Seedless Grapes BG 18# @ 16.75	$33,165.00
59422		Freight Charge	3,200.00
FC1044		Cox Recorder	23.50
6/2/97			$36,388.50
730	1089	Thompson Seedless Grapes 18# Bag @ 6.50	$ 7,078.50
59577	990	Flame Seedless Grapes 18# Bag @ 10.25	10,147.50
FC1053	1	Cox Recorder	23.50
6/21/97	1	Air Bag	10.00
			$17,259.50
791	360	Red Flame Grapes 19# Bag @ 9.75	$ 3,510.00
PU# 6880	360	Thompson Seedless Grapes 19# Bag @ 9.75	3,510.00
FC1839	1	Freight Charge	1,120.00
8/6/97		Cox Recorder	23.50
			$ 8,163.50
792	360	Honeydew 6 pack @ 3.00	$ 1,080.00
	1	Freight Charge	840.00
FC1838			$ 1,920.00
8/6/97			
736	229	Liner Lettuce 24 pack @ 12.50	$ 2,862.50
Hnln 60013		Cox Recorder	23.50
FC1842			$ 2,886.00
9/4/97			

770	1694	Red Glove Grapes 21#PP @ 4.25	$ 7,199.50
Hnln 186	1	Air Bag	10.00
FC1842A	1	Cox Recorder	23.50
9/9/97			$ 7,233.00
708	216	Brokerage on Cantaloupes size 12 @ 0.25	$ 54.00
	216	Brokerage on Cantaloupes size 15 @ 0.25	54.00
FC 1061			$ 108.00
7/10/97			
733	1120	Brokerage on Cantaloupes size 9 @ 0.25	$ 280.00
Hnln 1850			
FC1840			
8/14/97			
734	1120	Brokerage on Cantaloupes size 12 @ 0.25	$ 280.00
Hnln 1841			
FC1841			
8/16/97			

4 The informal complaint was filed on November 12, 1997, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant seeks to recover $44,207.29 in connection with the sale to Respondent of seven shipments of produce, and the brokering of three shipments. Respondent raises substantive defenses as to each shipment. We will treat each in turn.

The shipment designated by Complainant's invoice 654 consisted of 1,110 cartons of size 12 cantaloupes sold to Respondent for $6.50 per carton f.o.b., and shipped on May 31, 1997. A portion of the load was federally inspected at Respondent's place of business in Shelby, Ohio, on June 4, 1997, at 3:25 P.M. That inspection disclosed the following information, in relevant part:

LOT: A
TEMPERATURES:4? To 41°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"Sucassa Produce" (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 821
INSP. COUNT: Y

LOT: B
TEMPERATURES:4? To 42°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"No Brand" Net Wt 36 LBS, (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 56
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	03 %	00 %	Sunken Dark Areas (0 to 33%)	Each lot: Mostly ripe and
	04 %	00 %	00 %	Bruising	firm, Some firm. Ground
	04 %	04 %	00 %	Decay (0 to 17%) Generally early stages	color mostly yellow, many turning yellow.
	20 %	04 %	00 %	Checksum	
B	13 %	02 %	00 %	Sunken Dark Areas (8 to 17)	
	02 %	02 %	00 %	Decay	
	15 %	04 %	00 %	Checksum	

GRADE:

For some reason 233 cartons of the cantaloupes were not inspected. These melons must be averaged in with the melons inspected to determine whether there was a breach. The bill of lading lists all the melons as "Sucassa" label, and we will assume that the 56 cartons that were not so labeled were an anomaly, and that the 233 cartons that were not included in the inspection had the "Sucassa" label. If we assume that the 233 cartons contained no defects and average them in with the 821 cartons, we arrive at an average of 15.58 percent defects for the lot. Since the distance between the shipping point in Arizona and the Shelby, Ohio destination is approximately 2,000 miles, the transit period should have been slightly less than 3 days. The percentage of condition defects that we would allow in order to make good delivery under the suitable shipping condition rule is 13 percent, and if we use the four day period between shipment and time of inspection, we would allow 14 percent. Accordingly, although these cantaloupes were close to making good delivery, they did not made good delivery. This was the premise upon which the parties modified the contract to call for price after sale terms.

Neither the UCC nor the Act recognizes the term "Price After Sale". The term

has been held to be a subcategory of "Open Price."[1] The Uniform Commercial Code, section 2-305(1), states:

> Open Price Term:
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Thus "price after sale" or "Open Price" assumes that the parties will negotiate a price after the goods are sold. If they do not, the reasonable value of the goods should be imputed.[2] We have stated that although the Regulations do not place a duty to account upon a buyer who purchases on an open basis, should the parties fail to reach an agreement as to price the receiver fails to account accurately and in detail at its own risk.[3] In this case Respondent did not render a detailed accounting of the resale of the cantaloupes. Accordingly we will look to applicable market reports as a guide to determining a reasonable price. The closest market to Shelby, Ohio is Pittsburgh, Pennsylvania. Size 12 cantaloupes from Mexico were selling on that market on June 5, 1997, for $10.00 to $12.50. Since the subject cantaloupes contained a little more condition defects than is concordant with good delivery we will use the lower figure of the price range, or $10.00, rather than the average price. Applying this figure the market value of the load was $11,100.00. From this amount should be deducted a 20 percent profit, or $2,220.00.[4] Since Complainant billed Respondent $3,600.00 for freight we assume that freight was paid by Complainant, and should not be deducted in the computation of reasonable value. We conclude that the reasonable value of the load of cantaloupes was $8,880.00. Respondent claimed in its answer to have already paid Complainant $3,353.50 on

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[1] *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-1228 (1980).

[2] *PACA Doc. No. 4456*, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979).

[3] *Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992).

[4] *C.J. Prettyman, Jr., Inc. v. American Growers, Inc.*, 55 Agric. Dec. 1352 (1996).

this load, and Complainant made no reply to this allegation. We conclude that $5,526.50 remains due on this load.

The shipment designated by Complainant's invoice 658 consisted of 1,980 cartons of Superior Seedless grapes sold to Respondent for $16.75 per carton f.o.b., and shipped on June 2, 1997. Respondent asserts that the grapes were misbranded, and Complainant, in correspondence included in the Department's Report of Investigation concurred. Furthermore Respondent alleged that Fred Chaseley, who acted as an agent for, and was employed by, both Complainant and Respondent, instructed Respondent to pay at the rate of $9.00 per carton. The returns on the grapes were slightly less than this amount, and although the grapes were shipped to other firms to be handled on a price after sale basis, correspondence in the Report of Investigation from Complainant shows that Complainant concurred in this disposition. Respondent has paid Complainant at the agreed rate which amounted to a total of $21,043.50 when freight was included. We conclude that Respondent does not owe Complainant any further payment on this load.

The shipment designated by Complainant's invoice 730 consisted of 1,089 cartons of Thompson Seedless grapes invoiced to Respondent for $6.50 per carton f.o.b., and 990 cartons of Flame Seedless grapes invoiced to Respondent for $10.25 per carton f.o.b. This load was shipped on June 21, 1997, and included one Cox recorder for $23.50, and one air bag for $10.00, or a total for the load of $17,259.50. Following arrival at destination in Shelby, Ohio, the 1,089 cartons of Thompson Seedless grapes were federally inspected and found to grade U.S. No. 1 Table, with the notation: "Fails to meet marked weight account unit average below declared weight." As to weight the inspection also stated: "Reasonable shortage limit 17.25 pounds. Net weight ranges 16.50 to 19.50 pounds, average 17.90 pounds per carton." Fred Chaseley secured the agreement of both parties to the grapes being handled on a price after sale basis and instructed Complainant to invoice Respondent at the prices stated above. Mr. Chaseley also resold the grapes as Respondent's employee and apparently realized lower returns than what he instructed Complainant to invoice.

We have mentioned above that Fred Chaseley was employed by both parties to this action. Although Mr. Chaseley was apparently a person with a good track record in the produce industry, something happened that caused him to begin embezzling funds, and misdirecting checks that were entrusted to him. This was not discovered until the middle of October. As a part of this behavior pattern he failed to disclose to either of the parties to this proceeding that he was employed by the other. Such employment, of course, hopelessly compromised his loyalty to both employers as far as transactions between the two firms. Since the negotiations in regard to this transaction were all carried on through Mr. Chaseley, such

negotiations cannot be viewed to have been in good faith, and are tainted by fraud. Due to the ignorance of both Complainant and Respondent as to Mr. Chaseley's unethical conduct, they cannot be deemed to be tainted by Mr. Chaseley's fraud, but, nevertheless, the transactions themselves are so tainted that it would be improper to find that a contract resulted from negotiations so compromised, unless the parties themselves, independent of Mr. Chaseley, clearly acquiesced in the contract or a modification thereof. Such is not the case with this transaction, and we conclude that Respondent is liable to Complainant only for the reasonable value of the grapes.

The inspection of the grapes shows them to have been in good condition on arrival. The underweight condition of the 1,089 cartons of Thompson Seedless grapes was cured by Respondent's repacking of these grapes with a loss of 27 cartons. Respondent charged $1.00 per carton for the repacking which we will allow against the reasonable value for which Respondent is liable. Respondent also charged $.25 for relabeling. However, Respondent failed to explain why any relabeling was necessary since the repacking should have brought the cartons up to the proper weight. This expense will, therefore, be disallowed. Market reports for Pittsburg, Pennsylvania on June 27, 1997, show that 18 pound lugs of bagged Thompson Seedless grapes, medium size, were selling for $12.50 to $13.50, and 18 pound lugs of Flame Seedless grapes, medium size, were selling for $10.00 to $12.00. Using the average of these amounts, the market value of the load, if the 1,087 cartons had not been underweight, was $25,047.00. Respondent should be allowed the $1.00 cost of repacking, or $1,089.00, plus the value of the shrink at $13.00 per lug, or $351.00, and the cost of the two federal inspections, or $282.00. The reasonable value of the load was $23,325.00. Respondent has already paid Complainant $12,502.50, which leaves a difference of $10,822.50. Complainant on the copy of the invoice attached to the formal complaint states that only $4,752.00 is due from Respondent to Complainant on this invoice, so we will limit our award herein to this amount.

Under its invoice 791 Complainant seeks to recover $8,163.50. Respondent asserts that it never purchased or received the load. Respondent points to the bill of lading that shows the grapes shipped to Complainant at Cincinnati, Ohio, and asserts that it never received Complainant's invoice (dated 8/6/97) until November 17, 1997, when Complainant sent it by fax. Complainant's own evidence does not inspire any confidence that the load was ever received by Respondent. In an early letter sent to this Department Complainant's president Richard H. Speidell stated: "Invoice 791 was product purchased from New Leaf, Shaun Ricks and we originally showed Fries as the receiver but later found out it was received by Caruso for Hanline." Speidell claims to have sent proof of this to

Hanline, but we have seen no evidence in the record that would prove Complainant's contentions by a preponderance of the evidence. We conclude that Respondent has no liability to Complainant as to the produce represented by this invoice.

By its invoice 792 Complainant seeks to recover $1,920.00 from Respondent. This represents a very similar situation to the preceding invoice. Respondent denies ever receiving or purchasing the product. Complainant stated in the same letter to this Department mentioned above:

> Invoice 792 was purchased from Western Veg. Produce in Bakersfield, salesman Doug Heitman. . . . It originally showed Caruso as the receiver but Caruso advised received for Hanline, and we so advised Hanline.

Respondent points out that the passing sheet from Western Veg-Produce shows: "Sold to A.P.S., 943 N Ronact, Visalia, CA and Ship To: A.P.S., Cincinnati." Complainant's evidence that this produce was sold to Respondent is inadequate. We conclude that Respondent has no liability to Complainant for this load of produce.

By its invoice 736 Complainant seeks payment in the amount of $2,886.00 for a shipment of lettuce. Respondent submitted documentation showing that the total amount of this invoice has been paid by two checks, and referred us to an early letter from Complainant to this Department acknowledging receipt of the two payment checks. Complainant made no reply to the payment allegations by Respondent in its answer and we conclude that there is no further liability by Respondent to Complainant as to this invoice.

Complainant's invoice 770 is for $7,233.00 and covers a load of 1,694 cartons of Red Globe grapes shipped from California to Respondent in Shelby, Ohio. Respondent rendered an accounting showing that it, in turn, had shipped the grapes to four receivers. This accounting showed that a shipment of 604 cartons returned net proceeds of $3,020.00, 616 cartons returned net proceeds of $5,082.00, 320 cartons returned net proceeds of $2,560.00, and 144 cartons returned no net proceeds. From the total returns of $10,662.00 Respondent deducted $2,350.00 for freight, and $1,662.40 for a handling fee, and remitted $6,649.60 to Complainant. Both parties agree that this load was sold on a price after sale basis. There are many problems with the way this load was dealt with by Respondent, but suffice it to say that no justification was given for the lack of returns from the 144 carton lot. Complainant restricted its claim for this load in the formal complaint to $538.40. Red Globe grapes were selling in Pittsburgh at the time for $17.50 per carton. It is clear that Respondent owes Complainant at least the amount claimed, or $538.40.

Complainant's invoices 708, 733, and 734 are for brokerage in amounts totaling $668.00 on loads sold and shipped to Respondent. Respondent has shown that it has paid brokerage to other parties on these loads. Complainant did not submit any copies of broker's memorandums of sale covering these loads, and nowhere averred that the invoices covering these brokerage amounts were in fact sent to Respondent on the dates stated on the invoices. We conclude that Complainant has failed to prove by a preponderance of the evidence that it is entitled to the payment of the brokerage amounts represented by these invoices.

The total that we have found due from Respondent to Complainant is $10,816.90. Respondent's failure to pay Complainant this amount 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.[5] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[6] We have determined that a reasonable rate is 10 percent per annum.

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, $10,816.90, with interest thereon at the rate of 10% per annum from July 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[5] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[6] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

A.P.S. MARKETING, INC. v. M. DEGARO CO., INC.
PACA Docket No. R-99-0059.
Decision and Order filed February 9, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $27,863.70 in connection with transactions in interstate commerce involving mixed perishable produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent filed a counterclaim arising out of the same transactions as were the subject of the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds $30,000.00, and therefore the shortened method of procedure provided in 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 sworn statements. Complainant filed an opening statement, and Respondent filed an answering statement. Complainant did not file a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, A.P.S. Marketing, Inc., is a corporation whose address is 1025 W. Sunnyside Ave., Visalia, California. At the time of the transactions involved herein Complainant was licensed under the Act.

2. Respondent, M. Degaro Co., Inc., is a corporation whose address is 225 W. 2nd Street, Cincinnati, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. At all times relevant to the transactions herein Complainant allowed Fred

Chaseley to trade as a broker under Complainant's license, and listed Fred Chaseley as associated with Complainant in trade publications.

4. Acting through Fred Chaseley, Complainant sold and shipped to Respondent numerous loads of perishable produce for which Complainant invoiced Respondent in amounts totaling $88,900.25. Complainant received payment on the transactions in amounts totaling $61,036.55.

5. Respondent dealt only with Fred Chaseley in regard to the transactions that are the subject of the complaint. Fred Chaseley made allowances to Respondent as to some of the transactions and directed Respondent as to how payments should be made. Respondent followed the instructions of Fred Chaseley in the making of payments, and most payments were made directly to Fred Chaseley. Fred Chaseley appropriated some of the payments to himself, and misdirected some of the payments to third parties. The table below delineates pertinent information as to how, and under what circumstances, payments were made.

[1]Date & #	[2]Inv. Dt & #	[3]Payee	[4]2d Payee	[5]Endorsed	Amount
4/28/97 48234	4/18/97 663	F.C.	A.P.S.	A.P.S.	$ 2,535.40
4/28/97 48235		F.C.	A.P.S.	A.P.S.	2,025.00
4/28/97 48236	4/14/97 645	F.C.	A.P.S.	A.P.S.	8,064.00
4/28/97 48237	10/8/97 Shpd. 4/3 766	F.C.		F.C. & D.M.C.	737.50
4/28/97 48238		F.C.	A.P.S.	A.P.S.	2,604.00
4/29/97 48247	4/3/97 588	F.C.	A.P.S.	A.P.S.	450.00
5/13/97 48301	4/16/97 Shpd. 4/9 713	F.C.		F.C. & D.M.C.	1,575.00
5/22/97 48329	4/11/97 774	F.C.		F.C. & Yuma	960.00

6/3/97 48367	4/17/97 783	F.C.	F.C. & Yuma	2,018.00
6/3/97 48368	5/1/97 637	F.C.	F.C. & Yuma	482.50
6/3/97 48370	4/25/97 611	F.C.	F.C. & A.P.S.	3,354.00
6/3/97 48371	4/25/97 610	F.C.	F.C. & Hanline	8,886.00
6/3/97 48372	5/1/97 625	F.C.	F.C. & A.P.S.	2,095.00
6/3/97 48373	5/1/97 624	F.C.	F.C. & Yuma	560.00
6/3/97 48375	5/15/97 662	F.C.	F.C. & Hanline	10,577.40
7/7/97 48470	6/7/97 Shpd. 5/6 711	A.P.S.	A.P.S.	2,778.75
7/7/97 48473		F.C.	F.C. & A.P.S.	175.00
7/7/97 48474	5/19/97 671	F.C.	F.C. & A.P.S.	5,326.00
7/7/97 48475		F.C.	F.C. & A.P.S.	2,525.00
7/7/97 48476		F.C.	F.C. & A.P.S.	10,440.00
7/7/97 48478		F.C.	F.C. & A.P.S.	15,488.00
7/7/97 48480		F.C.	F.C. & A.P.S.	176.00

7/8/97 48481		F.C.	F.C. & A.P.S.	302.90
7/18/97 48527	4/28/97 665	A.P.S.	A.P.S.	2,697.50
8/20/97 48663	5/8/97 773	Hanline	Hanline	3,450.00
8/20/97 48664	5/24/97 674	Hanline	Hanline	4,606.60

[1] Date of issuance of check and check number.
[2] Shipping date (shown on invoice) is the same as the invoice date unless otherwise stated. Where no invoice number appears the transaction was not included in the complaint.
[3] F.C. = Fred Chaseley; A.P.S. = A.P.S. Marketing, Inc. or some variation thereof; Hanline = R. S. Hanline & Company or some variation thereof.
[4] Indicates that the second payee was handwritten along side the initial payee in a different hand.
[5] D.M.C. = Dona M. Chaseley, reputedly Fred Chaseley's wife. Yuma = Yuma Distributing Company.

6. An informal complaint was filed on October 30, 1997, which was within nine months after the causes of action alleged herein accrued.

Conclusions

Complainant seeks to recover from Respondent the difference between payments received in the amount of $61,036.55, and the $88,900.25 amount which it invoiced to Respondent. Complainant alleges that since Respondent received invoices from Complainant and instead paid Fred Chaseley, or other parties at Fred Chaseley's direction, Respondent should be liable for all payments that did not reach Complainant.

Respondent admits receiving Complainant's invoices, but alleges that some invoices were not received in a timely fashion. Respondent matched the payments with the invoices after Complainant faxed all the invoices to Respondent at the end of October, 1997. It appears that some of the invoices may not have been sent to Respondent on the dates stated on the invoices, since the sequence of the numbers of the invoices does not always match the dates on the invoices. For instance invoice numbers 610 and 611 are dated 4/25/97 and state that shipments were on the same dates. However, invoice 774 is dated 4/11/97 and states that shipment was

made on that date. There are many such discrepancies. However this question mark in Complainant's case pales into insignificance compared to other considerations.

The events that gave rise to this case do not appear to derive from any wrong doing by either Complainant or Respondent, but from that of Fred Chaseley, a person in whom both parties reposed trust. We are not privy to exactly what caused Mr. Chaseley to depart from that mode of conduct that earned him the initial trust of the parties herein, but when he began to err, he erred with a vengeance. Checks that should have been sent to Complainant were sent to other parties and in some cases were appropriated to his own use. The table set forth in Finding of Fact 5 shows how the checks were directed and misdirected. The pertinent fact that bears most heavily on Complainant's claim for reparation is the fact that Complainant admits that during the times relevant to the disputed transactions Mr. Chaseley was trading under Complainant's license, and was listed in trade publications as associated with Complainant. Mr. Chaseley was thus clothed with authority by Complainant to receive payments, direct payments, and make adjustments. These actions by Mr. Chaseley were binding on Complainant.[1] In addition to these facts, it is clear that Complainant acquiesced in the manner of payment. Complainant received and negotiated checks on a continuing basis that were made out initially to Fred Chaseley. Although Complainant maintains that it protested this arrangement, apparently protests were made through Chaseley, and in any event, even if Complainant had shown any direct protest to Respondent, it is clear that it acquiesced in Respondent's continuing to make out checks directly to Chaseley. This did not change until the checks dated July 7, and July 17, 1997, but this was near the end of the series of payments.

The two payments where the checks were made out to Hanline might seem at first blush to demand a different result. However, an examination of the documentation submitted by Respondent in connection with Complainant's invoices 773 and 674 shows that the bills of lading covering the loads do not disclose Complainant as the shipper. It was not Fred Chaseley's practice to issue any type of memorandum as to any of the loads, but credit memos issued by Respondent as to the two loads show credit due to "Hanline Co. (per Fred Chaseley)." Complainant allowed Fred Chaseley to deal in this manner with its produce and has

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[1] See *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, 44 Agric. Dec. 468, 1400 (1985); *Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (1979); *Johnson Produce v. R. L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743 (1978); *George Arakelian v. Leonard O'Day*, 31 Agric. Dec. 1395 (1972); *The G. Fava Co. v. Parkhill Produce Co.*, 19 Agric. Dec. 928 (1960); *Robert Johnson v. Carl Fritchey, et al.*, 16 Agric. Dec. 1082 (1957); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

not shown any reason why Respondent, having paid in accordance with the instructions of Complainant's agent, should now have to pay Complainant again. We conclude that the complaint should be dismissed. The counterclaim is framed so as to actually constitute a defense, and should also be dismissed.

Order

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

SUCASA PRODUCE v. A.P.S. MARKETING, INC.
PACA Docket No. R-99-0172.
Decision and Order filed February 9, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $14,772.00 in connection with three transactions in interstate commerce involving perishable produce.

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 shortened method of procedure provided in 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 sworn statements. Complainant filed an opening statement, and Respondent did not file an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Sucasa Produce, is a partnership composed of Sucasa Prod., Inc., Micasa Prod., Inc., and Pardis Prod., Inc. Complainant's address is P.O. Box 1381, Nogales, Arizona.

2. Respondent, A.P.S. Marketing, Inc., is a corporation whose address is 1525 S. Mooney Blvd., Suite D, Visalia, California. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about May 31, 1997, Complainant sold to Respondent, and shipped to Hanline in Shelby, Ohio, one truck load consisting of 1,110 cartons of cantaloupes, size 12's, on an f.o.b. basis. Respondent sold the melons to R. S. Hanline, and Hanline sold 816 cartons of the melons to Degaro.

4. The cantaloupes arrived at the place of business of Hanline, in Shelby, Ohio, and on June 4, 1997, at 3:25 P.M. a portion of the melons were federally inspected. That inspection disclosed the following information, in relevant part:

LOT: A
TEMPERATURES:4? To 41°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"Sucassa Produce" (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 821
INSP. COUNT: Y
LOT: B
TEMPERATURES:4? To 42°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"No Brand" Net Wt 36 LBS, (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 56
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	03 %	00 %	Sunken Dark Areas (0 to 33%)	Each lot: Mostly ripe and
	04 %	00 %	00 %	Bruising	firm, Some firm. Ground
	04 %	04 %	00 %	Decay (0 to 17%) Generally early stages	color mostly yellow, many turning yellow.
	20 %	04 %	00 %	Checksum	

B	13 %	02 %	00 %	Sunken Dark Areas (8 to 17)
	02 %	02 %	00 %	Decay
	15 %	04 %	00 %	Checksum

GRADE:

Complainant and Respondent agreed to the cantaloupes being sold on a price after sale basis.

5. On or about June 2, 1997, Complainant sold to Respondent, and shipped to M. Degaro Company, Inc., (hereafter sometimes Degaro) in Cincinnati, Ohio, one truck load consisting of 1,488 cartons of honeydew melons, size 6's, on an f.o.b basis. Respondent sold the melons to R. S. Hanline & Company, Inc., (hereafter sometimes Hanline) in Shelby, Ohio, and Hanline sold the melons to Degaro.

6. The honeydew melons arrived at the place of business of Degaro in Cincinnati, Ohio, and on June 5, 1997, they were federally inspected. The inspection showed temperatures of 50 to 57 degrees Fahrenheit, and 28 percent damage by surface scars, 8 percent damage by sunken discolored areas, and no decay. Complainant and Respondent then agreed to the melons being handled on a price after sale basis.

7. On or about May 31, 1997, Complainant sold to Respondent, and shipped to Hanline in Shelby, Ohio, one truck load consisting of 1,936 cartons of Flame seedless grapes. The grapes were sold on an f.o.b. basis, and priced at $10.50 per carton, plus $23.50 for a temperature recorder, and $3,800.00 for freight, or $24,151.50 for the load. Respondent accepted the grapes without objection, and has paid Complainant all but $1,366.00 of the purchase price.

8. Informal complaints were filed on August 27, and September 23, 1997, which dates were within nine months after the causes of action relative thereto accrued.

Conclusions

The inspection of the cantaloupes referred to in Findings of Fact 3 and 4 was not an inspection of the whole load. For some reason 233 cartons of the cantaloupes were not inspected. These melons must be averaged in with the melons inspected to determine whether there was a breach. The bill of lading lists all the melons as "Sucassa" label, and we will assume that the 56 cartons that were not so labeled were an anomaly, and that the 233 cartons that were not included in the inspection had the "Sucassa" label. If we assume that the 233 cartons contained no defects and

average them in with the 821 cartons, we arrive at an average of 15.58 percent defects for the lot. Since the distance between the shipping point in Arizona and the Shelby, Ohio, destination is approximately 2,000 miles, the transit period should have been slightly less than 3 days. The percentage of condition defects that we would allow in order to make good delivery under the suitable shipping condition rule is 13 percent, and if we use the four day period between shipment and time of inspection, we would allow 14 percent. Accordingly, although these cantaloupes were close to making good delivery, they did not made good delivery. This was the premise upon which the parties modified the contract to call for price after sale terms.

Neither the UCC nor the Act recognizes the term "Price After Sale". The term has been held to be a subcategory of "Open Price."[1] The Uniform Commercial Code, section 2-305(1), states:

> Open Price Term:
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Thus “price after sale” or “Open Price” assumes that the parties will negotiate a price after the goods are sold. If they do not, the reasonable value of the goods should be imputed.[2] We have stated that although the Regulations do not place a duty to account upon a buyer who purchases on an open basis, should the parties fail to reach an agreement as to price the receiver fails to account accurately and in detail at its own risk.[3] In this case Respondent did not render a detailed accounting of the resale of the cantaloupes. Accordingly we will look to applicable market reports as a guide to determining a reasonable price. The closest market to Shelby, Ohio, is Pittsburgh, Pennsylvania. Size 12 cantaloupes from Mexico were selling

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[1] *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-1228 (1980).

[2] *PACA Docket No. 4456*, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979).

[3] *Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992).

on that market on June 5, 1997, for $10.00 to $12.50. Since the subject cantaloupes contained a little more condition defects than is concordant with good delivery we will use the lower figure of the price range, or $10.00, rather than the average price. Applying this figure the market value of the load was $11,100.00. From this amount should be deducted a 20 percent profit, or $2,220.00.[4] Since Complainant billed Respondent $3,600.00 for freight we assume that freight was paid by Complainant, and should not be deducted in the computation of reasonable value. We conclude that the reasonable value of the load of cantaloupes was $8,880.00. Complainant has restricted its claim as to these melons to $6,660.00, and we conclude that this is the amount owing from Respondent to Complainant as to the cantaloupes.

The inspection of the honeydew melons covered by Findings of Fact 5 and 6 does not show a breach of the warranty of suitable shipping condition, since quality defects are not considered where melons are sold without reference to grade. However, no doubt on the basis of the high quality defects, the parties agreed after the inspection to the melons being sold on a price after sale basis. Although the receiver issued an accounting which showed a breakdown of the sales, the accounting did not show on what date the sales were made. Complainant has objected to this omission, and we agree that the accounting cannot be used.[5] Accordingly we must resort to market reports to ascertain the reasonable value of the honeydew melons. The receiving point for these melons was Cincinnati, Ohio, which is equidistant from Pittsburgh and Chicago. Only Chicago shows quotes for Mexican size 6 honeydews, and the price shown is $11.00 to $12.00. Since the subject melons had extensive scarring we will use the lower of these quotes, or $11.00, as the market value of these melons. The load of 1,488 cartons, therefore, had a value of $16,368.00. From this should be deducted a profit of 20 percent, or $3,273.60, and freight in the amount of $3,400.00. We conclude that the reasonable value of the melons was $9,694.40. Complainant has restricted its claim as to these melons to $6,696.00, and we conclude that this is the amount owing from Respondent to Complainant.

The deduction that Respondent made from the purchase price of the grapes was made on the basis that a deficit was incurred as to the cantaloupes and honeydews. Since we have found no deficit due, Respondent owes the remainder of the purchase price of the grapes, or $1,366.00. The total we have found due and owing from

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[4] *C.J. Prettyman, Jr., Inc. v. American Growers, Inc.*, 55 Agric. Dec. 1352 (1996).

[5] See *Sunkist Growers v. Fishman Produce*, 41 Agric. Dec. 137 (1982); and *Mutual Vegetable Sales v. Joseph Notarianni & Company*, 29 Agric. Dec. 1049 (1970).

Respondent to Complainant for the three loads is $14,772.00. Respondent's failure to pay Complainant this amount 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.[6] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[7] We have determined that a reasonable rate is 10 percent per annum.

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, $14,772.00, with interest thereon at the rate of 10% per annum from July 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[6] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[7] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

R. S. HANLINE & CO., INC. v. M. DEGARO CO., INC.
PACA Docket. No. R-99-0173.
Decision and Order filed February 9, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $29,948.64 in connection with transactions in interstate commerce involving perishable produce.

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 defaulted in the filing of an answer. However, Respondent filed a timely motion to reopen after default, along with a proposed answer. Respondent's motion and proposed answer were served on Complainant which did not offer any objection to the reopening. Respondent's motion was granted for good cause, and the answer accepted for filing.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the shortened method of procedure provided in 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 sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, R. S. Hanline & Co., Inc., is a corporation whose address is P.O. Box 494, Shelby, Ohio.

2. Respondent, M. Degaro Co., Inc., is a corporation whose address is 225 W. 2nd St., Cincinnati, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about the dates set forth below Complainant, acting through its employee, Fred Chaseley, sold to Respondent on an f.o.b. price after sale basis, and shipped to Respondent in Cincinnati, Ohio, perishable produce which Complainant

invoiced as follows:

Inv. No. ; Ship date; Degaro's lot No.	**Pkgs.**	**Commodity**	**Amount**
7741;	540	Grapes	$ 8,100.00
5/29/97;	360	Flame Grapes	4,140.00
164			$12,240.00
8572;	1,408	Grapes	$18,613.76
6/30/97;			
170			
8574;	1,120	Cantaloupe 12's	$13,092.80
6/30/97;			
168			
8756;	1,488	Honeydews 5ct	$ 3,720.00
7/01/97;			
173			
8745;	240	Cantaloupes 12's	$ 840.00
7/01/97;			
171			
8920;	108	Cantaloupes 12's	$ 864.00
7/25/97;	108	Cantaloupes 15's	864.00
251	122	Honeydews 5ct	671.00
	122	Honeydews 6ct	671.00
	180	Red Grapes	2,160.00
	1	Bin of Apples	284.50
	180	Thompson Grapes	1,980.00
	66	Honeydews 5ct	363.00
	54	Cantaloupes	432.00
	1	Bin of Apples	298.50
	1	Bin of Apples	276.50
			$ 8,864.50

8937; 7/17/97; 213	420	Peaches	$ 2,751.00
8950;	108	Cantaloupes 12's	$ 864.00
7/26/97;	132	Honeydews 5ct	726.00
254			$ 1,590.00
8997; 7/28/97; 223	2,024	Flame Grapes	$16,698.00
9086; 8/02/97; 272	110	Honeydews 6ct	$ 605.00

4. Informal complaints were filed on February 27, 1998, March 23, 1998, and April 20, 1998, which dates were within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant seeks to recover balances alleged to be due from respondent as to February 5, 2001the transactions listed in Finding of Fact 3. The total of the amounts invoiced was $79,015.06, and Complainant and Respondent agree that Respondent paid $49,066.42. The balances that Complainant seeks to recover, therefore, amount to $29,948.64.

Neither Complainant nor Respondent troubled themselves to submit much in the way of testimonial evidence. Complainant's submissions were all by Mike Feeney, who called himself Complainant's controller. Other than the knowledge that would naturally fall to a financial officer, nowhere is there any indication as to how Mr. Feeney knew the facts alleged in the submissions which he made. Respondent's submissions were all made by Linda M. Koscianski, and again there is no indication as to the foundation for the matters alleged in the submissions by Ms. Koscianski. The formal answer was signed by Ms. Koscianski, but it is not sworn to. However, the same document is in evidence as a result of being included in the Department's Report of Investigation. Mr. Feeney swore to the formal complaint, but there is no indication as to the foundation for the matters sworn to. Under the circumstances we can only take these submissions at face value, and accord them equal evidentiary

standing.

In a letter to this Department dated May 1, 1998, and included as an exhibit to the Department's Report of Investigation, Ms. Koscianski set forth Respondent's defense to Complainant's action. This defense may be summarized as follows: All Respondent's dealings were with Fred Chaseley, who was at the time Complainant's representative. All the produce was purchased from Fred Chaseley on a price after sale basis. Prices were agreed with Mr. Chaseley, and paid in accord with his instructions. Invoices received from Hanline were discussed with Chaseley, Hanline's employee, and paid in accord with instructions from Chaseley. Complainant never responded to any of the crucial assertions made by Ms. Koscianski. We conclude that Complainant has failed to prove by a preponderance of the evidence that it is entitled to the amounts claimed. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

AMERICAN GROWERS, INC. v. CALIFORNIA CITRUS SELECTORS, d/b/a VOITA CITRUS.
PACA Docket No. R-00-0016.
Decision and Order filed April 4, 2000.

George S. Whitten, Presiding Officer.
Thomas W. Johnston, P.A., Pompano Beach, FL, for Complainant.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $12,548.01 in connection with three transactions in interstate commerce involving watermelons.

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 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 sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, American Growers, Inc., is a corporation whose address is 3019 SR 15, Suite 4, Belle Glade, Florida.

2. Respondent, California Citrus Selectors, is a corporation doing business as Voita Citrus, whose address is 506 N. Kaweak Ave. Suite C, Exeter, California. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about July 10, 1998, Complainant sold to Respondent one bulk truck load of watermelons containing 45,800 pounds at $.0550 per pound or $2,519.00. The load was shipped from loading point in Tifton, Georgia, on or about July 10, 1998, to Respondent's customer in Akron, Ohio.

4. The load arrived in Akron, Ohio on or about July 14, 1998, and trouble was reported to Complainant's salesman, Scott Painter, who asked that the melons be inspected. Following the inspection Scott Painter agreed with Respondent to grant full protection with the understanding that Respondent's customer would handle the sales of the melons, and would not provide an accounting. Respondent's customer returned $1,258.50 from the sales of the melons. Respondent paid a freight bill on the load in the amount of $1,603.00, and deducted $344.50 from other invoices due Complainant.

5. On or about July 30, 1998, Complainant sold to Respondent one bulk truck load of watermelons containing 40,440 pounds at $.0650 per pound or $2,628.60. The load was shipped from loading point in Mount Olive, North Carolina, on or about July 30, 1998, to Respondent's customer in Stevens Point, Wisconsin.

6. The load arrived in Stevens Point, Wisconsin on or about August 3, 1998, and trouble was reported to Complainant's salesman, Scott Painter, who authorized the transfer of the load to Magilio Produce, in Glendale, Wisconsin, and asked that the melons be inspected. Following the inspection Scott Painter agreed with Respondent to grant full protection with the understanding that Respondent's customer would handle the sales of the melons, and would not provide an accounting. Magilio reported a negative return of $881.05 from the sales of the

melons. Respondent paid a freight bill on the load in the amount of $1,649.00, and deducted $2,530.05 from other invoices due Complainant.

7. On or about August 1, 1998, Complainant sold to Respondent one bulk truck load of watermelons containing 38,520 pounds at $.0650 per pound or $2,503.80. The load was shipped from loading point in Mount Olive, North Carolina, on or about August 1, 1998, to Respondent's customer in Stevens Point, Wisconsin.

8. The load arrived in Stevens Point, Wisconsin on or about August 3, 1998, and trouble was reported to Complainant's salesman, Scott Painter, who authorized the transfer of the load to Magilio Produce, in Glendale, Wisconsin, and asked that the melons be inspected. Following the inspection Scott Painter agreed with Respondent to grant full protection with the understanding that Respondent's customer would handle the sales of the melons, and would not provide an accounting. Magilio reported a negative return of $373.06 from the sales of the melons. Respondent paid a freight bill on the load in the amount of $1,649.00, and deducted $2,022.06 from other invoices due Complainant.

9. The informal complaint was filed on February 16, 1999, which was within nine months after the causes of action alleged herein accrued.

Conclusions

Complainant seeks to recover the purchase prices, totaling $7,651.40, of three loads of bulk watermelons, plus deductions made by Respondent for alleged deficits in amounts totaling $4,896.61, or a total of $12,548.01. Respondent admits the purchase and acceptance of the melons, but alleges that they arrived at the destinations in a deteriorated condition, and that Complainant's salesman, Scott Painter, agreed to the loads being handled by Respondent's customers with full protection against any loss, and with no requirement that accountings be rendered.

Respondent submitted sworn statements by Scott Painter which fully support its contention that full protection was granted, and that no accounting was required. Complainant contended that Scott Painter had no authority to grant protection on the loads. However, Complainant clearly clothed Painter with such authority.[1] We conclude that Complainant granted full protection to Respondent with no requirement that accountings be rendered. Other contentions made by Complainant

[1]See *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, 44 Agric. Dec. 468, 1400 (1985); *Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (1979); *Johnson Produce v. R. L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743 (1978); *George Arakelian v. Leonard O'Day*, 31 Agric. Dec. 1395 (1972); *The G. Fava Co. v. Parkhill Produce Co.*, 19 Agric. Dec. 928 (1960); *Robert Johnson v. Carl Fritchey, et al.*, 16 Agric. Dec. 1082 (1957); and *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

have been fully considered in arriving at our conclusions herein. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

DECLO PRODUCE, INC. v. SUN VALLEY POTATOES, INC.
PACA Docket No. R-99-0175.
Decision and Order filed April 6, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $6,520.65 in connection with transactions in interstate commerce involving potatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer included a counterclaim in the amount of $16,296.25, which was in part based on transactions which were not covered by the formal complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds $30,000.00, and therefore the documentary procedure provided in 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 sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Declo Produce, Inc., is a corporation whose address is P. O. Box 100, Declo, Idaho. At the time of the transactions involved herein Complainant was licensed under the Act.

2. Respondent, Sun Valley Potatoes, Inc., is a corporation whose address is P.O. Box 59, Paul, Idaho. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 23, 1998, under its invoice 2150, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 792 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $3,564.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and has not paid Complainant any part of the purchase price.

4. On or about September 23, 1998, under its invoice 2151, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 792 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $3,564.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and has paid Complainant $2,998.75, leaving $565.25 still owing.

5. On or about September 23, 1998, under its invoice 2152, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one bulk truck load consisting of 46,820 pounds of Idaho Russet Nugget potatoes, at $6.00 per cwt., or $2,809.20, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and has paid Complainant $1,872.80, leaving $936.40 still owing.

6. On or about September 25, 1998, under its invoice 2159, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 850 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $3,825.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and paid Complainant $2,550.00, leaving $1,275.00 still owing.

7. On or about September 23, 1998, under its invoice 2160, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 400 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $1,800.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and paid Complainant $1,620.00, leaving $180.00 still owing.

8. On or about September 15 and 16, 1998, Respondent shipped to Complainant a total of 2,072 cwt. of processing grade potatoes to be packed into 50 pound bags of U.S. No. 2 potatoes. Complainant has not accounted to Respondent for these potatoes.

9. The formal complaint was filed on March 25, 1999, which was within nine months after the causes of action therein accrued. The formal counterclaim was filed on May 11, 1999, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant seeks to recover reparation from Respondent in connection with the sale of five shipments of potatoes for prices totaling $15,562.20. Complainant asserts that Respondent has paid a total of $9,041.55, leaving $6,520.65 still due. Respondent disputed each of the shipments, and filed a counterclaim for a total of $16,296.25 arising partly from transactions covered by the complaint, and partly from other transactions that are extraneous to the complaint. Complainant did not reply individually to the matters raised in Respondent's counterclaim, but simply termed them "fabricated nonsense," and "smoke mirrors" (sic). We turn first to the matters alleged in the formal complaint.

Under invoices 2150 and 2151 Complainant sold identical loads to Respondent. Respondent asserted that only one load was shipped, and that the fact that the invoices showed the same quantity, product, and date proved this fact. Respondent, therefore, did not pay any part of the purchase price of the load represented by invoice 2150. However, Complainant submitted copies of both bills of lading, and while the trucker's name was the same on both invoices (the party's places of business are only 12 miles apart) the signatures of the trucker differed so as to show that he signed for two different loads. We find that Respondent is liable for the full purchase price of the load represented by invoice 2150, or $3,564.00.

Respondent presents several defenses as to the load represented by invoice 2151. Respondent alleges that the load was not inspected at shipping point as required by the applicable marketing order; that 72 cartons out of the load were shipped by Respondent to Sysco Food Service in Horsehead, New York, and were found to contain excessive rot on arrival, but that it was not economially feasible to get an inspection for such a small number of cartons; and that "portions of Lot #2151 were repacked in [Respondent's] warehouse and the remaining portion was returned to Declo Produce." Except for the first of these defenses (as to which the burden might fairly be said to be upon Complainant to show compliance with the marketing order) Respondent's defenses are unproven. It is particularly remarkable

that Respondent made no effort to show what portion of the load was repacked in Respondent's warehouse and what portion returned to Complainant. However, a more fundamental problem exists with Respondent's case. The Uniform Commercial Code provides that "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[1] Complainant has alleged that it received no timely notice of breach. Respondent responded that timely notice was given, but provided no documentation of such notice. Complainant reiterated its assertion that no timely notice was given in its reply to the counterclaim, and in its statement in reply. The burden of proving by a preponderance of the evidence that prompt notice was given rests upon Respondent.[2] We find that Respondent has not met that burden, and is barred from any remedy for any breach.

The bulk load of potatoes represented by invoice number 2152 was invoiced at $6.00 per hundredweight, and shipped on September 23, 1998, to Respondent at its place of business in Paul, Idaho. Respondent accepted the load on arrival, but now claims that the amount invoiced should have been $4.00 per hundredweight. Respondent has not shown that it objected promptly to the Complainant's invoice showing the price of $6.00 per hundredweight. We find that the price was $6.00 per hundredweight, and that Respondent has not proven prompt notice of any breach of contract by Complainant. Respondent is liable for the balance of the purchase price on this load, or $936.40.

The load of 850 50 pound bags of potatoes represented by invoice number 2159 was shipped by Complainant on September 25, 1998. Respondent claims that the load was shipped directly from Complainant's place of business to Respondent's customer, Hiatt Produce, Inc., in St. Charles, Illinois. However, the bill of lading signed by the carrier clearly shows that the load was consigned to Respondent at Paul, Idaho. Again, Respondent claims a breach by Complainant as to this load, but has not proven by a preponderance of the evidence that it gave prompt notice of a breach to Complainant. We conclude that Respondent is liable to Complainant for the balance of the purchase price as to this load, or $1,275.00.

On September 23, 1998, Complainant shipped a load of 400 50 pound bags of potatoes at $4.50 per bag, or $1,800.00, to Respondent under invoice number 2160.

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[1]UCC § 2 - 607(3)(a).

[2]*Hunts Point Tomato Co., Inc. v. Maryland Fresh Tomato Co., Inc.*, 47 Agric. Dec. 773 (1988), *overruled on other grounds by, Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994); *Welchel Produce Co. v. Rosenberg*, 15 Agric. Dec. 452 (1956).

Again, Respondent asserts that these potatoes went directly from Respondent's place of business to Respondent's customer Haitt Produce. However, the bill of lading shows that the shipment was to Respondent at Paul, Idaho. Respondent asserts a breach by Complainant, but has not shown by a preponderance of the evidence that it gave Complainant prompt notice of a breach. Respondent is liable to Complainant for the balance of the purchase price as to this load, or $180.00. The total that we have found due from Respondent to Complainant on the five loads that are the subject of the complaint is $6,520.25.

We now turn to Respondent's counterclaim. As a background to this claim, it should be recalled that Complainant failed to respond particularly to the individual allegations of the counterclaim, but asserted that it was "fabricated nonsense." We will take this to be a denial of the matters alleged in the counterclaim.

The first matter alleged by Respondent (exhibits 30 and 31[3]) is that 4,800 bags of 12,800 bags received by Respondent from Complainant were overpriced by $.30 per bag. Respondent states that communication to resolve the price difference was broken off when Complainant filed its complaint. Respondent asserts that "evidence of the bag count is supported on Exhibit 30 for 1515 Two Good bags and Exhibit 31 for 3294 Two Good bags for a total of 4809 bags." The two exhibits referred to are a federal inspection certificate, and an inspector's notes. There is no showing, or indeed allegation, that the overpriced bags were ever paid for by Respondent. We conclude that Respondent has failed to prove by a preponderance of the evidence that any amount is owing to it from Complainant as to the bags.

Respondent next alleges that 2,072 hundredweight of potatoes were delivered to Complainant by Respondent on September 15, and 16, 1998, to be packed as U.S. No. 2 grade into Respondent's bags (exhibit 1). Respondent submitted documentation showing the delivery to Complainant of the poundage alleged to have been shipped. Complainant's general denial will not suffice as a defense to this allegation. Respondent claims $2.00 per hundredweight for a pack-out of 1,554 hundredweight, or $3,108.00. We conclude that this amount is owing from Complainant to Respondent.

Respondent next asserts that a load of potatoes was received from Complainant, rejected by Respondent's in-house federal inspectors, and returned to Complainant (exhibit 3). Respondent asserts that the load was refused by Complainant because there was no room on their floor to unload the potatoes. Respondent asserts that the load was shipped without having been inspected at shipping point, and that "a load delivered without inspection, rejected by USDA as out of grade is an act of misbranding." Respondent has not submitted a copy of any inspection certificate.

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[3]Exhibits referenced are those attached to Respondent's answer and counterclaim.

We have held many times that the only way to prove a breach as to condition is by a neutral inspection of produce,[4] and just as we will not accept testimonial evidence of an interested party as to condition, we will also not accept testimonial evidence of an interested party to establish that a neutral inspection was performed, or as to what were the results of the alleged inspection. This count of Respondent's counterclaim must fail for want of adequate proof. Respondent's next allegation (exhibit 4) is apparently based on the breach alleged above, and must also fail.

Respondent's next claim (exhibit 5) relates to an alleged rejection of potatoes by its in-house federal inspectors. Again, Respondent failed to submit a copy of the federal inspection certificate, and consequently, Respondent's claim must fail.

In connection with Complainant's invoice 2161 (exhibits 6 and 7) Respondent claims that it has paid Complainant, but is entitled to damages. Respondent asserts that Complainant shipped 6 ounce Nugget potatoes when 10 ounce Burbank potatoes were ordered, and that its customer only returned $160.00, causing it to loose $1,340.00. However, Respondent did not submit a purchase order showing that 10 ounce Burbanks were ordered, nor did Respondent allege that it objected in a timely fashion to Complainant's invoice which clearly showed 6 ounce Nuggets. Moreover, Respondent's own invoice to its customer only says: "50# Burlap Bag U.S. Two Good." In addition Respondent did not submit an accounting from its customer showing the loss. Respondent's claim as to this load is denied.

Respondent's next two claims (exhibits 8 and 9) relate to Complainant's invoices 2152 and 2159. Respondent's contentions relative to these invoices have already been dealt with, and Respondent's claims are without merit.

Respondent claims damages of $2,600.07 in connection with potatoes shipped under Complainant's invoice 2144 on September 19, 1998 (exhibit 10). Respondent states that the potatoes were shipped by Complainant to Respondent and unloaded by Respondent at its place of business in Paul, Idaho. 300 bags of an original 864 bags were then shipped by Respondent to a customer in Massachusetts where a federal inspection on September 23, 1998, showed excessive rot. Respondent accepted the potatoes by unloading them in Paul, Idaho. The f.o.b. warranty of suitable shipping condition is applicable only to contract destination. Complainant's invoice (submitted by Respondent) shows the contract destination as Respondent's place of business in Paul, Idaho. There has been no showing that the parties contemplated an extension of the warranty to a distant point such as Massachusetts. We conclude that Respondent has not shown a breach on the part of Complainant as to this load of potatoes.

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[4] *Gordon Tantum v. Phillip R. Weller*, 41 Agric. Dec. 2456 (1982); *O. D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (1962).

Respondent's last two claims (exhibits 11 and 13) relate to Complainant's invoices 2151 and 2160, and have already been dealt with. These claims are without merit.

As stated earlier, the total that we have found due from Respondent to Complainant on the five loads that are the subject of the complaint is $6,520.25. The total amount due from Complainant on Respondent's counterclaim is the $3,108.00 found due as to one count. The remainder of the counterclaim is dismissed. When these two amounts are offset against each other, the sum of $3,412.25 remains owing from Respondent to Complainant. Respondent's failure to pay Complainant this amount 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.[5] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[6] We have determined that a reasonable rate is 10 percent per annum.

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, $3,412.25, with interest thereon at the rate of 10% per annum from October 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[5] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[6] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

BORG PRODUCE SALES, INC. v. C.P. FRUIT DENVER, INC., AND CALIFORNIA PACIFIC FRUIT CO.
PACA Docket No. R-00-0012.
Decision and Order filed April 6, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $17,663.50 in connection with transactions in interstate commerce involving mixed perishable produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondents. Respondent C.P. Fruit Denver, Inc., filed an answer thereto denying liability to Complainant. Respondent California Pacific Fruit Co. defaulted in the filing of an answer.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the documentary procedure provided in 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 sworn statements, however, none of the parties did so. None of the parties filed a brief.

Findings of Fact

1. Complainant, Borg Produce Sales, Inc., is a corporation whose address is 1601 E. Olympic Blvd. #105, Los Angeles, California.

2. Respondent, C. P. Fruit Denver, Inc., is a corporation whose address is 6100 "G" Stapleton Drive South, Denver, Colorado. At the time of the transactions involved herein this Respondent was not licensed under the Act, but was operating subject to license.

3. Respondent, California Pacific Fruit Co., is a corporation whose address is

2001 Main St., San Diego, California. At the time of the transactions involved herein this Respondent was licensed under the Act.

4. Between September 15, 1998, and October 29, 1998, Complainant sold to Respondents, and shipped to 6100 "G" Stapleton Drive South, Denver, Colorado, twelve truck lots of mixed perishable produce having a total invoice price of $17,663.50. Respondent's accepted the produce on arrival. Price reductions were negotiated and agreed to by the parties as to two of the invoices. These price reductions totaled $190.50. Respondent C.P. Fruit Denver, Inc., made a payment to Complainant of $391.52. A balance of $17,081.48 remains due to Complainant.

5. The formal complaint was filed on March 15, 1999, which was within nine months after the causes of action herein accrued.

Conclusions

Respondent C.P. Fruit Denver, Inc., admitted in its answer that the correct prices of the produce purchased from Complainant totaled $17,663.50. However, this Respondent alleged that adjustments were made to the amounts due as to two of the twelve invoices and that Complainant's Raul Martinez agreed to the adjustments. This Respondent asserted that the correct amount due as a result of the adjustments was $17,663.50. Respondent also asserted that a payment was tendered and accepted in the amount of $391.52. Complainant made no reply to these allegations, and we find that they are correct.

Respondent C.P. Fruit Denver, Inc., also alleged as a defense that a letter accompanied the check for $391.52 which proposed a series of 29 payments of $391.52, with a final payment of $6,118.94. Respondent asserts that Complainant's cashing of the first check amounted to a settlement and agreement to the payment schedule, and that Complainant has no right to bring this action. We do not agree. There is nothing in the letter which offered the settlement arrangement which made the tender of the check dependent on Complainant's acceptance of the repayment schedule. We conclude that the amount of $17,473.00 remains due and owing.

Respondent California Pacific Fruit Co. did not file an answer to the complaint and is therefore deemed to have admitted its allegations. We conclude that its liability is joint and several with that of Respondent C.P. Fruit Denver, Inc.

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.[1] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[2] We have determined that a reasonable rate is 10 percent per annum.

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 Respondents shall pay to complainant, as reparation, jointly and severally, $17,081.48, with interest thereon at the rate of 10% per annum from December 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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THE PRODUCE CONNECTION, INC. v. BRUCE M. LINCIS, d/b/a RAINBOW PRODUCE COMPANY.
PACA Docket No. R-99-0142.
Decision and Order filed April 17, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $42,413.79 in connection with eighty-five transactions in interstate commerce involving mixed

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[1] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[2] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

perishable produce.

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 for the amount claimed, but admitting that $20,567.25 was due to Complainant. An order was issued on July 14, 1999, for that amount with interest.

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the documentary procedure provided in 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 sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, The Produce Connection, Inc., is a corporation whose address is P.O. Box 42036-373, Phoenix, Arizona.

2. Respondent, Bruce M. Lincis, is an individual doing business as Rainbow Produce Company, whose address is 2105 E. Magnolia, Phoenix, Arizona. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about August 1, 1998, through December 18, 1998, Complainant sold to Respondent eighty-five lots of mixed perishable produce having a total invoice value of $63,732.20. The produce was sold on a delivered basis, and was either picked up by Respondent at Complainant's warehouse at 921 E. Madison, Phoenix, Arizona, or delivered by Complainant to Respondent at 2105 E. Magnolia, Phoenix, Arizona. In each instance Respondent inspected each individual package of produce, and accepted it at time of delivery.

4. The informal complaint was filed on January 29, 1999, which was within nine months after the causes of action alleged herein accrued.

Conclusions

Complainant's eighty-five invoices show prices totaling $63,732.20. The formal complaint claims that $42,413.79 remains unpaid. By inference this means that Complainant admitted the payment of $21,309.41 at the time the complaint was filed. The formal answer filed on June 29, 1999, admitted that $20,567.25 was then due. On July 12, 1999, Complainant wrote to this Department stating that

Respondent had made a payment of $2,562.50, leaving a balance still due of $39,851.29. On July 14, 1999, an Order was issued for the $20,567.25 admitted due by Respondent in his answer. Pursuant to this Order Respondent made payments to Complainant that totaled $22,623.98. This overpaid the amount due under the order of July 14, 1999 ($20,567.25 principal, and $1,262.54 interest) by $794.19. When the $20,567.25 payment on the principal amount plus the excess payment of $794.19 is credited against the $39,815.29 claimed due by Complainant immediately prior to the issuance of the July 14, 1999 order, a balance of $18,489.85 is left as the remaining amount which should be claimed due by Complainant.[1]

We will now assess the validity of Complainant's claim as to this remaining amount. Respondent in his answer admitted receipt of the produce, and that the produce was inspected by an agent of Respondent. Respondent additionally asserted that Complainant "was in fact notified of any discrepancy verbally by phone or in written form via fax, within 24 hours of receipt of product." Respondent did not specify which of the invoices, or what discrepancies, he had in mind. Complainant pointed out, and submitted statements by its employees to verify, that each individual package was inspected by Respondent's agent at time of delivery. It appears to be Complainant's contention that by this detailed inspection at time of delivery Respondent waived objection to any problems with the produce. We agree with this contention.[2] However, again without reference to specific transactions, Respondent also offers the following "shotgun" defense:

> The respondent has in fact made payments on the invoices. Do (sic) to the fact that The Produce Connection., (sic) has missadded (sic) invoices, misapplied payments, neglected to issue credits for refused or rejected product, billed for product that was in fact not received by the respondent. There is a large discrepancy of the balance owed. There are 6 invoices which the respondent has no record of, the copies provided does (sic) not have a signature, therefor (sic) respondent at this time is not certain of receipt of the product on these invoices.

Unfortunately, Respondent did not specify which transactions he referred to in the

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[1]For some inexplicable reason Complainant claimed in its opening statement that $25,121.70 remained due on September 23, 1999.

[2]See UCC § 2-316. Compare *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969 (1997) for the applicability of this section where the terms are f.o.b.

foregoing paragraph. However, we have examined each of the eighty-five invoices, together with other documentation attached to Respondent's answer. We were unable, from this examination, to confirm most of the defenses alleged by Respondent. There are, however, payment allegations as to some of the transactions that were not replied to by Complainant. Respondent attached copies of checks showing that certain invoices had been paid by him in the amounts originally claimed by Complainant, or in greater amounts than asserted by Complainant, and in two cases that Complainant was overpaid. These transactions are as follows:

Inv. #	Date	Inv. Amount	Explanation
16132	10/10	$ 861.00	Complainant claims this invoice was paid $4.00 short; however, Respondent's payment check shows that it was paid in the amount of $867.00, or a $6.00 overpayment.
16994	11/6	$1,234.00	Complainant claims this invoice was paid $24.50 short; however, Respondent's payment check shows that it was paid in full.
17057	11/9	$1,765.25	Complainant claims that this invoice was not paid in any amount; however, Respondent's payment check shows it paid in the amount of $1,761.50, or $3.75 short.
17086	11/9	$ 87.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
17100	11/10	$ 714.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.

17122	11/11	$1,464.00	Complainant's copy of the invoice shows $1,600.00 (written in a different hand from the remainder of the invoice) as the "Net Total." The $136.00 difference between this and the $1,464.00 is claimed as "Short paid." However the original total is $1,464.00, and this is the only total that Respondent's invoice shows. Respondent's check shows $1,464.00 paid. We conclude that Respondent has paid the amount invoiced.
18652	11/19	$ 281.50	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18665	11/20	$1,294.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18680	11/20	$ 840.50	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18687	11/20	$ 275.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18710	11/21	$ 235.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.

18723	11/23	$1,003.75	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18738	11/23	$ 525.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in the amount of $532.00.00, or a $7.00 overpayment.
18767	11/24	$ 900.75	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in the amount of $893.75, or $7.00 short.
18803	11/25	$ 885.25	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18816	11/25	$ 181.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.
18844	11/27	$ 855.00	Complainant claims this invoice was not paid; however, Respondent's payment check shows that it was paid in full.

Complainant did not respond in its opening statement or statement in reply to these documents. We conclude that Respondent should be credited with $10,009.75 against Complainant's remaining $18,489.85 claim.

Respondent also attached to its answer copies of numerous invoices from Respondent to Complainant. These are preceded in the documents attached to Respondent's answer by tabulations of some of Complainant's invoices which show

the invoices paid, whereas Complainant shows them not paid. The tabulation charges Complainant's invoices against an invoice referred to as 10998 for $9,993.15. None of Respondent's invoices to Complainant has this number, and there is no compilation of these invoices having this number.[3] We could have added all of Respondent's invoices up to see if they total $9,993.15, but it is not for us to go so far in making Respondent's case for him. Even if the invoices do add up to $9,993.15 we could not give Respondent credit for this amount since Respondent's answer made no allegation about sales by Respondent to Complainant, or about any claim for off-sets. Some reasonable notice is required to Complainant as to the nature of Respondent's defense.

We conclude that there remains due from Respondent to Complainant the sum of $8,480.10. Respondent's failure to pay Complainant this amount 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.[4] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[5] We have determined that a reasonable rate is 10 percent per annum.

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, $8,480.10, with interest thereon at the rate of 10% per annum from January 1, 1999, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

_____

[3]There is no compilation of the invoices at all.

[4]*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[5]See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

THE LIONHEART GROUP, INC. v. SY KATZ PRODUCE, INC.
PACA Docket No. R-99-0153.
Decision and Order filed April 17, 2000.

Jurisdiction - Contemplation interstate commerce.

Where a load of cucumbers was sold by a Florida Complainant to a Florida Respondent, and shipped to a customer of Respondent in Florida with the contemplation that the cucumbers would be distributed to firms outside the state, and over two-thirds of the cucumbers were shown to have in fact been shipped out of the state of Florida, but less that one-third were shipped to other Florida firms, it was found that the load was sold in contemplation of interstate commerce, and that the Secretary had jurisdiction.

Acceptance - Unloading of product.

Where Respondent gave notice of rejection following the unloading of produce the rejection was ineffective, and the load was deemed to have been accepted.

Consignment - Terminology inadequate to show.

The phrase "Customer will keep + Work Out" did not signify an agreement that the load could be handled on a consignment basis.

Attorney Fees - Contractual liability for.

Where Complainant placed words in its memorandum of sale requiring payment of attorney fees in connection with collection costs it held that the words used did not contemplate the payment of attorney fees in connection with the litigation of a good faith dispute.

George S. Whitten, Presiding Officer.
Thomas B. Bacon, Hollywood, FL, for Complainant.
Thomas W. Johnston, Pompano Beach, FL, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $13,127.04 in connection with a transaction in interstate commerce involving cucumbers.

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 of procedure provided in 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 sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Complainant also tendered an amended complaint with its statement in reply, which seeks attorney fees incurred in connection with the proceeding. Both parties filed briefs. Complainant filed a supplemental brief dealing with the request for attorney fees, and Respondent filed a motion to dismiss the amended complaint.

Findings of Fact

1. Complainant, The Lionheart Group, Inc., is a corporation whose address is P.O. Box 639, Pompano Beach, Florida.

2. Respondent, Sy Katz Produce, Inc., is a corporation whose address is P. O. Box 6216, Pompano Beach, Florida. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about April 13, 1998, in contemplation that the product would move in interstate commerce, Complainant sold to Respondent, and shipped from Pompano Beach, Florida to Respondent's customer, Dixie Growers, in Plant City, Florida, one truckload consisting of 1,008 cartons of super select cucumbers, at $14.00 per carton, plus $144.00 for pallets, or $14,256.00, f.o.b.

4. The cucumbers arrived at the place of business of Dixie Growers in Plant City, Florida on April 14, 1998. The receiver noted problems with the product, notified Respondent that there were problems, and called for a federal inspection. After unloading, an inspection was made of the cucumbers on April 14, 1998, at 11:50 a.m.[1], at the place of business of Dixie Growers in Plant City, Florida, with the following results in relevant part:

LOT: A
TEMPERATURES: 50 to 52° F
PRODUCT: Cucumbers
BRAND/MARKINGS: "No Brands" Fresh Vegetables, Super Select, 1 1/9 Bu.
ORIGINS: FL
LOT ID.:
NUMBER OF CONTAINERS: 1088
INSP. COUNT: N

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[1]The inspection certificate states "11:50 p.m." However, the inspectors's notes (which were not a part of the record, but of which we take official notice) state that the inspection was commenced at 11:50 a.m., and completed at 12:55 p.m.

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	03 %	00 %	00 %	Over 2⅜ inch diameter	Decay early stages
	09 %	00 %	00 %	Quality (1 to 14% Scars Misshapen Cuts	Size: 6 to 9½ mostly 7 to 8½ inches in length. Generally 1¾ to 2⅜ inches in diameter
	09 %	02 %	00 %	Soft and Shriveled Ends (0 to 22%)	
	02 %	02 %	00 %	yellowing	
	01 %	00 %	00 %	Sunken areas	
	01 %	00 %	00 %	Bruising	
	02 %	02 %	00 %	Decay (0 to 4%)	
	27 %	06 %	00 %	Checksum	

GRADE: Fails to grade U.S. No. 1 only account condition

5. Promptly following the federal inspection Respondent was notified of the results of the inspection by its customer. Respondent then promptly sent Complainant a copy of the inspection, a copy of Complainant's manifest with "Rejected" handwritten at the bottom, and a confirmation form under its letterhead which contained the statement: THIS CONFIRMS OUR TELEPHONE CONVERSATION 4,14,98 CONSTITUTING NOTICE REGARDING: "1008 - Super Select Cuxs - Rejected - See Inspection. . . . REJECTED AT: Plant City, Fla. . . . DISPOSITION: Customer Will Keep + Work Out."

6. Dixie Growers, Inc., rendered an accounting to Respondent on September 16, 1998. The accounting was handwritten and stated as follows:

Attn: Jim Sutton

9/16/98
Account of Sale on Sy Katz PO# 32642
Shipped 4/13/98
1008 S/S Cucumbers

Inspection Cost ($121.20)
Freight from Sy Katz to Dx Grs. (500.00)
Regraded 1008 x $1.25 = (1260.00)
lost 169 in Regrade
Shipped 339 @ 12.85 = 4356.15
Shipped 277 that were rejected/return $1.02 = 282.54
Shipped 49 that were rejected/return $2.10 = $102.90
Shipped 100 @ 5.00 = $500.00
Shipped 74 @ 3.00 = $222.00

Net: 3.55
less Hdl. Chg. and commission

Paid $3.00

7. On January 6, 1999, Dixie Growers, Inc., supplied this Department with the following accounting, in the form of a computer printout, on the same load of cucumbers. The portions in brackets [ ], were handwritten:

LOT SALES LISTING
Today's Date 01/06/99
From-04/14/98 To-04/14/98

Ticket #	Date	Lot#	Grower	Desc	Qty/Rcvd	Qty/Sold	Est/Pr	Act/Pr	Sales Ext
1224	04/14/98	1224-17-6	SY KATZ	CUCUMBERS SUPER SELECT	1008				
20506	A&P EDISON		0	04/14/98		144	0.00	16.85	2426.40
20503	A&P NEW ORLEANS		0	04/14/98		48	0.00	16.85	808.80
20503	A&P NEW ORLEANS		0	04/14/98		102	0.00	16.85	1718.70
20534	BURGIN			04/14/98		45	0.00	16.00	720.00
20536	L & M COMPANIES, INC			04/14/98		32	0.00	10.00	320.00
20536	L & M COMPANIES, INC			04/14/98		56	0.00	6.00	336.00
20513	WAL-MART STORES, INC REJ RETDX FRT			04/14/98 [188 shipped Rejected Afterward to Dixie]		*1*	0.00	-282.00	-282.00
20581	BURGIN			04/16/98		100	0.00	8.00	800.00
20578	COMMERCIAL GROWERS			04/17/98		23	0.00	15.00	345.00
20593	CAROLINA BROKERAGE REJ WICK20711			04/17/98		0	0.00	0.00	0.00
20612	ALL AMERICAN			04/17/98		49	0.00	6.34	310.65
20629	START FRESH			04/17/98		30	0.00	6.00	100.00
20605	HORIZON PRODUCE REJ LAN20673			04/17/98		0	0.00	0.00	0.00
20606	STANDARD FRUIT & VEG 0			04/18/98		58	0.00	8.00	464.00
20644	COMMERCIAL GROWERS			04/18/98		52	0.00	7.00	364.00
20673	LANCASTER FOODS INC			04/20/98		24	0.00	0.00	0.00
20711	WICK & BROTHERS INC.			04/21/98		157	0.00	1.02	160.14
0	0		79 LIR 4-14	12/31/99		79	0.00	0.00	0.00
0	0		17 LIR 4-17	12/31/99		17	0.00	0.00	0.00
0	0		60 LIR 4-18	12/31/99		60	0.00	0.00	0.00
0	0		13 LIR 4-18	12/31/99		13	0.00	0.00	0.00
						[1089]			
PRODUCT TOTALS					1008	~~1090~~			8671.70
						[1089]			

LISTING TOTALS

1008 ~~1090~~ 8671.70

[(81) Overshipped @ 9.98 avg (809.19)]

[1008]

7862.51

[Gross: 7862.51

.85 Handling Chg (856.80)

Frt to Dixie (500.00)

Inspection (121.20)

Regrade (1540 -) 1232 Regraded @ 1.25

(399.50) 470 New {illegible} (1 1/9) Boxes @ .85

(462.40) 544 New {illegible} (1 1/9) Boxes @ .85

(103.60) 148 New Carton {illegible} Boxes @ .70

3879.01 ÷ 1008 = 3.85]

8. An informal complaint was filed on November 5, 1998, which was within nine months after the cause of action herein accrued.

Conclusions

The initial defense raised by Respondent in its formal answer, and during the informal stages of this proceeding, was that the Secretary lacked jurisdiction over the transaction alleged by Complainant because it was not in interstate commerce. This defense was dropped in Respondent's brief. During the informal stages of this proceeding invoices were submitted by Respondent's customer, to whom the cucumbers were delivered by Respondent for sale, showing that over two-thirds of the product was sold by Respondent's customer to firms outside the state of Florida. Complainant alleged that it contemplated, at time of shipment, that the cucumbers would be sold to out of state firms. Also, it is entirely possible that the Florida firms that received less than one-third of the product ultimately shipped the product out of state. We conclude that the sale of the cucumbers from Complainant to Respondent was in contemplation of interstate commerce.[2]

Complainant filed a statement in reply, a brief, and an amended complaint on the same date, June 21, 1999. Complainant later asserted that the essential difference between the initial complaint and the amended complaint is that the latter specifically requests attorney fees. Section 47.6(d) of the Rules of Practice (7 C.F.R. § 47.6(d)) treats the subject of amendments to the formal complaint. The initial, somewhat lenient, provisions of the paragraph clearly deal with the oral hearing procedure during which evidence addressing matters raised in an amendment to the complaint may more easily be introduced. Complainant's amendment was offered at the close of the receipt of evidence under the documentary procedure, and, if allowed, would necessitate allowing a new round of submissions of evidence under that procedure. Under these circumstances an amendment should be allowed only for compelling reasons. We do not find that any such reasons are present here. Complainant could easily have included the explicit claim for attorney fees in its complaint, but failed to do so. Leave to amend the complaint is refused.

Respondent asserts that the cucumbers were rejected and that timely notice of the rejection was given. The evidence shows that notice of the rejection was given on the documents that were faxed to Complainant along with the copy of the

[2] *Cf. Troyer v. Blue Star Potato*, 27 Agric. Dec. 301 (1968).

inspection certificate.[3] However, the inspection certificate clearly shows that the cucumbers had been unloaded at the time of inspection. We have held many times that the unloading of product constitutes an acceptance thereof.[4] An acceptance precludes any subsequent rejection.[5]

Respondent has alleged that the cucumbers were sold as U.S. No. 1. Complainant asserts that they were only described as "super select." The contract documents all show "super select," and do not make any reference to U.S. grade. "Super select" is descriptive terminology commonly used in the trade, but has no certain meaning. Some may take it to be equivalent to U.S. No. 1, and it certainly denotes cucumber that is relatively good compared to others available at the time. However, we do not equate it with any particular U.S. grade, in the absence of a showing that the parties so intended. There has been no such showing here. We conclude that the cucumbers were sold without reference as to grade.

The cucumbers were sold on an f.o.b. basis. The Regulations,[6] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[7] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."[8]

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[3]Respondent's Jim Sutton asserted that notice of breach was given verbally prior to the inspection, but did not assert that the cucumbers were rejected at such time.

[4]*Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980); *Crown Orchard Co. v. Mid - Valley Prod. Corp.*, 34 Agric. Dec. 1381 at 1385 (1975); *Conn & Scalise Co., Inc. v. Frank J. Crivella & Co., Inc.*, 20 Agric. Dec. 415 (1961).

[5]*Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996).

[6]7 C.F.R. § 46.43(i).

[7]7 C.F.R. § 46.43(j).

[8]The 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. (continued...)

We come now to the issue of whether there was a breach of contract by Complainant. We note that Complainant's attorney has made the assertion that in a "no-grade contract" the purchaser is liable for the full purchase price despite allegations of excessive defects, and cites *Santa Clara Produce v. Morrissey, Stringer & Patlan, Inc.*, 40 Agric. Dec. 430 (1981). Complainant also attacks a subsequent case (which it denominates "Plantation Produce,"[9]) as contrary to Santa Clara Produce, and states that it "makes no sense and is inconsistent with precedent." Complainant has misconstrued both cases. Complainant's error seems to stem from a failure to distinguish between grade (or quality) defects, and condition defects. Grade or quality defects are those that do not tend to change over time, whereas condition defects tend to be of a progressive nature.[10] Produce sold without reference as to a U.S. grade can have any amount of quality defects, so long as such defects do not cause the product to be unmerchantable. But the amount of condition defects allowed for product sold as U.S. No. 1, and product sold without reference as to grade, is the same when determining whether there is a breach of the suitable shipping condition warranty. The lack of knowledge as to this distinction

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[8](...continued)
No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is , of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless 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. 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). 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 *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[9]*Sharyland LP d/b/a Plantation Produce v. Caribe Food Corp.*, 56 Agric. Dec. 1011 (1997).

[10]See General Market Inspection Instructions for Use of Fresh Fruit and Vegetable Inspectors, Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, p. 138, para. 404-404a (April, 1988).

led Complainant's attorney into much further misunderstanding of the two cases cited above. But, it is not necessary that we enter any further into that thicket. If the distinctions just mentioned are kept in mind, a reading of the two cases in conjunction with the explanations given in *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980) should dispel Complainant's perplexity.

Even if we totally discount the descriptive terminology "super select," it is clear from the results of the prompt federal inspection that the cucumbers were in breach of the warranty of suitable shipping condition. The federal inspection showed average condition defects totaling 15 percent, and temperatures were well within the normal range. The United States Standards for Cucumbers allow a tolerance of 10 percent for cucumbers in any lot which fail to meet the requirements of the grade, including therein not more than 1 percent for decay.[11] Since this was a no-grade contract the tolerance would be allocatable to condition defects only. On a coast to coast shipment we might allow an expansion of these tolerances, in certain circumstances, of up to 15 percent total condition defects, including 3 percent decay. However, this was not a coast to coast shipment, and the most that could be allowed would be a total of 11 percent condition defects, including 1 percent decay.

Respondent claims that an agreement was reached following arrival that allowed the cucumbers to be handled on a consignment basis. In support of this contention Respondent points to the language on its "confirmation" form stating: "Customer Will Keep + Work Out." However, we have held many times that such language falls short of indicating permission to handle on consignment.[12] Moreover, Respondent's Jim Sutton stated in the Answering Statement that the specific words used by Complainant's Ed Kodish were "keep the product and work them out on an open basis." While Ed Kodish specifically denied using these words, if they had

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[11]The United States Standards for Grades of Cucumbers, §51.2220, 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/vegfm.htm.

[12]See for example *Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992) ("handle" or "open"); *Chiquita Brands, Inc. v. Joseph Williams, Jr. Co. Inc.*, 45 Agric. Dec. 375 (1986) (respondent "should keep the shipment, [and] do with it what respondent could . . ."); *Relan Produce Farms v. Rushton & Co.*, 38 Agric. Dec. 1636 (1979) ("do the best you can"); *B&L Produce of Arizona v. Mim's Produce*, 37 Agric. Dec. 201 (1978) ("work out the load"); *Barkley Company of Arizona v. Ifsco, Inc.*, 31 Agric. Dec. 279 (1972) ("Do the best you can"); *Frank Gaglione & Sons v. Theron Hooker Co.*, 30 Agric. Dec. 528 (1971) ("the buyer should work it out"), Ralph Samsel v. L. Gillarde Sons Co., 19 Agric. Dec. 374 (1960) ("handle best possible" or "handle to best advantage").

been used they would exclude a consignment of the cucumbers.[13] We find that upon notice of the breach Complainant told Respondent to keep the cucumbers and work them out. This simply stated Respondent's obligation and right in the absence of an effective rejection.

Respondent accepted the cucumbers and is therefore liable to Complainant for their purchase price less damages flowing from Complainant's breach of the contract. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.[14] The best method of ascertaining the value the cucumbers would have had if they had been as warranted is to use the average price as shown by applicable market reports.[15] Market News Service reports for April 14, 1998, in Miami, Florida, show that 1 1/9 bushel cartons of medium size cucumbers were selling at $16.00 to $18.00 per carton. We conclude that the value of the subject cucumbers if they had been as warranted was $17.00 per carton, or $17,136.00, plus $144.00 for pallets, or $17,280.00.

The value of the produce accepted is best shown by the results of a prompt and proper resale. Such results are shown by the submission into evidence of a proper accounting. The record contains two accountings from Respondent's customer Dixie Growers, Inc. These accountings are in fundamental disagreement. Apart from the discrepancies in the accountings suggestive of actual fraud (which we do not attribute to Respondent), the fact that the cucumbers sold at such a wide range of prices after reworking is enough for us to refuse to use either of the accountings in our assessment of damages. Absent an accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by

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[13] A sale on an open basis is a sale, while a consignment is not a sale at all. See *Bonanza Farms, Inc v. Tom Lange Company, Inc., and/or Wm. Rosenstien & Sons Co.*, 51 Agric. Dec. 839 (1992) and *Cal/Mex Distributors, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1113 (1987). Respondent should be thankful that it has not succeed in proving a consignment, for given its failure to account (as will appear later), and the elevated market prices, its liability under a consignment would have been substantially higher.

[14] UCC § 2-714(2).

[15] *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990).

a prompt inspection.[16] The federal inspection disclosed a total of 15 percent condition defects. Accordingly we conclude that Respondent's basic damages are 15 percent of the $17,280.00 value of the cucumbers if they had been as warranted, or $2,592.00. The only incidental damages to which Respondent is entitled is the $121.00 cost of the federal inspection. Respondent's damages total $2,713.00.

As stated earlier Respondent's basic liability to Complainant is for the original contract price of the cucumbers, or $14,256.00. Respondent's damages deducted from this amount leaves $11,543.00 as the amount of Respondent's liability to Complainant for the cucumbers.

Complainant has also requested the payment of legal fees based on the allegation that the payment of such fees was a part of the contract, and also based on the general request in the prayer attached to its complaint that it be "awarded such amount of damages as it may be entitled to receive according to the facts established." The argument that attorney fees were included in the contract is based upon wording placed by Complainant on the face of its invoice. Complainant did not raise the issue of attorney fees until the statement in reply. Since a factual question exists as to whether the parties agreed to the payment of attorney fees there is clearly an issue of notice, and opportunity on the part of Respondent to present rebuttal evidence. However, an examination of the wording on the face of the invoice demonstrates to us that, even if agreed to by the parties, the wording does not contemplate the payment of attorney fees in a proceeding such as this. The words are as follows: "BUYER AGREES TO PAY ALL COLLECTION COSTS, INCLUDING COLLECTION AGENCY FEES, REASONABLE ATTORNEY FEES AND COURT COSTS IF THIS ACCOUNT IS PLACED IN COLLECTION." In our opinion these words contemplate the payment of costs associated with the collection of a delinquent account, and not the payment of attorney fees incurred in connection with the litigation of a good faith dispute as to whether the account is owed at all. Complainant's request for an award of attorney fees is denied.

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

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[16]See *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, PACA Docket No. R-92-83, decided January 21, 1993, 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); and *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952). See also *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F.2d 579 (2d Cir. 1986).

consequence of such violations." Such damages include interest.[17] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[18] We have determined that a reasonable rate is 10 percent per annum.

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, $11,543, with interest thereon at the rate of 10% per annum from May 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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PRIME COMMODITIES, INC. v. J. V. CAMPISI, INC.
PACA Docket No. R-00-0050.
Decision and Order filed April 20, 2000.

Jurisdiction - timeliness of complaint - accrual of cause of action - accountings

A cause of action accrues when suit may first be brought upon it. In the case of an accounting this usually occurs when the accounting is rendered. However, when the accounting is not timely rendered a Complainant knows that an action may be brought for an accounting. In such cases the cause of action accrues when the Complainant could first bring an action, that is, at the time the accounting was due but not rendered. In this case the Respondent actually paid Complainant without rendering an accounting, and Complainant was put on notice at that point that something was amiss under the consignment contract, and could have brought an action for an accounting at that point.

George S. Whitten, Presiding Officer.
Byron E. White, Arlington, Texas, for Complainant.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[17] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[18] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $2,893.78 in connection with a transaction in interstate commerce involving watermelons.

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 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 sworn statements. However, neither party did so. Complainant filed a brief.

Findings of Fact

1. Complainant, Prime Commodities, Inc., is a corporation whose address is 8933 East Esperanza, Suite C, McAllen, Texas.

2. Respondent, J. V. Campisi, Inc., is a corporation whose address is 2801 East Hillsborough Avenue, Tampa, Florida. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about August 14, 1998, Complainant sold to Respondent one truck load containing 40,280 pounds of red seedless watermelons in 60 bins on a price after sale basis. The melons were originally shipped on August 13, 1998, by Texas West Melon Co. from the state of Texas to a receiver in Plant City, Florida. Complainant purchased the melons after shipment and diverted them to Respondent in Tampa, Florida.

4. The melons arrived at the place of business of Respondent in Tampa, Florida, and on August 17, 1998, a portion of the melons was federally inspected with the following results in relevant part:

LOT: No ID
TEMPERATURES: 56 to 57°F
PRODUCT: Watermelons
BRAND/MARKINGS: “No Brand”
ORIGINS: TX
LOT ID.:
NUMBER OF CONTAINERS: 54 Bulk Bins
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	25 %	14 %	00 %	Bruising (20 to 30%)	Brusing scattered throughout Bin Generally affecting side Wall of Melon
	00 %	00 %	00 %	Decay	
	25 %	14 %	00 %	Checksum	

5. On September 8, 1998, Respondent sent Complainant a check for $1,800.00 for the melons. The check was received and negotiated by Complainant on or before September 14, 1998. On February 28, 1999, in response to a request from Complainant, Respondent rendered an accounting as follows:

Sold:

5 - Bins	@	$75	$375.00
6 "	@	60.00	360.00
38	@	50	1900.00
2 Singles	@	4.00	8.00
101 "	@	2.00	202.00
232 "	@	1.50	348.00
7 Lost			___
			3193.00
Less 49 Bins @ $20.00			980.00
			2213
Less 342 Singles @ $1.00			342
			1871
Less Inspection			72
			$1799

6. An informal complaint was filed on June 17, 1999, which was more than nine months after the cause of action alleged herein accrued.

Conclusions

Complainant alleges that the original "price after sale" contract between the parties was changed to a consignment contract, and Respondent denies that this occurred. Complainant submitted a copy of an invoice dated August 19, 1998 which does show "CONSIGNED" under a listing of the product, and an extension showing "0.00" as the price. For the purpose of the following discussion we will

assume that the change from "price after sale" to consignment terms was effected on August 19, 1998.

The crucial question which must be answered is whether the complaint filed herein is timely. A complaint, either informal or formal, must be filed within nine months of when the cause of action arose.[1] Furthermore, the statutory provision is jurisdictional in nature. As we stated in *Cadenasso v. California-Mexico Distributing Co.*: "...the time allowed for filing of claims is a limitation upon jurisdiction and, therefore, being of more consequence than a statute of limitations, cannot be altered by the parties."[2]

A cause of action accrues when a judicial proceeding may first be legally instituted upon it.[3] We have held that a suit may be instituted on an accounting when the accounting is rendered, and that the cause of action as to an accounting

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[1] 7 U.S.C. 499f(a). *Sanders & Drake v. Gardner Brothers*, 31 Agric. Dec. 128 (1972); *Freshpict Foods v. Consumers Produce*, 29 Agric. Dec. 163 (1970); *Immokalee Vegetable v. Rosenthal*, 29 Agric. Dec. 483 (1970); *Pelletier Fruit Co. v. Koutroulares*, 19 Agric. Dec. 1232 (1960).

[2] *Cadenasso v. California-Mexico Distributing Co.*, 2 Agric. Dec. 751 (1943); - citing *Louisville Cement Co. v. I.C.C.*, 246 U.S. 638 (1918), where Justice Clark, writing for a unanimous Court, stated:

> We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional, — is a limit set to the power of the commission, as distinguished from a rule of law for the guidance of it in reaching its conclusions.

The statute in question read:

> All complaints for the recovering of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.

[3] In *Louisville Cement Co. v. I.C.C.* the court stated

> . . . [W]hen the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it (citing cases); and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well understood meaning which had been given to it by this court. . . . *Id.* at 644.

The same conclusion applies to the identical phrase used in the Perishable Agricultural Commodities Act. See *Calavo Growers of California v. International Food Marketing, Inc.*, 40 Agric. Dec. 972 (1981).

accrues at that time.[4] The accounting in this case was not rendered until February 28, 1999. Thus it might seem that the informal complaint filed on June 17, 1999, was filed well within the allowable time. However, an examination of the case law will show that the cause of action on an accounting is said to accrue when the accounting is rendered precisely because that is usually the first opportunity a Complainant has to know that anything is amiss. Where, however, the accounting is not timely rendered a Complainant knows that an action may be brought for an accounting. Thus, in such cases the cause of action accrues when the Complainant could first bring such an action. Here, where the Respondent actually paid Complainant instead of rendering an accounting, Complainant was put on notice at that point that something was amiss under the consignment contract, and could have brought an action for an accounting at that point. Complainant's action herein is based on the alleged inadequacy of Respondent's accounting. The accounting was not even requested by Complainant until long after Respondent paid Complainant for the transaction. It is clear that the cause of action upon which Complainant bases its case accrued on or before September 14, 1998, when Complainant cashed Respondent's check. The informal complainant was not filed until June 17, 1999, or more than nine months after the cause of action accrued. The complainant should be dismissed for want of jurisdiction.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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[4] *George Wuszke v. Fruit Pak, Inc.*, 42 Agric. Dec. 1207 (1983); *Tatum v. Harrisburg Daily Mkt. et al.*, 23 Agric. Dec. 1272 (1964).

GREAT AMERICAN FARMS, INC. v. WILLIAM P. HEARNE PRODUCE CO., INC.
PACA Docket No. R-00-0023.
Decision and Order filed June 6, 2000.

Burden of Proof - to show what goods were shipped.
Evidence - lack of foundation for attestation.
Accountings - use of accounting that shows only average price.

A claimant who asserts that goods subjected to inspection by a receiver were not the goods shipped has the burden of showing what goods were shipped.

A verified signature on a questioned document is insufficient to show the authenticity of the document if there is no showing as to the knowledge of the person who signed it.

Accountings that show only an average price are commonly not used to show the value of consigned goods, or the value of damaged good resold by a buyer. However, where the accounting showed that the average price realized was the same as the current market price, and the amount of goods lost on repacking was less, as a percentage, than the condition defects shown on the arrival federal inspection, an exception was made, and the accounting was used to show the proper returns under a consignment contract.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $2,112.00 in connection with a transaction in interstate commerce involving a truck lot of peaches.

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 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 sworn statements. Complainant filed an opening statement,

Respondent filed an answering statement, and Complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Great American Farms, Inc., is a corporation whose address is 1287 W. Atlantic Blvd., Pompano Beach, Florida.

2. Respondent, William P. Hearne Produce Co., Inc., is a corporation whose address is P.O. Box 1975, Salisbury, Maryland. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about January 8, 1999, Complainant sold to Respondent one partial load of Chilien peaches consisting of 384 cases, size 20's, at $11.00 per case f.o.b. The peaches were shipped on January 8, 1999, from the cold storage facility used by Complainant (South Florida Cold Storage in Pompano Beach, Florida) to Respondent's customer Dietz & Kolodenko Co. in Chicago, Illinois.

4. The peaches arrived at the place of business of Respondent's customer on Tuesday, January 12, 1999, and were unloaded from the truck. On January 13, 1999, at 7:25 a.m., a lot of 384 cartons of peaches was federally inspected at the place of business of Respondent's customer with the following results in relevant part:

LOT: C
TEMPERATURES: 38 to 50° F
PRODUCT: Peaches
BRAND/MARKINGS: "CUMBREXPORT" (illegible)
ORIGINS: CE
LOT ID.:20, 22, 24, 26, 28CT
NUMBER OF CONTAINERS: 384 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
C	03 %	00 %	00 %	Quality (misshapen)	
	10 %	05 %	00 %	Bruising (0 to 27%)	
	04 %	04 %	00 %	Soft	
	06 %	06 %	00 %	Decay (0 to 20%) (Moderate to early(?) stages)	
	23 %	15 %	00 %	Checksum	

GRADE: Lot C: Fails to grade U.S. No. 1 only account condition.

5. Respondent faxed Complainant a copy of the inspection certificate, and it was agreed between the parties that Respondent would handle the product for Complainant's account. On the same day, upon reviewing the copy of the inspection certificate more closely, Complainant concluded that the peaches inspected were not the same peaches that were shipped, and informed Respondent that Complainant would expect full payment of the f.o.b. invoice price.

6. The formal complaint was filed on June 17, 1999, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant claimed that the goods subjected to federal inspection by Respondent were not the goods shipped. Complainant had the burden of showing what goods were shipped. Complainant's claim that the peaches inspected in Chicago were not the same peaches shipped is based on the brand displayed on the inspection certificate. Complainant asserts that the peaches shipped were from two lots in its cold storage facility, and that one of these lots (no. 6875) consisted of 169 cartons of Comerical Fruitcola brand, and one (no. 6922) of 215 cartons of unbranded peaches. In support of this contention Complainant submitted an inspection certificate on each lot. One certificate covered 256 cartons of no brand, count 18, 20, and 22, peaches and was performed at South Florida Cold Storage on January 5, 1999. The other certificate covered 326 cartons of "CF" brand, count 20, 22, and 24, peaches, and was performed at the same location on December 28, 1998. Complainant also submitted a copy of a "Pick-Ticket" that purported to show the peaches loaded at the cold storage facility. This document reads as follows:

SOUTH FL PRODUCE
PICK-TICKET

GREAT AMERICAN FARMS, INC.

PIC TIC NO. S8382

TRUCKER DATE 01/07/99
LOAD DATE 01/07/99 TIME 17:12:07

ORDER G33125
======

PO # 3018

quan	product	load
384	PEACHES 20'S	6875 169 / 6922 / 215

comments/instructions

EMPLOYEE SIGNATURE _____

As indicated above, the space for a signature was blank. Respondent pointed out this fact in its answering statement. In its statement in reply Complainant submitted a copy of the "Pick-Ticket" with a verified signature. Under the rubber stamped statement: "I solemnly swear or affirm that the information in this document is true and correct to the best of my knowledge," was an illegible signature. A notary's attestation was attached. The problem with this effort at supplying the lack of signature on the document is that there is nothing in the record to attest that the person who signed the document had any personal knowledge of what was sworn to. The signature is therefore worthless, and we still have a "Pick-Ticket" that, in the face of Respondent's objection, fails to furnish credible evidence of what was shipped.

Respondent's Jeff Coons engaged in the negotiations concerning the transaction with Complainant's sales manager William Abrams. Mr. Coons asserted during the informal stages of this proceeding that after arrival of the peaches Mr. Abrams informed Coons that "Cumbreexport is his label, but that is not what he put on my truck and therefore would not honor the inspection." Mr. Abrams did not deny this allegation, but did state that "[w]e . . . contend that the label on the product inspected in Chicago (Cumbreexport) was a label that was not handled by any sales agency exclusively, and possibly the Chicago receiver had received these peaches from another source." No brand was stated on the shipping documents, or on the invoice. We find that Complainant has not proven by a preponderance of the evidence that the peaches inspected in Chicago were not the peaches which it shipped.

It is clear from the record that the parties agreed, following the inspection on arrival, for the peaches to be handled on a consignment basis. We have found no basis for voiding the consignment agreement. However, the accounting submitted by Respondent from its Chicago customer, Dietz & Kolodenko Co., gives only an average price for the sales of the peaches. We commonly disallow such

accountings,[1] and use the market price at the time and place of arrival adjusted by the percentage of condition defects, in this case 20 percent.[2] The only comparable sales on the Chicago market for January 13, 1999, is of Chilean peaches, size 40's, at $22.00 per 2 layer container. Peaches are imported from Chile in one layer containers, and the containers are strapped together for marketing. So, a one layer carton in the 20's size range becomes a two layer carton in the 40's size range. This means that the peaches, if they had been in good condition on arrival, would have sold for $11.00 per one layer carton.

The accounting shows that the peaches were reworked with a loss of 60 cartons out of the original 384 (about 15 percent), and sold for an average of $11.089. The accounting deducts $84.95 for the federal inspection; $187.92 (324 at $.58) for cartage out; repacking at $1.00 per carton, or $324.00; disposal $20.00; and handling at $1.50, or $576.00. The net proceeds are reported at $2,400.13. Thus it can be seen that the reworking lost only about 15 percent, whereas the condition defects shown by the arrival inspection were 20 percent, and that the reworked peaches were sold at market price. Moreover, the repacking fee is reasonable, and the handling fee is about 15 percent, or less than the 20 percent commission which we commonly allow for consignments. It is clear that the accounting, though technically inadequate for not showing a breakdown of the resales with the dates of resales, reflects honest consignment handling of the peaches with good results. Accordingly, we will make an exception to our rule of not using accountings that show average resale prices, and use the accounting submitted by Respondent's customer. Respondent deducted $288.13, and remitted $2112.00 to Complainant. Complainant was aware when it agreed to the consignment that the actual sales would be accomplished by Respondent's customer, and presumably that Respondent would receive a fee as the original purchaser and intermediary. The $288.13 is not unreasonable under the circumstances. We find that there is nothing owing from Respondent to Complainant. The complaint should be dismissed.

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[1] *Supreme Berries, Inc. v. R. C. McEntire, Jr.*, 49 Agric. Dec. 1210 (1990).

[2] *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994); *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).

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

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FARIS FARMS v. LASSEN FARMS, d/b/a MIDSTATE CORPORATION.
PACA Docket No. R-99-0146.
Decision and Order filed June 28, 2000.

Jurisdiction - Covered transactions.
Jurisdiction - Interstate commerce.
Statute of Frauds - Applicability to reparation proceedings.
Evidence - Weight accorded to sworn statements.

Respondent contracted in a letter to Complainant to purchase and harvest tomatoes grown on two 75 acre fields during weeks ending August 30, and September 6, 1997. The contract contemplated that Respondent would contract with tomato processors to take tomatoes from the contracted acreage. With the consent of Complainant, Respondent began harvest of the first field early, on August 21, after a rain on August 19. After six days, when over 20 acres remained to be harvested from the first field, Respondent, citing the presence of excessive mold in the tomatoes, ceased to harvest the tomatoes under the contract, and offered to continue harvesting only if paid an hourly rate. Respondent also offered to allocate tomatoes which Complainant might harvest to its contracts with processors. Complainant continued the harvest with its own equipment but was not allocated sufficient loads to accommodate all the tomatoes which it could have harvested from the second field. Twenty acres were left unharvested in the first field due to excessive mold. It was found that Respondent breached the contract by ceasing to harvest Complainant's tomatoes under the contract, that Respondent did not harvest the first field in an expeditious manner, and that Respondent failed to allocate Complainant sufficient loads for processing from Complainant's harvest operation. Damages were awarded for these and other lesser breaches by Respondent.

It was also held that contracts for the rendering of a service such as harvesting are covered by the Act if they involved the sale of a perishable commodity, and that where tomatoes were sold for processing within the state where grown, and Complainant offered testmony which was unrebutted that the processed tomatoes were sold in interstate commerce, the Secretary had jurisdiction over the transactions. In addition it was held that the statute of frauds embodied in the Uniform Commercial Code is procedural and not substantive, and that, therefore, oral modifications of the written contract were a matter for proof in a reparation proceeding. In regard to relevant evidence offered by the parties under the documentary procedure it was stated that statements of fact sworn to by a party involved in relevant transactions could be accorded less weight when the statements were a part of legal argument obviously constructed by an attorney who was the first person to sign the statement.

George S. Whitten, Presiding Officer.
Steve Lewis, Sacramento, California, for Complainant.
Patrick Markham, Sacramento, California, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). A timely complaint was filed in which Complainant sought an award of reparation in the amount of $52,532.00, or "such amount of damages as it may be entitled to receive according to the facts established," in connection with transactions in interstate commerce involving tomatoes. Later, in its opening statement, Complainant increased its damages claim to $73,551.00.

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

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the documentary procedure provided in 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 sworn statements. Complainant filed an opening statement. Respondent did not file a proper answering statement. Respondent filed a brief.

Prior to the filing of its brief Respondent moved to dismiss the complaint because the complaint alleges a services contract for the harvesting of produce over which the Secretary has no jurisdiction. The Presiding Officer, however, refused to dismiss, pointing out that the complaint alleges that: "complainant, by written contract dated March 7, 1997 (and modified), sold to the respondent all tomatoes to be grown by complainant on 153 acres, ..." The Presiding Officer further stated:

> The sale of tomatoes is clearly a transaction that is covered by the Act. See John F. Areklet v. Stokely USA, Inc., 55 Agric. Dec. 1387 (1996); and R.B. Todd Prod. Co. v. Frostreat Frozen Foods, 22 Agric. Dec. 917 (1963). The fact that in conjunction with the sale Respondent undertook to perform other duties such as the harvesting of the tomatoes for a fee, does not divest the Secretary of jurisdiction. Compare Frank Kenworthy Co. v. D.L. Piazza Co., 16 Agric. Dec. 844 (1957); Alexis Relias v. Kenworthy, 16 Agric. Dec.

590 (1957) and Sawyer v. Rothstein & Sons, 15 Agric. Dec. 693 (1956). The motion to dismiss is denied.

The actual monetary arrangement of the contract is such as to enhance Respondent's contention that the contract was a service contract having only to do with the harvesting of the tomatoes. However, the form of the contract is not without practical significance and effect. The tomatoes were in fact sold by Complainant to Respondent, and in turn by Respondent to the processors. This involved a transfer of title with concomitant legal and practical results. The responsibilities resulting from this transfer of title were real, not fictional. If all that was intended was a contract for the service of harvesting the tomatoes the contract could have easily been drawn so as to achieve that object alone. We concur in the Presiding Officer's ruling.

Findings of Fact

1. Complainant is a partnership composed of Robert Faris, Sr., Robert Faris, Jr., and James Jobe Faris, doing business as Faris Farms, whose address is Attn: Robert Faris, P. O. Box 8449, Woodland, California 95776.

2. Respondent is a corporation, Lassen Farms, doing business as Midstate Corporation, a Nevada corporation, whose address is 2756 N. Green Valley Parkway, #193, Henderson, Nevada 89014. At the time of the transactions involved herein Respondent was not licensed under the Act, but was operating subject to license.

3. On or about March 7, 1997, Respondent's John Lear, under the letterhead of Lassen Farms, 2756 N. Green Valley Pkwy., #193, Henderson, Nevada 89014, wrote to Complainant's Robert Faris as follows:

> The following letter will act as a crop assignment between Lassen Farms above named address and Faris Farms of Woodland, California. The named principals involved are John M. Lear, owner and operator of Lassen Farms and Robert Faris who acts in the same capacity for Faris Farms.
>
> It is hereby agreed that Faris Farms will grow approximately 153 acres of processing or "cannery tomatoes" for Lassen Farms. The tomatoes will be delivered during week endings 8/30/97 and 9/6/97. Lassen agrees to purchase and deliver all tomatoes grown off designated acreage with Faris Farms. Designated food processors and contract numbers will be given at a later date.

> Lassen Farms agrees to harvest said acreage for a fee of $11.00 per paid ton of tomatoes with all remaining proceeds being assigned to Faris Farms or designated bank entity. Time is of the essence regarding food processor payments. Lassen Farms agrees to pay Faris Farms or designated bank on same day it receives named funds minus the $11.00 per ton harvest cost.

4. Complainant made staggered plantings of two approximately 75 acre fields. During the summer of 1997, Respondent informed Complainant that the harvesting was estimated to be accomplished in two three day shifts, or a total of six days for the entire ranch.

5. On the evening of August 19, 1997, it rained in the growing area of Complainant's two fields. Respondent began the harvesting of Complainant's crop from the first field on August 21, 1997. On August 26, 1997, Respondent wrote the following letter to Complainant:

> As is customary in the business I must change to an hourly rate of $350.00 per hour due to the mold crisis. I will begin that rate on day shift Wednesday August 27th. Tonight August 26th half of my picked loads met state requirements of 8% mold tolerance, however starting tomorrow they will not meet processor requirement of 5% mold maximum tolerance. As we discussed I will provide you starting August 27th with loads to pick on your own rather than pay me the $350.00 hourly rate. Starting day shift August 27th I will work for you on an hourly basis and at your instruction. I will not take responsibility as of August 27th for any processor mold rejects however I will work with you in any way I can to salvage the field, by contracting other processors, and as stated previously giving you loads on a daily basis to pick with your own machine.

6. On August 27, 1997, Respondent ceased harvesting Complainant's tomatoes after harvesting nine loads. The total number of loads harvested by Respondent during the time between beginning the harvest on August 21, and ending harvest on August 27, was ninety-seven loads, and all were harvested from the first field. The number of loads harvested by Respondent on a daily basis were as follows:

Date	Loads
21st	12
22nd	14
23rd	14
24th	5
25th	25
26th	18
27th	9

7. Complainant commenced harvesting the remainder of the first field on August 27, 1997, but did not harvest the last 20 acres from the first field because of excessive mold in the tomatoes. Complainant harvested tomatoes from the first field through the 27th, and continued harvesting the tomatoes from the remaining field through September 11, 1997. Respondent and Complainant together harvested a total of 180 loads from Complainant's two fields. The daily number of loads harvested by Complainant were as follows:

Date	Loads	Date	Loads
27th	6 (from first field)	4th	7
28th	4	5th	6
29th	4	6th	5
30th	5	7th	7
31st	5	8th	4
1st	7	9th	4
2nd	6	10th	4
3rd	7	11th	2

8. All of the 180 loads were weighed and inspected before being delivered to the processor. Out of the 180 harvested loads a total of four loads were rejected and not processed. Two of these loads, rejected and not processed, were rejected by the California Processing Tomato Advisory Board for excessive mold. These loads were as follows:

Date	Time	Certificate No.	Pounds	Mold Percentage
8/25	11:36	137940-01	52,110	10.5
8/26	9:03	130034-01	48,510	11.5

The remaining two loads, rejected and not processed, were termed "PROCESSOR REJECT" on the inspection certificates. These loads were as follows:

Date	Time	Certificate No.	Pounds	Mold Percentage
8/31	14:19	138641-01	49,570	7.5
9/09	12:51	140059-01	51,770	6.5

Four additional loads were classified as "PROCESSOR REJECT" on the inspection certificates, but were in fact accepted, processed and paid for by the processor. These loads were as follows:

Date	Time	Certificate No.	Pounds	Mold Percentage
8/27	14:49	138151-01	53,320	5.5
8/27	08:40	138119-01	46,070	5.5
9/02	12:50	138920-01	50,270	5.5
9/09	11:11	140044-01	50,130	5.5

9. Twenty-one additional loads were noted on the inspection certificates to have in excess of 5 percent mold, but were not noted as being rejected, and were in fact processed and paid for by the processor. Eleven of these loads were inspected on August 25, 1997. Of these August 25, loads one had 5.5 percent mold, seven had 6 or 6.5 percent mold, two had 7.5 percent mold, and one had 8 percent mold. Three of the twenty-one were inspected on August 26, 1997. Two of these had 7.5 percent mold, and one had 8 percent mold. Seven of the twenty-one were inspected on August 27, 1997. Four of these had 6 or 6.5 percent mold, two had 7.5 percent mold, and one had 8 percent mold.

10. The average sale price for the tomatoes harvested from Complainant's acreage was $52.65 per ton. On September 30, 1997, Respondent issued a final accounting to Complainant which stated as follows:

		Harvest Deduction Itemized	
Lassen Harvest	1671.26 Pay Tons at $11.00		18,383.86
Lassen Harvest	726.29 Pay Tons at $13.00		9,441.77
Faris Harvest	1834.93 Pay Tons		
	4232.48 Total Pay Tons		

Previous Payouts

			176	
W/E	8/23	36,000	Loads Gross Dollars	222,820.03
W/E	8/30	73,000	Total Deductions	31,496.48
W/E	9/6	50,000	Previous Payments	159,200.00
		159,200	Balance Due	$ 32,123.55

Deductions -		
.80% of Lassen 3	Curly Top	584.90
.80% of " "	Weigh Station Fees	60.00
" " " "	Inspect. Fees	686.02
H Rejects °126.00 (Reject Hauling)	Trucking Charges	505.00
Lassen Harvest		27825.63
Lassen Management $1.00 per pay ton		1834.93
Total Deduction		31,496.49

11. The informal complaint was filed on May 13, 1998, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant alleges breach of contract by Respondent, and seeks, in the formal complaint, to recover damages in the amount of $52,532.00. In its opening statement Complainant increased the damages request to $73,551.00.

Complainant asserts that the original contract, represented by the letter of March 7, 1997, quoted in Finding of Fact 3, was modified orally to provide for the harvesting and delivery of the first planting to commence on August 17, 1997, instead of the week ending August 30, 1997. Respondent's commencement of harvest on August 21, 1997, instead of on August 17, 1997, is one of the breaches of contract alleged by Complainant. Respondent denied in its answer that there was a modification of the contract. Complainant also alleges that Respondent did not harvest the first field in an expeditious manner, and that if it had the twenty acres of tomatoes that were left in the field because of mold could have been harvested. Respondent's refusal to continue the harvest after August 27, 1997, for the agreed $11.00 per paid ton, and the failure to harvest the second field under those terms is alleged as another breach of contract. Complainant also asserts that Respondent did not allow the delivery from the second field of all the tomatoes that Complainant could have harvested on its own.

Respondent, in its answer, denied generally the allegations of the complaint without any elaboration except to assert that the terms of the contract alleged by Complainant were incorrect to the extent that they differed from the written agreement. Also, Respondent set up six affirmative defenses. The first of these was that the Secretary lacks jurisdiction because the subject matter of the complaint concerns a service contract. This was dealt with in the preliminary statement.

Respondent's second defense alleges that the Secretary lacks jurisdiction because Complainant was not doing business in interstate commerce. However, the Act specifically includes within the definition of interstate commerce "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."[1] Complainant's partner, Robert Faris, alleged in the sworn complaint that he was informed and believed that the processed tomatoes were delivered and sold in interstate commerce. Respondent offered no rebuttal evidence that specifically addressed this testimony. We conclude that the subject matter of the complaint was in interstate commerce, and that the Secretary has jurisdiction over this matter for that reason.

The third affirmative defense asserts that "Complainant's alleged loss or damages, if any, was increased by Complainant's failure to use reasonable diligence to mitigate the same." The fourth defense alleges, in essence, that Complainant failed and refused to have sufficient quality tomatoes available pursuant to the harvest schedule. These allegations will be dealt with subsequently.

Respondent's fifth and sixth affirmative defenses relate to the alleged modification of the contract. Respondent states that the allegation of a modification is a misrepresentation directed toward this Department, and is therefore fraudulent, and also asserts that since it is alleged to be an oral modification of a written contract it is void and unenforceable under the statute of frauds.

It is not necessary for us to discuss whether the alleged modification of the written contract falls under one of the exceptions to the statute of frauds because the statute of frauds as embodied in the Uniform Commercial Code, sections 2-201 and 2-209(3) is not applicable to reparation proceedings under the Perishable Agricultural Commodities Act. In *Hegel Branch v. Mission Shippers*, 35 Agric. Dec. 726 (1976), we stated our policy relative to the applicability of State statutes of frauds to reparation proceedings:

> In matters involving the statute of frauds under the Perishable Agricultural Commodities Act, the Department has long followed the guidelines laid down in *Joseph Rothenberg v. A. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950), 9 A. D. 1272. In that case the court made it clear that a federal district court hearing a case on appeal from the Secretary under the Act does not sit as another court of the state and is not governed by the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Such a case is rather "to be determined under the same rules of substantive and procedural law as were involved in the Secretary's proceedings." (*Rothenberg*, supra). By the same token, *Rothenberg* also makes it clear that where the Act or regulations of the Secretary do not provide a solution to a problem of the validity of a contract, then state law is applicable. In the *Rothenberg* case the Court of

[1] 7 U.S.C. § 499a(b)(8).

> Appeals, recognizing that Pennsylvania law was applicable, determined that since the statute of frauds of Pennsylvania was procedural rather than substantive it would not be applicable in a reparation proceeding. The court reasoned that "the federal act intends to grant a new remedy which is not dependent upon but is in addition to such other remedies as may be available to the parties at common law or by the statute of any state", and that where the statute of frauds of a particular state only precluded *enforcement* of an oral contract *as a remedy*, but left it otherwise valid, though unenforceable, such a procedural statute would have no effect upon a proceeding before the Secretary or a subsequent appeal therefrom.

In *Donald Woods v. Conogra Inc., and Ctc North America Inc., d/b/a Agrafresh of California*, 50 Agric. Dec. 1018 (1991), where the California statute of frauds (drawn from UCC § 2-201) was in issue, we found that the statute relates to the enforceability of an existent contract, and that *Rothenberg* applied. We stated:

> We feel that the substantive - procedural distinction as drawn in *Rothenberg* is valid and should remain applicable in reparation proceedings before the Secretary. . . . we feel warranted in holding that in future cases the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable should be upon the party claiming the benefit of the statute.

The question whether there was in fact an oral modification of the contract calling for the harvest to begin on August 17, 1997, is a matter of proof. While the UCC provides that no consideration is necessary for a modification of a contract to be binding, this does not mean that a unilateral modification can take place. There must be at least tacit assent by both parties. The evidence for the existence of a modification of the contract to call for harvest to begin on August 17, 1997, is the statement in the formal complaint, sworn to by Robert Faris, that such a modification of the original contract was made. There is the additional fact that the opening statement, also sworn to by Mr. Faris, states that the contract was modified. However, in the latter statement, instead of saying that the modification called for harvest to commence on August 17, it is stated that "respondent had modified the parties' contract agreeing to commence the harvest of the first planting a week early." This would mean only that the tomatoes would be delivered during the week ending 8/23/97 instead of 8/30/97, and does not get us with any certainty to a commitment to the commencement of harvest on 8/17/97. Complainant later states

in the opening statement that "complainant terminated irrigation and prepared for harvest to commence the week on or about August 17, 1997, which is the week ending August 23, 1997." If anything, these statements in the Opening Statement weaken the assertion in the Complaint, and cause us to wonder if August 17, was a date certain on which harvest was to commence, or merely, being the first day of the preceding week, inferentially the first day on which harvest might commence. Respondent offered nothing by way of rebuttal evidence to the opening statement, and the only rebuttal evidence to the statement in the complaint are the general denials in the answer quoted earlier.

The problem with the sworn statements contained in the Opening Statement, and in the Answer, is that both these documents are primarily pleadings or argument drafted by the parties' respective attorneys. It is difficult, no doubt, for some to conceive of anyone preferring the simple and clear statement of a lawyer's client to the lawyer's own beautiful, and eloquently reasoned prose. However, in most cases the facts established by the evidence, rather than legal argument, are the most important elements in arriving at a decision. The trier of the facts in a reparation shortened procedure case is dependant upon what is in the pleadings if they are sworn to, is in evidence in the Report of Investigation, and, often most importantly, upon the verified statements of witnesses. When assaying the credibility of evidentiary statements offered in the proceeding something analogous to what goes on in the mind of a jury or judge listening to oral testimony usually takes place. Subtleties exist in written statements that, in the absence of clearer indicators, must be taken into account. Thus, when an evidentiary statement is apparently written by an attorney, when that attorney's signature is the first signature appended to the statement, and when it contains closely reasoned legal arguments, one naturally thinks of the statement as belonging to, and proceeding from, the attorney. The fact that it also contains pertinent statements of fact, and has attached a verification and signature of a witness, certainly makes it a verified statement under the Rules of Practice. But is such a statement as credible as a simple and direct statement of fact from the witness? The situation is somewhat analogous to that of a witness who, on direct, is closely coached by his or her attorney, versus one who is allowed to tell his or her own story without undue assistance from counsel.

We have a very general assertion of a modification. This general assertion is later weakened by the Opening Statement. The general assertion is confronted by

a very general denial.[2] Under the circumstances we think the generality of the denial is the more excusable. We conclude that Complainant has failed to prove by a preponderance of the evidence that the contract was modified to call for harvest to commence on August 17, 1997.

Harvest did in fact begin on August 21, 1997. Since we surely do not go far astray in assuming that Complainant did not try to prevent this early harvest date, the contract was certainly modified to that extent.[3] It is also clear that Respondent refused to continue the harvest under the terms originally agreed to, and ceased to harvest Complainant's crops on August 27, 1997. The question that confronts us now is whether Respondent's refusal to continue the harvest under the original terms was a breach.

At first blush Respondent's termination of the harvest would certainly appear to be a breach. However, Respondent's John Lear, in the skeleton statement that constitutes Respondent's answer, asserts that Complainant "failed and refused to have sufficient quality tomatoes available pursuant to the harvest schedule . . . ." Taking this assertion along with Lear's letter of August 26th, we infer the reference to be to the allegation of excessive mold in the tomatoes. There was no contract provision in regard to mold levels, or as to what effect, if any, such levels would have upon the duty to harvest. However, there is no necessity that there have been such a provision. Contracts are always governed by the rule of reason, and we have no problem in making the assumption that the contract contemplated only the harvest of tomatoes that were suitable for processing. Indeed, any other contemplation would have to be spelled out in very explicit terms to be given effect. There certainly came a point at which the first field could no longer be harvested because of mold, because Complainant tells us that 20 acres of the first field was left unharvested because of mold.[4] However, Respondent has not shown that the mold problem necessarily prevented its harvest of the entire field, and it is certain

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[2]The denial does go beyond the generality of the denial contained in paragraph 2 of the answer, to wit: "Respondent denies generally and specifically Paragraphs 4, 6, 7, 8, 9, and 10 of the Verified Complaint." Respondent asserts in the fifth affirmative defense that "the allegation that there was a modification to the harvest plan and contract is a misrepresentation . . . and therefore fraudulent." Here, at least, is a little heat to go along with the general denial, though we do not mean to imply that we accede to the accusation of intentional misrepresentation or fraud.

[3]Respondent, in its brief, implies that there was no *terminus a quo* to the contract. However, the initial letter states that the tomatoes "will be delivered during the week endings 8/30/97 and 9/6/97." This indicates that initially a period of no more than a week was contemplated for the harvest of each field.

[4]Respondent agrees with this figure in its brief.

that the presence of mold furnished no justification for Respondent's failure to harvest the second field. The inspections of harvested tomatoes show that there was an increase in the mold following the commencement of the first harvest. But the record fails to furnish support for Respondent's termination of the harvest contract. Respondent appears to have been searching for justification for a cessation of its harvesting responsibilities. In the letter of August 26, Respondent stated: "Tonight August 26th half of my picked loads met state requirements of 8% mold tolerance, however starting tomorrow they will not meet processor requirement of 5% mold maximum tolerance." In fact, the whole day of August 26th every load but one met the alleged 8% mold tolerance, and the one that did not meet it was inspected on the morning of August 26th, not the night of August 26th. So the statement that "Tonight August 26th half my picked loads met state requirements of 8% mold tolerance . . ." was certainly true. But the implication that half did not was not true. The projection that "starting tomorrow they will not meet processor requirement of 5% mold maximum tolerance," asks for concurrence in an unproved assertion, namely that the processors were enforcing a 5% maximum mold tolerance.[5] In fact the record shows that such a tolerance, if it existed, only excluded two of the 180 loads

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[5]Copies of processor contracts with Respondent were attached to Complainant's Opening Statement. These contracts do reference mold standards. The contract with Toma-Tek, Inc. states in part:

> E. **Inspection/Rejection/Tomatoes "Suitable for Canning"**: Delivery of tomatoes shall not be complete until inspected and passed by the State of California Tomato Inspection Service and inspected and accepted by Company. . . .
> In addition to the above, no tomato shall be deemed Suitable for Canning if:
> . . .
> 2. In excess of ten percent of the weight of the tomato cannot be used for canning purposes, due to the presence of mold or rot.
> . . .
> In addition to the above, any load of tomatoes offered for delivery hereunder may be rejected and turned back to the Seller if:
> . . .
> g. Loads contain in excess of 5% mold. This standard may be reduced as necessary to enable Company to pack an acceptable finished product, but Company will not reduce the reject standards below 5% capriciously.

The 5% standard is thus seen to be quite flexible. A load "may be rejected" for exceeding it, and it can be adjusted downward so as to make it more strict, but not capriciously. The record herein shows that in the vast majority of instances the processors were not enforcing the standard. To be sure one can envision Respondent having offered evidence to show that it was informed by the processors that strict enforcement was contemplated after the 26th. However, Respondent offered no such evidence, and, in contrast, the record shows that the processors accepted loads on the 27th that far exceeded the 5% standard.

that were harvested from processing. As noted in the findings of fact only 28 loads of the 180 harvested had in excess of 5 percent mold. Two of these were excluded from processing by the State Board on August 25 and 26, and two were excluded as processor rejects on August 31, and September 9. Four were classified on the inspections as processor rejects on August 27, September 2, and September 9, but were in fact processed and paid for. The remaining 21 loads that exceeded 5 percent mold were not rejected by the State Board, or noted by the inspections as processor rejects, or refused in any way by a processor. We conclude that Respondent has failed to show any justification for its cessation of harvest, and that it breached the contract by such cessation.

Complainant also alleges that Respondent breached the contract by failing to harvest the field in a timely manner, and that such failure caused the last twenty acres to fail to be harvested before mold became excessive. Complainant sought to show from Respondent's contracts with other growers that Respondent over-booked the total acreage for which it was responsible, and consequently neglected Complainant's field. However, all this evidence proves nothing because it tells us nothing about Respondent's capacity to harvest. Respondent could have booked one hundred times what Complainant shows was booked, and still have met every harvest deadline for all the record reveals. A more fruitful enquiry is whether Respondent performed the harvest with reasonable dispatch in the light of what is known about what was contemplated about how long the harvest should take. The original contract contemplated that the two fields would be harvested in maximum periods of one week. We have found as a matter of fact that Respondent estimated prior to harvest that the entire harvest would be accomplished in two three day periods. Moreover, Respondent should have performed expeditiously in light of what was known about the potential for a mold problem following the rain on the evening of the August 19th. Respondent had the capacity to complete the whole of the first field within a three day period, though there was no firm contract to do so. There was an implicit commitment to complete it within one week. On one of the harvest days Respondent harvested 25 loads from the first field. However, the average harvested was only 14, and on one day the total fell to 5. If Respondent had averaged 20 loads a day, which it clearly was capable of doing, it would have harvested all of the first field within the first week. Respondent was engaged in the harvest of the first field for about six and one half days, but still left in excess of 20 acres unharvested when it ceased harvesting the tomatoes. We conclude that Respondent did not harvest the first field with reasonable dispatch, and that this failure was a breach of the contract between the parties.

Complainant next alleges that Respondent not only failed to harvest the second field without any justification, but also failed to make a sufficient number of loads

available to Complainant for delivery to processors.[6] Proof of this allegation, like part of Complainant's proof of damages, depends upon Complainant's estimate of the amount that should be harvested.[7] This estimate is bolstered by Complainant's submission of statistics showing that the average 1997 tomato production in the county where the two fields were situated was 33.61 tons per acre. In addition Complainant's Robert Faris asserts in the opening statement that as to the first field the first four days of harvest produced approximately 1,125 tons of tomatoes from 28 acres, or more than 40 tons per acre. Moreover the parties agree that 55 acres from the first field were harvested, and the processor records show that 103[8] loads were harvested from those 55 acres. At an average of 23.28 tons per paid load (which the record shows to be an accurate figure) the 55 acres produced 2,397.8 tons or 43.59 paid tons per acre. Complainant states in the Opening Statement that the production from the second planting was not as great as from the first, and was probably closer to the average production for Yolo county where the fields were located. Using that figure (33.61 tons per acre) the second field would have yielded approximately 2,520.75 tons. Complainant's data and estimates supplied in the Opening Statement were not rebutted by Respondent, and we accept them as a reasonable bases for the determination that Respondent failed to make sufficient loads available for the full harvest of the second field, and for the assessment of damages. Respondent's defense that Complainant failed to mitigate damages is also answered by this conclusion.

We now arrive at the problem of assessing damages resulting from Respondent's breaches of contract. If Respondent had harvested the first field with reasonable dispatch the 20 acres that remained would have been harvested. Although we have found that the 55 acres harvested from the first field yielded 43.59 tons per acre,

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[6]This is a reference to the undertaking in Respondent's letter of August 26th whereby, in default of harvesting the field as it contracted to do, Respondent undertook to "provide you starting August 27th with loads to pick on your own rather than pay me the $350.00 hourly rate." This alludes to the fact that Respondent, not Complainant, possessed the contracts with the processors whereby the processors were under obligation to take and process a certain quantity of acceptable loads.

[7]Estimations of damages by an interested party have been accorded credibility in similar circumstances. See *Adolph O. Anderson v. Big Stone Canning Company*, 33 Agric. Dec. 961 (1974). See also *Farmers Sales, Inc. v. Tomatoes, Inc.*, 32 Agric. Dec. 1889 (1973).

[8]Complainant used 97 loads, which was the number harvested by Respondent before it ceased harvesting. Apparently Complainant forgot to include the 6 loads harvested from the first field by Complainant on the 27th after Respondent quit. The use of 97 loads from 55 acres yields approximately 2,168 tons, or 39.4 tons per acre at an average of 25 tons per load, which is the average used by Complainant.

Complainant has computed damages on the basis of the lower figure of 40 tons per acre, and we will also use the lower figure. The 20 remaining acres would have yielded a additional 800 paid tons. After deducting the $11.00 per ton harvesting fee these 800 tons would be worth a net amount of $41.65 per ton, or $33,320.00. We conclude that Respondent owes Complainant this amount for the 20 acres not harvested from the first field.

The second field actually yielded 1,834.74 paid tons of tomatoes. Complainant stated that the production from the second planting was not as great as from the first, and was probably closer to the average production for Yolo county where the fields were located. Complainant rounded off the amount that it claimed should have been produced from the second field down to 2,500 tons, and we will use this figure. The harvest from the second field should, therefore, have yielded an additional 665.26 tons. Using the net figure of $41.65 per ton the value of these additional tons would have been $27,708.08. We conclude that Respondent owes Complainant this amount for the tomatoes not harvested from the second field.

In addition to the above, Complainant asserted that Respondent overcharged for 726.29 tons of tomatoes which it harvested. The accounting reveals Respondent charged $13.00 per ton instead of the contracted $11.00 per ton. Complainant should be awarded the difference between these two amounts, or $1,425.28.

Complainant also claims for the harvest expenses it incurred in harvesting the tomatoes after Respondent ceased harvesting the tomatoes. Complainant detailed these expenses and provided supporting documentation. The expenses were as follows:

Harvest equipment	$16,905.00
Wages	9,390.00
Worker's compensation, FICA, unemployment ins. etc,	1,883.00
Compensation for Robert Faris, Sr.	1,500.00
	$29,678.00

Of course this amount is recoverable only to the extent that it exceeds the $11.00 per ton which it would have cost Complainant for the harvest under the contract. The accounting shows that 1,834.93 paid tons were harvested by Complainant. This should have cost $20,184.23 in harvest fees. Complainant is entitled to the difference between its harvest costs of $29,678.00 and this amount, or $9,493.77.

An additional item is deducted on Respondent's accounting that Complainant has complained of. This is the $1.00 per ton management fee in regard to the tomatoes harvested by Complainant, or $1,834.93. Respondent has not shown any

justification for this charge, and we conclude that Complainant should be reimbursed for this amount.

The total which we have found due from Respondent to Complainant is $73,782.06. Respondent's failure to pay Complainant this amount 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.[9] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[10] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(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, $73,782.06, with interest thereon at the rate of 10% per annum from October 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[9] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[10] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Stay Order as to JSG Trading Corp. filed January 27, 2000.

Andrew Y. Stanton, for Complainant.
Richard M. Adler, Washington, DC, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 29, 1999, I issued a Decision and Order on Remand as to JSG Trading Corp.: (1) concluding that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license. *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. ___, slip op. at 78 (Nov. 29, 1999).

On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion for a Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion for Stay Order] requesting a stay of the November 29, 1999, Order revoking Respondent's PACA license, pending the outcome of proceedings for judicial review. On January 24, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Motion for Stay Order.

Complainant states that on January 13, 2000, Respondent filed a Petition for Review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. ___ (Nov. 29, 1999), with the United States Court of Appeals for the District of Columbia Circuit and that Complainant's "counsel has been informed by [c]ounsel for JSG that it also desires a stay of the November 29, 1999, Order" (Motion for Stay Order). Failure to issue a stay order may result in revocation of Respondent's PACA license during proceedings for judicial review.

Therefore, in accordance with 5 U.S.C. § 705, I find justice requires postponement of the effective date of the November 29, 1999, Order revoking Respondent's PACA license.

Complainant's Motion for Stay Order is granted. The Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. ___ (Nov. 29, 1999), is hereby stayed pending the outcome of proceedings for judicial review.

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

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In re: CHARLES R. BROZ.
PACA-APP Docket No. 00-0001.
Dismissal of Petition for Review filed February 2, 2000.

Andrew Y. Stanton, for Respondent.
Bart M. Botta, Newport Beach, CA, for Petitioner.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

For reasons set forth in "Notice of Withdrawal of Responsibly Connected Determination and Motion for Dismissal of Petition for Review," the Petition for Review is Dismissed.

Copies hereof shall be served upon the parties.

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In re: ALLRED'S PRODUCE.
PACA Docket No. D-96-0531.
Order Lifting Stay filed March 13, 2000.

Jane McCavitt, for Complainant.
Kelly E. DeBerry, Fort Worth, Texas, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 5, 1997, I issued a Decision and Order concluding that Allred's Produce [hereinafter Respondent], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and revoking Respondent's PACA license. *In re Allred's Produce*, 56 Agric. Dec. 1884, 1892, 1919 (1997). On

January 6, 1998, Respondent filed a petition for reconsideration, which I denied. *In re Allred's Produce*, 57 Agric. Dec. 799 (1998) (Order Denying Pet. for Recons.).

On April 2, 1998, Respondent requested a stay of the order in *In re Allred's Produce*, 56 Agric. Dec. 1884 (1997), pending the outcome of proceedings for judicial review, and on April 3, 1998, I granted Respondent's request for a stay. *In re Allred's Produce*, 57 Agric. Dec. 802 (1998) (Stay Order).

Respondent filed an appeal with the United States Court of Appeals for the Fifth Circuit, which affirmed the December 5, 1997, Decision and Order. *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743 (5th Cir. 1999). Subsequently, Respondent filed a petition for writ of certiorari, which the Supreme Court of the United States denied. *Allred's Produce v. United States Dep't of Agric.*, 120 S.Ct. 530-31 (1999).

On January 31, 2000, the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order, which the Hearing Clerk served on Respondent on February 7, 2000. Respondent failed to file a response to Complainant's Motion to Lift Stay Order, and on March 10, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

Proceedings for judicial review are concluded. Therefore, Complainant's Motion to Lift Stay Order is granted; the Stay Order issued on April 3, 1998, *In re Allred's Produce*, 57 Agric. Dec. 802 (1998) (Stay Order), is lifted; and the Order issued in *In re Allred's Produce,* 56 Agric. Dec. 1884 (1997), is effective, as follows:

Order

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

In re: MICHAEL J. MENDENHALL.
PACA-APP Docket No. 97-0008.
Order Lifting Stay filed April 27, 2000.

Eric Paul, for Respondent.
Stephen P. McCarron, Washington, DC, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On November 10, 1998, I issued a Decision and Order: (1) concluding that Michael J. Mendenhall [hereinafter Petitioner] was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)). *In re Michael J. Mendenhall*, 57 Agric. Dec. 1607 (1998).

On January 28, 1999, the Acting Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service [hereinafter Respondent], filed Respondent's Request for a Stay Order, requesting a stay of the November 10, 1998, Order pending the outcome of proceedings for judicial review, which I granted. *In re Michael J. Mendenhall*, 58 Agric. Dec. 681 (1999) (Stay Order).

Petitioner filed a petition for review with the United States Court of Appeals for the Ninth Circuit on January 7, 1999. Subsequently, Petitioner filed a motion to withdraw his petition for review. Based upon Petitioner's motion to withdraw his petition for review, the United States Court of Appeals for the Ninth Circuit dismissed Petitioner's petition for review. *Mendenhall v. United States Dep't of Agric.*, No. 99-70040 (9th Cir. March 20, 2000) (Order).

On March 28, 2000, Respondent filed Respondent's Request to Lift Stay Order. On March 29, 2000, the Hearing Clerk served Petitioner with Respondent's Request to Lift Stay Order. Petitioner failed to file a response to Respondent's Request to Lift Stay Order within 20 days after service as required by section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)). On April 27, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Request to Lift Stay Order.

Proceedings for judicial review are concluded. Therefore, Respondent's Request to Lift Stay Order is granted; the Stay Order issued on January 28, 1999, *In re Michael J. Mendenhall*, 58 Agric. Dec. 681 (1999) (Stay Order), is lifted; and the Order issued in *In re Michael J. Mendenhall*, 57 Agric. Dec. 1607 (1998), is effective, as follows:

Order

Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the PACA. Accordingly, Petitioner Michael J. Mendenhall is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 65 days after service on Petitioner.

_____

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: G&G SALES CORPORATION AND LOREN GIRSBERGER.
PACA Docket No. D-99-0009.
Decision and Order filed December 13, 1999.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA), instituted by a complaint filed on May 5, 1999, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that Respondents willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when Respondent G&G Sales Corporation, under the direction, management and control of Respondent Loren Girsberger, during the period August 1997 through March 1998, failed to make full payment promptly to 15 sellers of the agreed purchase prices in the total amount of $598,293.86 for 200 lots of perishable agricultural commodities which the Respondent G&G Sales Corporation purchased, received and accepted in interstate commerce.

The complaint requested that the Administrative Law Judge issue a finding that Respondents willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order such finding published.

A copy of the complaint was served upon each Respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. G&G Sales Corporation (hereinafter, sometimes referred to as the "corporate Respondent"), is a corporation organized and existing under the laws of the State of Minnesota. Its business mailing address is 7317 Cahill Road, Suite 217, Edina,

Minnesota 55439. Upon information and belief, the corporate Respondent ceased conducting business in February 1998.

2. At all times material herein, the corporate Respondent was licensed under the PACA. License number 910777 was issued to the corporate Respondent on March 13, 1991. This license terminated on March 13, 1998, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), upon the corporate Respondent's failure to file the required annual renewal fee.

3. Loren Girsberger (hereinafter, sometimes referred to as the "individual Respondent"), is an individual whose address is 6625 Gleason Road, Edina, Minnesota 55439. The individual Respondent is the husband of Stella W. Girsberger who, at all times material herein, was the president, a director and 90 percent shareholder of the corporate Respondent. At all times material herein, the individual Respondent directed, managed and controlled the corporate Respondent.

4. As more fully set forth in paragraphs III and IV of the complaint, the corporate Respondent was the *alter ego* of the individual Respondent.

5. As more fully set forth in paragraph III of the complaint, the corporate Respondent, under the direction, management and control of the individual Respondent, during the period August 1997 through March 1998, failed to make full payment promptly to 15 sellers of the agreed purchase prices in the total amount of $598,293.86 for 200 lots of perishable agricultural commodities which the corporate Respondent purchased, received and accepted in interstate commerce.

Conclusions

Respondents' actions, as set forth in Finding of Fact 5 above, were in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondents G&G Sales Corporation and Loren Girsberger are hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

This Order shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service

hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 22, 2000.-Editor]

In re: SAN MARTIN PRODUCE & BROKERAGE, INC.
PACA Docket No. D-99-0006.
Decision and Order filed April 19, 2000.

False representations.

Respondent paid a supplier less money than the amount agreed upon, by check. After the check was negotiated and returned to Respondent by its bank, Respondent's president added the words "Final Payment", to the check in order to support his contention that the supplier accepted the check as full and final payment of the amount owed. In an USDA reparation proceeding, on four separate occasions, Respondent misrepresented in writing that the words "Final Payment", were on the check at the time that the supplier negotiated the check. Judge Bernstein concluded that by this conduct, Respondent violated Section 2(4) of the PACA by making false and misleading statements for a fraudulent purpose.

Eric Paul and Deborah Ben-David, for Complainant.
Robert B. Mitchell, Morgan Hill, California, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*., "the PACA" or "the Act") instituted by a Complaint filed on March 25, 1999, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. Complainant alleged that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making, for a fraudulent purpose, four false and misleading statements between March 14, 1995 and February 12, 1996, in connection with a reparation proceeding before the Secretary of Agriculture that concerned a shipment of tomatoes purchased on or about December 14, 1994, in the course of interstate commerce. Respondent submitted an Answer on April 13, 1999, in which it denied violating the act.

A hearing was held before me in San Francisco, California, on September 16, 1999. Complainant was represented by Eric Paul and Deborah Ben-David of the

Office of the General Counsel, USDA. Respondent was represented by Robert B. Mitchell. Complainant presented four witnesses and Respondent presented two witnesses. Complainant's Exhibits (CX) 1 through 10 were admitted. Respondent offered no exhibits. The abbreviation" Tr." refers to the hearing transcript. Following the hearing, each party presented proposed findings of fact, proposed conclusions of law and briefs. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

1. Respondent San Martin Produce & Brokerage, Inc., is a corporation organized and existing under the laws of the State of California. Its business address is 1245 Berlin Drive, San Martin, California 95046. Its mailing address is P.O. Box 875, San Martin, California 95046.

2. At all times material, Respondent was licensed under the provisions of the PACA. License #920742 was issued to Respondent on February 25, 1992. This license has been renewed annually.

3. On December 14, 1994, pursuant to oral agreement, a shipment of tomatoes that Respondent had purchased from Bonita Packing Co. Inc., ("Bonita Packing") was shipped from the seller's packing plant to Respondent. (CX-7, p.80; Tr. 53).

4. Respondent agreed to pay $18.00 per box for 480 boxes of extra large "Bonita's Pride" brand tomatoes; $16.00 per box for 1120 boxes of large "Bonita's Pride" brand tomatoes; plus additional charges for palletizing, degreening, and a temperature recorder, for a total f.o.b. invoice price of $27,783.50. (CX-7, p. 81; Tr. 54).

5. This shipment was delivered directly to Respondent's customer, Banner Fruit Co. on or about December 21, 1994. (CX-5).

6. On December 19, 1994, Respondent issued invoice #1106, billing Banner Fruit Co. $19.20 a box for 1120 boxes of large "Bonita's Pride" tomatoes; and $21.20 a box for 480 boxes of extra large "Bonita's Pride" tomatoes; with a total invoice amount of $31,703.50. (CX-5, p. 6).

7. On December 31, 1994, Banner Fruit Co. sent Respondent a letter, along with an account of sales and an adjusted copy of Respondent's invoice #1106, by which Banner Fruit Co. reduced the $19.20 a box price to $12.00 a box; the $21.20 a box price to $14.00 a box; and the total invoice amount from $31,703.50 to $20,138.50. (CX-5, pp. 3-6). The letter contained the following explanation for the reduction:

> Banner Fruit Co. originally entered into a verbal agreement to purchase tomatoes from San Martin Produce - these brand name tomatoes were suppose to be sold exclusively to Banner Fruit Co.. However, this product was being bought and sold in different houses within the market, namely, Golden State, SF Banana Co., and Fresh Produce. Due to this circumstance along with the drop in the market for tomatoes, we were forced to reduce our prices to be able to compete and sell these brand of tomatoes within the market. (CX-5, p. 3).

8. On February 1, 1995, Respondent sent a letter to Bonita Packing along with Respondent's account of the same date showing the $12.00 and $14.00 per carton prices paid by Banner Fruit Co. with further reductions of $2.00 per carton for freight and $0.25 per carton for brokerage. Also enclosed was Respondent's check #3602 in the amount of $16,583.50. The letter stated:

> The sales were adequate until Timco Co. placed 3 truck loads of "Bonita Pride" label tomatoes to 3 different houses on a "consighn (sic) or price after sale term" which is outside of our verbal agreement for an exclusive on "Bonita Pride" label in the So. San Francisco produce market.
>
> Due to the placement of the 3 loads and the terms of there (sic) sell (sic) Banner Fruit was forced to lower their prices on "Bonita Pride" label tomatoes in order to compete resulting on lower sales.
>
> I believe this will satisfy all parties concerned with this matter. (CX-5, p. 7).

9. Bonita Packing endorsed Respondent's check #3602 "ACCEPTED AS PARTIAL PAYMENT" and deposited the check. (CX-5, p. 9). When received and deposited, this check stated: "FOR 8424".

10. By letter dated February 24, 1995, Bonita Packing submitted a complaint to the PACA Branch in Tucson, Arizona for an award of reparation in the amount of $11,200.00, the difference between the agreed purchase price and the payment received from Respondent. (CX-7, pp. 76-79).

11. Respondent was advised of the pending complaint by letter dated March 1, 1995, which requested Respondent to either remit the $11,200.00 or submit a reply (CX-7, p. 83; Tr. 21).

12. On March 14, 1995, Respondent submitted its reply which read:

> Enclosed is all the pertinent information regarding T-4046 Also, copy of deposited check stating final payment.
>
> Please advise me if there is ant (sic) other information you may require. (CX-7 p.84).

The enclosed copy of check #3602 contained the words "Final Payment" after "FOR 8424." (CX-7, p. 85).

13. On July 13, 1995, J.W. Taylor, Regional Director, Tucson Regional Office, PACA Branch, AMS, sent Respondent a letter giving the agency's informal opinion that Respondent might be held liable in a formal proceeding. (CX-7, p. 94; Tr. 25).

14. On July 14, 1995, Linda Lubkeman of Bonita Packing sent a fax to the PACA Branch in Tucson, Arizona, that stated:

> Per our telephone conversation yesterday, enclosed is a copy of the check that we received from San Martin Produce & Brokerage Inc. At no time did we ever accept this check as final payment in full. If you need any other information, please call me. . . . (CX-7, p. 88).

The faxed copy of check #3602 did not contain the words "Final Payment" after "FOR 8424." (CX-7, p. 89).

15. Paul Hughes of PACA subsequently contacted each party, seeking better evidence of what words appeared on the check. On August 11, 1995, Respondent sent the original of check #3602 to Mr. Hughes with a letter that read:

> Per your request, enclosed is the original San Martin Produce Check # 3602 for final payment on Bonita Packings Invoice # 8424.
> Please return check to San Martin Produce when you are finished with your review. (Cx-7, p. 90).

The enclosed original check contained the words, "FOR 8424 Final Payment." (CX-7, p. 91).

16. Also on August 11, 1995, Linda Lubkeman sent Mr. Hughes a copy of check #3602. That copy of the check did not contain the words, "Final Payment". (CX-7, p. 93).

17. On September 22, 1995, a copy of the formal complaint filed by Bonita Packing was served upon Respondent (CX-7, pp. 53-56).

18. In Respondent's sworn answer to the formal complaint dated October 10, 1995, Respondent represented:

> 8) On or about February 1, 1995 San Martin Produce & Brokerage remitted check #3602 marked "Final Payment" with an accounting of sales from San Martin Produce & Brokerage and Banner Fruit Exhibit #3 in which Bonita Packing deposited. (Cx-5, p. 2).

19. On January 4, 1996, in Bonita Packing's sworn opening statement it stated:

> 8) These tomatoes were sold at an agreed upon price to San Martin Produce & Brokerage, Inc. We received a check less than the amount agreed upon and did not accept it as "Full Payment" and the check did not have "Full Payment" on it when we received it. Copies of the check that we received were previously submitted to your office in Tucson, Arizona. (CX-7, p. 42, Tr 28, 30).

20. On January 30, 1996, Respondent was given time to submit additional evidence. (CX-7, p. 39).

21. On February 12, 1996, in Respondent's sworn answering statement (CX-6; CX-7, p. 19; Tr 30-31), it stated:

> 8) Check #3602 was marked "Final Payment" and was deposited.

22. On May 30, 1996, the parties were notified that the reparation file was being referred for assignment and preparation of a decision. (CX-7, p. 8).

23. The Office of the General Counsel referred this matter to the Department's Office of Inspector General ("OIG"). (Tr. 75-76). In the course of OIG's investigation, a statement was prepared for Respondent's president, Rick Argel's signature, which he acknowledged was accurate but declined to sign. (CX-10; Tr. 80-82). A report of OIG's investigation was sent to the United States Attorney in San Francisco. (CX-9; Tr. 83).

24. On November 2, 1998, after the United States Attorney declined to institute a criminal proceeding (Tr. 83), a Decision and Order was issued in the reparation proceeding which concluded that Respondent had failed to prove its affirmative defense of accord and satisfaction and that Respondent was liable to Bonita Packing for the $11,200.00, plus interest and a $300.00 handling fee. (CX-7, pp. 3-7).

25. On November 25, 1998, Respondent paid $15,947.49 to Bonita Packing in satisfaction of this reparation award. (CX-8).

Conclusions of Law and Discussion

Respondent's president, Rick Argel, has admitted entering the words "Final Payment" on Respondent's check #3602 after the check was cashed by Bonita Packing and returned with Respondent's bank statement. (Answer; Tr. 80, p. 125).

On March 14, 1995, after he received notice of Bonita Packing's reparation complaint, Mr. Argel submitted a copy of this altered check to USDA, with a letter stating that he had enclosed the "copy of deposited check stating final payment." (CX-7, p. 84). Respondent misrepresented by this statement.

On August 11, 1995, after Bonita Packing had denied that check #3602 had contained the words "Final Payment" and USDA requested better proof, Rick Argel submitted the original of check #3602 with the "Final Payment" alteration along with a letter stating that ". . . Enclosed is the original San Martin Produce check #3602 for final payment on Bonita Packing's invoice #8424." (CX-7, p. 90). By this August 11, 1995 letter and the enclosed altered original check, Respondent misrepresented for a second time that check #3602, when deposited by Bonita Packing, contained the notation, "Final Payment".

On October 10, 1995, Respondent's sworn answer to the Formal Complaint stated:

> 8) On or about February 1, 1995 San Martin Produce & Brokerage remitted check #3602 marked "Final Payment" with an accounting of sales from San Martin Produce & Brokerage and Banner Fruit Exhibit #3 in which Bonita Packing deposited. (CX-5, p. 2).

By this answer and the enclosed altered check, Respondent misrepresented for a third time that check #3602 had contained the notation, "Final Payment", when deposited by Bonita Packing.

Finally, on February 12, 1996, Respondent's sworn answering statement stated:

> 8) Check #3602 was marked "Final Payment" and was deposited. (Cx-6; Cx-7, p. 19).

By this sworn answering statement and the enclosed altered check, Respondent misrepresented for the fourth time that check #3602 had contained the notation, "Final Payment", when received and deposited by Bonita Packing.

Respondent has denied that these misrepresentations were made for a fraudulent purpose. Respondent contends that once the words, "Final Payment" were innocently placed on check #3602, that there was no way to remove them. (Answer).

Respondent's assertions are disingenuous. Bonita Packing deposited Respondent's check with the words "ACCEPTED AS PARTIAL PAYMENT", included in its endorsement. Respondent had no basis to conclude that Bonita Packing had agreed to accept the $16,583.50 as full or final payment for the December 14, 1994 shipment of tomatoes. Although Mr. Argel testified that he entered the words, "Final Payment" on check #3602 to indicate that the matter was closed (Tr. 126-127), he admitted on cross-examination that, in all other instances in his business where a dispute was resolved, his entry would go on other transaction records and not on the check itself. (Tr. 152-153).

Respondent has failed to explain why to its president, Rick Argel, consistently represented in letters and sworn pleadings over an 11 month period that Respondent's check had been received and deposited by Bonita Packing with the words, "Final Payment" on the check, when, in fact, he had entered these words after the paid check had been returned by Respondent's bank. (Tr. 148). Respondent could have acknowledged the truth of Bonita Packing's assertions and explained "innocent" circumstances under which Mr. Argel added the words, "Final Payment". Instead, Respondent continued to make false and misleading statements about the check. In fact, it was not until OIG confronted Mr. Argel in 1998 with proof that check #3602 had not contained the notation, "Final Payment" when deposited, that Mr. Argel admitted that he had made the alteration after the bank had returned the check. (CX-10; Tr. 79-80).

In *The Produce Place*, 53 Agric. Dec. 1715 (1994), *aff'd Produce Place v. U.S. Dept. of Agriculture,* 91 F.3d 173 (D.C. Cir. 1996), an employee altered the temperatures for berries on inspection certificates. Fraudulent intent was inferred from the way that that respondent used the altered certificates. The innocent intent argument was rejected.

In the present case, even if Mr. Argel may have erroneously believed that check #3602 had been accepted as final payment when he entered these words on the check, his subsequent perpetuation of the falsehood that the words, "Final Payment" had been on the check when it was presented to Bonita Packing, was fraudulent.

Mr. Argel has denied having any knowledge of the defense of accord and satisfaction and intending to raise this defense in the reparation proceeding. (Tr. 130-131). However, I find it unbelievable that a person, with over 20 years of experience in the produce industry, can be ignorant of the significance of adding the words, "Final Payment" on a check, issued in payment for perishable agricultural

commodities. Mr. Argel may not have known of the legal defense of accord and satisfaction, but he should have known that adding the words, "Final Payment", on a check, that is accepted and deposited, may limit legal liability.

The record shows that Respondent relied on an affirmative defense of accord and satisfaction throughout the reparation proceeding. When the decision and order was issued in the reparation proceeding, holding that Respondent had asserted, but not proven, the affirmative defense of accord and satisfaction, Respondent elected to pay the reparation award and not seek reconsideration or file an appeal. In fact, Respondent never had a valid defense to the reparation complaint.

Suspension of PACA licenses for periods not to exceed 90 days, under subsection 8(a) of the PACA (7 U.S.C. § 499h(a)), may not be imposed unless the violations are willful or a prior warning letter was sent. This is mandated by section 558(c) of the Administrative Procedure Act (5 U.S.C. § 558(c)), which provides:

> . . . Except in cases of wilfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Respondent was not the subject of any prior investigation, which resulted in the sending of a notice letter respecting violations of the nature alleged in the Complaint. Accordingly, Complainant must establish by a preponderance of the evidence that the false or misleading statements that Respondent made by altering check #3602, and by submitting the altered check with cover letters and sworn pleadings that falsely represented that the words, "Final Payment" were on the check when it was received and deposited by Bonita Packing, were willful.

Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961), holds that doing an act, which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements", is willful; *See also United States v. Illinois Central Railroad Co*., 303 U.S. 239, 243, 58 S. Ct. 49, 82 L.Ed. 518 (1938). The use of this definition of "willfulness" in cases brought under the PACA has been approved in other circuits. *See, e.g. Potato Sales Co., Inc. v. Dept. of Agriculture*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. U.S. Dept. of Agriculture,* 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 178 (1991); *American Fruit Purveyors, Inc. v. United States,* 630 F.2d 370, 374

(5th Cir. 1980) (*per curiam*), *cert. denied,* 450 U.S. 997 (1981); In re: *George Steinberg and Son, Inc*., 32 Agric. Dec. 236 (1973); *aff'd sub nom., George Steinberg and Son, Inc. v. Butz,* 491 F.2d 988 (2d Cir.), *cert. denied,* 419 U.S. 830 (1974).

A more restrictive interpretation of "willful" has been advanced by the United States Courts of Appeals in the Fourth and Tenth Circuits. *Hutto Stockyard, Inc. v. U.S. Dept. of Agriculture,* 903 F.2d 299 (4th Cir. 1990); *Capital Produce Company, Inc. v. United States,* 930 F.2d 1077, 1079 (4th Cir. 1991); *Capital Packing Co. v. United States,* 350 F.2d 67 (10th Cir. 1965). In *Capital Packing* the court interpreted "willfully" to mean "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof," 350 F.2d at 78-79. However, in a later case brought under the same act, *Butz v. Glover Livestock Commission Company, Inc.,* 411 U.S. 182, 186-188 (1973), the United States Supreme Court expressly held that registrants may be suspended under the Packers and Stockyards Act (7 U.S.C. § 204) for negligent or careless violations that are not intentional or flagrant, stating:

> The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt v. United States,* 276 F.2d 308, 313 (CA 10 1960); *G. H. Miller & Co. v. United States,* 260 F.2d 286 (CA 7 1958); *In re: Silver,* 21 Agric. Dec. 1438, 1452 (1962). [footnote omitted].

Respondent's violations were intentional misdeeds rather than negligent bookkeeping errors and, therefore, willful under all of the above decisions.

Respondent has claimed that the $16,583.50 paid to Bonita Packing was all this seller was entitled to because it breached the agreement for exclusive sales that Respondent obtained at the start of the 1994 season. Respondent presented oral testimony on this point. However, Respondent has failed to prove that any such exclusive sales agreement ever existed.

Respondent also raised this breach of contract defense in the reparation proceeding, but failed to support it with any evidence. The decision in that matter stated:

> Respondent has furnished no evidence, other than its bare assertion, that there was any agreement that it should have exclusive distribution rights to Complainant's label in the area to which these tomatoes were shipped. Complainant has denied that there was any such agreement, and we find that Respondent has failed to prove its affirmative defense by a preponderance of the evidence. (CX-7, p. 5).

Respondent produced no documentary evidence at this hearing. Rick Argel testified that he had talked to Billy Don Grant of Bonita Packing at the start of the season and obtained his oral agreement to exclusive sales rights at the South San Francisco market. (Tr. 114-115, 118). However, he admitted that he had nothing in writing to substantiate this contention (Tr. 135), and he failed to produce records of any prior transactions with Bonita Packing. (Tr. 135-136). He testified that he had purchased one or two loads a week during the California season for Florida tomatoes that began in November, 1994. (Tr. 138-139). However, he admitted, on cross-examination and when interviewed by the OIG Special Agent, that purchases of Bonita Packing tomatoes made prior to 1994 were done through a broker. (CX-10; Tr.133).

Bonita Packing's president, Billy Don Grant's testimony completely disputed that of Rick Argel. Mr. Grant testified that he sold tomatoes for growers, whose tomatoes were packed at the Bonita Packing facility in Florida, to buyers in California, in two short seasons each year. (Tr. 42). He believed that he had first sold tomatoes to Respondent either in the spring or fall of 1994. (Tr. 44). He denied knowing where Respondent's customers were located and having agreed to sell exclusively to Respondent in any distribution areas (Tr. 48-49, 172). Mr. Grant, who sold a very large volume of tomatoes, explained that he had given exclusive sales to only two customers in the entire country. (Tr. 49, 173-174). He testified that one of these was located in Los Angeles and that when firms located in the Los Angeles area called he would confirm that the tomatoes were not going to the Los Angeles produce market for resale before making any sales. (Tr. 174). Mr. Grant's testimony was credible. He had no reason to grant any exclusive distribution rights to Respondent at the start of the 1994 season. I found Mr. Grant to be a very believable witness.

Thus, Respondent has failed to prove the existence of any exclusive sales agreement. Respondent has also failed to provide credible evidence that the low sales prices reported by its customer on resale were caused by the asserted breach rather than by a market decline produced by a general increase in the availability of Florida tomatoes of all labels. (Tr. 69-70, 163, 165-166, 175-176). In any event, Respondent's argument is beside the point. Respondent altered the check after it

was negotiated by Bonita Packing and perpetuated the falsehood that the check was presented to Bonita Packing with the "Final Payment" notation on its face. In so doing, Respondent made false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA.

As a sanction, Complainant seeks the imposition of a 45-day suspension, or the assessment of an equivalent civil penalty upon Respondent.

90-day suspensions were ordered in the two cases relied upon by Complainant *In re*: *Jacobson Produce, Inc. and George Saer,* 53 Agric. Dec. 728 (1994), and *The Produce Place,* 53 Agric. Dec. 1715 (1994), *aff'd, Produce Place v. U.S. Dept. of Agriculture,* 91 F.3d 173 (D.C. Cir. 1996), *cert. denied,* 516 U.S. 1116, 136 L.Ed. 845, 117 S. Ct. 957 (1997). *In Jacobson,* seven inspection certificates were found to have been fraudulently altered by an agent to falsely represent that the produce purchased on an open or price after sale basis was in worse condition than it really was, and faxed to the seller to justify lower returns. *In Produce Place,* six inspection certificates were found to have been fraudulently altered to show lower temperatures for the strawberries and raspberries inspected. The altered certificates were held to have been sent to the shipper for a fraudulent purpose, that is, to facilitate obtaining price reductions totaling $9,111.00 (53 Agric. Dec. at 1736, 1739-1740). As the serious violations in Produce Place were found to be comparable to those in *Jacobson,* a similar 90-day suspension was ordered. (53 Agric. Dec. at 1763).

False representations made in statements submitted to the Secretary in the course of a reparation proceeding constitute equally serious violations of section 2(4) of the PACA. Because the integrity of the reparation proceeding process is seriously harmed whenever a party makes a false representation to the Secretary, it is appropriate that a sanction be imposed at least equal to that assessed for making false representations to shippers by the altering inspection certificates.

The 45-day suspension sought in the present case also is consistent with the length of suspensions obtained in recent consent decisions. In *In re: James T. Whitlock d/b/a Garden Fresh Produce Company,* PACA Docket No. D-98-0010 (January 6, 1999), a 90-day suspension was agreed to for false representations made for a fraudulent purpose involving seven altered inspection certificates. The suspension was to be held in abeyance and terminated provided Respondent paid a $75,000.00 civil penalty and made restitution to shippers. In *In re: Finest Fruit, Inc.,* PACA Docket No. D-98-0017 (February 10, 1999), a 60-day suspension was agreed to for false representations made for a fraudulent purpose involving four altered inspection certificates, with a provision permitting the payment of a $74,000.00 civil penalty instead of serving the suspension. In *In re: Ram Produce Distributors, Inc.,* PACA Docket No. D-98-0011 (January 21, 1999), a 30-day

suspension was agreed to for false representations made for a fraudulent purpose involving nine altered inspection certificates where restitution totaling $9,644.30 had been made to three sellers. In each of these actions resolved by consent decision, a civil penalty amount was agreed to based on an assessment of financial information provided so that the civil penalty would have a deterrent effect commensurate with the suspension that it replaced.

In this case, Complainant's counsel agreed to provide a specific monetary sanction recommendation provided that Respondent provided Complainant with necessary records after the hearing. However, since Respondent has failed to provide Complainant with such information, I conclude that the imposition of a suspension for 45 days is appropriate.

Order

1. Respondent has willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Respondent's license is suspended for 45 days.

3. This decision shall become final without further proceedings 35 days after the date of service of this Decision and Order upon Respondent as provided in section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), unless it is appealed to the Judicial Officer by Respondent within 30 days as provided in section 1.145 of the Rules of Practice (7 C.F.R. §1.145).

[This Decision and Order became final on May 27, 2000.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Ro Bee Sons, Inc. PACA Docket No. D-00-0003. 3/9/2000.

Evergreen International, Inc. PACA Docket No. D-99-0011. 3/9/2000.

Hapco Farms, Inc. PACA Docket No. D-00-0012. 3/30/2000.

Market Masters, Inc. PACA Docket No. D-99-0017. 3/30/2000.

Jack T. Humphreys d/b/a Zia Onion Sales and Fishing Expeditions. PACA Docket No. D-00-0002. 4/17/2000.

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INDEX
JANUARY - DECEMBER 2000

ANIMAL WELFARE ACT

PACKERS AND STOCKYARDS ACT, 1921

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930